IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ALBERTO VICTOR BATISTA,

Respondent.
_____/

Supreme Court Case
No. SC00-2219

The Florida Bar File
Nos. 1999-71,220(11G)
1999-71,458(11G)
1999-71,635(11G)

Second Amended Report of Referee

This cause came on to be heard before the undersigned on April 19, 2001 and May 14, 2001 pursuant to the Complaint of the Florida Bar dated October 23, 2000. On June 5, 2001 a Report of Referee was submitted followed by an Amended Report of Referee on June 27, 2001. On April 10, 2002 this matter was remanded to the undersigned by the Supreme Court of Florida with instructions to provide a second amended report. Before reviewing the testimony of the witnesses and the merits of the case against the Respondent, Alberto V. Batista, the undersigned feels compelled to describe certain troubling behavior of the Respondent prior to trial.

This matter was referred to the undersigned late in the year 2000. Subsequent to said referral the undersigned received a Christmas card from the Respondent followed shortly thereafter by a Hanukkah card. Your referee found this to be unusual but chose not to read anything into it. Throughout the next few months the parties regularly filed written pleadings and regularly appeared before the undersigned.

Respondent's representation of himself during this time on many occasions led the undersigned to question how wise a decision the Respondent had made in choosing to represent himself. The old adage "he who represents himself has a fool for a client" could well be applied herein.

Pleadings filed by Respondent were often untimely, when presented were sometimes unsigned and were regularly printed out on the back side of Respondent's letterhead (printed stationary). The

content of the pleadings often tended to ramble on endlessly without seeming to directly respond to what was requested. Mr. Batista tends to blame his problems on everyone but himself and has repeatedly suggested discrimination against Hispanics by the Court system and the Florida Bar as the reason for his problems. Instead of concentrating on responding to charges against him, Mr. Batista has chosen to attack his accusers including counsel for the Florida Bar.

Mental health experts who have examined Mr. Batista as a requirement of an Unconditional Guilty Plea and Consent Judgment for Discipline entered into by Respondent in May 2000 have found no significant pathology and no major mental illness. The undersigned must rely on the experts opinions but observations of the Respondent's behavior in the prior proceedings and in the instant matter make it somewhat difficult to do so.

Respondent further hurt his cause when on the day of trial he appeared 20 minutes late and incurred a sizeable fine imposed by the undersigned after failing to find Respondent's explanation for his late arrival to be credible or justifiable. On the heels of the late arrival and early on in the case, it was revealed through complaining witnesses that only two days prior to trial Respondent had sent an investigator to the homes of the witnesses and had offered to repay the fees taken by him if they would execute false affidavits basically stating that Mr. Batista had done a good job, that they were satisfied with his work and that they had never intended to pursue these matters against Mr. Batista.

Upon hearing this testimony from one complainant who didn't accept Mr. Batista's pretrial offer and two others who did, the undersigned was outraged to say the least and advised Mr. Batista that he had possibly committed multiple felonies including bribery, witness tampering and subornation of perjury. Mr. Batista's response was that he understood he would be mitigating damages and helping to reduce any potential sanctions against him. Either he was extremely devious, unethical and conniving or just plain stupid to approach these witnesses on the eve of trial. The undersigned is certain that had Mr. Batista been represented by counsel all of the aforementioned behavior could have and would have been avoided and Mr. Batista would be facing a short suspension as originally recommended by Florida Bar counsel as opposed to possible disbarment which is now being recommended by the Florida Bar.

After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As to Count I

Respondent is charged with accepting attorneys fees totaling $2000.00 from Maria Lopez after being retained in October 1999 to represent her in obtaining social security benefits for her minor son but doing little or nothing to obtain said benefits. Additionally, subsequent to a complaint being filed with the Florida Bar, Respondent failed to timely respond to Bar Counsel and the Investigating Member of the Grievance Committee as required by the Rules Regulating the Florida Bar.

