IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, Complainant, v. BARTLEY CHARLES MILLER, Respondent. _____/	Supreme Court Case No. SC01-736 The Florida Bar File Nos. 2000-51,031(11D) 2000-70,361(11D)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On April 9, 2001, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. On March 18, 2002, a final hearing was held in this matter. All of the aforementioned pleadings, responses thereto, exhibits received in evidence and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Vivian Maria Reyes

For the Respondent: Theodore Klein

II. Findings of Fact:

A. Jurisdictional Statement: Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary of Case:

1. Respondent represented Roberta Santini in an action for sexual harassment and age and gender discrimination against Cleveland Clinic, Florida.

2. In 1997, Respondent filed a complaint with the Equal Employment Opportunity Commission (hereinafter "EEOC") on behalf of Roberta Santini. In October 1997, the Broward County Human Rights Board issued a determination of no finding and notice of dismissal. This is a prerequisite before filing a lawsuit for discrimination.

3. On or about January 27, 1998, the EEOC mailed a Right to Sue Notice to Roberta Santini at her mother's residence that was undated. Federal law requires that a claim must be filed within ninety days from receipt of this notice.

4. The January, 1998 notice was delivered to Roberta Santini's mother's address, but it was addressed to Roberta Santini. It had been sent certified mail and was signed for by Roberta Santini's mother.

5. On or about March 2, 1998, the EEOC issued a second Right to Sue Notice to Respondent and Roberta Santini. This second notice was dated.

6. Respondent, on May 28, 1998, filed a complaint in federal court. The complaint was filed 122 days after the January

notice and within 90 days of the March 2, 1998 notice.

7. On October 13, 1998, Roberta Santini, along with the Respondent, attended her deposition. Roberta Santini produced a file purportedly containing all documents received from the EEOC. The file only contained the March, 1998 notice. When questioned about receipt of the January 1998 notice, Roberta Santini testified she did not recall seeing it.

8. Subsequently, the Cleveland Clinic moved for Summary Judgment arguing that Roberta Santini had failed to file a timely claim.

9. In response to Cleveland Clinic's argument, Respondent contended that the case had been timely filed because the ninety day filing window did not begin until the Respondent and Roberta Santini had received the March 2, 1998 right-to-sue letter. To bolster his argument that the period began to run upon receipt of the March 2, 1998 notice, Respondent attached the affidavits of Roberta Santini's mother, Elsa Santini, Roberta Santini, and Heidi Friedman, a former associate attorney.

10. Elsa Santini's affidavit stated that she was not authorized by her daughter to accept mail sent to her address. Elsa Santini also stated that she was being medicated for her depression and her caretaker retrieved mail as part of her duties. There was no mention in her affidavit of whether she gave the January 27, 1998 notice to her daughter.

11. Roberta Santini, in her affidavit, did not mention receipt of the January, 1998 notice and confirmed that her mother did not have authority to receive mail or packages on her behalf that had been mailed to her mother's address.

12. Respondent submitted Heidi Friedman's affidavit stating that she had represented Roberta Santini and the only Right to Sue letter Heidi Friedman received from EEOC was dated March 2, 1998.

13. The Court scheduled an evidentiary hearing for May 21, 1999 and ordered Elsa and Roberta Santini and attorney Heidi Friedman to be present to testify.

14. On the date of the hearing, Roberta Santini failed to attend.

15. At the hearing, Elsa Santini acknowledged her signature on the January 29, 1998 return receipt for the right-to-sue notice, but said she had no memory of it.

16. Even though Heidi Friedman was present at the hearing, Respondent tried to prevent her from testifying by arguing that it was not necessary.

17. Nevertheless, Heidi Friedman testified that Respondent was a partner in her firm and was in charge of overseeing her work.

18. During cross-examination, Heidi Friedman testified that she had reviewed the firm's file prior to testifying and admitted that the file contained the undated first right-to-sue notice. Moreover, Respondent was present during that review and participated in that review with her.

