IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

PETER ELLIS KELLY,

Respondent.
_____/

Case No. SC96 940
TFB No. 1998-11,254(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, Peter Ellis Kelly, will be referred to as "Respondent."

"TT" will refer to the transcript of the hearings before the Referee in Supreme Court Case No. SC96 940 held November 2, 2000 (Volumes I and II).

The Report of Referee dated January 29, 2001 will be referred to as "RR."

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R Exh." will refer to exhibits presented by the Respondent at the hearings before the Referee in Supreme Court Case No. SC96 940.

"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 CASE AND OF THE FACTS

STATEMENT OF THE CASE

The Florida Bar filed a three count Complaint in this matter on November 2, 1999. By order dated November 12, 1999, The Honorable Judy Goldman, County Court Judge, in and for the Twelfth Judicial Circuit, was appointed as referee in this case.

The final hearing was held in this matter on November 2, 2000. On January 29, 2001, the Referee issued a Report of Referee finding Respondent guilty of violating the following rules: as to Count I, Rule 4-1.5(a) (a lawyer shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee), Rule 4-1.15(a) (safeguarding client property and commingling client funds), Rule 4-1.16(d) (protecting client's interest upon termination of representation) and Rule 4-8.4(d) (conduct prejudicial to the administration of justice); as to Count II, Rule 4-1.6(a) (revealing confidential information without consent), Rule 4-1.16(d) (protecting client's interest upon termination of representation), Rule 4-3.1 (frivolous action) and Rule 4-8.4(d) (conduct prejudicial to the administration of justice), Rule 4-8.4(g)(failure to respond in writing to an inquiry by a disciplinary agency); as to Count III, Rule 5-1.1(d) (minimum trust account records shall be maintained), Rule 5-1.2(b)(2) (a lawyer shall maintain original or duplicate deposit slips), Rule 5-1.2(b)(4) (documentary support for all disbursements and transfers from the trust account), Rule 5-1.2(b)(5) (a lawyer shall maintain a separate cash

receipts and disbursements journal), Rule 5-1.2(b)(6) (a lawyer shall maintain a separate file or ledger card for each client or matter), and Rule 5-1.2(c) (minimum trust accounting procedures shall be followed by all attorneys practicing in Florida).

The Report of Referee contains a finding that Respondent violated Rule 4-8.4(g), Rules Regulating The Florida Bar, pertaining to Count II of the Complaint as part of the findings of rule violations. (RR 13). At the conclusion of the final hearing, the Referee requested that the Bar and Respondent submit proposed reports of referee. (TT 133). The Referee adopted the Bar's proposed report, with the exception of the Bar's recommendation for a ninety-one (91) day suspension. The Bar's proposed report erroneously included Rule 4-8.4(g) in the section pertaining to findings of Rule violations. The Bar did not allege in its Complaint that Respondent violated Rule 4-8.4(g). Nor did either party introduce evidence or make argument that Rule 4-8.4(g) had been breached. The inclusion of Rule 4-8.4(g) in the Bar's proposed report was a scrivener's error that the Referee understandably overlooked. The finding that Respondent violated Rule 4-8.4(g) should be stricken from the Referee's finding of guilt.

The Report of Referee included the recommendation that Respondent be suspended from the practice of law for sixty (60) days followed by probation for a

period of one year, completion of the Bar's ethics school trust accounting course, and an assessment of the Bar's costs. The Referee further recommended that during the period of probation the Respondent be required to retain, at his cost, the services of a certified public accountant, approved by the Bar, who shall provide quarterly reports indicating whether or not Respondent's trust account records are in compliance with the Rules Regulating Trust Accounts. The Referee's report was considered by the Board of Governors of The Florida Bar at its meeting which ended February 9, 2001, at which time the Board voted to file a Petition for Review of the Referee's report and request a ninety-one (91) day suspension. The Florida Bar filed a Petition for Review of the Referee's report with this Court on or about February 14, 2001. Pursuant to Rule 3-7.7, the jurisdiction of this Court is invoked.

