IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Case Nos. SC03-1203

Complainant/Cross Petitioner,

v.

TFB File No. 2002-01,100(1A)

BRUCE EDWARD COMMITTE,

Respondent/Petitioner.
_____/

THE FLORIDA BAR'S ANSWER BRIEF AND CROSS PETITION FOR REVIEW

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PRELIMINARY STATEMENT

Complainant/Cross Petitioner, THE FLORIDA BAR, will be referred to as "The Florida Bar" throughout this Answer Brief and Cross Petition.

Respondent/Petitioner, BRUCE EDWARD COMMITTE, will be referred to as "Committe".

References to the Rules Regulating The Florida Bar shall be designated as “Rule” with the appropriate number, i.e., “Rule 3-7.1,” or as "Rules."

References to "The Referee's Findings of Fact and Conclusions of Law" shall be designated as "ROR" for the report of referee dated April 2, 2004, followed by the appropriate page number, i.e., "ROR at p. 12."

References to The Florida Bar's Exhibits at the Final Hearing on January 8-9, 2004, shall be designated as "TFB Exhibit" with the appropriate number, i.e., "TFB Exhibit 4."

References to Respondent's Exhibits at the Final Hearing on January 8-9, 2004, shall be designated as "R Exhibit" with the appropriate number, i.e., "R Exhibit 3."

References to Transcript for the Final Hearing on January 8-9, 2004, Volume I and Volume II that run consecutively, shall be designated as " T." with the appropriate number, i.e., " T-4."

"Petitioner's First Amended Initial Brief" will be referred to as "Initial Brief" with the appropriate page number, i.e., "Initial Brief at p. 4."

"The Florida Bar's Answer Brief and Cross Petition for Review" will be referred to as "Answer Brief" with the appropriate page number, i.e., "Answer Brief at p. 4."

References to specific pleadings in the disciplinary record will be made by identification and reference to their title in the Supreme Court pleadings file and index, i.e., “Motion to Dismiss.”

STATEMENT OF THE CASE

This is a petition for review by Committe of a report of referee dated April 4, 2004, entitled "The Referee's Findings of Fact and Conclusions of Law." See Rule 3-7.7(a). The Florida Bar files this Answer Brief in response to Committe's First Amended Initial Brief, including a Cross Petition for Review. See Rules 3-7.7 (c)(1), and 3-7.7(c)(3). For clarity, the Statement of the Case is included in The Florida Bar's Answer Brief.

On July 7, 2003, The Florida Bar filed a Complaint and Request for Admissions with the Florida Supreme Court alleging Committe engaged in misconduct resulting in the violation of a various ethical rules. Committe filed a Motion to Dismiss the Complaint to which The Florida Bar filed a reply on August 6, 2003. Subsequently, Committe filed a Second Motion to Dismiss the Complaint, a Corrected Motion to Dismiss the Complaint, a Motion to Obtain Probable Cause Transcript, a Motion for Protective Order, and a Motion for Protective Order Re: His Deposition. After listening to the parties' oral argument on the motions on November 14, 2003, the referee denied Committe's motions, and granted The Florida Bar's *ore tenus* Motion for a Protective Order. See Notice of Filing Hearing Transcript dated December 5, 2003, and the Transcript dated November 14, 2003, attached.

After engaging in discovery, the Final Hearing was held on January 8-9, 2004. Subsequently, the parties submitted proposed findings of fact and conclusions of law as well as written closing arguments to the referee. On April 4, 2004, the referee submitted his final report to the Court finding in favor of The Florida Bar on all its proposed facts, finding that Committe had engaged in misconduct in violation of the Rules, recommended a private reprimand, but did not mention taxable costs. Committe petitioned for review of the referee's final report, and The Florida Bar filed a Cross Petition.

STATEMENT OF THE FACTS

Committe's Statement of the Facts in his Initial Brief is incomplete and does not specifically address all the factual issues as set forth in the referee's final report. For the sake of clarity and completeness, The Florida Bar has set forth its own statement of the facts in this Answer Brief. The Florida Bar adopts and incorporates the findings of fact as reflected in the referee's report with citations to the evidentiary record to show that the findings of fact are supported by competent substantial evidence.

The following findings of fact in the referee's report are supported by competent substantial evidence in the record:

1. On July 16, 1993, a money judgment was obtained against Respondent in Arlington, VA, by attorney William E. Gardner in the amount of $4,527.21 plus interest. See TFB Exhibit 1, T-26.

