IN THE SUPREME COURT OF FLORIDA

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| THE FLORIDA BAR,<br><br>Complainant,<br><br>v.<br><br>ALBERTO VICTOR BATISTA,<br><br>Respondent.<br>______________________________/ | Supreme Court Case<br>No. SC00-2219<br><br>The Florida Bar File<br>Nos. 1999-71,220(11G)<br>1999-71,458(11G)<br>1999-71,635(11G) |

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The Florida Bar's Answer Brief and
Initial Brief on Cross Appeal

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## STATEMENT OF THE CASE AND OF THE FACTS

The Bar generally accepts Respondent's statement of the Case and Facts. This Court should note that there were three counts regarding parties who had complained to the Bar. Respondent has raised no issue on appeal as to Count III, a violation of Rule 4-8.4(g) (failure to respond in writing to an inquiry from a disciplinary agency conducting an investigation into attorney's conduct).

In addition, the following matters were deemed admitted by an order dated April 2, 2001:

COUNT I

G. That:
  1. Lopez received little or no assistance from you.
  2. You failed to return phone calls
  3. You frequently scheduled appointments and failed to appear.

J. That you refused to refund any money to Lopez.

K. That:
  1. Lopez subsequently filed a complaint against you with The Florida Bar .
  2. When asked to respond to the allegations, you failed to timely respond to Bar Counsel as required by the Rules Regulating the Florida Bar.
  3. When asked to respond to the allegations, you failed to timely respond to the Investigating Member of the Grievance

Committee as required by the Rules Regulating the Florida Bar.

L. That:

1. By reason of the foregoing, you have violated Rule 4-1.1 (Competence) of the Rules of Professional Conduct.
2. By reason of the foregoing, you have violated Rule 4-1.3 (Diligence) of the Rules of Professional Conduct.
3. By reason of the foregoing, you have violated Rule 4-1.4 (Communication) of the Rules of Professional Conduct.
4. By reason of the foregoing, you have violated Rule 4-8.4(g) (A lawyer shall not fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct) of the Rules of Professional Conduct.

## COUNT II

M. That:

1. In February, 1997, Luisa Brooks (hereinafter "Brooks" ) sought your assistance.
2. Brooks wanted to obtain a reinstated work permit and permanent residency status in the United States
3. In February, 1997 Ramon Mayan (hereinafter "Mayan") sought your assistance.
4. Mayan needed assistance in having his driver's license reinstated.

N. That:

1. Mayan and Brooks paid you a total of $4,000.00 for your services.
2. You were to begin Brooks' quest for permanent residency and/or reinstated work permit
3. You were to reinstate Mayan's driver license.

Q. That you failed to return phone calls and cancelled numerous appointments regarding the status of the representation.

R. That you failed to inform Brooks and/or Mayan of the status of their

cases even after Mayan and Brooks attempts to contact you.

COUNT III

V. That on July 21, 1999 and August 16, 1999, bar counsel requested that you respond to the allegations made against you by Richards. You failed to respond.

W. That on February 17, 2000, bar counsel asked you to provide Richards' case file in order to aid in the investigation of Richards' complaint. You failed to do so.

X. That subsequently, the investigating member of the grievance committee requested you to provide, in writing, an accounting of dates, hours, and services expended on Richards' behalf. The investigating member also requested your written response to the allegations against you. You failed to respond to these requests.

Y. That by reason of the foregoing, you have violated Rule 4-8.4(g) (A lawyer shall not fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct) of the Rules of Professional Conduct.

The Bar proceeded to prove its case without specific dependence upon the admissions.

## SUMMARY OF ARGUMENT

Respondent initially argues that the Referee made a number of mistakes. The Bar will establish that those mistakes are non-existent. Furthermore, even if the alleged mistakes had occurred, they are not a basis for reversal in regard to any specific issue. Also, the Respondent is erroneously asserting that if there are several minor mistakes, the entire Report of Referee must be rejected.

Second, Respondent argues that there is a due process denial when an aggravating factor is considered without a prior pleading. Respondent is incorrect. No case holds that prior notice of an aggravating factor must be provided.

