ORIGINAL

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	Case No. SC96,743
Petitioner-Appellant,	
v.	The Florida Bar File No. 2000-50,249(15D)
DEWEY HOMER VARNER, JR.,	
Respondent-Appellee.)	

RESPONDENT-APPELLEE, DEWEY HOMER VARNER. JR.'S ANSWER BRIEF

MICHAEL J. McNERNEY, ESQ., #167155
BRINKLEY, McNERNEY, MORGAN,
SOLOMON & TATUM, LLP
Attorneys for Respondent-Appellee
200 East Las Olas Blvd., Suite 1800
Fort Lauderdale, Florida 33301
(954) 522-2200

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CERTIFICATION OF TYPE, SIZE, STYLE AND ANTI-VIRUS SCAN

Undersigned counsel hereby certifies that the Answer Brief of Dewey Homer Varner, Jr. is submitted in 14 point, proportionately spaced, Times New Roman font, and that the computer disk filed with this Answer Brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

STATEMENT OF THE CASE

The Florida Bar charged Mr. Varner with the commission of several violations of the Rules Regulating The Florida Bar in connection with Mr. Varner's submission of a Notice of Voluntary Dismissal with a fictitious case number to conclude a settlement of a civil action that Mr. Varner believed had been filed, but which, in fact, had not.

The Bar's Complaint was filed on September 13, 1999. Mr. Varner filed his Answer to The Bar's Complaint on November 1, 1999. The final hearing was held on February 22, 2000, and March 23, 2000. Based on the evidence presented, the referee found that Mr. Varner had violated Rules 3-4.3 and 4-8.4(c), two of the nine alleged Rule violations. Rule 3-4.3 proscribes the commission by a lawyer of any act that is unlawful or contrary to honesty and justice and Rule 4-8.4(c) states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Accordingly, the referee recommended that Mr. Varner receive a 30-day suspension and that he pay The Bar's costs.

The referee's report was considered by The Bar's Board of Governors at a meeting which ended June 3, 2000. The Board decided to petition for a review of the referee's findings of guilt and sanction recommendation. Specifically, **The Bar** appeals the referee's findings regarding Rule 4-4.1(a), 4-8.4(b) and 4-8.4(d), that deal

directly with Mr. Varner's conduct. Rule 4-4.1 (a) states that a lawyer shall not knowingly make a false statement of material fact or law to a third person. Rule 4-8.4(b) prescribes that a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Finally, Rule 4-8.4(d) proscribes a lawyer from engaging in conduct in connection with the practice of law that is prejudicial to the administration ofjustice.

The two other rules that The Bar appeals are Rules 4-5.3(b) and 4-5.3(c)(1), which rules deal with Mr. Varner's conduct in connection with his supervision of his secretary, Rule 4-5.3(b) states that with respect to a nonlawyer employed or retained by or associated with a lawyer, a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Rule 4-5.3(c)(1) further states that with respect to a nonlawyer employed or retained by or associated with a lawyer, a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders the conduct involved.

STATEMENT OF THE FACTS

Respondent, Dewey H. Varner, Jr., is and at all times hereinafter mentioned, was a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida (See Agreed Statement of Facts).

On December 2 1, 1998, Mr. Varner, at an examination under oath of a client, Martha Janet Utterback, and in the presence of Ms. Utterback and State Farm Mutual Automobile Insurance Company representatives, Ed Welch and Evan B. Plotka, represented, what at the time he believed to be true, that he had filed suit on behalf of Ms. Utterback against State Farm, in reference to a 1997 accident that involved Ms. Utterback. At the time that Mr. Varner made such statement, he believed the case had been filed as he had given instructions for it to be filed [See Agreed Statement of Facts; See also, Final Hearing Transcript, page 65].

At the conclusion of the taking of the examination, Mr. Varner engaged in a conversation with Mr. Ed Welch concerning the settlement of the suit [See Agreed Statement of Facts]. The two main provisions of the settlement were to restore and pay Ms. Utterback's P.J.P. benefits and to allow Mr. Varner to be present at the time of Ms. Utterback's medical examination [See Final Hearing Testimony, pages 36, 37]. During such conversation, Mr. Vamer told Mr. Welch that he would settle the suit on those terms plus attorney's fees in the amount of $200 and payment of the

filing fees in the amount of $2 15. Mr. Varner, on behalf of his client, and Mr. Welch, on behalf of State Farm Mutual Automobile Insurance Company, agreed to this settlement [See Agreed Statement of Facts].