STATEMENT OF THE FACTS

On February 2, 1996, Respondent entered into the continency fee agreement to handle Gregory Halderman's claims arising from an injury that Mr. Halderman suffered to his left eye. (TFB Composite Exh.11). The agreement provided that Respondent would receive 33 1/3 % of the gross amount of the recovery obtained on behalf of Mr. Halderman. (Responses 2 and 3 to the Bar's Request for Admissions and TFB Composite Exh. 11). Florida Statute 440.34 does not allow

for the terms set forth in Respondent's contingency fee agreement. (TT 105 - 106 and 109 - 110). Respondent sought benefits for Mr. Halderman through the pursuit of a worker's compensation claim to the exclusion of all other potential actions. (TFB Exhs. 2, 3,12 and 13, TFB Composite Exh. 11, Responses 6, 7 and 10 to the Bar's Request for Admissions, and TT 165 - 166 and 189). During the course of the representation, Respondent received checks from Riscorp made payable to Mr. Halderman that he failed to forward to Mr. Halderman until after the checks became stale. (TT 245 and Answer 5 to the Bar's Request for Admissions). On April 4, 1998, Mr. Halderman sent a letter to Respondent advising that his services were terminated and requested the return of several W-2 forms. (TFB Exh. 12). Respondent sent a letter dated April 7, 1998 to Mr. Halderman wherein he advised that he was going to collect 33 1/3 % of any settlement or court judgment in the worker's compensation proceeding and that he would file a charging lien to prevent Mr. Halderman from receiving "any proceeds from the workers compensation claim payment" before Respondent received his percentage. (TFB Exh. 13). No recovery had been obtained by Respondent for Mr. Halderman at the time of the letter. (TT 209). Respondent did not return the W-2 forms to Mr. Halderman as requested. (TT 197 - 198). By correspondence dated April 8, 1998, Robert Keezel forwarded a proposed Stipulation for Substitution of Counsel to Respondent

thereby providing notice that he had been hired by Mr. Halderman to take over the worker's compensation claim. (TT 79 and TFB Exh. 6). Mr. Halderman submitted a grievance against Respondent on April 22, 1998, regarding his handling of the worker's compensation claim. (TFB Composite Exh. 11). On December 19, 1998, Mr. Keezel sent a letter to Respondent requesting a copy of Respondent's file pertaining to Mr. Halderman's case. (TFB Exh. 7). Respondent failed to respond to Mr. Keezel's letter or provide a copy of his file. (TT 84). On January 26, 1999, Respondent indicated to the Bar that he would cooperate with Mr. Keezel by providing a copy of his file regarding Mr. Halderman's claim. (TFB Exh. 3). Subsequently, on February 17, 1999, Respondent sent a letter to Mr. Keezel indicating that he would provide his file as soon as possible. (TT 85 and TFB Exh. 8). Respondent failed to forward the records as promised. (TT 85 - 86). On March 30, 1999, the Bar sent a notice to Respondent advising him that on April 22, 1999, the grievance committee would determine whether there was probable cause that he violated ethical rules. (TFB Exh. 5). The second paragraph on page 2 of the notice identified, as an issue, Respondent's failure to surrender papers and property to Mr. Halderman or his new counsel. (TFB Exh. 5). On April 20, 1999, two days prior to the scheduled grievance committee determination, Respondent called Mr. Keezel's office and represented that his file was available to be picked

up at his office. (TT 87). Mr. Keezel sent a messenger to Respondent's office to retrieve the file at which time Respondent refused to allow the messenger to take possession of the documents. (TT 88). After the messenger had left, Respondent sent a letter by facsimile transmission to Mr. Keezel insisting that a list of the requested documents be provided before any documents would be released. (TT 88 and TFB Exh. 9). Two days later on April 22, 1999, Mr. Keezel sent another letter to Respondent insisting on the delivery the documents pertaining to Mr. Halderman's claim. (TT 90 - 92 and TFB Exh. 10). On May 21, 1999, and only after the grievance committee made its determination, Respondent finally forwarded the documents concerning Mr. Halderman's claim to Mr. Keezel. (TT 90).