19. The Court terminated the hearing in order to have Roberta Santini appear and scheduled a new hearing date of June 1, 1999.

20. At the June 1, 1999 hearing, Respondent, for the first time, told the Court that he was not contesting receipt of the first January, 1998 right-to-sue notice.

21. Also at that hearing, Roberta Santini testified that on or before February 2, 1998, she had received the undated first right-to-sue notice that she later faxed to Respondent's office.

22. Respondent testified he did not recall having received the first undated right-to-sue notice. However, the law firm's time

records dated February 2, 1998 show 30 minutes expended on "receipt and review of right to sue letter; follow up on same."

23. Respondent testified that he did not recall having made the time entry. It was later discovered by the magistrate that it was the Respondent's handwritten time sheet.

24. The firm's file also contained a memorandum that was ostensibly written between February 2, 1998, and February 13, 1998, acknowledging receipt of the right-to-sue notice on February 2, 1998. This memorandum included a reminder to draft the complaint by February 13, 1998.

25. Shari Levine, Respondent's secretary, prepared an affidavit stating that she prepared the memorandum as directed by the respondent via telephone.

26. Respondent drafted his witnesses' affidavits and memorandum opposing summary judgment, as well as structured his witnesses' testimony, in such a way as to give the Court a false impression that the first right-to-sue notice had never been received.

27. Following hearing, the Honorable Barry S. Seltzer, U.S. Magistrate Judge, issued an Order dated September 2, 1999 finding Respondent's conduct constituted bad faith and imposing sanctions on respondent.

28. Respondent appealed the Order Imposing Sanctions to the Eleventh Circuit Court of Appeals. The appellate court affirmed the Magistrate's decision.

III. <u>Recommendations as to Guilt</u>: I recommend that Respondent be found guilty of violating Rules 4-3.3(a)(l) (A lawyer shall not knowingly make a false statement of material fact or law to a tribunal); 4-3.4(a) (A lawyer shall not

unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending proceeding; nor counsel or assist a witness to testify falsely); and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct.

V. Recommendation as to the Disciplinary Measures to be Applied: I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. A suspension for a period of two (2) years.

B. Payment of The Florida Bar's costs in these proceedings.

VI. Personal History and Past Disciplinary Record:

Prior to recommending discipline pursuant to Rule 3-7.6(k)(l), I considered the following:

A. Personal History of Respondent:
Age: 42
Date admitted to The Florida Bar: February 15, 1989
Prior Disciplinary Record: None

B. Factors Considered in Aggravation:

9.22(b) - dishonest or selfish motive;
9.22(c) - pattern of misconduct;

Respondent's continued pattern of deceit was not an isolated instance but rather an intentional manipulation to create a false impression to the court, in order to hide the truth.

9.22(d) - multiple offenses;

Respondent had multiple offenses; filing of false affidavits, misleading memoranda, false testimony of witnesses, attempting to prevent witnesses from testifying, lying to the court.

9.22(g) - refusal to acknowledge wrongful nature of conduct;

Respondent is still giving different excuses for his behavior and not acknowledging the wrongful nature of his conduct

9.22(i) - substantial experience in the practice of law;

Respondent had been practicing employment law for a number of years at the time of this offense.

C. Factors Considered in Mitigation:

The Court also considered the following mitigating factors:

9.32(a) - absence of a prior disciplinary record;

Respondent in this case has no prior disciplinary record since his admission to the Florida Bar in February 1989.

9.32(g) - character or reputation;

Respondent presented evidence from witnesses who testified that he was ethical and possessed excellent character.

9.32(k) - imposition of other penalties or sanction;

Respondent was sanctioned by the magistrate who imposed a $1,000.00 fine and ordered Respondent to pay $20,000.00 in sanctions payable to the Defendant, Cleveland Clinic, for attorney fees and costs. The magistrate ordered Respondent also to attend 5 hours of Continuing Legal Education.