Third, there is competent substantial evidence that Respondent's conduct was unethical and criminal. The witnesses testified that Respondent directly and/or through his investigator asked the parties who filed Bar complaints to sign false affidavits in exchange for payments.

There is also competent substantial evidence to support the Referee's findings of guilt. Each of the complaining witnesses testified that Respondent promised results which the evidence shows he could not deliver. Each also

testified that nothing was done, Respondent did not contact them[1] and Respondent refused to return any fees.

Respondent's discipline should be viewed in the context of a composite pattern of gross behavior. The record demonstrates that his credibility was severely undermined. Respondent also engaged in many activities during and collateral to the trial which were seriously inappropriate professional behavior. An aggravating factor was that he attempted to tamper with witnesses.

Respondent's discipline should be based upon an aggravating factor that calls for disbarment; unethical, improper and diversionary conduct, and testimony which is obviously not truthful. Respondent should be disbarred.

[1] With difficulty, <u>they</u> contacted him.

# ARGUMENT
# I

## RESPONDENT'S BURDEN IS TO ESTABLISH A LACK OF COMPETENT SUBSTANTIAL EVIDENCE OR THAT THE FINDING(S) ARE CLEARLY ERRONEOUS. RESPONDENT'S STATEMENT OF THE ISSUE SEEKS TO REVERSE THE BURDEN.

Respondent has adroitly adopted the language of some settled appellate principles, turned them upside down and mixed them together with a number of different factual questions and issues. Respondent sets forth the premise that if the report contains facts which lack evidentiary support or are clearly erroneous, the report as a whole must fail. No authority supports this assertion.

Rather, the governing principle is that it is the appellant's (Respondent's) burden to establish error. The Florida Bar v. Vining, 761 So.2d 1044 (Fla. 2000). A party does not satisfy his burden of showing that a Referee's findings are clearly erroneous by simply pointing to the contradictory evidence where there is also competent substantial evidence to support the Referee's findings. Vining, supra. Respondent is arguing in behalf of a position that is quite different by suggesting

that if there are several incorrect statements in regard to several different issues, there is a basis for reversal. Note initially that the Bar denies the existence of alleged incorrect statements.

Respondent does not even attempt to prove that the particular factual contentions presented, if true, would establish a lack of competent substantial evidence as to any ultimate findings of the Referee. Since that is his burden, the arguments set forth in the context of Respondent's erroneous premise will be discussed in regard to those ultimate findings disputed in subsequent portions of Respondent's brief.

The Bar would point out that there is one factor which does permeate all of the findings, and that, of course is credibility. It is well settled that the credibility of witnesses is a matter for consideration by the trier of fact. The Referee apparently found the Bar's witnesses to be credible. Furthermore, in this case Respondent's statements on the record constitute unequivocal evidence of a lack of credibility.

When questioned by the Referee about the visit of his investigator to the witnesses two days prior to trial, offering payment in exchange for signing exculpatory affidavits, Respondent provided the absurd explanation that: "I had a right to depose that witness." (T. 439). He added the equally absurd claim that: "If anything, it was a case of entrapment." (T. 438).

He attacked the Bar stating: “The Florida Bar has shown in its conduct at all times in this matter by hook or by crook...” (T 434-5). He attacked Bar counsel many times including: “Mr. Leon was before this Court lying to the Court.” (T. 434).

He apparently did not tell the truth about witness Mayan. (discussed infra.) Mayan provided copies of receipts for payments to Respondent. Respondent claimed that they were not his receipts and were forgeries. (Mayan-Brooks Bar file; Comp. 33). See Respondent’s letter of June 2, 1999 and February 7, 2001, Investigator’s Report dated June 30, 2000. However, he did not assert that defense in Small Claims Court or before the Referee.

Respondent advised the investigating member orally that client Brooks had not sent documents that he requested. The investigating member reviewed Respondent’s file and wrote:

> The file does not contain any correspondence from Mr. Batista to Ms. Brooks attempting to get her to sign documents or warning her that her failure to do so could jeopardize her application until nearly one year after the complaint was filed. Accordingly it does not appear from the record evidence that Mr. Batista’s excuse is factually accurate. (Comp. Exh. 33).

