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) |
| ALBERTO BATISTA, | 1999-71,458 (11G) |
| | |
| Respondent. | |

_____/

On Petition for Review

of
the Referee's Report
in a Disciplinary
Proceeding.

**RESPONDENT'S REPLY/CROSS ANSWER BRIEF**

PATRICIA S. ETKIN
The Florida Bar No. 290742
WEISS & ETKIN
8181 West Broward Boulevard, Suite 262
Plantation, FL 33324
954-424-9272
COUNSEL FOR RESPONDENT

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**C**ASESPAGE

## OTHER AUTHORITIES

FLORIDA STATUTES



STANDARDS FOR IMPOSING LAWYER SANCTIONS

RULES REGULATING THE FLORIDA BAR

## SUMMARY OF ARGUMENT VI

[Answer to Cross Appeal]

Discipline should be based upon a finding of guilt as to the specific conduct alleged in the Bar's complaint and a proper application of the aggravating/mitigating factors set forth in Florida Standards for Imposing Lawyer Sanctions. Discipline should not be enhanced based upon uncharged misconduct consisting of allegedly improper pretrial contact with witnesses or other assorted objectionable behaviors attributed to Respondent, which are deemed by the Bar to constitute "composite conduct which is gross". Notwithstanding this position, if this Court determines to consider the uncharged misconduct, a 90-day suspension, rather than disbarment, would be the most severe discipline that would be warranted.

## ARGUMENT

RESPONDENT HAS MET HIS BURDEN OF DEMONSTRATING ERROR IN THE REFEREE'S REPORT

[Reply to Argument I of Bar's Answer Brief]

In his Initial Brief, Respondent has demonstrated that there is either no record evidence or that the record evidence clearly contradicts certain specific findings and conclusions of the Referee.

[1] Accordingly, Respondent has met the burden stated in The Florida Bar v. Vining, 761 So.2d 1044 (Fla. 2000), which is cited by the Bar, to wit:

> The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is **no evidence in the record to support those findings** or that the **record evidence clearly contradicts the conclusions**. Vining at 1047. [Emphasis added]

The Bar both denies the existence of "incorrect statements" and asserts that

---

[1] Specifically: (1) Respondent did not "fail" to obtain a work permit for Brooks in three years (RR 4); (2) Respondent did not "repeatedly" tell the clients that their cases were proceeding (RR 3); (3) the Referee did not hear testimony from "one complainant" [Lopez] pertaining to a "pretrial offer" regarding repayment of fees (RR 2); and (4) the Referee did not hear testimony from two other complainants [Brooks and Mayan] which supports a finding that prior to trial Respondent offered to repay fees if they would execute false affidavits or that they accepted the pretrial offer and executed false affidavits (RR 2). These erroneous findings and conclusions are fully discussed in Respondent's Initial Brief.

Respondent has not met his burden of establishing error with regard to the Referee's report. Significantly, however, the Bar does not make any effort to refute Respondent's argument by referring to record evidence (witness testimony or exhibits) which would demonstrate that the specific findings and conclusions which Respondent claims are clearly erroneous are supported by competent and substantial evidence.

Instead, in a transparent effort to divert attention from the lack of record evidence that would support the specific findings and conclusions of the Referee which Respondent claims are clearly erroneous, the Bar points to credibility, a subject which has no relevance to the issues raised by Respondent. Answer Brief at 7. Furthermore, although the Bar claims that credibility is the one factor that "permeates" all of the [Referee's] findings, witness credibility (or lack thereof) is not even mentioned in the Referee's report as a factor with regard to any of the findings or conclusions that are at issue.

2

---

[2] In fact, the only reference to credibility in the Referee's report pertains to Respondent's explanation for appearing 20 minutes late to trial. Respondent's explanation, which the Referee did not find to be credible or justifiable, cannot be examined because it is not part of the record. However, it should be noted that the Referee's imposition of a "sizeable fine" is not authorized by the Rules Regulating The

Accordingly, Respondent has established, and the Bar has not refuted, that there is either no evidence in the record or that the record evidence clearly contradicts specific findings and conclusions of the Referee. Therefore, Respondent has met his burden of demonstrating error regarding findings and conclusions of the Referee, thereby justifying rejection of all or significant portions of the Referee's report.

## DENIAL OF DUE PROCESS CANNOT BE CURED BY THE BAR DESIGNATING UNCHARGED MISCONDUCT AS AN AGGRAVATING FACTOR

[Reply to Argument II of Bar's Answer Brief]

The Bar's Complaint does not charge Respondent with conduct involving "witness tampering". Furthermore, the Bar's Complaint does not allege any facts that would support a finding of misconduct involving "witness tampering". Nevertheless, the Bar made allegations at Final Hearing that Respondent had engaged in uncharged misconduct, which the Bar repeatedly characterized as "witness tampering". TR 41, 420, 422, 427, 428, 430, and 431. Notably, in response to inquiry by the Referee as to whether he could properly consider these allegations, the Bar assured the Referee

---

Florida Bar.

that these allegations could be considered, even though they were not part of the original case. TR 421. Thus, the Referee issued his report which includes findings and a disciplinary recommendation specifically and substantially based upon consideration of the Bar's allegations of uncharged misconduct involving witness tampering.

The issue is whether this is proper.

Respondent maintains that the Bar's presentation of evidence and argument related to uncharged misconduct involving witness tampering was improper and denied him due process based upon this Court's holding in The Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999) and The Florida Bar v. Vernell, 721 So.2d 705 (Fla. 1998).

The Bar has argued that Vernell and Fredericks are inapplicable to the instant case because the Referee considered uncharged misconduct in aggravation and did not find Respondent guilty of any additional rule violation. Answer Brief at 10. This argument is without merit and ignores due process concerns regarding adequacy of notice and ability to defend. Moreover, if the Bar's argument is accepted, a procedure will have been established which will allow the due process rights of a respondent to

be circumvented by presentation of uncharged misconduct under the guise of aggravating factors. Respondent urges this Court to reject the Bar's argument and reaffirm the principles of Vernell and Fredericks by holding that unless the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint, it is not properly before a referee for findings or as a basis for a disciplinary recommendation.