2. The judgment was domesticated and recorded in Pensacola, Florida, as Escambia County Court Case No. 94-215-CC-12, Division II, Security Pacific Executive/Professional Services v. Bruce Committe where it was referred to a local collection agency, Collection Services, Inc.("CSI").

3. CSI referred the case to attorney Stephen M. Guttmann to collect on Security Pacific's money judgment against Respondent. T-111-112.

4. Mr. Guttmann appeared in the debt collection suit for Security Pacific on June 11, 1998, and issued a notice of deposition with a subpoena duces tecum in aid of execution to Respondent to appear on June 24, 1998. TFB Exhibit 2, T-112.

5. Prior to that date, on June 15, 1998, Respondent filed a motion for a protective order claiming the deposition was "burdensome" because he had prior plans to be out of state, and proposed alternative dates when he was available. TFB Exhibit 3.

6. Relying on the alternative dates listed in Respondent's motion, Mr. Guttmann filed an amended notice of deposition and subpoena rescheduling Respondent's deposition for June 18, 1998. TFB Exhibit 4.

7. On June 17, 1998, however, Respondent filed a second motion for a protective order based on the Fair Debt Collection Practices Act ("FDCPA") [15 U.S.C. § 1692 et seq.], claiming that Mr. Guttmann was a "debt collector" under the statute, and, having been notified in the motion to "cease communication" with Respondent, the FDCPA prohibited Mr. Guttmann from taking his deposition in aid of execution on the money judgment. TFB Exhibit 5.

8. Respondent's second motion for protective order relied on the FDCPA as "good cause" asserting that the federal law prevented Mr. Guttmann from taking his deposition in aid of execution on the money judgment because it prohibited Mr. Guttmann from communicating with him once he had invoked the "cease communication" rule of the FDCPA in his motion. See 15 U.S.C. § 1692c(c).

9. Respondent did not have time to set his second motion for protective order for hearing before the deposition date, and mistakenly believing that his motion acted as a stay, did not appear at the deposition pursuant to the subpoena duces tecum served by Mr. Guttmann. TFB Exhibit 6.

10. Mr. Guttmann set Respondent's second motion for protective order down for hearing on July 23, 1998. TFB Exhibit 7.

11. In an Order dated August 19, 1998, Judge Roark denied Respondent's second motion for a protective order finding that, while Mr. Guttmann was a "debt collector" under the Act and Respondent had informed him to "cease communication" regarding his consumer debt, the FDCPA did not prohibit an attorney from engaging in the litigation activity of a deposition in aid of execution on a money judgment. TFB Exhibit 8.

12. On August 22, 1998, Respondent filed a motion for rehearing, citing to Heintz v. Jenkins, 115 S. Ct. 1489 (1995) as grounds for reversing Judge Roark's prior ruling. TFB Exhibit 9.

13. Mr. Guttmann set the motion for rehearing on May 12, 1999, before Judge Roark who again denied Respondent's motion based on the argument that the FDCPA prevented Mr. Guttmann from taking his deposition in aid of execution on Respondent's money judgment. TFB Exhibits 10-11.

14. The county court having ruled twice that the FDCPA did not prohibit the litigation activity of taking a deposition in aid of execution on a money judgment, Mr. Guttmann filed a third Notice of Taking Deposition in Aid of Execution and a

Subpoena Duces Tecum, and had it served personally on Respondent setting his deposition for August 2, 1999. TFB Exhibit 12

15. On the date of the deposition, Respondent filed a third motion for protective order and stay alleging as "good cause" that he needed to appeal Judge Roark's decision on his motion for rehearing, and failed to appear pursuant to the subpoena duces tecum. TFB Exhibit 13.

16. On October 9, 1999, Mr. Guttmann served Respondent with a motion for contempt for failure to appear pursuant to the notice of deposition and subpoena. TFB Exhibits 14-15.

17. On October 22, 1999, Judge G. J. Roark III held Respondent in contempt of court for failure to comply with a subpoena duces tecum to appear at his deposition in aid of execution on the money judgment. TFB Exhibit 16.

18. Judge Roark sentenced Respondent to 60 days in jail for contempt, but gave Respondent 35 days to purge the contempt by complying with the terms of his Order, including appearing for his deposition on November 22, 1999. TFB Exhibits 16-17.

19. On October 15, 1999, while Mr. Guttmann's motion for contempt in the county court action was pending, Respondent filed a federal court action against Mr. Guttmann and Mr. Gardner in the U.S. District Court, Northern District of Florida,

Pensacola Division, Case No 3:99cv 426/RV, with a total damage claim of over $3 million.[1] TFB Exhibit 20.