VII. Discussion: At the final hearing held on March 18, 2002, The Florida Bar introduced documentary evidence including the magistrate's 50 page Order Imposing Sanctions on the Respondent. The Florida Bar's documentary evidence also consisted of transcripts of the hearings held before the magistrate, pleadings filed by both Respondent and opposing counsel, Respondent's time sheets and affidavits, Respondent's memoranda, etc.

The Respondent testified and also presented evidence through fact and character witnesses.

The Referee has also received case law and the applicable Standards for Imposing Discipline presented by The Florida Bar and Respondent's attorney on the issue of the appropriate sanctions to be imposed against Respondent.

The following Standards clearly apply to this case:

> **Standard 6.12** states suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action.
>
> **Standard 6.22** states suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
>
> **Standard 7.2** states suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

In this case, I find that Respondent intentionally failed to disclose a crucial piece of evidence that he knew was the main focus of the legal proceeding. I also find that Respondent, through his machinations, directly interfered with the legal process. Respondent also engaged in a pattern of deceit throughout the case. Respondent did not concede that he received the letter until he was exposed at the hearing before the magistrate. Despite his concession, he continued his evasive actions. Respondent did not disclose that he had actually reviewed the file at his firm nor did he disclose to the magistrate that he had reviewed the right-to-sue letter on February 2, 1998.

This referee has carefully reviewed the case law submitted by both parties. Although there are no cases directly on point with the matter at bar, the Referee is mindful that Respondent's actions in this case were egregious because he

orchestrated a series of half truths and omissions in order to deceive the Court which adversely affected the integrity of our justice system. The Referee considered the following cases cited by The Florida Bar.

In The Florida Bar v. Rood, 620 So. 2d 1252 (Fla. 1993), Rood conveyed property to his father with the intent to defraud creditors. This hindered the creditors from collecting their judgment. The court disbarred the respondent in Rood . Similarly, Respondent hid a crucial piece of evidence to prevent opposing counsel and the court from ascertaining its existence. Respondent's actions hindered opposing counsel and created additional litigation expenses.

In The Florida Bar v. Maynard, 672 So. 2d 530 (Fla.1996), the respondent knowingly made a false statement to a tribunal, misused client funds, violated other rules, and also had prior discipline. The court found that disbarment was the appropriate sanction. While Maynard appears more egregious than the instant case because Maynard misused client funds and had prior discipline, in the case at bar Respondent engaged in a pattern of misrepresentations to the magistrate. A review of the "Order Imposing Sanctions" reveals the severity of his actions. Candor and honesty to the court go to the heart of the legal profession.

In The Florida Bar v. Hmielewski, 702 So. 2d 218 (Fla. 1997), the respondent's client had surreptitiously removed medical records from the hospital

whose property they were. The hospital was therefore unable to find or produce this critical evidence. The hospital requested that respondent produce any of the client's father's records that he had in his possession. The respondent falsely stated that all records in his client's possession had already been provided to the hospital. The respondent also misrepresented to the court that the hospital had failed to maintain critical patient records during the pertinent time frame. As a result of the respondent's misleading representations, the hospital was put to substantial trouble and expense trying to locate the medical records. Similarly, in the instant case, on September 14, 1998, Respondent was requested to produce documents through the Notice of Taking Deposition of Roberta Santini (his client). Paragraphs three and four of the Request for Production of Documents specifically sought the following documents:

> 3. Originals, or legible copies, of any and all correspondence (or other documents) between her and the Division of Unemployment Compensation of the Department of Labor and Employment Security.
>
> 4. Originals, or legible copies, of each and every document that she submitted to or received from, or that was created by, the Broward County Human Rights Division or United States Equal Employment Opportunity Commission or any other person or entity in conjunction with her discrimination charge(s) against Defendant.