The question of Respondent’ s credibility is particularly pertinent to some alleged defenses which appeared during or shortly before the final hearing. The surrounding facts demonstrate that Respondent’s after-the-fact excuses are not

sustainable.

## ARGUMENT
## II

## RESPONDENT WAS NOT DENIED DUE PROCESS BY THE REFEREE'S CONSIDERATION OF AN AGGRAVATING FACTOR.

In regard to the determination of discipline, the Referee was asked to consider as aggravation Respondent's conduct in approaching the witnesses on the eve of trial. The Referee summarized that conduct as follows:

> ...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 not being recommended by the Florida Bar.
>
> As to the merits of the allegations against the Respondent the referee finds... (ROR; emphasis supplied).

The report clearly indicates that the Referee did consider the foregoing conduct as aggravating, before discussing "the merits of the allegations." Furthermore, it is clear that Bar counsel had asked the Referee to consider that conduct as an aggravating factor:

> MR. LEON: The only reason he would have tried to contact Complainant Lopez via Investigator Lopez was to offer her money as well.
>
> Brooks and Mayan came before this Court and told your Honor that that is exactly what happened. Judge, that is witness tampering and that aggravates this matter. (T. 431)

No case or rule requires that the Respondent be notified by a pleading or otherwise, that a particular factor will be advanced as aggravation. The Florida Bar v. Vernell, 721 So.2d 705 (Fla. 1998) and The Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999) are, therefore, totally inapplicable. As Respondent states in his brief:

> The case law is clear. In The Florida Bar v. Vernell, 721 So.2d 705 (Fla. 1998), this Court rejected a referee's recommendation of

> guilt as to a specific disciplinary rule violation that was not charged in the Bar's complaint. In rejecting the referee's recommendation of guilt as to this rule, this Court held...
>
> (Brief, p. 32 emphasis supplied)

The holding in Fredericks also dealt with "a finding of an uncharged rule violation...".

The Referee in this case made no finding of guilt as to any additional rule violation. Since the attempt to induce the complainants to sign false affidavits had occurred shortly before the trial, the Bar had no choice but to present it as aggravating.

## ARGUMENT
## III

### THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO ESTABLISH THAT THE RESPONDENT'S CONTACT WITH THE WITNESSES CONSTITUTED AN AGGRAVATING FACTOR.

A woman came to the home of two of the witnesses and stated that Respondent wanted to give them their money back (T. 109). Witness Mayan spoke to Respondent on the telephone regarding the offer. The woman returned after the initial visit with receipts and affidavits. (T. 114).

Respondent glosses over the facts regarding this approach to the witnesses. The single most important fact that cannot be overlooked is that Respondent's representative asked the witnesses to sign affidavits that weren't true prior to receipt of the money. Note the precise testimony of Luisa Brooks:

> Q. What did Leyda Lopez tell you Mr. Batista wanted you to say?

A. Mrs. Lopez explained to us in which the way we had to make the affidavits.

Q. And what did she want you to say?

A. Well, more or less according to what she said, it was more or less similar to the other ones before that she had taken.

Q. And what is it more or less that they were supposed to say?

A. Well, that she wanted for us to write down like that we had always been very happy about the job that he had been doing for us.

Q. And is that true?

A. That is false.

Q. What else were you supposed to write?

A. That he was a good attorney.

Q. And based on what services he rendered for you was that true?

A. That is false.

Q. What else were you supposed to write?

A. And that I was never in agreement with -- well, for example, that my father would file this complaint with the Florida Bar.

Q. And is that true?

A. That is false.

Q. Did you say those things?

A. No.

Q. And why?

A. Because no, because if I had said that is correct, I would have been lying.

(T. 125, 126)

Ramon Mayan, Luisa's father was present when Leyda Lopez, Respondent's investigator, approached them regarding the affidavits. Respondent was also representing Mayan who hoped to get his driver's license back. Mayan told Lopez that he did not want to sign the proposed two page affidavit. (T. 240). His refusal was based on the fact that the affidavit "said things that weren't true". (T. 241). One of the statements in the proposed affidavit which was untrue was that the Bar had, in Mayan, words, "obliged" him to pursue the complaint. (T. 241).