The evidence is clear and convincing from the testimony of Maria Lopez that attorney Batista did nothing for her despite having had two meetings with her and six telephone conversations. Her testimony further revealed that at least two other appointments were set by Mr. Batista but canceled by him the day before they were to have occurred

Ms. Lopez further testified that Mr. Batista was always vague and always in a hurry. Her last contact with Mr. Batista was in June 1998 after which she retained another attorney to request a return of her $2000.00 from Mr. Batista. Two days prior to the trial in this matter, and almost three years after his last contact with Ms. Lopez, Mr. Batista's investigator left a business card at the Lopez home. Ms. Lopez assumed it was from Mr. Batista and didn't respond.

Correspondence in the record from the Florida Bar Counsel and Investigating Member of the Grievance Committee was not timely responded to by attorney Batista. (Exhibits 5,6,8,9 & 15)

As to Count II

Respondent is charged with accepting $4,000.00 in attorneys fees to represent Luisa Brooks in obtaining a work permit and permanent residency status in the United States and to represent Ms Brooks father, Ramon Mayan, in having his drivers license reinstated, yet failing to obtain the requested results for either client.

The evidence adduced through the testimony of Ms Brooks and Mr. Mayan is clear and convincing as to the above allegations. Mr. Brooks indicated that she had received a deportation order but since she was married to a U.S. citizen Mr. Batista advised her that it would be easy to obtain the relief sought. Mr. Batista further advised her that he was an immigration attorney and had handled these types of cases previously.

In March 2000 after three or four office visits and at least five telephone calls Ms. Brooks obtained no results from Mr. Batista and was forced to retain other counsel. One or two months after new counsel became involved she was contacted by immigration and one month thereafter she received the work permit that Mr. Batista failed to obtain in three years.

Ms. Brooks further testified that she and her father, were approached at their home two days before trial and offered the return of all fees paid to Mr. Batista if they would sign what she described as untruthful affidavits exonerating Mr. Batista of any wrongdoing. Apparently modified affidavits were prepared and a cash repayment of all attorneys fees was made by Mr. Batista's investigator.

The undersigned also heard from Ramon Mayan, Luisa Brooks' father who retained Mr. Batista in February 1997 seeking to reinstate his Florida Drivers License which had been suspended for one year by a Judge and subsequently for life by the Department of Motor Vehicles, apparently as a result of four DUI's. Mr. Batisita advised the client that his problem could be easily solved.

Mr. Mayan paid Mr. Batista a total of $4000.00 on behalf of himself and his daughter. Mr. Mayan appeared for scheduled appointments with Mr. Batista on three occasions and found no one at the office. During telephone conversations with Mr. Batista Mr. Mayan was repeatedly told that everything is working fine. After more than two years with no results, Mr. Mayan filed a complaint for return of his and his daughters attorneys' fees in County Court where on July 30, 1999 he obtained a Default Final Judgment against Mr. Batista for the $4000.00 attorneys fees plus $129.00 in court costs. Until two days before the trial in this matter that Judgment remained unsatisfied. Mr. Mayan confirmed his daughter's testimony concerning events occurring just prior to trial and the repayment by Mr. Batista of attorneys fees.

As to Count III

Respondent was charged with being retained by Robin Richards in March 1999 to assist her in obtaining a restraining order and failing to do so. Additionally, Mr. Batista is charged with failing to

respond to bar counsel and the investigating member of the grievance committee seeking information concerning a complaint filed with the Florida Bar by Robin Richards.

Robin Richards did not testify before the undersigned and therefore there is no clear and convincing evidence concerning Respondents failure to perform services for which he was allegedly retained. However, exhibits in evidence do provide clear and convincing evidence of Mr. Batista's failure to respond to Florida Bar counsel and the grievance committee member as charged. (Exhibits 8,9,11,12,15 & 16)

As to each of the Counts of the Complaint I make the following recommendations as to guilt or innocense:

As to Count I

I recommend that the Respondent be found guilty of having violated Rule 4-1.1 (Competence), Rule 4-1.3 (Diligence), Rule4-1.4 (Communication), and Rule 4-8.4(g) (Failure to respond, in writing, to an inquiry by a disciplinary agency conducting an investigation into attorney conduct) of the Rules of Professional Conduct.

