IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	Supreme Court Case
	No. SC 00-2219
Complainant,	
	The Florida Bar File
v.	Nos. 1999-71,635 (11G) 1999-71,220 (11G) 1999-71,458 (11G)
ALBERTO BATISTA,	
Respondent.	

______________________________/

On Petition for Review
of
the Referee's Report
in a Disciplinary
Proceeding.

INITIAL BRIEF OF RESPONDENT

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INTRODUCTION

In this brief, ALBERTO BATISTA is referred to as either "Respondent" or "Batista"; The Florida Bar is referred to as either the "Complainant" or the "Bar"; Vivian Maria Reyes or Carlos Leon, both of whom appeared as counsel for The Florida Bar are referred to as "Bar Counsel"; Leyda Lopez is referred to as "investigator Lopez"; all other witnesses are referred to by their respective names or surnames for clarity; and Maria Lopez, Ramon Mayan and Luisa Brooks are collectively referred to as "complaining witnesses".

Abbreviations utilized in this brief are as follows:

"TR" refers to the Transcript of Proceedings before the Referee held April 19, 2001, April 20, 2001, and May 4, 2001.

"RR" refers to the Amended Report of Referee dated June 27, 2001 as Referee's report or report. Although the pages of the Referee's report are not numbered, references are made to specific pages as if the report had been numbered.

"EX" refers to Bar Exhibits introduced in the proceedings before the Referee.

"APP" refers to Appendix to Initial Brief of Respondent, attached hereto.

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STATEMENT OF THE CASE

This disciplinary proceeding commenced on October 24, 2000 with the filing of a three-count Complaint against Respondent. Counts I and II alleged violations of Rules 4-1.1 (lawyer shall provide competent representation), 4-1.3 (lawyer shall act with reasonable diligence and promptness in representing a client), and 4-1.4 (communication)[1] of the Rules of Professional Conduct. Rule 4-8.4(g) (lawyer shall not fail to respond, in writing, to any official inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct) of the Rules of Professional Conduct also was alleged as a violation in Count I and was the only disciplinary rule violation that was alleged in Count III.

A Referee was appointed on November 30, 2000.

Respondent, appearing pro se, answered the Bar's Complaint and Request for Admissions by admitting portions of the allegations. Respondent provided an explanation for those portions that he denied.

The Bar filed a Motion to Strike Portions of Respondent's Answer and Response to The Florida Bar's Request for Admissions and Motion to Deem Matters Admitted. In addition, the Bar filed a Motion to Strike Respondent's Affirmative Defenses. A hearing was held March 1, 2001.[1] Following this hearing, the Referee

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[1]Although not supported by a hearing transcript or order, Bar Counsel's comments at final hearing confirm that the Referee ruled that he was not going to rely solely on matters that were deemed admitted and that the Bar was to put on evidence. TR 418, 429.

entered an order dated March 13, 2001 pursuant to which Respondent's Affirmative Defenses were stricken in their entirety, but Respondent was allowed an opportunity to file amended Affirmative Defenses within 10 days, if he so chose. The order also granted, in part, and denied, in part, the Bar's Motion to Strike Portions of Respondent's Answer and Response to Request for Admissions and denied the Bar's Motion to Deem [admitted] Paragraph 12 of the Complaint, but allowed Respondent 10 days leave to amend his answer to include a response.[2] In granting the Bar's motion to strike portions of Respondent's response to the Bar's Request for Admissions, the Referee granted Respondent 10 days leave to amend his response and with regard to some requests, directed that the Bar first file an Amended Request for Admissions. The Bar served its Amended Request for Admissions on March 2, 2001.

On April 2, 2001 The Bar filed a Motion to Compel a response by Respondent to The Florida Bar's First Set of Interrogatories and Request for Production of Documents. In addition, the Bar filed a Motion for Order Deeming Matters Admitted, asserting as a basis that Respondent did not file a response to the Bar's Amended Request for Admissions.

By order dated April 2, 2001, the Referee deemed as admitted certain Paragraphs of the Bar's Request for Admissions. In addition, by order dated April 2, 2001, the Referee granted the Bar's motion to compel and ordered Respondent to respond to discovery within five (5) days or he would be precluded from presenting any witnesses or any documentary evidence at the final hearing. These orders were entered by the Referee without a hearing or allowing Respondent an opportunity to respond to the motion.

On April 6, 2001, Respondent filed a Motion to Set Aside Order Deeming Matters Admitted. In addition, on April 6, 2001, Respondent filed a Notice of Interlocutory Appeal of the Referee's order dated March 13, 2001 on the Motion to Strike. Respondent also filed a Motion for Continuance of Trial, Amended Answer and Affirmative Defenses, Notice of Response to Interrogatories, Response to Interrogatories, and Response to Request for Production. Respondent also served a Notice of Taking Depositions on April 17, 2001.

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[2] On March 1, 2001, Respondent filed a Motion to Amend Answer which requests leave of Court to Amend the Answer to reflect that Paragraph 12 is, in effect, denied.

On April 10, 2001, the Bar filed a Motion in Opposition to Respondent's Motion for Continuance of Trial, to Set Aside Order Deeming Matters Admitted and Enlargement of Time to Amend the Answer. In addition, the Bar filed a Motion for Sanctions for Respondent's Failure to Respond to Interrogatories and Production of Documents as Previously Compelled. On April 11, 2001, the Bar also filed a Response in Opposition to Respondent's Notice of Interlocutory Appeal and/or Motion to Dismiss Respondent's Interlocutory Appeal.

By order dated April 11, 2001 the Referee denied Respondent's Motion to Set Aside Matters Deemed Admitted, and Respondent's Motion for Continuance, Motion for Stay (pending appeal). The Referee granted Respondent's Motion to Enlarge Time for Filing Amended Answer and Affirmative Defenses.

On April 17, 2001, the Bar served a Motion to Strike Respondent's Affirmative Defenses; Respondent served his Motion to Compel Better Addresses.

On April 18, 2001, the Bar served a Motion for Protective Order and Response to Motion to Compel Better Addresses.

The final hearing before the Referee was held on April 19, 2001, April 20, 2001 and May 4, 2001.

The Referee considered pretrial matters, including the Bar's Motion to Strike Respondent's Affirmative Defenses, prior to commencement of the final hearing. The Referee denied the Bar's motion as to Respondent's Second Affirmative Defense and granted the motion, thereby striking, Respondent's Third Affirmative Defense. (TR 7) The Referee declined to rule on Respondent's Motion to Compel Better Addresses because the motion was then moot. (TR 9). The Referee also declined to consider any filings of Respondent or those received by the Bar on that day as late. TR 10.