Respondent would further urge this Court to reject the Bar's argument that it had "no choice" but to present allegations of uncharged misconduct involving witness tampering because the conduct "occurred shortly before the trial." Answer Brief at 11. Presentation by the Bar or consideration by the Referee of uncharged misconduct is improper regardless of when the alleged misconduct occurred. See The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985) (referee's finding of guilt of perjury involving respondent's testimony which occurred during trial was rejected as a violation of due process).

The Bar clearly had a choice: the Bar could have, and should have, presented testimony and evidence relevant to the allegations and specific disciplinary rule violations that are set forth in the Bar's Complaint. The Bar could have, and should

have, notified Respondent that allegations of "witness tampering" would be the basis for further investigation and disciplinary proceedings in accordance with procedures set forth in the Rules Regulating The Florida Bar. The Bar clearly had a choice: the Bar chose to circumvent, rather than comply with, procedures that have been established to ensure due process.

## THE TESTIMONY OF BROOKS AND MAYAN ESTABLISHES THAT FEES WERE REFUNDED TO THEM PRIOR TO THEIR REVIEWING THE PROPOSED AFFIDAVITS AND SUBSEQUENT PREPARATION OF THEIR HANDWRITTEN AFFIDAVITS, THEREBY SUBSTANTIATING THAT EXECUTION OF THEIR AFFIDAVITS WAS NOT A CONDITION PRECEDENT TO PAYMENT

[In Reply to Argument III of Bar's Answer Brief]

Respondent's contact with the complaining witnesses prior to trial for purposes of settlement was neither criminal nor unethical and should not be considered in aggravation of discipline.

Preliminarily, it should be noted that Lopez testified that she had received a card from a paralegal, private investigator but did not respond. TR 39, 40. The Bar concedes this point. Answer Brief at 14. Accordingly, notwithstanding any statement to the contrary by the Referee, Lopez clearly had no pretrial contact with Respondent, or anyone on his behalf, regarding any pretrial offer or affidavit. However, two-days

prior to trial, Brooks and Mayan did have direct contact with Investigator Lopez as well as telephone contact with Respondent and representatives of The Florida Bar.

In its Answer Brief at 12, the Bar notes as significant the "precise" testimony of Brooks, which it then cites, to support the premise identified by the Bar as the "single most important fact", to wit: "that Respondent's representative asked the witnesses to sign affidavits that weren't true prior to receipt of the money." However, this "precise" testimony does not support the Bar's premise. On its face, Brooks' partial testimony quoted by the Bar [Answer Brief at 12-13] reflects that there was no discussion about payment. Clearly, Brooks was describing the content of the affidavits which she and Mayan were to prepare in their own handwriting, rather than the proposed affidavits prepared by Respondent which they did not sign. As set forth in Respondent's Statement of the Facts [Initial Brief at 18-21], which has not been challenged by the Bar [Answer Brief at 1], the discussion with Investigator Lopez about preparation of the handwritten affidavits **occurred after** Brooks and Mayan had received funds and had executed a receipt. This is further confirmed by other testimony of Brooks, which the Bar has not cited, (TR 112-116) as well as the testimony of Mayan, also not cited by the Bar (TR 240).

Based upon the actual sequence of events [see Statement of the Facts, Initial Brief at 18-21], it is apparent there was no condition precedent whereby Brooks and Mayan were required to execute affidavits drafted by respondent prior to receiving payment from Respondent in satisfaction of their judgment (representing all legal fees previously paid to Respondent plus court costs). Instead, Brooks and Mayan had received their money prior to the presentation of Respondent's proposed affidavits. This occurred after they had contacted The Florida Bar and were advised that they could accept money from Respondent and sign any document presented to them. After Brooks and Mayan declined to sign the proposed affidavits which had been presented to them, they retained the money that they had already received, and prepared their own affidavits, which were then notarized by Investigator Lopez.

Contrary to the Bar's assertion, fees were refunded to Brooks and Mayan, without condition, prior to their review of the proposed affidavits and the subsequent preparation, by them, of their own handwritten affidavits. Accordingly, there was no unethical or criminal conduct with respect to the pretrial contact with Brooks and Mayan.

THE REFEREE'S FINDING OF GUILT AS TO VIOLATIONS OF

## RULES 4-1.1 AND 4-1.3 CANNOT BE PRESUMED CORRECT WHEN IT IS CONTRARY TO THE EVIDENCE AND OTHER FACTUAL FINDINGS OF THE REFEREE

[In Reply to Argument IV of Bar's Answer Brief]

Respondent undertook the representation of Lopez, Brooks, and Mayan believing that he would complete the representation and obtain the results desired by the clients. However, Respondent did not obtain the desired results. This is because, after the representation commenced, the clients did not provide Respondent with the information or documentation that was necessary to proceed, the clients' situation changed, or the clients' actual situation differed from the situation as originally explained to Respondent. As found by the Referee:

> The testimony before the undersigned partially supported Mr. Batista's position that the desired results were unobtainable because of the clients' actions. In the case of the claim for social security benefits by a minor child [Lopez] said child's mother failed to present Mr. Batista with proof that the deceased father had been employed in the United States, which would be required for entitlement to the benefits. The client seeking a work permit [Brooks] may have failed to execute the required documents . . . Finally, reinstatement of the third clients [Mayan] drivers license was not possible once it was discovered that the client had four DUI's on his driving record. RR 3.