Prior to the appearance of Leyda Lopez two days before the final hearing, Respondent had refused to refund the money which the witness had paid. (T. 237). Mayan and Brooks had been forced to file a claim in Small Claims Court where they had obtained a judgment approximately one year earlier against Respondent for the full amount of the fee paid plus costs in the total amount of

$4,129.00. (T. 235).

A third witness, Maria Lopez, was the recipient of a business card left by Leyda Lopez. (T. 39). A message on the card said: "please contact me." She did not do so. The reason for not doing so was "because she knew where it was coming from and [she] didn't want anything to do with him, Mr. Batista." (T. 40).

## ARGUMENT
## IV

### RESPONDENT HAS NOT OVERCOME THE PRESUMPTION OF CORRECTNESS IN FAVOR OF THE REFEREE'S FINDINGS.

The Referee found that Respondent was guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence) of the Rules of Professional Conduct. The applicable law was stated in The Florida Bar v. Glick, 693 So.2d 550, 551-2 (Fla. 1997):

> A referee's findings of fact concerning guilt carry a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. Florida Bar v. Benchimol, 681 So.2d 663, 665 (Fla. 1996); Florida Bar v. Vannier, 498 So.2d 896, 898 (Fla. 1986). Benchimol, 681 So.2d at 665; Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992). The party contending that the referee's findings of fact and recommendations 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 recommendations. Florida Bar v. Spann, 682 So.2d 1070, 1073 (Fla. 1996); Florida Bar v. Miele, 605 So.2d 866, 868 (Fla. 1992).

> *... a party does not meet the burden of showing that a referee's findings are erroneous simply by pointing to contradictory evidence where there also is competent, substantial evidence in the record that supports the referee's findings. Florida Bar v. Benchimol, 681 So.2d at 665; Florida Bar v. de la Puente, 658 So.2d 65, 68 (Fla. 1995).

In regard to client Maria Lopez, Respondent was paid $2,000.00 which he had requested. (T. 25, 26). Mrs. Lopez advised Respondent that she was hoping for financial assistance from Social Security. She testified as to her initial visit to Respondent and the representations that he made at that time.

> A. He -- once again, he said yes, he could help me. I told him all the truth. I was a widow. My husband was deceased and he was never a resident or a citizen of this country.
>
> He said that he could help me, of course. He had done this before and he even gave me like an amount that I would get, four or $500 a month for this.
>
> Q. Ms. Lopez, when you say that he told he [sic.] he could help you, what did that mean to you?
>
> A. That I would receive some money from the government to help me because I was a single mother, I'd say.
>
> Q. Did he say about how long it might take to get that money?
>
> A. He told me eight months, up to a year, but he said it's not likely, that eight months would be the time.
>
> (T. 18)

Lopez spoke to Respondent approximately six times. (T. 32). He gave answers like "...it's taking longer that I thought." (T. 33).[2] Respondent points out his shortcomings in his own brief by asserting that: Respondent could not pursue Social Security benefits for Maria Lopez in the absence of employment information concerning Maria Lopez' husband (R's brief, p. 36). There is no evidence that Respondent knew that at any time material hereto. The testimony of Mrs. Lopez is that the absence of records was not a factor which Respondent told her was a cause of the delay. Rather, when she spoke to him about the progress of the case or lack thereof, he was vague. (T. 33). Furthermore, she had advised him that she didn't know if her deceased husband had been employed in the United States. (T. 29).[3]

Respondent's stated reason for not being able to proceed with the case was never offered until late in the proceedings before the Referee. He provided no documents in support of his defense despite numerous letters from the Bar

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[2] Respondent's Argument I asserts that the fact that the Referee's finding that Respondent "repeatedly" stated that the case was in progress is inconsistent with the finding of lack of communication. However, since Lopez testified that <u>she called</u> the Respondent six times and saw him twice, the conclusion that Respondent "repeatedly" stated the case was in progress creates no contradiction.

[3] Her husband had been in the United States for many years before they were married.

requesting that specific information. (TFB Exh. 5, 6, 7, 8, 9). The only reference to the defense was a few words hidden in a five page bizarre letter (discussed infra.) addressed to Theresa Bartlett of the Client's Security Fund and provided by Respondent to Bar counsel. He did not provide any written information in support of a defense to the grievance committee when he was notified that a paper hearing was about to take place. (TFB Exh. 13, 16).