At final hearing on April 19, 2001, the Referee considered and denied the Bar's motion to quash the subpoenas served on three employees of the Bar. TR 76.

By Supreme Court order dated May 8, 2001, the Court held that the matters raised in Respondent's Notice of Interlocutory Appeal, Emergency Motion to Stay and Notice of Appeal appeared moot and ordered the Notice of Interlocutory Appeal dismissed unless objections were filed on or before May 23, 2001.

On June 5, 2001, the Referee issued a Report of Referee recommending that Respondent be found guilty of the disciplinary rule violations alleged in Counts I and II. The Referee found that there was no testimony or evidence presented to support Count III and recommended an involuntary dismissal with regard to this Count.

On June 11, 201, the Bar filed a Motion for Rehearing or Reconsideration as to

the Referee's dismissal of Count III. By order dated June 27, 2001, the Referee granted the Bar's Motion for Rehearing, without a hearing, and issued an Amended Report of Referee in which Respondent was found guilty of the disciplinary rule violations in Count III as well as Counts I and II.

In his amended report, the Referee recommended that Respondent be suspended for two years and that he be required to reimburse Maria Lopez for attorney's fees of $2,000.00. RR 5. The Referee's recommendation of a two-year suspension is based upon matters which occurred just prior to trial (RR 5) rather than only the conduct that is set forth in the Bar's Complaint.

On July 16, 2001, Respondent, through other counsel, filed a Petition for Review of the Referee Bernard S. Shapiro's Report pursuant to Rule 3-7.7 of the Rules Regulating The Florida Bar. On July 25, 2001, The Florida Bar filed a Cross Petition for Review with regard to recommended discipline.

Thereafter, Respondent, through undersigned counsel, filed a Motion for Extension of Time to file an initial brief and, if necessary an amended petition for review. The unopposed motion was granted pursuant to Supreme Court order dated August 15, 2001.

Pursuant to an Amended Petition for Review, filed herewith, Respondent requests rejection of the Referee's findings with regard to facts as well as the Referee's recommendations as to guilt and discipline.

<u>STATEMENT OF FACTS</u>

Count I of the Bar's Complaint involves Respondent's representation of Maria Lopez. At final hearing, Maria Lopez and attorney Michael Lechtman, testified as witnesses for the Bar. Respondent also testified regarding this Count.

Maria Lopez retained Respondent on October 20, 1997 in connection with a family law matter. EX 1. TR 23. Maria Lopez's husband was deceased; he was not a U.S. citizen. TR 18. She had a child who was then 2 ½ years old. TR 18, 20. Maria Lopez wanted to receive some help through Social Security. TR 18. Maria Lopez testified that Respondent had told her he had done this before; that she could receive money from the government because she was a single mother. TR 18.

Respondent's fee was $2,000.00. TR 24. She paid $1,500.00 at her initial meeting. TR 25; EX 2. In December 1997, she went to Respondent's office and paid $500.00 in cash. TR 26; EX 3.

Respondent spent in excess of 45 minutes with Maria Lopez at her initial visit. TR 26. Respondent told her to bring him some papers, social security cards for her son and herself and the death certificate of her husband, her passports and that of her son and her. TR 20-21. About one month later, she brought papers. TR 22.

Maria Lopez met Respondent two times: October 1997 and in November. TR 31. Maria Lopez did not see Respondent after November 1997. TR 32. She spoke with Respondent on the telephone a maximum of six times. TR 32, 53. Maria Lopez last spoke with Respondent in June 1998. TR 33. Respondent told her it was going to take longer than he thought. TR 33. A couple of times, Respondent called and canceled a day before he was to meet with her. TR 34.

Maria Lopez called Social Security herself. TR 35. She came to realize nothing was going to happen. TR 34. About a year later, Maria Lopez went to another lawyer. TR 35, 36. She wanted a refund of the money she paid Respondent. TR 38. In September 1998, Maria Lopez hired Michael Lechtman. TR. 132. There was no retainer agreement. TR 136. She paid Lechtman $150. TR 132. Maria Lopez wanted to see if she could "get back a retainer" paid to Respondent. TR 132. Lechtman mailed Respondent a letter. TR 133; EX 4. Respondent did not contact Lechtman regarding the letter. TR 133. Lechtman was also retained to consult with Maria Lopez as to her case and whether she could obtain the benefits. TR 134. Lechtman gave Maria Lopez his opinion that Respondent could not have done what Maria Lopez said Respondent told her he could do. TR 136. Lechtman was hired by Maria Lopez as a family law expert; her problem was to try to get child support through the social

security office. TR 137, 138.

Lechtman was advised that the father of the child had not worked in the United States. TR 139. However, at final hearing, Maria Lopez was asked whether she ever determined if her husband had worked in the United States. TR 57. She testified, "No. Maybe yes; maybe no. I never knew for sure." TR 57. In addition, Maria Lopez responded "No, sir" to the following questions asked by Respondent:

> So, at the time when you met with me in October of 1997, you did not know anything regarding whether or not he [husband] had been employed or was paying any kind of taxes in the United States?
>
> * * * *
>
> And at this time, you still don't know? TR 62.

Although Lechtman was not certain, he thought that one of the elements in order to obtain social security benefits was that the father had worked in the United States. Lechtman knows how social security applies to child support guidelines but has never represented a client to obtain benefits. TR 140.

Respondent testified that when he met with Maria Lopez, she was pregnant with her boyfriend's child. TR 338. Her problems involved benefits for the child that was 2 ½ as well as her boyfriend who did not want to take responsibility for the unborn child and with whom she had domestic issues. TR 338. Respondent testified that he spoke with Maria Lopez on many occasions and about the third or fourth time, he recommended that she see a therapist. TR 338. Respondent testified that Maria Lopez paid him $2,000.00 for a situation that kept changing. TR 341. Most of his time was spent in dealing with Maria Lopez's "emotional problems and what she wanted and her phone calls and her personal needs of discussing these different fathers and all these problems." TR 345.

Respondent testified that with regard to Maria Lopez's social security benefits, her child is eligible if the father paid sufficient amount of "SSI taxes." TR 342, 344. Respondent advised Maria Lopez that for social security benefits, she needed documentation that the person worked in the United States. TR 342. Respondent originally filed out some applications. Maria Lopez did not want to provide information relating to her husband's family. She didn't give Respondent any information. TR 342. In March 1998, she returned with her boyfriend and did not contact Respondent

again. TR 343.