Accordingly, Respondent did not complete the representation of Lopez, Brooks, and Mayan because of factors that he could not control, rather than because

of unethical conduct involving a lack of competence (Rule 4-1.1) or lack of diligence (Rule 4-1.3). Accordingly, Respondent should not be found guilty of violating Rule 4-1.1(competence) and Rule 4-1.3 (diligence) of the Rules Regulating The Florida Bar for failing to diligently and competently pursue matters, which after commencement, could not be completed.

Instead of demonstrating the existence of competent and substantial evidence to refute Respondent's position, the Bar's Answer Brief merely cites to testimony of witnesses and findings of the Referee that pertain to the charge of inadequate client communication, in violation of Rule 4-1.4, a finding which has not been challenged by Respondent. Accordingly, any presumption of correctness has been overcome by witness testimony and other findings of the Referee which clearly demonstrate that that a finding of guilt as to a violation of Rule 4-1.1 (competence) and Rule 4-1.3 (diligence) is error.

## A 10-DAY SUSPENSION IS APPROPRIATE DISCIPLINE IF THE REFEREE'S RECOMMENDATIONS OF GUILT AS TO THE DISCIPLINARY RULE VIOLATIONS CHARGED IN THE BAR'S COMPLAINT ARE APPROVED

[Reply to Argument V of Bar's Answer Brief]

Argument V contains argument in response and rebuttal to the Bar's Answer

Brief as it relates to the charged misconduct consisting of a lack of diligence, competence and communication involving three client matters and failure to respond to Bar inquiry.

Respondent acknowledges that there is evidentiary support for the charged misconduct involving two disciplinary rule violations: Rule 4-8.4(g) (failure to respond to Bar inquiry) as alleged in Count I ( Lopez) and Count III (Richards); and Rule 4-1.4 (client communication) as alleged in Count I ( Lopez) and Count II (Brooks and Mayan).

Rule 4-8.4(g)

Respondent agrees that he should have promptly responded to Bar inquiry and that his failure to do so is violative of Rule 4-8.4(g) of the Rules Regulating The Florida Bar. Although Respondent has cited case law authority which would support a 10-day suspension, the Bar cites The Florida Bar v. Vaughn, 608 So.2d 18 (Fla. 1992) for the proposition that "failure to cooperate with the Bar, by itself, justifies a public reprimand". Answer Brief at 28. The respondent in Vaughn was found guilty of violating Rule 4-8.1(b) for failure to cooperate with the Bar (including not replying to initial complaint). Respondent views Rule 4-8.1(b) to be the functional equivalent

of Rule 4-8.4(g) (failure to respond, in writing, to a Bar inquiry), which is the violation charged in the case *sub judice*. Accordingly, Respondent accepts both the Bar's premise and case law authority that a public reprimand is an appropriate disciplinary sanction for Respondent's failure to respond to Bar inquiry.

## Rule 4-1.4

Respondent agrees that he should have clearly and promptly advised Lopez, Brooks, and Mayan that there was no relief available to them given the procedural posture of their legal matters and that his failure to do so is violative of Rule 4-1.4 of the Rules Regulating The Florida Bar.[3] However, there was no injury caused by any inadequate communication with Lopez, Brooks, and Mayan because there was no legal remedy available to them based upon the circumstances of their cases. Accordingly, Standard 4.64, Florida Standards for Imposing Lawyer Sanctions, is applicable. This standard provides that an admonishment is appropriate discipline when a lawyer negligently fails to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

## Rules 4-1.1 and 4-1.3

Respondent maintains that the Referee's findings of fact do not support findings of guilt for the charged misconduct involving two disciplinary rule violations with regard to his representation of Lopez, Brooks, and Mayan, as alleged in Counts

[3] Respondent was not charged with violating any disciplinary rule with regard to charging or collecting a clearly excessive fee and there is no evidence in the record which would support such a finding, or specifically the portion of the fee which is unearned. Nevertheless, Respondent did agree to and did expect to resolve any question of his fees through mediation. APP A. This did not occur. Respondent refunded fees and court costs to Brooks and Mayan and does not object to refunding fees to Lopez.

I and II: Rule 4-1.1 (competence) and Rule 4-1.3 (diligence). Respondent's position is based upon both witness testimony and the finding of the Referee, which recognizes that results for Lopez, Brooks, and Mayan were unobtainable because of the clients' actions. RR2. It is axiomatic that a lawyer cannot be guilty of neglect or incompetence if the matter for which they were retained is incapable of performance.

Notwithstanding this position, in the event that this Court approves findings of guilt as to violations of Rules 4-1.1 (competence) and 4-1.3 (diligence), a 10-day suspension would still be appropriate based upon the case law cited in Respondent's Initial Brief.[4] However, the Bar disputes Respondent's cases and cites The Florida Bar v. Gunther, 400 So.2d 968 (Fla. 1981), The Florida Bar v. Segal, 462 So.2d 1091 (Fla. 1985), and The Florida Bar v. Page, 475 So.2d 1236 (Fla. 1985) for the proposition that disbarment is warranted. These cases are easily distinguishable.

In Gunther, the respondent was charged with a total of 26 counts of neglecting

[4] The Florida Bar v. Golden, 502 So.2d 891 (Fla. 1987) (10-day suspension for lack of diligence). See also The Florida Bar v. Morse, 784 So.2d 414 (Fla. 2001)(10-day suspension for a lack of both diligence and competence), and The Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997) (10-day suspension for a lack of diligence, competence, and communication, in addition to other more serious misconduct involving dishonesty).

legal matters entrusted to him. Assuming, arguendo, that Respondent failed to diligently represent the three complaining witnesses, this is a far cry from the number of neglect cases found in Gunther. Furthermore, there is mitigation by virtue of the Referee's specific finding that there was partial support for Respondent's position that the desired results were unobtainable because of the clients' actions. If desired results are unobtainable, it is impossible to find that an attorney has failed to competently and diligently represent the client.