Respondent brought some of the documents, but alleged he did not have the first right to sue letter. However, as evidenced by his time sheets and the faxed letter, both he and his client had the letter as of February 2, 1998. Neither Respondent or his client produced the letter sought by the Defendant. Respondent argued, as did Hmielewski's counsel, on page three of his "Response" that the "Defendant has failed to produce any evidence that Plaintiff **received** the first Dismissal and Notice of Right to Sue Letter." Respondent made this argument after he had already seen the faxed letter sent by his client and received by his firm on February 2, 1998. This is just one of Respondent's many bad faith actions. In Hmielewski, the referee found that the respondent was overzealous, got caught up in his own lie, and allowed it to perpetuate in violation of his duty to the Court and to opposing counsel. The Supreme Court was mindful of this finding and considered respondent's strong character evidence and his relatively unblemished record and approved a three year suspension instead of disbarment. Respondent's pattern of deceit continued past the discovery stage. Indeed, Respondent took his pattern with him to the federal courthouse where the magistrate uncovered what clearly should have been disclosed by Responent.

In The Florida Bar v. Agar, 394 So. 2d 405 (Fla. 1981), the respondent called as a witness the client's wife who testified falsely. The respondent knew of

the fraud, but never told the court. Similarly, the Respondent in the instant case submitted affidavits he prepared. These affidavits omitted any mention of receiving the first right to sue letter. At the May 21, 1999 evidentiary hearing, Respondent questioned Elsa Santini, his client's mother. She that testified she had no recollection of receiving the first right-to-sue letter despite the fact that her affidavit acknowledged receiving it. She also testified that she had never given the first right to sue notice to her daughter. Respondent stood by silently and allowed her to testify unequivocally that she never gave the right to sue letter to her daughter. He never corrected the record knowing that someone had given his client the letter. Respondent's client was ordered by the court to appear at the hearing. Despite the court's order, Respondent told his client that her attendance was not necessary. Additionally, Respondent submitted Heidi Friedman's affidavit and argued in his "Response" that the only Right to Sue Notice from the EEOC which Ms. Friedman received was dated March 2, 1998. Respondent attempted to prevent Ms. Friedman from testifying, but the court ordered her to testify. Respondent questioned her, but avoided any questions that referred in any manner to the faxed letter.

In Agar, the respondent pled nolo contendre to a misdemeanor offense of solicitation to commit perjury. Here, Respondent participated in the presentation of

perjured testimony by his silence. In Agar the Supreme Court reiterated its prior statement in Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1960) in which the Court held:

> No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done ***it deserves the harshest penalty***. (Id. 19, emphasis supplied).

The cases cited by the Respondent were less egregious than the case at bar and therefore inapplicable. The Referee has considered all the mitigating and aggravating factors, all of the evidence, all the case law presented by both parties, and the applicable Standards.

The Referee finds by clear and convincing evidence that the Florida Bar proved that the Respondent violated Rules 4-3.3(a)(l) (A lawyer shall not knowingly make a false statement of material fact or law to a tribunal); 4-3.4(a) (A lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending proceeding; nor counsel or assist a witness to testify falsely); and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of

Professional Conduct.

Consequently, the Referee recommends that the Respondent should be suspended for a period of two years.

VIII. <u>Statement of Costs and Manner in Which Costs Should be Taxed</u>:

I find the following costs were reasonably incurred by The Florida Bar:

Administrative fee	$	750.00
Rule 3-7.6(o)(1)(I)		
Court reporter attendance fee for September 5, 2001 hearing.....	$	60.00
Court reporter attendance fee for March 18, 2002 final hearing.....	$	180.00
T O T A L	**$**	**990.00**

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

DATED this _____ day of _____, 2002.

_____

Hon. Arthur L. Rothenberg, Referee
Dade County Courthouse
73 West Flagler Street, Room 311

Miami, Florida 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399, and that true and correct copies were mailed to Theodore Klein, Attorney for Respondent, 800 Brickell Avenue, Penthouse Two, Miami, Florida 33131; Vivian Maria Reyes, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131; and John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this _____ day of _____, 2002.

_____

Hon. Arthur L. Rothenberg, Referee
Dade County Courthouse
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Room 311
Miami, Florida 33130