Count II of the Bar's Complaint involves Respondent's representation of Luisa Brooks and her father, Ramon Mayan. At final hearing, Luisa Brooks and Ramon Mayan testified as witnesses for the Bar. Respondent also testified at final hearing regarding this Count.

Brooks does not read English and speaks very little English; she communicated with Respondent in Spanish and understood documents through her father. TR 96. Mayan had been a witness in a case in which Respondent was an attorney. TR 222. Mayan was very impressed with Respondent's performance. TR 222. Mayan told Respondent that his driver's license had been suspended for one year and was then told by the Department of Motor Vehicles that it was for life. TR 223.

Mayan gave Respondent four payments totaling $4,000.00 (TR 226) for both cases. Mayan testified that after he made all the payments, he never saw Respondent again. TR 233. Mayan said the only time he talked to Respondent is when he made payments. TR 234. Mayan also testified that he met Respondent at the Department of Mother Vehicles where his record was pulled and Respondent talked to the Clerk. TR 248.

Mayan further testified that one day he called Respondent to ask if Respondent was going to work on or resolve his case and Respondent "more or less" said that "he was not going to work on the case". TR 267. Respondent said "Well, listen. You have fours [sic] DUI." TR 267.

Luisa Brooks confirmed that she knew Respondent through her father, who took her to Respondent's office TR. 77. Her first visit was on February 14, 1997. TR 82. When Brooks signed the retainer, she was with her father. TR 80; EX 18. She paid Respondent $1,000. TR 83, EX 20.

Brooks needed an attorney for immigration papers, to obtain a work permit and residency. TR 78, 79. She had a deportation order but had married an American and wanted to know whether she could get a permit and residency through her husband. TR 79. Brooks' husband said he would help her. TR 158. Respondent told Brooks that she could receive her papers through her husband who was an American. TR 157.

Mayan testified that when he first went to Respondent's office, he talked to Respondent about Brooks' marital situation and confirmed to Respondent that Brooks and her husband were happily married and living in his house. TR. 261-262. Brooks and her husband lived together as husband and wife, "more or less" from 1997

through 1999 and separated a little bit before he filed the Bar complaint. TR 262. Brooks testified that she had separated when she contacted Respondent. TR 158.

Brooks did not see that Respondent did any work. TR 86. She met with Respondent three or four times in his office. TR 91, 92. In addition, she spoke with Respondent approximately five times. TR 92. Respondent told her he could not start the case because Brooks had not filled out all the paperwork. TR 92. Respondent asked for papers. TR 93.

In March 2000, Brooks hired another attorney to obtain a work permit and residency. She obtained a work permit 4 or 5 months later. TR 89. When she hired a new attorney, in March 2000, she applied for Year 2000 Life Act, but doesn't know if this law existed in 1997. TR 161.

With regard to Mayan's legal matter, Respondent testified that Mayan showed one DUI which he said had one-year suspension and a letter from the Department of Motor Vehicles saying that his licensee had been suspended indefinitely. TR 345-346. Respondent and Mayan went to the Department of Motor Vehicles on three occasions and eventually got Mayan's actual history which showed that he had five DUI's. TR 346. Mayan had forgotten about the 30 year old DUI. TR 347. With that many DUI's, Mayan could not get his driver's license back and could not get a work permit. TR 348.

With regard to Brooks' legal matter, Respondent testified that Brooks had a working marriage, but the Petitioner [her husband] would never show up to sign any documents. TR 351. Without the Petitioner signing the petition, "you don't have a petition." TR 351. Respondent sent the documents by mail but they weren't signed correctly." TR 351. Respondent testified that he told them that you can't file a claim if you don't have a valid marriage; if you don't have a husband." TR 352. Respondent argued with them and sent them documentation regarding immigration law. TR 352.

Enrique Miranda, an attorney with extensive experience in immigration, testified as an expert witness on behalf of Respondent. TR 206-212. Miranda testified that the Life Act of 2000 was not available prior to 2000. TR 210-211. Miranda also confirmed that between 1997 and 2000, the only way a person who had been deported could apply for immigration was through her husband. TR 210-211. The marriage had to be a working marriage, not a marriage in paper only. TR 208.

Brooks' father filed the complaint with the Bar in English. TR 162. One of the requests made of the Bar by Brooks was for a refund of her money. TR 162. Brooks

father was the one who filed the Bar complaint. TR 166. After he explained it to her, she agreed. TR 166. Brooks' father filed the Bar's complaint on her behalf because he had more knowledge and was also complaining about himself. TR 188. She didn't write the Bar complaint because it was in English. TR 189.

In 1999, when Brooks and her father went to the Bar complain, they were told by the Bar that the Bar could not take the money away from Respondent and pay them and that was a decision that was to be "done by the Judge". TR 163. Brooks filed a lawsuit in Small Claims Court against Respondent. 165 . Mayan filed a small claims action. TR 235. He filed lawsuit to get his money back. TR 236. Mayan wanted to get back the same amount of money that he paid. TR 237. Mayan won the lawsuit and got a final default judgment on July 30, 1999 in the amount of $4,129.00 with court expenses, because Respondent did not show up for mediation. TR 235, 237, 238.

Mayan further testified that if Respondent didn't pay the judgment, he wanted to get paid through the Client Recovery Fund "because that's a department in the Florida Bar so people will get their money back." TR 269. Respondent paid Mayan all the money and "also court costs 2 days ago." TR 239.

Counts I and III of the Bar's Complaint allege Respondent failed to respond to Bar inquiry. Evidence offered by the Bar to support this charge included letters from The Florida Bar to Respondent. EX 5,6,7,8,9,10,11,12,13,14,15,16,17. In addition, the Bar introduced its files into evidence. EX 10, 17, 33. Respondent maintained that he provided all documents, but acknowledged that they may not all have been provided in a timely fashion. TR 457.

Attorney Joseph Chambrot testified on behalf of Respondent as a character witness. TR 275-278. Chambrot had hired Respondent as a law Clerk and then as an associate until 1990-1991. TR 275. Chambrot knew Respondent to be honest and hard working. During the following ten years, Chambrot saw Respondent in Court working diligently for his clients. TR 277. Although there was lapses in time in which Chambrot didn't keep up with Respondent on a constant basis, Chambrot confirmed that he knows that Respondent was a hard worker and honest person. TR 278.