In Segal, there were two separate cases prosecuted. One of the cases had three separate counts, with findings of guilt for eleven separate rule violations. Significantly, Counts I and II had rule violations for engaging in conduct prejudicial to the administration of justice and Count II had rule violations for conduct involving dishonesty, fraud, deceit and misrepresentation and failure to properly pay funds to a client that the client was entitled to receive. The other case had one count involving a rule violation for neglect. In addition respondent was currently under suspension at the time of the disbarment order.

In Page, the respondent had prior discipline (public reprimand with probation; suspension for probation violation; three-year suspension to run consecutively with the

suspension for probation violation). The respondent in Page was disbarred based upon his handling a legal matter without adequate preparation, neglect of a legal matter, failing to seek client objectives through reasonably available means permitted by law, and a finding of cumulative misconduct. Based upon a finding of cumulative misconduct and a substantial history of prior discipline, disbarment was ordered. None of these factors are present in this case.

Significantly, none of the respondents in Gunther, Segal and Page participated in the disciplinary proceedings which led to their disbarment. This factor is not present in this case.

Based upon the foregoing analysis, the cases cited by the Bar have been shown to be factually distinguishable and, therefore, do not support the Bar's position. Moreover, the cases previously cited by Respondent (Golden, Morse, and Glick) do support a 10-day suspension, Contrary to the Bar's assertion, the cases cited by Respondent involve more than "only an isolated violation" [Answer Brief at 30]: Golden involves three disciplinary rule violations and also includes client prejudice; Morse involves two disciplinary rule violations and also includes client prejudice; Glick involves 10 disciplinary rule violations and also includes client prejudice.

If the Referee's recommendations of guilt as to all of the rule violations charged in the Bar's complaint are approved, a 10-day suspension is appropriate, particularly when considering Respondent's prior disciplinary history (admonishment) in conjunction with the fact that desired results were unobtainable because of the clients' actions, existing law, or both. Where desired results are legally unobtainable, there cannot be a claim of client prejudice or injury.

A 90-DAY SUSPENSION IS THE MOST SEVERE DISCIPLINE THAT IS WARRANTED IF CONSIDERATION OF UNCHARGED MISCONDUCT IS DEEMED APPROPRIATE

[Answer to Argument V of Bar's Initial Brief on Cross Appeal [5]]

Argument VI answers the Bar's Initial Brief as it relates to the uncharged misconduct which, according to the Bar, justifies Respondent's disbarment. Argument VI also addresses the appropriate disciplinary sanction should consideration of the uncharged misconduct be deemed appropriate.

The Bar seeks to disbar Respondent based upon uncharged misconduct involving pretrial contact with complaining witnesses, which the Bar inaccurately

[5] To avoid confusion, Respondent will refer to the The Florida Bar's Answer Brief and Initial Brief on Cross Appeal as Answer Brief.

characterizes as either "bribery" or "witness tampering". Answer Brief at 22, 32. As additional support for disbarment, the Bar asserts that Respondent engaged in other uncharged misconduct, unrelated to any specific disciplinary rule violation, but which, in the Bar's opinion, is "gross". Answer Brief at 24, 25, 27, 28, and 30.

Pretrial Contact[6]

The Bar argues that the aggravating factor in this case consists of pretrial contact involving seeking to bribe witnesses. Answer Brief at 22. Significantly, the only Florida criminal statute involving the act of bribery pertains to "misuse of public office" by "public servants". Section 838.015, Florida Statutes. There is also a criminal offense for accepting a "bribe", but this statute is only applicable to witnesses who "accept, or agree to accept money or anything of value . . . to testify. . . or withhold any testimony. . . ." Section 914.14, Florida Statutes. Accordingly, the Bar cannot properly argue that Respondent engaged in the criminal act of bribery.

Additionally, during the course of the Final Hearing, the Bar repeatedly referred to the pretrial contact at issue as "witness tampering", rather than bribery. TR 41, 420, 422, 427, 428, 430, and 431. Furthermore, the Bar has specifically cited Section 914.22, Florida Statutes, the criminal statute which pertains to witness tampering, both in argument before the Referee (TR 427) and in its Answer Brief at 32. Based upon the specific language of this statute, the Bar must show that Respondent knowingly

[6] Since Lopez did not have any pretrial contact with investigator Lopez or Respondent, Respondent could not have engaged in the act of bribery or witness tampering with respect to Lopez. Accordingly, Respondent will limit argument to pretrial contact with Brooks and Mayan.

offered a pecuniary benefit to the complaining witnesses with the intent to cause or induce them to: withhold testimony; be absent from the Final Hearing, if summoned by legal process; or testify untruthfully at the Final Hearing. None of these factors are present in this case because:

- Brooks and Mayan had obtained a money judgment against Respondent after filing suit against him for the return of legal fees previously paid.
- It was legally permissible for Respondent to contact judgment creditors at any time for the purpose of satisfying their judgment.
- Respondent could make payment to judgment creditors at any time because he had the absolute legal right to satisfy their judgment so that he would not be a judgment debtor.
- Respondent's intent was to have the payment to Brooks and Mayan considered as a mitigating factor by the Referee. Rule 3-7.6(j), Rules Regulating The Florida Bar (Procedures before a Referee), provides that "neither unwillingness nor neglect of the complaining witness to cooperate, nor settlement, compromise or restitution will excuse failure to complete any trial." Accordingly, it cannot be argued that the desires

expressed by Brooks and Mayan in their handwritten affidavits regarding dismissal or withdrawal of the charges would have any impact upon the scheduled Final Hearing. See TR 123, 243, as referenced in Respondent's Initial Brief at 20, for a translation of Brooks' and Mayan's handwritten affidavits.

- The payment accepted by Brooks and Mayan was with the prior knowledge and acquiescence of The Florida Bar.
- The payment made to Brooks and Mayan was for the amount of their judgment, plus court costs, and was not conditioned upon any future act of a testimonial nature.
- Payment was received by Brooks and Mayan **prior** to presentation of proposed affidavits, which Respondent believed to be truthful, but which they did not sign.
- When Brooks and Mayan did not sign the proposed affidavits, their decision was accepted by Respondent, and he suggested that they

handwrite their own affidavits,[7] which they then prepared.