On December 30, 1998, State Farm issued and forwarded to Mr. Varner's law firm a check in payment of the settlement amount of $4 15, which was received and deposited into the law firm's account. This check was accompanied by a December 30, 1998 letter to Mr. Varner requesting that he furnish State Farm a Voluntary Dismissal With Prejudice of the suit that Mr. Varner represented had been filed [See Agreed Statement of Facts].

On or about January 27, 1999, Mr. Varner received a telephone message from Mr. Welch requesting that the Voluntary Dismissal be sent to him [See Agreed Statement of Facts]. Accordingly, Mr. Varner instructed his secretary to prepare a Notice of Voluntary Dismissal [See Agreed Statement of Facts].

Mr. Varner's secretary, complying with his instruction, prepared a Voluntary Dismissal and delivered it to Mr. Vamer, informing him at the time of such delivery that she had not been able to fill in a case number since the action had not been filed. Mr. Vamer then took the Voluntary Dismissal, filled in a fictitious case number,

signed the dismissal and mailed a copy to Mr. Welch [See Agreed Statement of Facts].

At the time Mr. Varner forwarded the Notice of Voluntary Dismissal to State Farm, there had been no Summons, Complaint or other pleadings drafted or prepared in the referenced matter [See Agreed Statement of Facts].

When Mr. Varner received the investigative inquiry from The Bar regarding the settlement matter, he asked his secretary to prepare the pleadings to file the lawsuit because he thought one possibility was to still file suit [Final Hearing Transcript, Vol. II, page 21].

At this time Mr. Varner asked his secretary if it was possible to back-date the dates on the computer that the pleadings were prepared [Final Hearing Transcript, Vol. IT, page 21]. Within thirty (30) minutes of Mr. Varner's two requests to his secretary, he then instructed her not to continue with the requests, as he was going to write a letter to The Bar that explained what he had done [Final Hearing Transcript, Vol. II, pages 2 1-22]. Mr. Varner's secretary corroborated Mr. Varner's testimony by testifying that once she returned to Mr. Varner's office with the documents, he informed her that he was not going to use them [Final Hearing Transcript, page 109]. She further testified that before Mr. Varner's partners met with him to discuss the

situation, she informed one of the partners that Mr. Varner had no intention of using the documents [Final Hearing Transcript, pages 110-111].

At the meeting, in which Mr. Varner's secretary and two partners gathered to discuss the situation, Mr. Varner informed everyone that he was not going to make use of the pleadings and that he would not use them [Final Hearing Transcript, page 111].

SUMMARY OF THE ARGUMENT

Absent a showing that the referee's findings as to guilt and sanction recommendation are clearly erroneous, this Court should affirm the referee's conclusions. The record clearly demonstrates that there is competent, substantial evidence that supports the referee's finding that Mr. Varner was not guilty of violating Rules 4-4.1 (a), 4-8.4(b), 4-8.4(d), 4-5.3(b), and 4-5.3(c)(1) regulating The Florida Bar.

In addition, the case law demonstrates that the recommended 30-day suspension sanction is a just and adequate punishment consistent with the established purposes for disciplinary actions.

ARGUMENT

I. THE REFEREE'S FINDING THAT MR. VARNER WAS NOT GUILTY OF VIOLATING RULES 4-4.1(a), 4-8.4(b) AND 4-8.4(d) DEALING WITH HIS DIRECT PERSONAL CONDUCT IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

It is a fundamental principle of appellate review that in an attorney disciplinary proceeding, "a referee's findings of fact regarding guilt [carries] a presumption of correctness that should be upheld unless clearly erroneous or without support in the record." The Florida Bar v. Sweeney, 730 So.2d 1269, 1271 (Fla. 1998). It is also well settled that if the findings of the referee "are supported by competent, substantial evidence in the record" then this Court is "precluded from reweighing the evidence and substituting [this court's] judgment for that of the referee." The Florida Bar v. Frederick, 756 So.2d 79, 86 (Fla. 2000)(quoting The Florida Bar v. Lange, 711 So.2d 5 18, 520 (Fla. 1998)). In addition, The Florida Bar, who contends that the referee's findings of fact and conclusions as to 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." Frederick, 756 So.2d at 86. This Court has reasoned that a party does not meet this burden "by simply repeating testimony and arguments thereon that the referee heard and rejected below." Id. Therefore, it is respectfully requested that this Court follow its holding in The Florida