On February 3, 1999, while Mr. Halderman's grievance was under investigation by the grievance committee, Respondent filed a five count lawsuit in the Twentieth Judicial Circuit Court against Mr. Halderman and his wife, Dolores Halderman, seeking damages in excess of one million dollars ($1,000,000.00). (TFB Composite Exhibit 11). In the first count of his lawsuit, Respondent sought a judgment in the amount of fifty thousand dollars ($50,000.00), based on his claim that Mr. Halderman had not paid reasonable attorney fees for services rendered under the contingency fee agreement, for "loss of the contingency amount due him

from a settlement," and for Mr. Halderman's cancellation of the agreement. (TFB Composite Exh. 11). In his second cause of action Respondent sought $10,694.00 in damages from Mr. Halderman based on quantum meruit. (TFB Composite Exh. 11). At the time of Respondent's filing of his lawsuit, no settlement or recovery had been achieved for Mr. Halderman which could trigger the calculation of Respondent's percentage, even if the percentage were permitted by statute. (TT 138).

The third count of Respondent's lawsuit involved a claim against Mrs. Halderman for $60,000.00 alleging that she interfered with Respondent's continency fee contract because she "advised" her husband to terminate Respondent's services. (TFB Composite Exhibit 11).

In the fourth count Respondent sought a judgment of one half million dollars ($500,000.00) against Mr. Halderman for filing the grievance against Respondent, notwithstanding the fact that Mr. Halderman was immune from suit pursuant to this Court's opinion in the case of Tobkin v. Jarobe, 710 So. 2d 975 (Fla. 1998). (TT 24, TFB Exh. 1 and TFB Composite Exhibit 11). On March 24, 1999, Respondent acknowledged in his letter to the Bar that he was informed of the immunity issue and of the Court's decision regarding same. (TFB Exh. 1).

In the Respondent's fifth count he sued Mr. Halderman for yet another one

half million dollars ($500,000.00), alleging that during the course of the representation, Mr. Halderman misrepresented the existence of a pre-existing eye injury. (TFB Composite Exh. 11). The pre-existing condition was a detached retina that Mr. Halderman suffered several years prior to the injury which formed the basis for his worker's compensation claim. (TT 102). Even after the instant proceeding had been noticed for final hearing, Respondent did not take any affirmative steps to dismiss his lawsuit against the Haldermans. Respondent's lawsuit was dismissed by the circuit court for lack of prosecution two months before the final hearing. (TFB Composite Exh. 11).

During the course of the grievance committee's investigation of Mr. Halderman's grievance, the Bar conducted an audit of Respondent's trust account. (TT 258 and TFB Exh. 15). Respondent did not maintain all required trust account records. (TT 258 - 262). The grievance committee's March 30, 1999 notice to Respondent listed the rules concerning his trust account deficiencies and included a report of the Bar's audit. (TFB Exh. 5). The Respondent did not produce additional trust account records at any stage of the Bar's investigation or the disciplinary proceedings.

SUMMARY OF ARGUMENT

In view of the Referee's finding of considerable aggravation and the absence of significant mitigation, the recommended sanction of a sixty (60) day suspension is insufficient given the substantial scope and gravity of Respondent's misconduct in the instant case. Respondent represented Gregory Halderman in a worker's compensation claim. During the representation, Respondent received medical benefit checks from the worker's compensation carrier made payable to Mr. Halderman. Respondent failed to forward the checks to Mr. Halderman before the checks became stale. Mr. Halderman suffered financial loss due to Respondent's failure to safeguard property that Mr. Halderman was entitled to receive. Mr. Halderman terminated Respondent's representation and requested the return of his W-2 forms. Thereafter, Mr. Halderman filed a grievance against Respondent with the Bar. Respondent, an attorney with in excess of twenty years experience in the profession, deliberately sought to harass his client, Gregory Halderman, and the client's wife, Dolores Halderman, by withholding client records and filing a frivolous lawsuit seeking a judgment in excess of a million dollars against the Haldermans because a grievance was initiated against him. In addition, Respondent failed to maintain trust account records in accordance with the Rules Regulating Trust Accounts.