20. Respondent alleged that Mr. Guttmann and Mr. Gardner had violated the FDCPA, and the Florida Consumer Collection Practices Act ("FCCPA")(Fla. Stat. § 559.55 et seq.).

21. While this federal case was pending, Respondent filed a second complaint against Mr. Guttmann on October 20, 2000, styled as Bruce Edward Committe v. Stephen M. Guttmann, Case No. 3:00cv464/RV with similar allegations but adding another allegation regarding substitute service of process.[2]

22. Respondent filed a Chapter 7 bankruptcy petition on November 2, 1999, in order to stay the county court proceedings, including the contempt commitment order and the deposition in aid of execution, in which he stated that his federal lawsuit against Mr. Guttmann had market value of $1,000. TFB Exhibit 30.

23. On November 16, 1999, Respondent sent a letter to Mr. Guttmann's attorney and proposed that the federal lawsuit be settled for a total of $4500 paid in return for Respondent filing a notice of voluntary dismissal. TFB Exhibit 21.

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[1] Mr. Gardner was dropped as a co-defendant, and Respondent proceeded solely against attorney Guttmann in this case.

[2] On May 22, 2001, the federal court granted Mr. Guttmann's motion to strike and summarily dismissed Respondent's second complaint.

24. At the 941 creditors' meeting in Respondent's bankruptcy case on August 1, 2000, Respondent admitted to the bankruptcy trustee and to Mr. Guttmann that the market value of the first federal lawsuit Respondent filed against Mr. Guttmann was in fact $1,000. TFB Exhibit 31.

25. On June 15, 2001, Judge Vinson granted summary judgment to Mr. Guttmann in the first federal lawsuit, stating that Respondent's action amounted to "an abuse of legal process," that Respondent's claims were "frivolous," and that Respondent's clear intent was "to harass" Mr. Guttmann. TFB Exhibit 22 at p. 11.

26. Further, Judge Vinson held that Respondent's case was "brought in bad faith" and *sua sponte* ordered Respondent to show cause why Rule 11 sanctions should not be imposed. TFB Exhibit 22 at p. 11-12, TFB Exhibit 25.

27. Judge Vinson also ordered Respondent to pay Mr. Guttmann's "reasonable fees and costs as a sanction for his bad faith in filing this frivolous action." TFB Exhibit 22, TFB Exhibit 33.

28. In a separate order dated February 21, 2002, the federal court ordered Respondent to pay Mr. Guttmann $15,382.50 for attorney's fees, and $649.50 for costs for violation of Rule 11, Federal Rules of Civil Procedure. TFB Exhibit 24.

29. Respondent filed an appeal of Judge Vinson's June 15, 2001, Order with the Eleventh Circuit Court of Appeals.

30. On February 13, 2003, The Eleventh Circuit Court of Appeals affirmed the lower federal court's decision granting summary judgment to Mr. Guttmann, and imposing Rule 11 sanctions on Respondent. TFB Exhibit 28.

31. Respondent testified that he had substantial experience in filing claims under the FDCPA and FCCPA since 1991. Respondent has practiced law in Florida since 1994 and a large part of his legal practice consists of representing plaintiff debtors with possible FDCPA claims against debt collectors. Respondent had almost five years of prior legal experience in this particular field before he filed the two federal lawsuits against Mr. Guttmann. T-15, 19-21, 23, 26.

32. Respondent's filing of two federal lawsuits against Mr. Guttmann was frivolous because Respondent had no reasonable "good faith" basis in law or in fact for the reasons stated in Judge Vinson's Order granting summary judgment and imposing Rule 11 sanctions, and the Order granting defendant's motion to strike the complaint, as well as in the decision of the Eleventh Circuit Court of Appeals. TFB Exhibits 22, 23, 24, 27.

33. Respondent had no statutory basis under the FDCPA or FCCPA to support his factual allegations in the federal lawsuits against Mr. Guttmann.

34. The prevailing case law also did not support Respondent's claims in the federal lawsuits against Mr. Guttman.

35. Respondent knowingly and intentionally failed to comply with a legally proper discovery request by Mr. Guttmann by failing to appear for his deposition pursuant to a subpoena duces tecum in the county court collection action on August 2, 1999. TFB Exhibits 14, 16

36. Respondent also knowingly failed to obey the rules of civil procedure by failing to appear at his scheduled deposition pursuant to a subpoena duces tecum. TFB Exhibit 14.