Bar v. Glick, where it held that "a party does not meet the burden of showing that a referee's findings are erroneous simply by pointing to contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's finding." Frederick, 756 So.2d at 86 (quoting The Florida Bar v. Glick, 693 So. 2d 550, 552 (Fla. 1997)).

The referee found that Mr. Varner violated two of the Rules Regulating The Florida Bar, specifically Rule 3-4.3 which proscribes the commission by a lawyer of any act that is unlawful or contrary to honesty and justice, and Rule 4-8.4(c) which proscribes that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation [See Final Report of Referee, page 4]. The referee concluded, however, that Mr. Varner did not violate Rules 4-4.1 (a), 4-8.4(a), 4-8.4(b), 4-8.4(d), 4-5.3(b), 4-5.3(c)(1) and 4-5.3(c)(2) [See Final Report of Referee, pages 4, 5].

Rule 4-4.1(a) In evaluating the applicability of all of The Bar's charges, the court must consider that the underlying facts deal with one basic act; the inscription of a fictitious case number on a notice of dismissal after Mr. Varner learned of his mistaken representation. Having considered the long list of charges that The Bar presented to the lower court, the referee found that Rules Regulating The Florida Bar

3-4.3 and 4-8.4(c) were the most appropriate rules to apply to Mr. Varner under the specific circumstances of this case.

When Mr. Varner first represented to Mr. Welch that he had filed suit against State Farm Mutual Automobile Insurance Company, he said so believing it to be true as he had previously requested his staff to file suit. The Bar stipulated to this fact. Accordingly, Mr. Varner did not violate the mandate of Rule 4-4.1 (a) as this rule prohibits a lawyer from *knowingly* making a false statement of material fact to a third person, whereas Mr. Varner unknowingly made a misrepresentation to Mr. Welch. The referee's finding that Mr. Varner had violated Rules 3-4.3 and 4-8.4(c) rather than Rule 4-4.1(a) is a correct and reasonable decision that those are the more applicable rules to these facts.

Rule 4-8.4(b) states that a lawyer shall not commit a *criminal* act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects (emphasis added). To support a finding of guilt, The Bar asserts that Section 817.234(1)(a)(1)-(2), Florida Statutes (1999)(a False Insurance Claim statute) was also violated. The Bar alleges that with the intent to injure, defraud or deceive State Farm Mutual Automobile Insurance Company, Mr. Varner presented a written or oral statement in support of a claim for payment knowing that such statement

contained a false, incomplete or misleading information. Fla. Stat. Ann. § 8 17.234(l)(a)(1) (West 1999). In addition, The Bar further asserts that Mr. Varner prepared a written or oral statement that was intended to be presented to State Farm Mutual Insurance Company knowing that such statement contained false, incomplete or misleading information. Fla. Stat. Ann. § 8 17.234(1)(a)(2).

This is a tortured interpretation of the facts. As the referee found and noted in her report, the act disputed in the case at bar does not constitute a false insurance claim. The Bar first needs to demonstrate Mr. Varner's intent to defraud the insurer. In order to satisfy the element of intent it must be shown that the conduct was deliberate or knowing. The Florida Bar v. Fredericks, 73 1 So.2d 1249, 1252 (Fla. 1999). When Mr. Varner represented to Mr. Ed Welch that a suit had been filed against State Farm Mutual Insurance Company, Mr. Varner believed this to be true. As noted earlier, the Bar has stipulated to this. That same day, when the two began talking about the settlement of "the case," Mr. Varner was still under the impression that a suit had indeed been filed. In fact, when asked about a settlement, Mr. Varner, without giving much thought to the time and expenses already incurred on the case, answered that $2 15 would cover the filing fees and that he would accept $200 for attorney's fees [See Final Hearing Transcript, page 68-69]. The Court should note that by this time Mr. Vamer had incurred much more than $200 worth of attorney's