Respondent's misconduct caused injury to the legal system and undeserved

and unnecessary stress and suffering to the Haldermans. The blatant and malicious course of action by Respondent against his former client deserves the imposition of a rehabilitative suspension along with the ethics school and probation requirements that the Referee recommended in her report. A sixty (60) day suspension does not sufficiently address the seriousness of Respondent's misconduct and the adverse effects thereof. A rehabilitative suspension would serve to protect the public and deter others from engaging in similar misconduct. A ninety-one (91) day suspension is the appropriate sanction considering the serious and multiple violations committed by Respondent.

ARGUMENT

I. The Referee erred in recommending a sixty (60) day suspension for a lawyer who failed to safeguard client property, intentionally withheld documents from a former client, filed a meritless and frivolous lawsuit against a former client, and failed to maintain adequate trust account records.

In attorney disciplinary proceedings "a referee's findings of fact are presumed correct and this Court will not reweigh the evidence and substitute its judgment for that of the referee as long as the findings are not clearly erroneous or lacking in evidentiary support." The Florida Bar v. Beach, 675 So.2d 106, 108 (Fla. 1996). A referee's legal conclusions, however, are subject to broader review by this Court than are findings of fact. Id. This Court has broader discretion to review a referee's recommended discipline, because it is this Court's "responsibility to order the appropriate punishment." The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994). The referee erred in recommending a sixty (60) day suspension in this case, because such sanction is not severe enough to address the seriousness of Respondent's misconduct and the substantial harm that resulted therefrom.

The first of several unethical acts perpetrated by Respondent was his failure to forward the checks that he received from Riscorp, the worker's compensation

insurance carrier, to Mr. Halderman until after the checks became stale. (Response 5 to the Bar's Request for Admissions and TT 245). Respondent cavalierly excused his failure to promptly forward the checks to Mr. Halderman because he was "busy in his office." (TT 246). The failure of Respondent to provide the benefit checks to Mr. Halderman was serious misconduct in and of itself and merits the imposition of a suspension from the practice of law.

After Mr. Halderman terminated Respondent's services, the latter sent a threatening letter to the former, advising that Mr. Halderman would not receive any recovery unless and until Respondent received his 33 1/3 %. (TFB Exh. 13). No recovery had been obtained. (TT 138). Nor had Respondent petitioned the worker's compensation court for approval of his fee as required by statute. (TT 126). Respondent escalated the seriousness of his misconduct by suing Mr. Halderman after a complaint was submitted to the Bar regarding Respondent's handling of the workers compensation case. In The Florida Bar v. Richardson, 591 So. 2d 908 (Fla. 1992), this Court suspended Richardson for sixty (60) days for bringing a frivolous suit in federal court. Richardson's federal suit alleged that the Florida circuit court's order requiring him to reimburse fees to his client violated his civil rights based on his claim of lack of jurisdiction. Id. at 911. Richardson was found guilty of violating Rule 4-3.1, however, there was no explicit finding

that Richardson lawsuit was pursued in bad faith. Id. at 911.

Respondent's misconduct in the instant case is much more egregious than that found in Richardson. Respondent's lawsuit against the Haldermans was a vindictive act designed to punish Mr. Halderman for submitting his grievance to the Bar. The timing of Respondent's filing of his lawsuit demonstrates the vindictive and malicious nature of Respondent's action against his former client. The lawsuit was filed almost a year after he had been discharged and after Mr. Halderman's grievance was under investigation. (TFB Composite Exhibit 11). No settlement had been achieved in Mr. Halderman's worker's compensation case which could trigger the calculation of Respondent's contingency fee. (TT 209). Thus, it was not permissible under applicable statutes for Respondent to seek a judgment for fees in circuit court for services rendered in Mr. Halderman's workers compensation case based on a contingency fee agreement or quantum meruit. (TT 133, and 136 - 137). In order for Respondent to receive any fee for representing Mr. Halderman in the workers compensation case he would have had to receive approval of the workers compensation judge. (TT 106 - 107, and 137). Further, Respondent's contingency fee agreement did not comply with F.S. 440.34, and therefor, was impermissible. (TT 110 - 111 and 120). The lawsuit included damages for the time that Respondent spent communicating with the grievance

committee member who investigated Mr. Halderman's grievance. (Answer 21 to the Bar's Request for Admissions and TFB Composite Exh. 11).