Attorney Jorge Sibila testified on behalf of Respondent as a character witness. TR 302-307 Respondent did collection work for Sibilia years ago and Sibilia found Respondent. to be "very competent" and "very honest". TR 302. Sibilia is in the military and confirmed that Respondent is one of a few attorneys that he would call to cover for him. TR 303-304. Sibiia was one of the fellows who recommended to Respondent that he become a member of the Masonic Order. TR 303. Respondent

not only became a Mason, but a Scottish Rite Mason. TR 303.

Mark Brown also testified at final hearing on behalf of Respondent. 215-220. Brown works with the Put Something Back, a joint pro bono project of the Eleventh Judicial Circuit and the Dade County Bar. TR 215. Brown confirmed that Respondent had agreed to accept a family law case and that he knows Respondent's name as one who takes cases, however, his knowledge of Respondent was limited. TR 219.

Two Bar employees were subpoenaed to testify by Respondent. Arlene Sankel testified (TR 314-329) that fee arbitration and fee mediation exist under the Bar rules. TR 316. She further confirmed that an offer of mediation is left at the discretion of the Bar counsel. TR 317. Complainant and Respondent can reject it. TR 317-318. Further if a file is successfully mediated, the file is closed. TR 321. 323. Nancy Fronckowiak, a legal secretary with the Bar, testified (329-337) that Respondent had called her office during the past three years regarding Mayan, Richards, Brooks and Maria Lopez. TR 330. Lately, Respondent has called more frequently. TR 331.

Gail Greenberg testified on behalf of Respondent. TR 409-412. Greenberg is a licensed clinical social worker and a consultant for Florida Lawyers Assistance as well as the Professional Resource Network. 409. She testified that Respondent has been involved in a psychotherapy group for lawyers and has attended individual therapy. TR 410. Respondent has no "significant pathology" meaning no major mental illness that needed treatment or required that he not practice law. TR 411. She also indicated that Respondent has difficulty expressing anger, but not with the propensity to anger or physical violence. She confirmed that Respondent is capable of practicing law competently. TR 412.

During final hearing, the Bar announced that it was going to argue that Respondent engaged in "witness tampering" TR 41. 420 [3]

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[3] At the conclusion of the first day of the final hearing and prior to hearing any testimony about any witnesses' contact with the Bar, the Referee commented that he had heard "disturbing testimony" and warned Respondent that he did not only have to worry about that he be disbarred, but about going to jail. TR 141. The next day, the Referee addressed the Bar, stating that he wished that he had heard from Bar counsel yesterday some of the things that he heard from the witness today, "including your involvement when the money was paid. It might have changed my

Thereafter, towards the end of the proceeding, the Referee noted that this charge is not the subject of the Bar's complaint. TR 421. The Bar assured the Referee that does not have to be a separate charge because it occurred in the "midst" of the proceedings. TR 421. The Bar elicited the testimony of Maria Lopez, Brooks and Mayan regarding uncharged misconduct.

Maria Lopez testified that two days before the hearing, she received a business card from a paralegal, private investigator which said to contact her. TR 39, EX 23. Maria Lopez did not call this person.

Brooks testified that two days prior to the final hearing investigator Lopez came to her house. TR 107. Investigator Lopez asked for her and said she was there on behalf of Respondent. TR 109. When Brooks told investigator Lopez that she wasn't home, investigator Lopez asked for her father and she responded that he was sleeping. TR 109. When investigator Lopez said that Respondent wanted to return money that he owed them, Brooks called her father and let investigator Lopez in. TR 109, 111, 112.

Ramon Mayan spoke with investigator Lopez. She wanted Mayan to sign receipts because Respondent would make copies and would later send money. Mayan did not sign the receipts because no one guaranteed that Respondent was going to send the money. TR 112. While investigator Lopez was first there, Brooks and her father spoke to the Bar. TR 172, 175. Mayan called the Bar to see if there was a problem. They were told by the Bar that they could sign everything that they wanted; that that they could accept the money. TR 250-251. They understood that they could accept the money being returned. TR 172.

Before investigator Lopez left, Mayan spoke with Respondent. TR 113. Brooks overheard her father speaking with Respondent. Mayan told Respondent that he wanted the money in cash and when Respondent sent the money, they would sign the receipts. TR 114.

Investigator Lopez left and came back the same day with receipts and affidavits. TR 114. They signed the receipts. TR 115, EX 30. After they signed the receipts, investigator Lopez gave the money to Mayan. TR 115, 116. Money was given first and then they signed receipt stating that they received the money. TR 178.

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reaction that I had at the end of yesterday. TR 197.

Mayan also wanted court costs. TR 180.

Then investigator Lopez showed them the affidavits. TR 116. When they saw the affidavits they contacted the Bar. TR 177, 189-190. They did not sign the affidavits. Investigator Lopez wanted to take the money back because they didn't sign the affidavits because the affidavits were "going contrary to the complaints made." TR 118. Mayan said the money belonged to them. Respondent was then contacted by telephone. TR 119, 191. Mayan did not want to sign the affidavit because he thought it was going to hurt him. TR 240. The affidavits said things that weren't true. TR 241. Mayan told investigator Lopez that if Respondent made more moderate affidavits maybe they could sign. TR 120. An agreement was reached with Respondent that other affidavits were going to be made. TR 122. Mayan testified that Respondent told investigator Lopez to tell them to draft a handwritten affidavit. TR 242.

Brooks wrote her own affidavit, which stated:

> [I], Luisa Brooks, declare that I want to withdraw the charges against Mr. Alberto Batista and I state that I do not have any other complaint against him so that because Mr. Batista returned the money that I had paid to him, so that he would be my legal representative. TR 123, EX 29.

Mayan wrote his own affidavit, which stated:

> I, Ramon Mayan, want to dismiss the charges against Albert Batista He returned the money that I gave him for the two cases. . . . TR 243. EX 32.

Because Respondent requested that Mayan put something nice about him in the affidavit, Mayan added, "when I met him, I thought he was a very good attorney. I don't have any more complaints against him because he paid me and he apologized and everything." TR 243.

Mayan testified that he also wanted Court costs. TR 252. He drafted his handwritten affidavit [EX 32] and read it to investigator Lopez and said that he would give it to investigator Lopez when she brought $200.00 and a receipt for the $200.00. Mayan gave his handwritten affidavit to investigator Lopez when she brought back the receipt with the $200.00. TR 256. Mayan confirmed under oath that his handwritten affidavit [EX 32] reflected his true feelings:

[Respondent]: Now does that affidavit that you handwrote reflect your true feelings?

[Mayan]: Yes, because I wanted for a long time for him to pay me that money and he was supposed to and he didn't want to pay me the money back. So I didn't want to destroy him, but I wanted my money back. I wanted for him to pay me my money back.