fees with regard to the dispute over the medical bills and his attendance at the medical examination [See Final Hearing Transcript, page 75]. In addition, there was no violation of a false insurance claim statute or for that matter of Rule 4-8.4(b) by Mr. Varner having forwarded to Mr. Ed Welch the notice of dismissal with the fictitious case number. It is important to understand that this was an informal settlement between both parties primarily intended to finalize the pending case. Consequently, Mr. Ed Welch's letter to Mr. Varner which confirmed the settlement agreement as well as requested the notice of dismissal, did not even include the two main provisions of the agreement. [See Final Hearing Transcript, pages 36, 38]. In fact, because of the informality of the settlement agreement, Mr. Varner believed that Mr. Ed Welch needed the notice of dismissal simply to close the file. [See Final Hearing Transcript, page 75]. Therefore, although Mr. Varner forwarded the notice of dismissal with the fictitious case number to Mr. Ed Welch, he did not *intend* to deceive or defraud State Farm Mutual Automobile Insurance Company of $41 5(emphasis added). He sent the notice of dismissal *believing* this would end the entire misunderstanding. As the referee stated in the final hearing, this case did not begin with the idea of any pecuniary gain. [See Final Hearing Transcript, vol. II, page 39].

Rule 4-8.4(d) The referee also found that the record did not support a finding of a violation of Rule 4-8.4(d) which states that a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice. Mr. Varner, who through testimony (discussed infra) has demonstrated a sense of professionalism and integrity sought by most attorneys, did not engage in conduct that would jeopardize faith in the administration of justice. Mr. Vamer's forwarding of the notice of dismissal with the fictitious case number to Mr. Ed Welch did not constitute a mockery of the dignity and prestige of the justice system, as Mr. Varner never presented any fictitious document before the court. Once again, attention should be given to the informality of the settlement agreement by both parties, and to the fact that Mr. Varner believed that the notice of dismissal was only necessary to close the pending case. Thereby, this Court should affirm the referee's decision, and find Mr. Varner not guilty of violating Rule 4-8.4(d).

II. THE REFEREE'S FINDING THAT MR. VARNER WAS NOT GUILTY OF VIOLATING RULES 4-5.3(b) AND 4-5.3(c)(1) DEALING WITH HIS SUPERVISION OF HIS SECRETARY IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

In addition to the charges relating to his direct personal conduct, The Bar charged Mr. Vamer with violation of Rules 4-5.3(b), 4-5.3(c)(1), and 4-5.3(c)(2) [See Florida Bar Complaint, paragraph 15, page 5]. The referee found Mr. Vamer not guilty of all three of these charges, and The Bar has appealed the finding as to Rule 4-5.3(b) and 4-5.3(c)(1). The Bar's argument with regard to these two charges is without merit, and not supported by any competent evidence.

Rule 4-5.3(b) states that with respect to a nonlawyer employed or retained by or associated with a lawyer, a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Rule 4-5.3(c)(1) further states that with respect to a nonlawyer employed or retained by or associated with a lawyer, a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders the conduct involved.

It is uncontradicted that Ms. Hagar's only involvement in this matter was preparing the initial notice of voluntary dismissal and the subsequent preparation of a set of pleadings that were never filed.

When Ms. Hagar prepared the initial notice of dismissal, she properly pointed out to Mr. Varner that the case had not been filed. Mr. Varner then placed a case number on the notice and mailed a copy to Mr. Welch. Later on, when Mr. Varner was confronted with what he had done, he asked Ms. Hagar to determine if pleadings could be prepared using a prior date. [See Final Hearing Transcript, Vol. II, page 2 1]. Thirty minutes later he told her to stop; he was going to write a letter to The Bar acknowledging what he had done. [See Final Hearing Transcript, Vol. II, pages 2 1-22].