- The affidavits executed by Brooks and Mayan were voluntarily created in their own handwriting, and expressed what they believed to be truthful information.
- Notwithstanding the fact that Respondent knew that Brooks and Mayan were to be called as witnesses at the Final Hearing scheduled to commence on April 17, 2001, there was no evidence presented by the Bar that Respondent instructed these witnesses not to appear at Final Hearing or not testify at the Final Hearing, or to testify untruthfully.
- The affidavits handwritten by Brooks and Mayan were introduced into evidence by the Bar at the Final Hearing. EX 29, EX 32.
- At the Final Hearing there was no testimony from Brooks and Mayan to suggest that their handwritten affidavits were false. Indeed, Mayan

[7] While there was testimony that Investigator Lopez asked for return of the money paid at the second meeting after Brooks and Mayan declined to sign the proposed affidavits at the second meeting, there is no evidence that this request was at Respondent's direction. Indeed, the record reflects that Respondent was contacted by Investigator Lopez during the course of the second meeting and instructed her to have Brooks and Mayan handwrite their own affidavits with any language that they deemed appropriate. TR 119, 191, 242.

confirmed, under oath, that his handwritten affidavit [EX 32] reflected his true feelings. TR 256

In support of its contention that "the aggravating factor of seeking to bribe witnesses" warrants disbarment, the Bar cites Standard 6.31, Florida Standards for Imposing Lawyer Sanctions. This standard, provides, in pertinent part, that "disbarment is appropriate when a lawyer intentionally directly or indirectly tampers with a witness." Significantly, the prefatory language to this standard states that "the following sanctions are generally appropriate in cases involving attempts to influence a witness. . . by means prohibited by law." The Bar has made no showing with its citation to Standard 6.31 as to how the contact with Brooks and Mayan was prohibited by law. The Bar cannot make such a showing because, as previously stated by Respondent in response to the alleged violation of Florida's witness tampering statute, Respondent had the legal right to satisfy the judgment obtained against him and did not condition payment upon future testimonial acts. Therefore, The Florida Bar's reliance on Florida Statute 914.22 as well as Standard 6.31, Florida Standards for Imposing Lawyer Sanctions, is misplaced.

Following its reference to Standard 6.31, the Bar states that Standard 6.11 also

applies. Answer Brief at 24. However, in order for Standard 6.11 to apply, the Bar must demonstrate that Respondent engaged in certain specific completed acts, with intent to deceive the court, consisting of knowingly making a false statement, knowingly submitting a false document, or improperly withholding material information in the context of conduct that is prejudicial to the administration of justice. This did not occur because Respondent did not make any false statement to the Court; Respondent did not submit to the Court any false document;

[8] and Respondent did not improperly withhold material information from the Court. Therefore, Standard 6.11 does not apply.

[9] Similarly, The Florida Bar v. Agar, 394 So.2d 405, 406 (Fla. 1980), cited by the Bar, is inapposite.

---

[8] In fact, the testimony of Brooks and Mayan establish that each prepared their own handwritten affidavit which the Bar introduced into evidence. The affidavits prepared by Respondent which Brooks and Mayan found objectionable were never executed nor were these affidavits presented to the Court in any form.

[9]The Bar recognizes that the operative facts do not support the applicability of Standard 6.11 when it states that "the only difference between that standard and the Respondent's conduct is that his attempt to present false statements was kindered [sic] by the refusal of the witnesses to cooperate." Answer Brief at 24. In the absence of necessary facts, the Bar asks this Court to ignore the specific language of this standard and, in lieu thereof, accept the Bar's prognostication as to what might have occurred if an alleged attempt to obtain documents known to be false became a completed act.

[10]

Other standards listed by the Bar in its Answer Brief are Standards 5.11(e), 5.11(f) and 7.0, Florida Standards for Imposing Lawyer Sanctions. However, the Bar does not offer any reasons why these particular standards are applicable. Nevertheless, Respondent is compelled to reiterate that none of the foregoing standards apply for the reasons previously stated by Respondent in response to the alleged violation of Florida's witness tampering statute.

[10] Agar is cited by the Bar in the context of arguing the serious nature of "seeking to bribe witnesses". The Bar's citation to this case is confusing because Agar does not involve bribery, but as stated by this Court concerns the "respondent's knowingly presenting false testimony before a Circuit Court". Agar at 405.

## "Gross" Conduct

As an additional support for disbarment, the Bar asserts that "when the composite conduct of a lawyer is gross, disbarment is warranted." Answer Brief at 24-25. As indicated in the cases cited by the Bar, this Court has disbarred attorneys when the composite conduct of the attorney is gross. However, disbarment only results when the attorney has been found guilty of extremely egregious misconduct that is violative of disciplinary rules. See The Florida Bar v. Horowitz, 697 So.2d 78 (Fla. 1997) (involving more than 20 violations, total neglect of clients which caused significant actual and potential client injury, and prior disciplinary history consisting of an admonishment, public reprimand, and suspension) and The Florida Bar v. Setien, 530 So.2d 298 (Fla. 1988) (repeatedly ignored clients, abandoned practice without notice and disappeared, dishonesty). See alsoThe Florida Bar v. Penrose, 413 So.2d 15 (Fla. 1982) (abandonment of law practice, leaving all files unattended and in the possession of a nonlawyer; pled guilty to possession of marijuana; failed to conclude legal matter; involvement in conspiracy to purchase and distribute marijuana).

The charged misconduct in the instant case involves lack of diligence, competence, and communication regarding three client matters (which did not result in client injury), and failure to respond to Bar inquiry. Respondent's has not engaged in the type of extremely egregious misconduct which this Court has deemed to constitute composite misconduct which is gross, as described in Horowitz, Setien, and Penrose.