When Lopez obtained another attorney, Michael Lechtman, that attorney advised Respondent that he would be unable to obtain the funds from the government for her. (TFB Exh. 4). The letter was dated September 16, 1998. Lechtman also asked Respondent to return Lopez' fees which had not been earned. (TFB Exh. 4). Respondent did not tell Lechtman of any failure of his client to produce needed records which was impeding the progress of the case.

Respondent argues that "the Referee's Report recognizes Respondent's position 'the desired results were unobtainable because of the clients' actions." [4] However, Respondent ignores the sound conclusions of the Referee in the same

[4] Respondent also argues (Issue #1) that the Referee made a mistake by referring to Maria Lopez in the context of the statement: "Upon hearing the testimony from one complainant who didn't accept Mr. Batista's pre-trial offer." The argument is not material to any issue. Furthermore, the statement is correct. Lopez did testify and did not accept the offer. The Respondent's argument is merely quibbling over sentence structure.

paragraph:

> Accepting Mr. Batista's version in each case still doesn't justify stringing along these clients and obtaining no results 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. (ROR)

Luisa Brooks also retained the Respondent. Note the following testimony:

> Q. What did he, the Respondent, tell you that he could do for you?
>
> A. I mentioned to him my problem.
>
> Q. And what did he say he could do for you?
>
> A. That yes, that he could carry my case because that was easy.
>
> Q. Could you describe what it is specifically that you said your problems were and what he was going to seek out for you?
>
> A. I told him that I had a deportation order and I wanted to know whether since I was married to an American, a guy. He told me that by paying a bond, this deportation order could be taken away and that through my husband, he could take, get these papers out well for me.
>
> (T. 79)

Brooks paid the Respondent $1,000.00 on February 14, 1997. (T. 82).

Respondent told her he had handled that type of case before. (T. 84).

She gave Respondent some papers which he had requested (T. 86). She

never received anything from Respondent or from immigration thereafter. (T. 87).

Brooks called Respondent regarding the progress of the case. She met with him three or four times in his office and called approximately five times. (T. 91-93). Respondent asked her to get fingerprinted and to take a medical exam. (T. 92-93).

Six months elapsed before Brooks heard from Respondent. (T. 94). She sent additional documents to Respondent that he had requested, including certified copies, but heard nothing from Immigration or any other agency (T. 98). Brooks attempted to see Respondent after she provided the additional documents but Respondent canceled and/or missed appointments. (T. 99-101).

Respondent's argument that Brooks could not have obtained relief (Issue I) until legislation was passed in the year 2000 is immaterial. Was Respondent clairvoyant and waiting three years for legislation which would solve his client's problem? The fact remains that there is no evidence that Respondent was aware of the problem with the case until some time prior to the final hearing. Respondent's own expert said that he should have declined to take the case. (T. 211-212). Instead, Respondent kept the fees paid by Mayan and Brooks, sat on the cases for several years, and refused to return the fees. (T. 237).

Brooks and her father obtained a judgment in Small Claims Court for the fees

they had paid to Respondent (TFB Exh. 31). Her father, Ramon Mayan, had also retained Respondent regarding a loss of his driver's license. Respondent assured him that it was an easy problem to solve and requested a retainer for his case and that of his daughter. (T. 225, 226).

Respondent told Mayan that he would start on the case right away. (T. 225). However, Respondent did nothing and Mayan heard nothing from Respondent or any agency or court. (T. 233). Mayan asked about the progress of the case and asked to see what documents had been prepared. Respondent sent him documents from someone else's case (T. 233). Visits to Respondent's office were futile as were several conversations on the telephone. (T. 234). [5]

When Mayan and Brooks sued in Small Claims Court, Respondent offered no defense (T. 235). Respondent offered no explanation to the Bar despite written requests. (TFB Exh. 33). He offered no defense to Bar counsel, the investigating member of the grievance committee or the committee itself. He provided no defense during the discovery stage of these proceedings. Only at trial did he come forward with a surprise witness and a surprise defense.