In Respondent's third count he further reveals his bad faith and malice by suing Mrs. Halderman for $60,000.00 based on a theory that she interfered with his contract because she "advised" her husband to terminate Respondent's services. (TFB Composite Exh.11). By pursuing his third cause of action against Mr. and Mrs. Halderman, Respondent sought to punish his former client for exercising his right to terminate the representation and seek new counsel. Respondent's action was designed to harass and intimidate his former client merely because Mr. Halderman was no longer satisfied with Respondent's services. Respondent's action against his former client's wife made his conduct much more egregious than the respondent's conduct in Richardson.

Respondent's fourth count in his lawsuit advanced a spurious claim for half a million dollars in damages alleging that Mr. Halderman initiated a false grievance. (TFB Composite Exh. 11). Shortly after Respondent filed his lawsuit against the Haldermans, he was made aware of this Court's decision in the case of Tobkin v. Jarobe, 710 So. 2d 975 (Fla. 1998), which provides immunity to a complainant who does not publish his or her grievance against a lawyer beyond the grievance proceedings. (TFB Exh. 1). The Bar provided Respondent with the cite for the

Tobkin decision not later than March 24, 1999, less than two months after Respondent filed his lawsuit. (TFB Exh. 1). In his letter of March 24, 1999, Respondent indicated that he would read the decision and determine whether his lawsuit complied with the opinion. (TFB Exh. 1). However, Respondent did not bother to review Tobkin or take any corrective action after he was warned that his lawsuit may constitute a violation of ethical rules. (TT 249). Clearly, Respondent's pursuit of the frivolous lawsuit against the Haldermans, without considering the Referee's other findings, establishes the necessity for imposing a more severe sanction than that in Richardson.

Respondent's fifth count sought another judgment for half a million dollars ($500,000.00) in damages, alleging that Mr. Halderman misrepresented the existence of a pre-existing injury to his eye. (TFB Composite Exh. 11). Respondent alleged in his civil complaint that Mr. Halderman "deliberately misrepresented the truth" to him and "allowed him to continue to work on the case under false pretenses." (TFB Composite Exh. 11). Mr. Halderman had previously suffered a detached retina, however, the prior injury was not relevant and had no bearing on the workers compensation claim. (TT 102). Respondent deliberately sought to portray and expose his former client as a liar in a public and frivolous lawsuit which could only serve to harm and intimidate Mr. Halderman. The

potential for damage to Mr. Halderman's case is obvious. Had Respondent's lawsuit been discovered by the workers compensation carrier, he could have become a witness against his client concerning Mr. Halderman' s credibility. Thus, Respondent's motive, unlike that described in Richardson, was to punish and harass the Haldermans for seeking redress of their grievance.

Even after Respondent was alerted by the Bar that his pursuit of his lawsuit against the Haldermans was considered to be potentially unethical, he took no steps to rectify his conduct by simply filing a notice of dismissal of the action. (TFB Exh. 1 and TT 296). Respondent's refusal to recognize the wrongfulness of his conduct is amplified by his Showing of Good Cause which was filed on May 30, 2000, in response to the circuit court's Motion, Notice and Judgment of Dismissal of Respondent's lawsuit while the instant disciplinary matter was pending before the Referee. (TFB Composite Exh.11). In his Showing of Good Cause, Respondent argued to the circuit court that his case should not be dismissed because he would be filing a motion to amend his complaint. (TFB Composite Exh. 11). The Showing of Good Cause was a further effort by Respondent to antagonize and harass Mr. and Mrs. Halderman through the abuse of the legal system.