37. Respondent had no reasonable grounds for failing to appear pursuant to Mr. Guttmann's third notice of deposition and subpoena duces tecum. Respondent had notice and ample time prior to the third deposition date to file a motion for a protective order and set it for hearing before the court to obtain an order before failing to appear pursuant to the deposition notice and a subpoena duces tecum. TFB Exhibits 14, 15, 16, 17.

38. Respondent's filing of two nonmeritorious and frivolous federal lawsuits for the purpose of harassing Mr. Guttmann who was attempting to collect a money judgment for his client is an abuse of legal process and prejudicial to the administration of justice. TFB Exhibit 34.

39. Respondent's second motion for protective order was also frivolous and prejudicial to the administration of justice because the exceptions contained in the

FDCPA did not prevent Mr. Guttmann from engaging in the litigation activity of taking Respondent's deposition. See 15 U.S.C. § 1692c(c)(2)(3), Heintz v. Jenkins, 115 S. Ct. 1489, 1491 and 1492 (1995); Lewis v. ACB Business Services, 135 F. 3rd 389 (6th CCA 1998).

40. Respondent's conduct in the county court case to obstruct the discovery process by failing to appear and filing motions for protective orders on what he should have known were frivolous grounds, as well as the filing of frivolous pleadings in federal court is an abuse of the legal process and is conduct prejudicial to the administration of justice.

41. Respondent's letter to Mr. Gardner on July 26, 1999, claiming a violation of the FDCPA and FCCPA was prejudicial to the administration of justice because Respondent threatened to sue Mr. Gardner if he didn't pay him, and then when Mr. Gardner ignored his letter, Respondent filed suit against him in November 1999. TFB Exhibits 19, 20.

SUMMARY OF ARGUMENT

The Florida Bar contends that the report of referee should be adopted by the Court because there is ample support for the referee's findings of fact and determination of guilt. The Florida Bar's case rests on the official orders of Judge Roger Vinson the United States District Court for the Northern District of Florida, holding that Committe filed frivolous and nonmeritorious lawsuits in bad faith for the sole purpose of harassing Mr. Guttmann who was his opposing counsel in a county court debt collection case. After a thorough and detailed analysis of Committe's claims, as well as the relevant facts and case law, the federal judge *sua sponte* issued an Order to Show Cause why Rule 11 sanctions should not be imposed. Subsequently, the federal court imposed Rule 11 sanctions for Committe's "bad faith" pleadings and granted Mr. Guttmann's Motion to Tax Costs.

In the county court debt collection action, Committe abused the legal process by continually filing motions for protective order in county court to avoid appearing pursuant to three notices of deposition and subpoenas duces tecum. In the Escambia County Court, Judge George J. Roark issued numerous Orders denying Committe's repetitive motions for protective order, and ruled that the federal and state law on fair debt collection did not apply to discovery on a deposition in aid of execution of a

court judgment. On October 22, 1999, Judge Roark issued an Order Adjudicating Defendant (Committe) in Contempt of Court and Order of Commitment.

Despite the fact that Committe knew the federal and state law on debt collection did not apply to his county court case, he wrote a letter to Virginia attorney, William Gardner, and demanded that he withdraw Mr. Guttmann as attorney on the case, or he would take legal action against him. Subsequently, Committe made good on his threat and filed a multimillion dollar lawsuit against Mr. Gardner and Mr. Guttmann.

The Florida Bar cross petitions on the recommended discipline in the referee's report and the failure of the referee to award taxable costs to The Florida Bar. The Florida Bar maintains that a private reprimand is no longer a permissible discipline under the Rules, and an appropriate discipline would be 91-days under the circumstances of this case. Committe's actions are an egregious abuse of both the federal and state legal system, and, as a member of The Florida Bar, reflects poorly on the legal profession when a lawyer files frivolous lawsuits, continually fails to comply with discovery, and abuses legal process for his own selfish ends. Further, The Florida Bar contends that it is entitled to taxable costs under Rule 3-7.6(q) because it prevailed in the disciplinary case.

LEGAL ARGUMENT

I. THE FINAL REPORT OF REFEREE SHOULD BE APPROVED AS TO THE FINDINGS OF FACT AND DETERMINATION OF GUILT BECAUSE IT IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The standard of review in attorney discipline cases is a well-established principle, i.e., that a referee's findings of fact enjoy a presumption of correctness that will be upheld unless the challenging party can show that the facts are unsupported by the evidence in the record, or are clearly erroneous. The Florida Bar v. Cox, 718 So. 2d 788, 792 (Fla. 1998): The Florida Bar v. McKenzie, 442 So. 2d 934 (Fla. 1983); see also, Rule 3-7.6(m)(1)(A). Moreover, the Court will not reweigh the evidence and substitute its judgment for that of the referee if there is competent substantial evidence to support the referee's findings. See The Florida Bar v. Smith, 866 So. 2d 41, 45 (Fla. 2004); The Florida Bar v. MacMillan, 600 So. 2d 457, 459 (Fla. 1992), as cited in The Florida Bar v. Lecznar, 690 So. 2d 1284, 1287 (Fla. 1997). Further, "[t]he 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." The Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996), citing to The Florida Bar v. Miele, 605 So. 2d 866, 868 (Fla. 1992). See also The Florida