Because Respondent's charged misconduct, in its totality, doesn't qualify as "gross", the Bar resorts to quoting certain gratuitous comments made by the Referee in his report. Answer Brief at 25-26; RR at 1-2. Significantly, these comments did not

have any bearing on the Referee's disciplinary recommendation for a two-year suspension, which represents enhanced discipline based solely upon the pretrial contact with witnesses. The Referee specifically stated that he was "incensed after learning about the matters occurring just prior to trial but at the time of trial The Florida Bar had only been looking for and the Respondent had only been facing at worst a ninety (90) day suspension."

[11] RR 5.

Furthermore, none of the Referee's gratuitous comments rise to the level of "unethical and improper conduct during the trial" as suggested by the Bar because:

- The Referee found the receipt of a Christmas card and Hanukkah card from Respondent to "be unusual but chose not to read anything into it." Significantly, at no time was Respondent asked about this mailing and whether it was a holiday mass mailing.
- While it very well may have been foolish for Respondent to represent

[11] Brooks testified on the first and second day of the Final Hearing. After Brooks completed her testimony on the second day, the Referee indicated that his reaction on the first day might have been tempered if he had heard about the Bar's involvement when the money was paid. TR 196-197. This involvement consisted of separate telephone calls to the Bar by both Brooks and Mayan regarding their acceptance of payment from Respondent and execution of requested documents.

himself, Respondent had the right to do so. The Bar has not cited any disciplinary rule which prohibits pro se representation in disciplinary proceedings.

- Any deficiency in Respondent's pleadings was considered by the Referee prior to the Final Hearing and appropriate rulings made.
- The Referee chose to rely on expert opinion that Respondent had no significant pathology and no mental illness, but stated that it was "somewhat difficult to do so" because of his personal observations of Respondent. If action were to be taken on the basis of an attorney being incapable of practicing law due to mental illness, the Bar well knows that there is a procedure for classification as an inactive member pursuant to Rules Regulating The Florida Bar 3-7.13(a), Incapacity Not Related to Misconduct.
- Appearing late for the Final Hearing did not inure to Respondent's benefit. As indicated by the Referee, a sizable fine was imposed and that was the end of the matter. However, it should be noted that unless compelled by subpoena, a respondent is not required to attend a Final

Hearing. However, a respondent who chooses not to appear at Final Hearing will suffer the consequences of the Referee making findings and recommendations based upon a one-sided presentation.

For purposes of demonstrating "gross" misconduct, the Bar also relies upon correspondence that Respondent sent to Theresa Bartlett (Clients' Security Fund Coordinator) and Arlene Sankel (Branch Staff Counsel, The Florida Bar Miami Office). Answer Brief at 26. The Bar argues that Respondent's letter to Ms. Bartlett dated April 5, 1999, improperly revealed client confidences pertaining to Lopez. This position is without merit.

[12] First, Respondent furnished information at Ms. Bartlett's specific request so that a determination could be made whether Lopez had suffered a reimbursable loss. Second, the comparison between Respondent's conduct with that which was at issue in The Florida Bar v. Lange, 711 So.2d 518 (Fla. 1998) is far fetched.

[13] There was no disclosure of any client confidences in a public forum, as occurred

---

[12] In addition, the allegation of revealing client confidences, which is not specifically referred to in the Bar's complaint or within the scope of the allegations in the Complaint, is another example of the Bar improperly relying upon uncharged misconduct to buttress its case and, thereby, deny Respondent his fundamental due process rights.

[13] In Lange, the respondent had previously represented a former client who was now listed as a government witness in proceedings brought against his current client. In two pretrial motions and one

in Lange, because all records of the Clients' Security Fund, including correspondence, are deemed confidential pursuant to Rule 7-5.1(a), Rules Regulating The Florida Bar.

Concerning the Bar's reference to three sentences within his three-page letter to Arlene Sankel dated February 7, 2000, Respondent maintains that he has the right to freedom of expression, even if others, including the Bar, view his writings as inappropriate to the situation. A dangerous precedent will be set if "gross" misconduct justifying disbarment is based upon an exercise of free speech. Moreover, preceding the portion of the letter quoted by the Bar, Respondent informs Ms. Sankel, that he "never stated that a Jewish Conspiracy has existed in any way shape, or form . . ." Finally, questions posed to the supervisor of an office regarding employment practices are benign and certainly do not constitute "gross" misconduct.

Insofar as Respondent's Motion for Continuance dated April 9, 2000, is concerned (Answer Brief at 27), the Bar cites a small portion of a two-page filing which reflects a venting of frustration by Respondent as a result of his perception that

---

motion filed on the opening day of trial, respondent divulged confidential communications made to him by the former client related to uncharged crimes that the former client had confessed to committing. Accordingly, the situation in Lange is easily distinguishable from the Bar's allegations arising from an attorney's response to an inquiry from a Florida Bar employee (Ms. Bartlett) who administers a Florida Bar program (Clients' Security Fund).

the Bar was not properly responsive to his Request for Admissions. While the language employed by Respondent may be in poor taste, again it is protected free speech and does not constitute "gross" misconduct.

According to the Bar, Respondent has compounded the "gross" misconduct, described above, with other actions such as alleged "neglect" of the truth in explaining the pretrial contact with the complaining witnesses. Answer Brief at 27. Although the Bar may not accept Respondent's explanations, this does not mean that he was untruthful. Respondent must again take issue with the Bar's characterization of the pretrial contact because payment was made prior to presentation of the proposed affidavits and was for the purpose of establishing restitution as a mitigating factor. While the use of the word "depose" may be inartful, Respondent had every right to informally contact potential adverse witnesses either directly or through an investigator to ascertain their position as long as there was no court order prohibiting such contact. [14] Since both Brooks and Mayan testified at Final Hearing that they had contacted The

[14] It is interesting to note that in The Florida Bar v. Attias, 513 So.2d 1055 (Fla. 1987), the respondent had been adjudicated guilty of criminal contempt (a misdemeanor under the United States criminal code) for improper contact with a potential witness in a pending criminal matter when such contact had been prohibited per court order. A public reprimand was the resulting discipline.