TR. 256

Respondent testified that when he spoke to Mayan on the telephone, Mayan said that he had requested mediation from the Bar, that all he wanted was his money back and that the Bar had never complied with his request. TR 385. That's what Respondent put in that affidavit. TR 383. Respondent prepared the affidavit based on what Mayan told him. 388. Mayan changed his mind and didn't want to sign it. TR 387. Mayan's attitude on the telephone with Respondent was the Florida Bar' has screwed us both. TR 389. When investigator Lopez went to Mayan, she went with receipt that said he was getting $4,000.00. TR 389. Mayan talked to the Bar, investigator Lopez talked to Mayan and the "next think[sic] I know is he is talking to me and he has said fine, the Florida Bar and I,ÿlike I was his friend. It was the Florida Bar that had been the enemy. That's what he said to me. "What Mayan told Respondent on the phone was what was in the affidavit that Respondent prepared. TR 390. 393-394, 399-400, 401-402.

Respondent didn't return Mayan's money when he found out that Mayan didn't have a claim because he did not think he was "obligated to return somebody's money just because they want something and you cannot achieve what they want. " TR 378.

Respondent explained that the week before the final hearing, Greenberg was contacted by the Bar regarding her being a witness and Respondent's Bar case was discussed in group therapy. TR 363. Thereafter, Respondent did research and it seemed that "if people had been paid . . .it seemed that the discipline was lower because the restitution had occurred prior to ruling. " TR 364. Respondent wanted to pay these people in full. TR 366. Respondent stated that he had requested mediation. TR. 367. That his attitude has changed substantially from

group therapy and that all Respondent wants to do “from anyone that has a complaint is to resolve it. If they want their money back, great,” regardless of the time spent. TR. 367.

SUMMARY OF ARGUMENT

As indicated in the Bar's Complaint, the conduct that is the subject of this disciplinary proceeding involves a lack of diligence, competence, and communication in connection with Respondent's handling of three client matters as well as Respondent's failure to respond to Bar inquiry. However, at final hearing, the Bar announced that it would also be presenting evidence of witness tampering. The Bar's accusation of witness tampering was based upon allegations of unethical conduct involving the circumstances in which Respondent refunded to a complaining witness the legal fees received by Respondent in connection with two client matters, as well as efforts to contact another complaining witness who had also previously requested a refund. The claim for which fees were refunded prior to trial had been reduced to a civil judgment against Respondent.

The Bar's new allegations against Respondent involving witness tampering represent allegations of uncharged misconduct which are clearly outside the scope of the conduct that is the subject of the Bar's Complaint. Nevertheless, the Bar used the witness tampering allegations and testimony elicited in support thereof as justification for its recommendation of severe discipline. As indicated in his report, the Referee considered the allegations of uncharged misconduct against Respondent as a basis for recommending a two-year suspension as a disciplinary sanction.

As a result of the presentation, in this proceeding, of evidence and argument related to witness tampering, the scope of this proceeding changed from allegations of neglect/communication/competence to allegations involving more egregious conduct, i.e., criminal acts. In this manner, Respondent was denied due process in that he did not have notice nor an opportunity to have these matters considered by a grievance committee. The Referee's recommendation of discipline, based upon the more egregious uncharged misconduct, should be rejected and, in lieu thereof, discipline should be imposed based upon only those findings of guilt as to the specific charges in the Bar's Complaint which are upheld by this Court on appeal.

Notwithstanding Respondent's position that consideration of uncharged misconduct violated due process and was improper, Respondent would further argue that his pre-trial contact with the complaining witnesses regarding settlement was neither unethical nor criminal.

Respondent further maintains that the Referee's report contains findings of guilt as to violations involving competence and diligence which are contrary to the evidence or other findings of the Referee. In addition, the Referee's report contains facts and

findings which are either erroneous or lack evidentiary support. The cumulative effect of these errors warrant rejection of the report.

Finally, Respondent asserts that the Referee's recommendation of a two-year suspension as a disciplinary sanction is excessive and should not be approved. In the event that the Court approves findings of guilt with regard to the conduct charged in the Bar's complaint, Respondent would urge this Court to impose a ten-day suspension as a disciplinary sanction. In the event that this Court finds it appropriate to also consider the uncharged misconduct in determining discipline, Respondent would urge this Court to approve a 90-day suspension as discipline.

ARGUMENT

THE REFEREE'S REPORT CONTAINS FACTS AND FINDINGS THAT ARE CLEARLY ERRONEOUS OR LACK EVIDENTIARY SUPPORT, THE CUMULATIVE EFFECT OF WHICH WARRANTS REJECTION OF THE REFEREE'S REPORT

It is well established that a referee's findings will be upheld unless the findings are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978). The Referee's report contains numerous factual errors, some of which are significant, thereby justifying rejection of specific findings or conclusions of the Referee.[4]

First, with regard to the Referee's findings pertaining to Brooks, Respondent does not dispute that Brooks retained other counsel in March 2000 and thereafter received a work permit. RR 4. In fact, Brooks obtained the results 4-5 months after she retained new counsel. TR 89. However, Respondent does dispute the Referee's statement that Respondent failed to obtain a work permit for Brooks in three years. RR 4. This statement suggests a lack of diligence by Respondent during a three-year period and presupposes that Respondent had been in a position to obtain a work permit for Brooks at an earlier date. This position is contrary to another finding of the Referee that "the testimony. . .partially supported Mr. Batista's position that the desired results were unobtainable because of the clients' actions." RR 3. In fact, with regard to Brooks, the Referee specifically noted that the "client seeking the work permit may have failed to execute the required documents as alleged by Mr. Batista". RR 3.

Moreover, not only did Respondent not receive the executed documents that were required in order for him to proceed on behalf of Brooks, but the record clearly establishes that Brooks' immigration application was made pursuant to the Year 2000

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[4] The Referee's report includes other errors which are hereby noted but not offered as a basis to render the report invalid: The final hearing was held during a three-day period--April 19, 2001, April 20, 2001 and May 12, 2001. See RR 1; The Bar was represented by two Bar counsel: Vivian M. Reyes and Carlos Leon. See RR 6; Mayan had five DUI's. See RR 4.

Life Act (TR 161). Brooks, herself, was unaware whether this Act existed in 1997 (TR 161). However, the uncontroverted testimony of attorney Miranda, who testified as an expert witness, confirmed that the Life Act of 2000 was not available prior to the year 2000. TR 210-211. Accordingly, the legislation, which ultimately enabled Brooks to obtain a work permit, was not in effect in 1997 when Respondent was retained. Thus, any finding or conclusion that Respondent "failed" to obtain Brooks' work permit during a three-year period is error.