The seriousness of Respondent's conduct is further distinguished from that

set forth in Richardson by his unnecessary and unjustified withholding of materials pertaining to Mr. Halderman's worker's compensation claim. In Mr. Halderman's April 4, 1996 termination letter to Mr. Kelly, the former requested that his W-2 forms for the years 1994 through 1997 be returned to him. (TFB Exh. 12). Respondent did not return the documents to Mr. Halderman. (TT 197 - 198) . Inquiry 6 on page 2 of the Bar's December 15, 1998 letter to Respondent posed the following question:

> "Have you provided Mr. Halderman or his new counsel with the file or copy of the same? If you have not, why not? If you have, please indicate when the file was provided."

(TFB Exh. 2). Respondent represented that he would cooperate with Mr. Halderman's lawyer when in fact he stonwalled Mr. Keezel's office for five months during the pendency of the grievance before the Bar's grievance committee. (TFB Exh.3). Respondent failed to provide any legal justification for his refusal to produce his file to Mr. Keezel or Mr. Halderman. Instead, Respondent defiantly asserted at the final hearing that he had a valid attorney's lien on Mr. Halderman's file. (TT 244). The following exchange took place at final hearing which amply illustrates Respondent's vindictive attitude toward his former client and his disregard for the administration of justice:

MR. KELLY: My understanding at the time was that I

had an attorney's lien on the files, which I think is correct. Still think it is correct. I'm not, as I stated before, a workers compensation expert so I'm not sure whether -- if there is a statute I'm not aware of, that may be the case. But as far as I know, you still have a right to retain files for payment of valid attorney's fees.

THE COURT: And other than your belief, is there no other explanation for why it took five months to remit those to Mr. Keezel?

MR. KELLY: No. That was the reason.

(TT 244). Respondent, without any valid legal or reasonable good faith basis withheld Mr. Halderman's file from his new lawyer.

The vindictive and spiteful attitude of Respondent toward his former client as revealed in the record justifies the imposition of a rehabilitative suspension. On March 30, 1999, the Bar sent a notice to Respondent advising that on April 22, 1999, the grievance committee would determine whether there was probable cause that he violated ethical rules. In particular, the second paragraph on the second page of the notice identified as an issue Respondent's failure to surrender papers and property to Mr. Halderman or his new counsel. (TFB Exh.5). Notwithstanding the notice given by the grievance committee that it considered Respondent's refusal to provide his file to Mr. Keezel to be a potential violation of ethical rules, Respondent refused to cooperate with Mr. Keezel's office. (TFB Exh. 9). In his

letter of April 22, 1999 to Respondent, Mr. Keezel expressed his frustration with Respondent's unjustified refusal to turn over the records pertaining to Mr. Halderman's workers compensation case. (TFB Exh.10). Mr. Keezel confirmed in his letter that Respondent refused to provide the file to a runner who was sent to retrieve same. Further, Respondent denied the runner the use of his telephone to contact Mr. Keezel. (TFB Exh. 10). Respondent continued to withhold the file from Mr. Keezel for another month. (TT 91).

Respondent's conduct is akin to the offending lawyer in The Florida Bar v. McKenzie, 557 So. 2d 31 (Fla. 1990). McKenzie was suspended for ninety-one (91) days and required to take and pass the ethics portion of the Bar examination for filing a suit to harass the defendants, improper contact with the judge in a divorce case, and threatening the opposing counsel. Therefore, the multiple offenses committed by Respondent make the instant case analogous to, if not more egregious than, McKenzie. Respondent not only filed a frivolous and harassing lawsuit, he failed to deliver benefit checks to his client, he delayed turning over documents to Mr. Halderman's new counsel, failed to maintain required trust account records, he improperly accused his client of being dishonest in a public document, and sought to obtain a fee that was not permissible under applicable law. The scope and totality of Respondent's misconduct calls for a rehabilitative

suspension. The misconduct cited in McKenzie did not involve the numerous bad acts that were perpetrated by Respondent in the instant case.