Florida Bar to ascertain whether they could accept money and sign documents and were advised that they could do so, it is understandable that Respondent would feel that there had been some form of entrapment. His expression of opinion to that effect during closing argument does not establish "neglect" of the truth and certainly is not unethical.

The Bar's final effort to establish "gross" conduct consists of questioning Respondent's professed skepticism of the Bar and some of its employees. From Respondent's perspective, he accepted the Bar's offer of mediation in the Lopez case in good faith. However, instead of a non-disciplinary resolution through mediation, the Lopez complaint was rerouted through the Bar's disciplinary system, without explanation for the change in direction. Respondent also believed that the complaints of Brooks and Mayan were going to be resolved through mediation. TR 437. This did not happen. Respondent never understood why Lopez, Brooks and Mayan were not mediated. He became frustrated and distrustful of the Bar which ultimately led to Respondent's opinion that "The Florida Bar was not acting as a representative organization of lawyers, that they just viewed me as someone that they could treat very badly . . . ." TR 367.

The Bar concludes its discussion of gross conduct with a digression involving Respondent's propensity to blame others and the effectiveness of his group therapy. However, even if the Bar's assessment is correct, it does not involve conduct in violation of any disciplinary rule and should be rejected as a basis for any disciplinary action.

In its transitional paragraph to disciplinary case law regarding charged misconduct, the Bar asserts that "the case law concerning discipline for Respondent's offenses should be considered in the context of gross cumulative misconduct including Respondent's lack of credibility and aberrant behavior." Answer Brief at 28. This is improper. Any disciplinary case cited by the Bar should provide the necessary guidance with respect to an appropriate sanction for charged misconduct and not be bolstered by uncharged misconduct.

Analysis as to Discipline

In State v. Dawson, 111 So.2d 427 (Fla.1959), this Court recognized the two most important factors in determining an appropriate measure of discipline as that "which will be fair to this respondent but which will be designed to correct the offensive tendencies which he has heretofore demonstrated as well as of sufficient

severity to deter others who might be similarly minded." Dawson at 432. Thereafter, this Court added to fairness to respondent and deterrence a third factor: fairness 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." The Florida Bar v. Pahules, 233 So.2d 130,132 (Fla. 1970). See also The Florida Bar v. Cibula, 725 So.2d 360 (Fla. 1999) and The Florida Bar v. Reed, 664 So.2d 1355 (Fla. 1994), both of which are cited in the Bar's Answer Brief.

Accordingly, fairness to society, fairness to respondent, and deterrence all go into the disciplinary mix to create the final product. This Court has never taken the position that different weights are to be assigned to each ingredient. Therefore, this Court should reject the Bar's position that "great weight" should be given only to those ingredients which are to the Bar's taste: "protection of the public and deterrence". Answer Brief at 22. Instead, this Court should do as it has always done -- carefully balance the three purposes of attorney discipline to arrive at a disciplinary sanction which is well reasoned and fair.

The Bar requests Respondent's disbarment in this case. In The Florida Bar v.

Hirsch, 342 So.2d 970 (Fla. 1977), this Court rejected the Bar's request to disbar an attorney who engaged in serious misconduct (conversion of client funds). In so doing, this Court recognized that:

> Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved . . . for those who should not be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the Society of which they are a part. Hirsch at 971.

The Hirsch opinion also recognized, with approval, the guidelines set forth by Henry S. Drinker in his book, Legal Ethics:

> 'Ordinarily the occasion for disbarment should be the demonstration, by a continued course of conduct, of an attitude wholly inconsistent with the recognition of proper professional standards. Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable. For isolated acts, censure, private or public, is more appropriate. Only where a single offense is of so grave a nature as to be impossible to a respectable lawyer, such as deliberate embezzlement, bribery of a juror or court official, or the like, should suspension or disbarment be imposed. Even here the lawyer should be given the benefit of every doubt, particularly where he has a professional record and reputation free from offenses like that charged. Similarly, such extreme measures should be invoked only in case of fairly recent offenses, proof in refutation of which would be reasonably available to respondent, except, of course, in cases where he was shown to have actively concealed them. Just as a lawyer who has been habitually dishonest will almost certainly revert to his low professional standards when necessity, temptation, and occasion recur, so one who has been consistently straight and upright can properly be trusted not to repeat an isolated offense unless of such a nature as of itself to demonstrate a basically depraved character.' Hirsch at 971.

Applying these guidelines to the case *sub judice*, it is apparent that disbarment is clearly excessive because:

- Respondent's disciplinary history consists of one admonishment (which did not involve representation of clients).
- The charged misconduct (lack of communication, diligence, competence and failure to respond in

writing to Bar inquiry) does not involve acts "of so grave a nature as to be impossible to a respectable lawyer."

- Respondent's professional record is "free" from offenses similar in nature to the charged or uncharged misconduct.
- Respondent enjoys a good professional reputation. See the unrefuted testimony of Respondent's character witnesses: Attorneys Joseph Chambrot (TR 275-278) and Jorge Sibila (TR 302-307).
- Respondent was denied adequate notice and a reasonable opportunity to present proof in refutation of the uncharged misconduct, evidence of which was improperly presented to the Referee under the guise of an aggravating factor.

In his report, the Referee states that he gave "careful and thoughtful consideration of the entire circumstances herein." RR 5. The Referee rejected disbarment, as requested by the Bar, stating "the ultimate penalty, disbarment is not justified." RR 5. In determining his disciplinary recommendation, the Referee specifically considered the "matters occurring just prior to trial," together with the fact that "at the time of trial the Florida Bar had only been looking for and the Respondent had only been facing at **worst** a ninety (90) day suspension." [Emphasis added] RR 5. After considering all factors, the Referee recommended a two-year suspension as enhanced discipline based upon his perception that Respondent had acted improperly with regard to contact with the complaining witnesses two days before trial.