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[5] Again, the conclusion that Respondent "repeatedly" stated that the case was in progress is not inconsistent with the charge of lack of communication. Mayan, Brooks and Lopez initiated communication because there was no communication from Respondent as to progress in their cases.

However, his own witness, attorney Enrique Miranda, stated that he would have declined to take Brooks' case (T. 237).

## ARGUMENT V

**THE RESPONDENT SHOULD BE DISBARRED.**

(This issue answers Respondent's Argument V and also constitutes the Bar's Cross Appeal)

This Court has articulated the three purposes of discipline:

> 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 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.

The Florida Bar v. Cibula, 725 So.2d 360, 363 (Fla. 1998) [quoting The Florida Bar v. Reed, 664 So.2d 1357 (Fla. 1994)]

A broader review than that which applies to factual matters is the proper standard insofar as this Court has the ultimate responsibility for determining the proper discipline. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989); The Florida Bar v. Horowitz, 697 So.2d 78 (Fla. 1997).

The Bar submits that protection of the public and deterrence should be given great weight in this case, particularly in view of the serious nature of the aggravating factor in this case.

The aggravating factor consisted of seeking to bribe witnesses, an act which undermines the legal system. As this Court stated in The Florida Bar v. Agar, 394 So. 2d 405,406 (Fla. 1986):

> This Court has not changed its attitude since Dodd v. The Florida Bar, 118 So.2d 17 (Fla. 1960), in which we said:
>
> > No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty.
>
> *Id*. at 19. The punishment in Dodd was disbarment, and we believe that must be the punishment here. We have reviewed those disciplinary cases called to our attention by The Florida Bar and respondent concerning use of false testimony by an attorney, and we acknowledge that in some cases the punishment has been significantly less than that sought by The Florida Bar here. However to the extent that those cases with lighter punishments do not substantially differ

> from the instant case in the degree of participation by the attorney or some other significant factor, they represent the exception to the general rule of strict discipline against deliberate, knowing elicitation or concealment of false testimony. (Emphasis added).

Aggravating factors will enhance discipline, Vining, supra; The Florida Bar v. Weisser, 721 So.2d 1142 (Fla. 1998).

If one were to rely upon the Florida Standards for Imposing Lawyer Sanctions in respect to Respondent's conduct on the aggravating factor alone, Standard 6.31 would apply. That standard follows:

> 6.31 Disbarment is appropriate when a lawyer:
>
> (a) intentionally directly or indirectly tampers with a witness; or
>
> (b) makes an unauthorized ex parte communication with a judge or juror with intent to affect the outcome of the proceeding.

Standard 6.11 also applies. The only difference between that standard and the Respondent's conduct is that his attempt to present false statements was kindered by the refusal of the witnesses to cooperate. The standard follows:

> 6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION
>
> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice of that involves dishonesty,

fraud, deceit, or misrepresentation to a court:

> 6.11 Disbarment is appropriate when a lawyer:
>
> (a) with intent to deceive the court, knowingly makes a false statement or submits a false document; or
>
> (b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

Additional standards that call for disbarment are 5.11 (e)(f) and 7.0. Furthermore, when the composite conduct of a lawyer is gross, disbarment is warranted. The Florida Bar v. Setien, 530 So.2d 298 (Fla. 1988); The Florida Bar v. Horowitz, 697 So.2d 78 (Fla. 1992).

Respondent's composite conduct was clearly gross. The Amended Referee's report discusses the unethical and improper conduct during the 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 one year ago have found no significant pathology and no 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 sizable fine imposed by the undersigned after failing to find Respondent's explanation for his late arrival to be credible or justifiable.

Respondent also wrote a bizarre letter dated April 5, 1999 (TFB Comp Exh. 10) to Theresa Bartlett of the Client's Security Fund regarding the Lopez case and copied to the Bar. It reveals client confidences which extend far beyond the need to defend this case. See The Florida Bar v. Lange, 711 So.2d 518 (Fla. 1998). The letter includes the reported statements of a non-essential witness among others regarding molestation, threatened homicide, drug dealing, a homicide, etc. None of

these distractions materialized as evidence at trial.