In neither instance did Ms. Hagar engage in conduct that was a violation of the Rules of Professional Conduct. The fact that Mr. Varner considered filing the lawsuit and asked the question about whether the dates the pleadings were created could be changed does not constitute a violation of the Rules by Mr. Varner since he quickly decided not to take such action. The Bar did not charge Mr. Varner with any violation regarding this "thought" that he had about what action to take. Does asking his secretary about what could be done and then telling her he was not going to do it constitute a violation of the Rules? Is The Bar suggesting that a new standard should

be adopted that "Thinking about doing something is the same as doing it"? During the cross examination of Mr. Raymond Holton, this exact issue was discussed and the referee stated that exploring an unethical act is not the same as doing the act, [See Final Hearing Transcript, page 153]. There is no question that there is "competent, substantial evidence to support the referee's finding."

Ms. Hagar, Mr. Varner's legal assistant, has worked under his supervision for over 10 years [See Final Hearing Transcript, page 96]. Throughout this time, Mr. Varner has demonstrated outstanding professionalism and high ethical standards as confirmed by his ex-law partner Mr. Seaman who was called as a witness by The Bar. [See Final Hearing Transcript, pages 14 1, 142].

During the time Ms. Hagar has worked under his supervision, and ultimately throughout his law career, Mr. Varner has demonstrated professionalism and high ethical standards, Accordingly, it is once again respectfully requested that this Court affirm the referee's conclusion, and find that Mr. Varner did not violate Rule 4-5.3(c)(1).

111, THE REFEREE'S FINDING THAT THERE WERE NO AGGRAVATING FACTORS IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

The referee, referring to the Florida Standards for Imposing Lawyer Standards, found no aggravating factors applicable to the case at bar and did find several mitigating factors The Bar asks this Court to find that Standards 9.22(b)–dishonest or selfish motive and Standard 9.22(i)–substantial experience in the practice of law, apply as aggravating factors. Mr. Varner did not act in a dishonest or selfish way when he represented that he had filed suit against State Farm Mutual Insurance Company, when in fact unknowingly, he had not. The Bar has stipulated that he believed that the suit had been filed. [See Agreed Statement of Facts]. There is no evidence in the record that there was any "selfish" motives underlying Mr. Varner's proposal for settlement. The agreed upon settlement figure of $415 was to cover filing fees and a token amount for attorney's fees. These amounts are not indicative of a claim of dishonesty and selfishness. Mr. Varner had spent hours trying to resolve this dispute and for $200 in attorney's fees was certainly not being dishonest or selfish. [See Final Hearing Transcript, page 75]. His actual fees totaled a higher amount and the client got her disputed medical bills paid and Mr. Varner was allowed to attend the medical examination. Furthermore, Mr. Varner's experience in the

practice of law had nothing to do with his mistaken belief that suit had been filed nor his inappropriate action in putting a case number on the notice of dismissal. He admits making a stupid mistake for which he takes full responsibility, and it is not unreasonable for the referee to determine that his experience is not a relevant factor under these circumstances. [See Final Hearing Transcript, Vol. II page 19].

IV. THE REFEREE'S RECOMMENDATION OF A 30-DAY SUSPENSION IS CONSISTENT WITH THE PURPOSE OF DISCIPLINARY ACTIONS AND SHOULD BE AFFIRMED.

The three purposes for a bar disciplinary action are: (1) the judgment must be fair to society; (2) it must be fair to attorney; and (3) it must be severe enough to deter other attorneys from similar misconduct. The Florida Bar v. Nunes, 734 So.2d 393, 399 (Fla. 1999). The referee's recommendation of a 30-day suspension is consistent with all three of these purposes and should be affirmed.

The referee found there were three mitigating factors and The Bar has not appealed that finding. The three mitigating factors which the referee found applicable were: (1) Standard 9.32(d) as Mr. Varner made a timely good faith effort to make restitution and to rectify the consequences of his misconduct; (2) Standard 9.32(l) as he demonstrated being remorseful for his actions; and (3) Standard 9.32(g) evidence of his character and reputation.