As to Count II

I recommend that the Respondent be found guilty of having violated Rule 4-1.1(Competence), Rule 4-1.3(Diligence), and Rule 4-1.4 (Communication) of the Rules of Professional Conduct.

As to Count III

I recommend that the Respondent be found guilty of having violated Rule 4-8.4(g) (Failure to respond in writing to an inquiring by a disciplinary agency conducting an investigation into attorney conduct) of the Rules of Professional Conduct.

Disciplinary Measures

The various complaints herein seem to have a central theme, clients are advised by Mr. Batista that he can help them with their legal problems which included obtaining social security benefits for a minor child whose father was deceased, obtaining a work permit along with other immigration related matters for a second client and helping reinstate a suspended drivers license for a third. In all instances the Respondent either knew when initial attorneys fees were paid or found out shortly thereafter that he

would be unable to obtain the results promised but instead of advising the clients of same he repeatedly told them that their cases were proceeding without ever obtaining the desired results.

The testimony before the undersigned partially supported Mr. Batista's position that the desired results were unobtainable because of the clients' actions. In the case of the claim for social security benefits by a minor child said child's mother failed to present Mr. Batista with proof that the deceased father had been employed in the United States, which would be required for entitlement to the benefits. The client seeking a work permit may have failed to execute required documents as alleged by Mr. Batista but she did subsequently obtain the work permits through the efforts of subsequent counsel. Finally, reinstatement of the third clients drivers license was not possible once it was discovered that the client had four DUI's on his driving record. Accepting Mr. Batista's version in each case still doesn't justify stringing along these clients and doing nothing for the attorneys fees accepted by him. If he didn't realize at the initial consultations that the results expected by the clients were unobtainable he should have figured it out shortly thereafter, advised the clients accordingly and promptly refunded retainers or unused portions thereof.

The Florida Bar has requested that Alberto V. Batista be disbarred and asks the referee to take into consideration not only his actions herein but the fact that Mr. Batista was involved in a prior disciplinary proceeding which resulted in the entry of an Unconditional Guilty Plea and Consent Judgment for Discipline in May 2000. That prior matter was treated as minor misconduct and did not involve representation of clients.

An argument could be made by the undersigned and has indeed been made by the Florida Bar for disbarment. However, after careful and thoughtful consideration of the entire circumstances herein the undersigned finds such a severe sanction to be inappropriate. It is true that the undersigned was incensed after learning about the matters occurring just prior to trial but at the time of trial the Florida Bar had only been looking for and the Respondent had only been facing at worst a ninety (90) day suspension. Imposition shortly thereafter of the ultimate penalty, disbarment is not justified. Were the undersigned to find disbarment appropriate herein, it would be based on Respondent's actions prior to trial in contacting former clients who had filed complaints and in attempting to influence those clients to withdraw their complaints. Disbarment is not supported by the allegations of the Complaint of the Florida Bar filed October 24, 2000. Just to be perfectly clear, even if the pretrial misconduct was

alleged by the Florida Bar in an Amended Complaint prior to trial it is unlikely that the sentence about to be recommended would change drastically.

The Respondent, Alberto V. Batista, should face a lengthy suspension, in excess of the suspension initially sought by the Florida Bar. The recommendation at this time is a two year suspension. Additionally, Respondent shall reimburse Maria Lopez her attorneys fees of $2000.00 and pay the Florida Bar's costs in the amount of $2,044.92., both amounts which shall be included in the Judgement in this case and which shall accrue statutory interest. All amounts due and owing shall be paid in full as a prerequisite to Respondent filing a Petition for Reinstatement.

Dated at Miami, Florida this _____day of July, 2002.

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BERNARD S. SHAPIRO
REFEREE

cc: Vivian Maria Reyes, Esq.
Alberto V. Batista, Esq.