Respondent's failure to maintain the required trust account records establishes further support for a rehabilitative suspension. The failure by Respondent to maintain trust account deposit slips, support for all trust account transfers, a cash receipts and disbursement journal, and client ledger cards constituted serious misconduct and placed his clients' funds at risk. (TT 258 - 262). 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). The deficiencies in Respondent's trust account records were wide ranging and coincided with his violations pertaining to Mr. Halderman's worker's compensation case. Thus, a less severe sanction such as set forth in Schultz is not applicable to the facts in these proceedings.

II. A ninety-one (91) day 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.

This sanction is supported by the record herein, the relevant case law, the aggravating and mitigating factors, and the Florida Standards for Imposing Lawyer

Sanctions (Standards).

The discipline imposed on Respondent must correspond to the serious nature of his actions and serve as a deterrent to others who might be inclined toward 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. This Court held in McKenzie that a ninety-one (91) day suspension is appropriate when a lawyer filed a harassing lawsuit against an opposing party. In the instant case, Respondent sought to punish and harass his own former client merely because the client submitted a grievance to the Bar.

Standard 4.1 provides that absent aggravating and mitigating circumstances,

"suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to the client." Clearly, injury was caused by Respondent's failure to provide Mr. Halderman with several Riscorp checks before they expired. Furthermore, Mr. Halderman testified that he never received reimbursement for the checks that Respondent withheld from him. (TT 225).

Standard 4.22 provides that absent aggravating and mitigating circumstances, "suspension is appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client." As indicated above, Respondent's public pronouncement in his lawsuit that Mr. Halderman was a liar had the very real potential for injury to Mr. Halderman.

Standard 7.2 provides that absent aggravating and 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." The record establishes that Respondent attempted to harm his former client for whom he had an obligation to protect. Respondent sought to punish and harass Mr. Halderman because he discharged

Respondent and filed a grievance with the Bar. As the record makes exceedingly clear, Respondent had numerous opportunities to rectify his misconduct or at least mitigate it. After the grievance was under investigation, Respondent filed a bogus lawsuit seeking 1.1 million dollars in damages from Mr. and Mrs. Halderman. Respondent made a knowing and wrongful choice to perpetuate his lawsuit while withholding Mr. Halderman's documents from his new lawyer and thereby continuing the harassment of his former client. Respondent took no affirmative steps to dismiss his civil action against the Haldermans. The lawsuit was dismissed in September 2001, two months before the final hearing in this proceeding, for lack of prosecution. (TFB Composite Exh. 11).

Standard 9.22 lists several aggravating factors that 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 several aggravating factors which may justify an increase in the degree of discipline that she recommended in her report. The aggravating factors found by the Referee are as follows:

Standard 9.22(b) Dishonest or selfish motive. Clearly, Respondent's motives behind his misconduct were selfish. Respondent continued to wrongly insist that

he was entitled to hundreds of thousands of dollars from the Haldermans. Respondent's actions towards Mr. and Mrs. Halderman can only be considered vengeful and improper.

Standard 9.22(c) and (d) Pattern of misconduct and multiple offenses. As indicated above, Respondent rejected request after request from Mr. Halderman and Mr. Keezel to provide his file. Respondent continuously refused to provide the documents for five months without justification. Respondent, in bad faith, permitted his lawsuit to hang over the heads of Mr. and Mrs. Halderman in excess of a year. A lawsuit that included a count seeking half a million dollars from the Haldermans for pursuing a grievance with the Bar. Notwithstanding the Bar's warning that the Haldermans enjoyed immunity from suit concerning their grievance, Respondent maintained his civil action. Respondent's failure to maintain significant trust account records and safeguard client property further illustrates the scope and breadth of his misconduct.

Standard 9.22(e) Bad faith obstruction of the disciplinary proceedings. Respondent refused to appear in person at final hearing and displayed a contemptuous attitude throughout the course of the proceedings.