The record is clear on each of these three factors. Four witnesses, including The Bar's own witness (Mr. Alan Seaman, Mr. Varner's ex-partner at the law firm), and United States District Judge Shelby Highsmith, all attested to Mr. Varner's good character, reputation, and remorse. Having practiced law beside Mr. Varner for 10 years, approximately the same time Ms. Hagar has been Mr. Varner's secretary, Mr. Seaman, when asked about his opinion of Mr. Vamer's personal integrity, testified:

A. Leaving out this event, I think Dewey is a fine and honorable lawyer, and I think that his reputation in the community

Q. and by "this event" you mean the signing of the voluntary dismissa

A. Yes, sir.

Q. Do you think that that act on his part was abhorrent or unusual behavior by him

A. Yes, certainly. [See Final Hearing Transcript, page 14 1].

Federal District Judge Shelby Highsmith testified that "without question . . . [Mr. Varner] possessed all of what [he] considered to be appropriate attributes for a practicing lawyer. . ." [Deposition of Judge Shelby Highsmith, page 9]. When asked about his current opinion on Mr. Varner's honesty and integrity, Judge Highsmith replied that his opinion had not changed since the time he practiced law with Mr. Varner. He believes Mr. Varner is a man of "absolute integrity." [Deposition of Judge Highsmith, page 12]. Finally, on cross examination The Bar's counsel asked Judge Highsmith to assume the facts presented by The Bar were true, and if Mr. Varner's actions were consistent with the character sought for a Florida attorney. Judge Highsmith answered:

A. That would, to me, indicate that Dewey indeed at the time was not only panicked but he was continuing to act in a fashion that was totally out of character for the man that I know and the man that he is and was. [Deposition of Judge Highsmith, page 2 1].

Mr. Raymond Otto Holton, Jr., usually an adversary in personal injury cases handled by Mr. Varner, testified that while Mr. Varner "has had numerous instances where he certainly could have taken advantage of the situations, like any advocate could, [he] never had anything in [his] dealings with [Mr. Varner] that would cause [him] to question [Mr. Varner's] integrity or honesty or fitness . . ." [See Final Hearing Transcript, page 148]. In addition to this testimony, Mr. Robert W. Rutter, former Chief Judge of the Fifteenth Judicial Circuit, who has served as mediator for personal injury cases handled by Mr. Varner, testified that Mr. Varner seems to have a good reputation among insurance adjusters [See Final Hearing Transcript, Vol. II, page 8].

There is no negative testimonial evidence in the record as to Mr. Varner's character, professionalism, moral standards, or integrity.

In The Florida Bar v. Lecznar, this Court noted that a referee in a bar proceeding "occupies a favored vantage point for assessing key considerations-such as respondent's degree of culpability and his or her cooperation, forthrightness, remorse and rehabilitation (or potential for rehabilitation)". Consequently, this Court ". . . will not second guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law." Id. 690 So. 2d 1284, 1288 (Fla. 1997).

While it is acknowledged that this Court has the ultimate responsibility to determine the appropriate sanction given in a bar disciplinary proceeding, The Florida Bar v. Sweeney, 730 So.2d 1269, 1272 (Fla. 1998), it is respectfully requested that this Court uphold the referee's recommended 30 day suspension as it is based on comparable recommended sanctions in other cases.

While The Bar portrays Mr. Vamer as a man with questionable professional standards and dubious moral character, the record clearly contradicts this portrayal through the testimony of the four witnesses each of whom has known Mr. Varner under different circumstances. This is one instance of improper conduct. There is no pattern.

The Bar tries to attack Mr. Varner's reputation by an improper reference to a prior reprimand. Standard 9.22(a) on Aggravation clearly states that such a factor shall not be considered. The Bar presented no testimony or other evidence in support of the theory that this action by Mr. Vamer was not aberrant behavior. The Bar admitted that this should not be an aggravating factor. [See Final Hearing Transcript, Vol. II, page 30].

In support of its 91-day suspension, The Bar cites and relies on case law that has little, if any, applicability to the case at bar.

In The Florida Bar v. Forbes, the respondent was disbarred after knowingly and willfully making false statements of material fact to a bank ***for*** *the purpose of* securing a loan. 596 So. 2d 105 1 (Fla. 1992). There are three facts that render this case completely inapplicable to the case at bar. First, in the Forbes case the respondent knowingly made the material misrepresentations for the purpose of obtaining a personal loan. Secondly, Forbes deals with a felony whereas there is no such finding of a felony in Mr. Varner's case. Lastly, but perhaps most importantly, whereas Mr. Varner intended to settle the suit he thought was filed for $200 worth of attorney's fees and $215 to cover the filing fee, Mr. Forbes intentionally misrepresented information in his loan application to obtain a $750,000 loan.