Respondent does not agree with the Referee's disciplinary recommendation and does not concede that the uncharged misconduct in this case can properly be considered as an aggravating factor. Nonetheless, the two-year suspension recommended by the Referee is clearly excessive, even if this Court determines to consider the pretrial witness contact.

In Respondent's Initial Brief, The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981) was cited for this Court's holding 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 addition, The Florida Bar v. Carswell, 624 So.2d 259 (Fla. 1993) was cited in Respondent's Initial Brief for this Court's holding that a 180-day suspension was warranted based upon a nolo contendre plea to a misdemeanor charge of witness tampering involving inducing a witness to lie to law enforcement officers in an investigation.

Respondent submits that Lopez and Carswell support rejection of the two-year suspension recommended by the Referee for misconduct involving witness tampering. Moreover, further examination of Lopez and Carswell reveals that the conduct of these

respondents was more egregious than the conduct of Respondent which the Bar has alleged constitutes witness tampering in this case. First, there is absolutely no record evidence that even suggests that the complaining witnesses were induced not to appear at the Final Hearing or to testify falsely. Furthermore, with respect to Brooks and Mayan, there can be no finding of any criminal inducement because they received money to satisfy their judgment and thereafter handwrote their own affidavits in language that they found acceptable.

Interestingly, the Bar asserts that "Lopez does not apply." Answer Brief at 32. This position should be compared with the Bar's closing argument before the Referee at the Final Hearing, wherein the Bar stated:

> Your Honor, **here is case law that is applicable to the facts at Bar**, and again, we have summarized it for the Court's convenience.
>
> I would especially like to point out to the Court on page one, Florida Bar versus Lopez which is at 406 So2d 1100, and the holding there was explicitly urging parties and/or witnesses to testify under oath to matters that an attorney knows or should know that witnesses do not believe or which are false warrants a one year suspension.
>
> **This is precisely the case we have on hand.**
> [Emphasis added] TR 425

Respondent does not understand how the Bar can cite Lopez to the Referee as being similar to Respondent's alleged misconduct involving witness tampering and then disingenuously argue to this Court that the facts in Lopez should be disregarded because "Lopez does not apply." Answer Brief at 32. Respondent maintains that the Bar was correct in the first instance. Lopez is a case that should be considered if this Court determines to include the uncharged misconduct involving the alleged improper pretrial contact with witnesses as a basis for discipline in this case.

The case that is closest on point factually to the uncharged misconduct involving alleged improper pretrial contact with complaining witnesses is The Florida Bar v. Frederick, 756 So.2d 79 (Fla. 2000). In Frederick, clients were required to sign a release stating that they would not contact the Bar with any complaints against respondent and, if they had already done so, they would withdraw their complaints, as a condition precedent to receiving a refund of fees. This court imposed a 91-day suspension in Frederick. It is noteworthy, however, that this sanction resolved **two** independent disciplinary cases which, collectively, involved violations of Rules 4-8.4(d), 4-1.15(a), 5-1.1(a), 3-6.1(c), and 4-5.3(a), (b), & (c) of the Rules Regulating

The Florida Bar. Furthermore, the respondent in Frederick had a prior disciplinary history consisting of two private reprimands, one admonishment, and one public reprimand. Accordingly, even with a substantial disciplinary history, the respondent in Frederick was suspended for 91-days for a myriad of disciplinary rule violations including misconduct which involved requiring the execution of a release and withdrawal of a Bar complaint as a condition precedent to refunding fees.

Respondent asserts that the uncharged misconduct in the instant case is less egregious than the composite conduct in Frederick, thereby justifying a lesser disciplinary sanction. Accordingly, even if consideration of the uncharged misconduct is deemed appropriate as a basis for discipline, Respondent submits that a 90-day suspension is the most severe disciplinary sanction that should be imposed in this case.

## CONCLUSION

A disciplinary proceeding which, at worst, would have resulted in a short suspension has morphed into a Referee's recommendation of a two-year suspension, and is now before this Court with a request by the Bar for disbarment. This transformation occurred because uncharged misconduct involving allegedly improper

pretrial contact with complaining witnesses was presented to and considered by the Referee as a basis to enhance discipline. This action was fundamentally unfair and denied Respondent due process.

Respondent requests that this Court reject consideration of uncharged misconduct and approve a disciplinary sanction that is predicated upon consideration of the charged misconduct and proper application of Florida Standards for Imposing Lawyer Sanctions. If this case is evaluated as suggested, a 10-day suspension is appropriate discipline for the charged misconduct set forth in the Bar's complaint. However, if it is determined that consideration of uncharged misconduct is appropriate, Respondent would urge this Court to reject both the two-year suspension recommended by the Referee and disbarment requested by the Bar and, in lieu thereof, impose a 90-day suspension.

Respectfully submitted,

_____

PATRICIA S. ETKIN
The Florida Bar No. 290742
WEISS & ETKIN
8181 West Broward Boulevard, Suite 262
Plantation, FL 33324
954-424-9272
COUNSEL FOR RESPONDENT

RICHARD B. LISS, Of Counsel

The Florida Bar No. 200751
WEISS AND ETKIN
8181 West Broward Boulevard
Suite 262
Plantation, FL 33324
954-424-9272
CO-COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Respondent's Reply/Cross Answer Brief was forwarded by U.S. Priority Mail 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 U.S. Priority Mail to Vivian Reyes, 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 December, 2001.

_____
PATRICIA S. ETKIN
Counsel for Respondent

## CERTIFICATE OF TYPE SIZE AND STYLE

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

_____
PATRICIA S. ETKIN

Counsel for Respondent