Second, Respondent disputes the Referee's finding that Respondent "repeatedly" told the clients that their cases were proceeding. TR 3. This finding regarding the frequency of contact is inconsistent with an allegation of inadequate communication. Further, the evidence does not support any finding as to the specific content of communication between Respondent and clients..

Third, Respondent disputes the Referee's statements pertaining to Respondent's contact or efforts to contact the complaining witnesses prior to trial, as set forth below:

> [I]t was revealed through complaining witnesses that only two days prior to trial Respondent had sent an investigator to the homes of the witnesses and 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. . . .RR 2.

The three complaining witnesses were: Maria Lopez, Brooks, and Mayan. However, Maria Lopez only testified that:

> Someone, a paralegal, private investigator left a card in my door and the back of the card says 'Maria Lopez, please contact me'. Her name is Leyda Lopez. TR 39, See EX 23.

Maria Lopez further testified that "they" (referring to the Bar or Bar Counsel) told her

that "most likely, that card might have been from your [Respondent's] sources and that I was free to call if I wanted to or not call if I didn't. That was pretty much it." TR 44. Maria Lopez did not call the person whose name was on the card because she "knew where it was coming from and . . .didn't want anything to do with him, Mr. Batista." TR 40. Accordingly, Maria Lopez's testimony directly contradicts, rather than supports, any conclusion that she either received or rejected any pretrial offer or that she was requested to sign any affidavit. The Referee's report that he heard "testimony from one complaining witness [Maria Lopez] who didn't accept" pretrial offer is, therefore, directly contrary to the evidence. RR 2.

Complaining witnesses Mayan and Brooks did testify regarding their contact with investigator Lopez.. However, Respondent disputes the Referee's finding that these two complaining witnesses either were offered or accepted an offer for repayment of fees only if they executed any affidavit.

The testimony of Mayan and Brooks confirm that they had a default final judgment against Respondent (TR 235, 238; EX 31). While investigator Lopez was present, Mayan spoke to Respondent by telephone and told him that he wanted payment in cash and when they received the money, they would sign a receipt (EX 31). TR 114. Respondent further testified that Mayan told him that the Bar was the "bad guys" and that he was willing to put it on paper and that he had requested mediation. TR 394, 389.

Investigator Lopez then left and returned with $4,000.00 cash. Mayan gave Investigator Lopez the receipt (EX 31) after he received the money. 240. Mayan was then shown an affidavit which he didn't want to sign. TR 240. Respondent testified that this affidavit was based upon his telephone discussion with Mayan. TR 390-391, 394, 399-400. However, when Mayan did not want to sign the document, Respondent told investigator Lopez, '[If] he wants to sign anything, fine. Just whatever he wants, to write it down himself." TR 396. The handwritten affidavits of both Mayan and Brooks, which are part of this record (EX 29, 32), were prepared by Mayan and Brooks. The affidavits are not false.

The evidence establishes that Respondent refunded the fees paid by Mayan, thereby satisfying the judgment against him, and Mayan and Brooks then gave investigator Lopez an executed receipt (TR 30). Thereafter, Mayan and Brooks prepared their own handwritten affidavits, which they subsequently gave to investigator

Lopez (EX 29, 32).[5]

Accordingly, it is apparent that Mayan and Brooks never executed any affidavit setting forth any information that they claim was false. Moreover, the affidavit which Mayan and Brooks gave to Respondent occurred after they received payment and was not conditioned upon the execution of any affidavit. To the extent that the Referee's report suggests that a false affidavit was either executed or a condition precedent to receiving funds to satisfy a judgment, it is error.

RESPONDENT WAS DENIED DUE PROCESS AS A RESULT OF A DISCIPLINARY RECOMMENDATION THAT IS BASED UPON CONSIDERATION OF MATTERS THAT ARE NEITHER CHARGED IN THE BAR'S COMPLAINT NOR WITHIN THE SCOPE OF THE ALLEGATIONS IN THE COMPLAINT

At final hearing, the Bar accused Respondent of witness tampering based upon contact between investigator Lopez and the two complaining witnesses, Mayan and Brooks, and mere attempts to contact complaining witness, Maria Lopez, all of which occurred two-days prior to trial. TR 41, 420. At final hearing the Referee raised a question of whether the Bar's allegation of witness tampering could be considered because it was not part of the original case. TR 421. The Bar argued that these allegations could be considered because the conduct occurred in the "midst" of the proceeding and further stated, "[T]here is case law to support that there doesn't have to be a criminal charge pending." TR 421. This is not correct.

The instant Complaint is based upon a probable cause finding with respect to specific disciplinary rule violations regarding diligence, competence, communication and failure to respond to Bar investigative inquiry. The Bar's accusation of witness tampering is an allegation of additional uncharged misconduct, which is not based upon a finding of probable cause and is not a matter properly before the Referee. Accordingly, the Bar's allegations of witness tampering should not have been considered by the Referee as either a basis for discipline or as justification to enhance

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[5] Mayan's testimony also confirms that he received $200.00 for costs and that he executed a receipt for these funds. TR 254. This receipt was not introduced at trial and is not part of the record.

discipline.

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:

> The United States Supreme Court has held that because Bar disciplinary proceedings are quasi-criminal in nature, attorneys must know the charges thy face before proceedings commence. *See In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), *modified on other grounds*, 392 U.S. 919, 88 S.Ct. 2257, 20 L.Ed.2d 1380 (1968). The absence of fair notice as to the reach of the procedure deprives the attorney of due process . . . .*See also Florida Bar v. Price*, 478 So.2d 812 (Fla. 1985) (rejecting "for due process reasons" referee's finding that attorney committed perjury at trial and during disciplinary hearing where perjury was not charged). Such matters may only be prosecuted after notice and due process concerns are met such as by a new proceeding. We recede from any language in prior opinions that may support a contrary result. See, e.g., *Florida Bar v. Stillman*, 401 So.2d 1306 (Fla. 1981). Vernell at 707.

The Vernell holding was reaffirmed in The Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999). In so doing, the Court reiterated its holding that "a finding of an uncharged rule violation based on conduct that is not within the scope of the specific allegations of the complaint is a violation of due process." Fredericks at 1253 FN1. As stated by this court in Frederick's:

> [U]nder our case law, specific findings of uncharged conduct and violations of rules not charged in the complaint are permitted where the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint. Fredericks at 1253.