The Bar also relies on The Florida Bar v. Cramer where respondent was disbarred based on his prior disciplinary record and upon respondent's fraudulent misrepresentation of material fact to a financial institution in order to procure two leases. Again, this case differs significantly from Mr. Vamer's case in that Mr. Cramer intentionally misrepresented information in order to receive a lease on equipment that was worth $3 1,93 1.19.

While there is no case law that precisely covers the specific facts of this case, this court has found 30-day suspensions warranted for conduct more egregious than that of Mr. Vamer's.

In The Florida Bar v. Kravitz, this court found that a 30-day suspension was warranted by Mr. Kravitz for having presented false evidence to the court, misrepresenting to an individual that he would be arrested if he did not provide $4,000 by a certain time; misrepresenting to opposing counsel that his trust fund contained sufficient funds to cover settlement, and misrepresenting to the court that opposing counsel had agreed to proposed orders. 694 So.2d 725 (Fla. 1997). Even after having found all of these serious violations, this court held a 30-day suspension appropriate.

In The Florida Bar v. Beneke, a public reprimand was found warranted for respondent's misrepresentation to a financial institution about the final sales price of a building, thereby leaving respondent with a $16,000 excess of the purchase price of the property. 464 So. 2d 548 (Fla. 1985). See also The Florida Bar v. Rose, 607 So, 2d 394 (Fla. 1992) (holding a 30-day suspension was warranted for attorney who misrepresented information to a financial institution to obtain his children's money from a trust without his ex-wife's authorization).

Still, The Bar contends that these cases are distinguishable from the case at bar in that Mr. Varner enjoined his secretary in "fraudulent" behavior. As noted, supra, Mr. Varner himself filled in the fictitious case number, signed the notice of dismissal and mailed the document to Mr. Ed Welch. Asking his secretary about the possibility

of back-dating a pleading does not constitute enjoining the same in fraudulent behavior. Thinking about different alternatives is not the same as actual conduct.

No one understands better than Mr. Varner the consequences of his action. He has paid for and learned from his mistake. Not only did he return the $415 from the insurance company, but he took upon himself the responsibility of writing to his colleagues explaining the misrepresentation. Clearly, he is truly remorseful and repents from his wrongdoing. Accordingly, Mr. Varner is ready to take responsibility for his wrongdoing and thereby respectfully requests this Court to uphold the referee's reasonable and just sanction recommendation. To hold otherwise would directly contradict the three purposes for bar disciplinary actions. A 90- or 91 -day suspension would be excessive for the act committed and not consistent with the purposes of a disciplinary action or existing case law. The court has previously ordered a 30-day suspension for acts more egregious than that committed by Mr. Varner. Finally, the recommended 30-day suspension along with Mr. Varner's efforts to amend his wrongdoing by informing his peers of his error will serve as deterrent enough to deter other attorneys by showing the punishment and humiliation that derives from committing such action.

CONCLUSION

The referee's findings, which carry a presumption of correctness, should be affirmed by this Court because they are supported by competent, substantial evidence. This case involves one action by Mr. Varner which will be reasonably and justly punished through the recommended 30-day suspension. Therefore, it is respectfully submitted that this Court affirms the referee's finding that Mr. Varner violated Rules 3-4.3 and Rule 4-8.4(c), and uphold the recommended 30-day suspension.

CERTIFICATE OF SERVICE

COMES NOW the Respondent-Appellee, DEWEY HOMER VARNER, JR., by and through undersigned counsel, and certifies that a true and correct copy of foregoing was sent by U. S. Mail to David M. Barnovitz, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Florida, 33309; and to John A. Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 9th day of August, 2000.

BRINKLEY, McNERNEY, MORGAN, SOLOMON & TATUM, LLP
Attorneys for Respondent-Appellee
200 E. Las Olas Blvd., Suite 1800
P. 0. Box 522
Fort Lauderdale, Florida 33302-0522
Ph: (954) 522-2200
Fax: (954) 522-9123

By: _____
MICHAEL J. McNERNEY
Florida Bar No. 167 155

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