Respondent wrote another letter (dated February 7, 2000; Composite Exh. 33) to Arlene Sankel of the Bar in which he denied that he had referred to a "Jewish conspiracy." However, he admitted to discussing "non-Christian" judges and added:

> What is your position regarding this Jewish Conspiracy your Associate is discussing? Also, when are you going to hire a Hispanic Attorney for your staff? Are your having trouble locating candidates?

He also filed a Motion for Continuance dated April 9, 2000 in which he described the Bar's position as "sort of like we only work here, we don't know or the more ominous '<u>vee chest farlow oarders</u>'." (Emphasis added; the spelling is that of Respondent).

Further compounding the gross pattern of misconduct is Respondent's demonstration of a ready willingness to neglect the truth and accuse others of lying or worse.

As the Bar pointed out in regard to Argument I, Respondent told an incredulous Referee that his investigator's behavior could be explained when she (the investigator) approached the witnesses and promised payment, (the return of their fees) in exchange for signing false affidavits. He stated that he was entitled to

depose the witnesses and that "if anything it was a case of entrapment." (T. 438, 439).

Respondent describes his conduct two days prior to the final hearing as just innocent effort to repay "anyone who has a claim against me." He also ignored the fact that both witnesses said that Leyda Lopez demanded that they sign a prepared affidavit before receiving payment. (T. 364).

On several occasions, he accused Bar counsel Leon of lying to the Court. As the Referee pointed out in his report, Respondent blamed everyone but himself.

In regard to that behavior, Respondent provided this somewhat contradictory self assessment combined with another attack [6] upon the Bar.

> MR. BATISTA: Okay. In any event, Your Honor, I think that for whatever reasons, that I kind of was blaming other people for the problems that were going through my life, whether it was Judge Cohen or the Florida Bar, Suzanne Goodis or whatever, and it was kind of like one of these things where once you say something, you're kind of boxed into having to defend it.
>
> There's no other way, especially with the Florida Bar in terms of you've got to give up and surrender or you have to continue defending the same situation.
>
> You know, it's sort of like you can never make an inconsistent statement. So if you said something one time, then you sort of have to fight to the death with the same problem.
>
> (T. 361-362)

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[6] Respondent's additional testimony regarding entering group therapy to deal with his behavior (T. 36) and the testimony of the therapist (T. 409 ff.) appears to be inconsistent with Respondent's continued attacks upon the Bar.

The case law concerning discipline for Respondent's offenses should be considered in the context of gross cumulative conduct including Respondent's lack of credibility and aberrant behavior. Among other misconduct, the Referee found in Count III regarding a fourth client, Robin Richards, that Respondent had failed to respond to the Bar. Failure to cooperate with the Bar, by itself, justifies a public reprimand. The Florida Bar v. Vaughn, 608 So.2d 18 (Fla. 1992).

As discussed previously, and reflected in the Bar letters which were exhibits in this case (Exhs. 5-9), Respondent did not cooperate in this case as well. Respondent's statement in regard to that non-cooperation, in closing argument, is both a partial admission as well as another accusation.

> MR. BATISTA: That's really the height of hypocrisy and really an incredible double standard where the Florida Bar is allowed to harass somebody to death, piece by piece, document by document, and obviously, if you request so many different things enough times and you don't take into account somebody's grandmother dying and things like that, I mean, you know, that an impossible standard and I really think it's an abuse of their power, and the bottom line is I provided all the documents that they wanted.
>
> It may not have been in a timely fashion, but they were provided. I mean, some were provided when they wanted and some weren't, but I mean, they were all provided long before this matter got past the Grievance Committee or to trial.
>
> (T. 456-457)

There are several additional cases which are instructive regarding some basic

applicable principles. In The Florida Bar v. Gunther, 400 So.2d 968 (Fla. 1981) this Court held that the neglect of legal matters warrants disbarment. The instant case does not involve as many cases of neglect, but both are similar in regard to the Respondent's failure to return fees to clients. Respondent's neglect, although, involving fewer cases, should be considered as part of the total pattern of gross misconduct, and therefore, should be given added weight.

Likewise, in The Florida Bar v. Segal, 462 So.2d 1091 (Fla. 1985) Respondent was guilty of similar misconduct, although there were more violations than in this case. This Court held that neglect, failure to pay funds which a client is entitled to receive, and making false representations to a client warranted disbarment.