Although in the instant case the Referee did not find Respondent guilty of any additional disciplinary rule, nevertheless the Referee recommended enhancement of discipline based upon allegations of witness tampering. However, this conduct was not specifically referred to in the Bar's complaint or within the scope of the specific allegations in the complaint. Based upon the due process principles and this Court's

holdings in Vernell and Fredericks, this is fundamental error and warrants rejection of the Referee's report.[6]

RESPONDENT'S CONTACT WITH THE COMPLAINING WITNESSES PRIOR TO TRIAL WAS NEITHER CRIMINAL NOR UNETHICAL AND SHOULD NOT BE CONSIDERED A BASIS TO ENHANCE DISCIPLINE

Why did Respondent contact or attempt to contact the complaining witnesses two days prior to trial?

Respondent always believed that the goal of the clients' in contacting the Bar was to obtain a refund of fees. Respondent testified repeatedly at final hearing that he believed that the complaints would be resolved through mediation (TR 437-438, 454). In fact, there is support for Respondent's perception contained within this record. See APP A which consists of the letters sent by the Bar offering mediation in connection with Maria Lopez's complaint, together with an agreement executed by Respondent confirming his acceptance. These are contained within the Bar's files (EX 10) .[7]

At final hearing, Respondent explained that the week before, his Bar case was discussed in his group therapy (TR 363). Respondent further explained that based

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[6] Additionally, it is noted that the Referee begins his report by referring to troubling behavior of the Respondent and then makes reference to having received a Christmas and Hanukkah card from Respondent, which he found to be unusual. RR 1. It is not clear why the Referee found it either unusual or necessary to include this in his report since he was appointed November 30, 2000 and it is not unexpected to receive holiday cards at that time of year. The fact that the Referee found this to be worthy of noting in his report raises a question as to whether it should have been raised on the record so that Respondent could have had an opportunity to explain if, for example, his practice was to send a mass mailing.

[7] Although at final hearing, the Bar objected to Respondent's references to mediation as irrelevant (TR 435), the Referee understood Respondent's position regarding mediation to be: if the Bar "had sent it [Bar complaints] to mediation, you would have paid the money and we wouldn't be here?" TR 435. To which Respondent replied, "Exactly." TR 435.

upon his research, he learned that "if people had been paid . . .it seemed that the discipline was lower because the restitution had occurred prior to ruling." TR 364. For these reasons, Respondent directed investigator Lopez to undertake efforts to effectuate the last-minute refund of fees prior to trial and obtain documentation confirming the settlement. See EX 30. Although harshly critical of Respondent, the Referee correctly stated Respondent's intention, to wit; by repaying fees, Respondent "understood that he would be mitigating and helping to reduce any potential sanctions against him." RR 2.

Respondent's understanding is not wrong. The Rules Regulating The Florida Bar specifically provide that an "announced willingness of an attorney to submit a dispute as to the amount of a fee to a competent tribunal may be considered in mitigation of discipline . . . ." Rule 5-1.1 (a), Rules Regulating The Florida Bar. See also Standard 9.32(d), Florida Standards for Imposing Lawyer Sanctions (confirming restitution may be considered in mitigation).

It is not unethical for an attorney to refund fees or to otherwise seek to settle a dispute with a client. A respondent's efforts in this regard, whether undertaken when a complaint is initially filed, through mediation, or even on the day of trial, is not unethical and certainly is not criminal. To hold otherwise would discourage settlement of disputes and would be contrary to public policy. Accordingly, Respondent's actions should not be considered a basis to enhance discipline.

THE REFEREE'S FINDING OF GUILT AS TO VIOLATIONS OF RULES 4-1.1 AND 4-1.3 IS CONTRARY TO THE EVIDENCE AND FACTUAL FINDINGS OF THE REFEREE AND IS, THEREFORE, CLEARLY ERRONEOUS

The Bar has the burden to present clear and convincing evidence to establish that the code of conduct governing lawyers has been breached. The Florida Bar v. Rayman, 238 So.2d 594 (1970); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

The evidence presented in this case does not support a finding of lack of diligence or competence in connection with Respondent's representation of Maria Lopez, Mayan, and Brooks. In fact, the Referee's report recognizes Respondent's position that "the desired results were unobtainable because of the clients' actions." RR 3. Respondent could not pursue social security benefits for Maria Lopez in the absence of employment information concerning Maria Lopez's husband which would

demonstrate entitlement to benefits; Respondent could not pursue Mayan's driver's license when it was discovered that Mayan actually had five DUIs; and Respondent could not pursue Brooks' immigration matter in 1997 because she was not in a working marriage, with a husband who was willing to sign a petition.

Under these circumstances, Respondent should not have been charged with or be found guilty of disciplinary rule violations involving a lack of competence or diligence for failing to pursue matters on behalf of clients when these matters cannot be pursued. Notwithstanding this position, as suggested by the Referee (RR 3), Respondent recognizes that as an attorney he has an obligation to clearly communicate to the client that the results are unobtainable and refund any fees that the client may be entitled to receive.

Thus, although the record may include some evidence relevant to Respondent's communication Maria Lopez, Mayan, and Brooks which may support a violation of Rule 4-1.4 (communication), there is insufficient evidence to support a finding of a violation of Rule 4-1.1 (competence) and Rule 4-1.3 (diligence) in connection with Respondent's handling of these client matters. In fact, a finding that Respondent violated Rules 4-1.1 and 4-1.3 would be contrary to the testimony and evidence which supports Respondent's position: that the results desired by these clients was legally unobtainable.

THE REFEREE'S RECOMMENDATION OF A TWO-YEAR SUSPENSION AS A DISCIPLINARY SANCTION IS EXCESSIVE AND SHOULD BE REJECTED

The Supreme Court is not bound by a referee's recommendation for discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 178). This Court should reject the Referee's disciplinary recommendation of a two-year suspension because it is clearly excessive.

The Referee's report confirms that at the time of trial, "The Florida Bar had been looking for **and the Respondent had only been facing at worst** a **ninety** (90) day suspension." RR 5 (Emphasis added). The Referee's report further confirms that discipline was substantially enhanced based upon matters occurring "just prior to trial" (RR 5) involving contact with witnesses. RR 2. Accordingly, in order to determine an appropriate disciplinary sanction in this case, it is necessary to examine case law that pertains to the both charged misconduct as well as the uncharged allegations that became the basis for the Referee's recommended discipline.