Standard 9.22(g) Lack of remorse. Respondent clearly does not have remorse for his actions. He accused the Bar's worker's compensation expert

witness of being absolutely incorrect in her opinions without providing even the thinnest support for his disagreement. (TT 153 - 158). Respondent casually labeled Mr. Halderman a murderer to improperly prejudice the Referee. (TT 241). Respondent attempted to blame Randall Henderson, the grievance committee investigating member, for Respondent's decision to sue the Haldermans. (Answer 15 to the Bar's Request for Admissions and TT 59). Mr. Henderson testified that he gave no such encouragement to Respondent. (TT 49).

Standard 9.22(h) Vulnerability of victim. Mr. Halderman knew of no way to compel Respondent to turn over the workers compensation file. Both Mr. Halderman and Mr. Keezel attempted on several occasions to obtain the needed documents. However, Respondent obstinately withheld the records for no other purpose than to punish Mr. Halderman. Respondent, an experienced lawyer, served Mr. Halderman, who worked as a laborer, and his wife with a lawsuit seeking 1.1 million dollars because they determined that Respondent's services were no longer needed. It is apparent that the Haldermans did not have the ability to litigate against Respondent.

Standard 9.22(I) Substantial experience in the practice of law. Respondent has been a practicing lawyer for 22 years in New York and Florida. (TT 287 - 288). Due to his blind intent on punishing Mr. Halderman, Respondent ignored the

requests and warnings directed at him while the grievance was under investigation. A lawyer with the experience of Respondent would clearly know that his actions were improper.

Standard 9.3 lists several mitigating factors which may justify a reduction in the degree of discipline to be imposed. The Referee only found one mitigating factor to be applicable; Standard 9.32(a) Absence of a prior disciplinary history. Considering the multiple and serious violations committed by Respondent, the absence of a prior sanctions does not mitigate the sanction below a rehabilitative suspension.

A harsh discipline is warranted and necessary to protect the public, encourage reformation, and to deter others who might be tempted to commit similar acts of misconduct. Suspending Respondent for sixty (60) day is not sufficient to accomplish these goals. Respondent's misconduct deserves no less than a ninety-one (91) day suspension from the practice of law, followed by probation for a period of one year, completion of the Bar's ethics school trust accounting course, and an assessment of the Bar's costs in these proceedings.

CONCLUSION

Respondent, an experienced attorney, willfully and in bad faith pursued a harassing lawsuit against his former client in retaliation for the client's submission

of a grievance to the Bar. Respondent refused to withdraw his lawsuit or otherwise correct his misconduct at any time during the course of these disciplinary proceedings. Moreover, Respondent spitefully withheld documents from his former client's counsel for an extended period of time and did not provide his client with worker's compensation benefit checks in a timely manner. Finally, Respondent did not maintain trust account records in accordance with the Rules Regulating Trust Accounts.

Respondent's multiple violations were the result of his desire to harm and punish his former client without regard to the potential harm to the legal system that Respondent is privileged to practice in. The Respondent's misconduct merits a suspension from the practice of law for ninety-one (91) days followed by probation for a period of one year, completion of the Bar's ethics school trust accounting course, and an assessment of the Bar's costs. During the period of probation the Respondent should be required to retain, at his cost, the services of a certified public accountant, approved by the Bar, who shall provide quarterly reports indicating whether or not Respondent's trust account records are in compliance with the Rules Regulating Trust Accounts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of The Florida Bar's Initial Brief have been furnished by Certified U.S. Mail, Return Receipt 7000 1670 005 3368 5469 to Thomas D. Hall, 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 and certified U. S. Mail, Return Receipt No.7000 0520 0018 3073 8796, to Peter Ellis Kelly, Respondent, at 1648 Periwinkle Way, Suite 1-A, Sanibel, FL 33957-4403; 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 _____ day of March, 2001.

_____
Stephen Christopher Whalen
Assistant Staff Counsel

CERTIFICATION OF FONT SIZE AND STYLE AND OF VIRUS SCAN

I HEREBY CERTIFY that this brief has been written in font size Times New Roman 14 pt, and that the enclosed diskette has been scanned using "Norton Antivirus."

_____
Stephen Christopher Whalen
Assistant Staff Counsel