Also, in The Florida Bar v. Page, 475 So.2d 1236 (Fla. 1985) this Court held that handling a legal matter without adequate preparation, neglect, and failure to seek client objectives, warrants disbarment. Respondent had a prior disciplinary record. The prior record, absent herein is, nevertheless, equivalent to the factors of aggravation, lack of credibility and the improper behavior of the Respondent in this case, i.e., the gross pattern of misconduct.

Respondent cites a number of cases in relation to the argument that he should receive no more than a ninety day suspension. Those cases are: The

Florida Bar v. Grosso, 647 So.2d 840 (Fla. 1994); The Florida Bar v. Golden, 502 So.2d 891 (Fla. 1987); The Florida Bar v. Morse, 784 So.2d 414 (Fla. 2001); The Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997).

Each of those cases involves only an isolated violation. None of them involve composite conduct of a gross nature. Therefore, they are inapplicable.

Respondent also offers The Florida Bar v. Pearce, 356 So.2d 317 (Fla. 1978) as authority. A ten day suspension was given to Pearce for alleged planning of perjury. However, this Court recognized that "the witnesses testimony varied on the extent of respondent's participation in the preparation of the false story" (at 319). The dissent referred to Respondent as "Pearce, who was only indirectly involved, if at all..." (at 319).

Respondent relies upon several more cases as alleged supporting authority. The Florida Bar v. Maier, 784 So. 2d 411 (Fla. 2001), however, is clearly inapplicable. Only one client was involved. Also, this Court based the discipline upon several mitigating factors (unspecified) in the record below. Also, six years had elapsed and this Court also specified the passage of time as a fact to be considered.

In The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981) the Court tracked the potential criminal statute in determining the proper period of suspension.

Reliance was placed upon a misdemeanor statute which dealt with "Inducement not involving force, deception, threat or pecuniary benefit." The instant case would not be governed by the misdemeanor statute and, therefore, Lopez does not apply. Also, Lopez encompassed only one prohibited act, albeit a serious one, and not composite gross misconduct.

In The Florida Bar v. Carswell, 624 So.2d 259 (Fla. 1993), this Court relied again upon the misdemeanor penalty standard. Furthermore, mitigating factors were considered which were ample and substantial. This Court stated:

> In recommending this discipline, the referee stated, "I am satisfied that the violations complained of constitute a one-time departure from what has otherwise been demonstrated to be a career of exemplary professional conduct." The referee further stated that Carswell "appears... to be a competent, trustworthy and ethical practitioner with a deep sense of commitment to the members of his community." The referee added that "any aggravating circumstances which may exist are far outweighed by the elements of mitigation." The referee noted the following mitigating circumstances: a cooperative and remorseful attitude during the proceedings; Carswell's uncompromised reputation for honesty, integrity, and fair dealing, and the legal community's high degree of confidence in Carswell's professional ability and integrity.
>
> (At 360).

The standard employed in Lopez and Carswell supports the Bar's position, not that of the Respondent. Since Respondent offered a pecuniary benefit to

obtain false affidavits, Florida Statute 914.22 would apply. That offense is a third degree felony. The sentence, pursuant to Florida Statute 775.082 is up to five years of incarceration.

Finally, in The Florida Bar v. Frederick, 756 So.2d 79 (Fla. 2000) the ninety-one (91) day suspension was only half of the discipline recommended by the Bar, approved by the Referee and affirmed by this Court. The recommended discipline in that case included a $5,500.00 fine (which was rejected by this Court). Therefore, the ninety-one day suspension recommended by the Bar and Referee in Frederick must be viewed in the context of a partial recommendation.

## CONCLUSION

The Referee's findings of guilt should be approved. However, the Respondent should be disbarred rather than suspended.

________________________________

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief was forwarded via Airborne Express, airbill no. 3370027824, to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Patricia S. Etkin, Attorney for Respondent, 8181 West Broward Boulevard, Suite 262, Plantation, Florida 33324, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this ____ day of November, 2001.

______________________________
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**CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN**

I HEREBY CERTIFY that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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