This disciplinary proceeding is based upon charges of misconduct involving a lack of competence, diligence, communication, as well as a failure to respond to inquiry by a disciplinary agency. The Referee concluded that "at worst" a ninety-day suspension would be warranted for this misconduct. Notwithstanding the Referee's position, there is substantial case law support for even lesser discipline, such as a ten-day suspension.

This Court has held that a ten-day suspension was warranted for failing to respond to Bar investigative inquiry. The Florida Bar v. Grosso, 647 So.2d 840 (Fla. 1994).

Similarly, this Court also has found a ten-day suspension, followed by one-year probation, appropriate for conduct involving a lack of diligence. The Florida Bar v. Golden, 502 So.2d 891 (Fla. 1987). See also The Florida Bar v. Morse, 784 So.2d 414 (Fla. 2001), where an attorney also was suspended for ten days for a lack of diligence involving a probate matter where the conduct was found to be knowing. In Morse, the respondent also was found guilty of a lack of competence. Moreover, in The Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997), an attorney was suspended for ten-days based upon conduct which included a lack of diligence, competence, and communication, in addition to other more serious misconduct involving dishonesty.

In The Florida Bar v. Maier, 784 So.2d 411 (Fla. 2001), a respondent was suspended for 60 days for misconduct which included failing to respond to Bar investigative inquiry, in addition to a lack of diligence in pursuing an immigration matter and lack of communication with the client. In suspending Maier for 60 days, this Court specifically noted Maier's disciplinary history: two previous admonishments in addition to a prior 30-day suspension, all of which involved the same type of misconduct.

Unlike Maier, Respondent's disciplinary history consists of a minor misconduct that does not include representation of clients. RR 5. Accordingly, Respondent maintains that a ten-day suspension would be appropriate should this Court uphold a finding of guilt for conduct of the conduct charged in the Bar's complaint, to wit: lack of diligence, competence, communication, or failing to respond to Bar inquiry. A short-term suspension is further supported by the fact that there was no prejudice caused to any client matters in that the results were unobtainable because of either the clients' actions, existing law, or both.

Respondent maintains that he should neither be found guilty of nor disciplined for any uncharged misconduct involving his contact or effort to contact the

complaining witnesses prior to trial. Notwithstanding this position, if enhancement of discipline is determined to be appropriate, Respondent would argue that case law does not support the two-year suspension recommended by the Referee, even if Respondent's actions are found to involve perjury or witness tampering.

In The Florida Bar v. Pearce, 356 So.2d 317 (Fla. 1978), the Supreme Court held that conduct which involved participation in a plan for witnesses to commit perjury warranted a public reprimand. See also The Florida Bar v. Brooks, 336 So.2d 359 (Fla. 1976) wherein another attorney who participated in the agreement to commit perjury received a public reprimand.

In The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981) the Supreme Court held that a one-year suspension was warranted for misconduct which involved soliciting testimony that the respondent knew the witnesses did not believe to be true in exchange for releasing the witnesses from a lawsuit. In recommending discipline, the Court considered as a guideline the one-year term of imprisonment which would have been applicable if the respondent had been convicted of witness tampering. Thereafter, this Court held that a nolo plea to a misdemeanor charge of witness tampering involving inducing a witness to lie to law enforcement officers in an investigation warranted a suspension for 180 days. The Florida Bar v. Carswell, 624 So.2d 259 (Fla. 1993). In recommending a 180-day suspension, this Court considered as mitigation the fact that the misconduct was isolated, out of character and occurred during an "intense, emotional time." Carswell at 260.

Accordingly, case law supports a suspension for one year, not two years as recommended by the Referee, as the most severe disciplinary sanction for conduct involving perjury or witness tampering.

Moreover, assuming that Respondent's contact with the witnesses is determined not to involve perjury or witness tampering, but to be otherwise improper, consideration should be given to The Florida Bar v. Frederick, 756 So.2d (Fla. 2000). The respondent in Frederick received a 91-day suspension for numerous ethical violations, specifically including requiring clients to sign a release stating that they would not contact the Bar with any complaints or, if they had already done so, they would withdraw their complaints, as a condition precedent to receiving a refund of fees. This action by respondent Frederick was found to constitute conduct prejudicial to the administration of justice.

Respondent disputes that as a condition precedent to refunding fees to Mayan, he required Brooks and Mayan to withdraw their Bar complaints. Nevertheless, even

if his actions were found to fall within Frederick, Respondent maintains that a 91-day suspension would be excessive in the instant case because Frederick also includes numerous other ethical violations. Accordingly, Respondent asserts that a suspension of 90-days or less would be appropriate based upon findings of guilt as to the misconduct charged in the Bar's complaint as well as a finding of impropriety with regard to his contact with the complaining witnesses prior to trial.

CONCLUSION

The allegations raised by the Bar at final hearing involving Respondent's pre-trial contact with the complaining witnesses are clearly outside the scope of the allegations charged in the Bar's Complaint. Accordingly, these matters are uncharged misconduct, consideration of which by the Referee resulted in a denial of due process and was an improper basis to either impose or enhance discipline.

There are other errors contained in the Referee's report with regard to both factual findings and guilt. The cumulative effect of these errors warrants rejection of the Referee's report.

Nevertheless, even if this Court approves findings of guilt as to some or all of the charged misconduct, the two-year suspension that is recommended by the Referee is excessive. In lieu thereof, Respondent requests consideration of a ten-day suspension. Further, notwithstanding Respondent's position that the allegations of uncharged misconduct should not be considered, in the event that these allegations are considered, Respondent requests consideration of a suspension from the practice of law for ninety days or less, with automatic reinstatement, as a final order of discipline.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of

Respondent was forwarded by Airborne Express to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy was forwarded by Airborne Express to Vivian Reyes and Carlos Leon, Co-Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131 and mailed to John A. Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this _____ day of October, 2001.

____
PATRICIA S. ETKIN
Counsel for Respondent

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that Respondent's Initial Brief is submitted in Times New Roman 14-point font, proportionately spaced.

____
PATRICIA S. ETKIN
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	Supreme Court Case
	No. SC 00-2219
Complainant,	
	The Florida Bar File
v.	Nos. 1999-71,635 (11G) 1999-71,220 (11G) 1999-71,458 (11G)
ALBERTO BATISTA,	
Respondent.	

_______________________________/

APPENDIX

The Florida Bar's letter to Maria Lopez dated April 5, 1999 offering mediation;
Respondent's Request/Consent to Mediation dated April 15, 1999 . . . . A

[1] The Bar's Complaint does not specify a particular subsection of Rule 4-1.4.