Bar v. Miller, 863 So. 2d 231, 234 (Fla. 2003) citing to The Florida Bar v. Vining, 761 So. 2d 1044, 1047 (Fla. 2000).

At the final hearing, The Florida Bar presented clear and convincing, oral and written evidence that supports a substantial competent substantial basis for the referee's findings of fact and determination of guilt. In this case, the findings of fact were based on competent substantial evidence from the oral testimony of Committe and Stephen Guttmann ("Mr. Guttmann") in the trial transcript and on the voluminous court pleadings on the state and federal level that supported The Florida Bar's allegations of misconduct. On the other hand, Committe has failed to meet his burden on appeal by showing that there is no evidence in the record to support the referee's findings of fact, or that the referee's findings of fact and conclusions of law are erroneous, unlawful, or unjustified. See Rule 3-7.7(c)(5). For these reasons, the referee's findings of fact and conclusions as to guilt should be adopted *in toto* by the Court.

Standard of Review

Committe mistakenly states that the "standard of review for this court is denovo [sic] in determining whether the Referee's Report on the Complaint...is lawful." See Initial Brief at p. 5. The law is well settled that Committe is not entitled to a trial *de novo* before this Court on the disputed issues of fact that were disposed of before the

referee. In The Florida Bar v. Hooper, 509 So. 2d 289 (Fla. 1987), this Court clearly stated its "review of a referee's findings of fact is not in the nature of a trial *de novo* in which the Court must be satisfied that the evidence is clear and convincing. The responsibility for finding facts and resolving conflicts in the evidence is placed with the referee." Id. at p. 290. See also, The Florida Bar v. Niles, 644 So. 2d 504, 506 (Fla. 1994).

Issues Disputed by Committein the ROR

Committe sets forth a "Statement of the Issues, " a Summary of his "Issues" Argument, and then elaborates on these "Issues" in his section on "Argument." See Initial Brief at pp. 9, 11, and 13. As to Issues A and B, Committe raised similar arguments before the referee in his prehearing motions that were denied by the referee. See Hearing Transcript dated November 14, 2003, submitted to the referee for filing on December 5, 2003. As to Issues C and D, the state, federal and appellate court records, as well as the relevant statutes and case law, clearly support the referee's findings of fact and determination of guilt. The Florida Bar will address Committe's Issues A through D, as well as Issue E designated as a "Miscellaneous" argument.

Issue A
Section 286.011 is inapplicable and Committe was not denied due process

Committe claims that the grievance committee proceedings denied him due process because he was not allowed to personally appear, the "meeting was not noticed to others, nor was it open to the public, nor was the meeting reported so a transcript could be made" as required by Section 286.011, Fla. Stat. Initial Brief at p. 11. Committe's claims are without merit. Section 286.011, Fla. Stat., is not applicable to grievance committee procedures of The Florida Bar regarding its deliberations on disciplinary complaints, and Committe was not denied due process because he was not entitled to appear at a live hearing before the grievance committee under the Rules.

This Court has dealt with public records questions in the past and has amended the Rules Regulating The Florida Bar to clarify public access to records of the judicial branch and The Florida Bar. See In re: Amendments to the Florida Rules of Judicial Administration--Public Access to Judicial Records. In re: Amendments to the Rules Regulating The Florida Bar-Public Records, 608 So. 2d 472 (Fla. 1992). All the records of the judiciary are public except those exempted by Court rule or those exempted by the legislature. Id. Recently, the Court considered further changes to the confidentiality Rule clarifying what Bar records were public information. See

Amendment to the Rules Regulating The Florida Bar, SC03-705 (May 20, 2004), specifically the changes to Rule 3-7.1.

Pursuant to court rule, a disciplinary matter before a grievance committee is confidential. Rule 3-7.1(a)(1). It becomes a public record after the grievance committee makes its final determination. See Rules 3-7.1 (a) (1), (2), (3), (4), (5), 3-7.1(b). The grievance committee record is defined in Rule 3-7.4(l) that also permits the grievance committee to retire into private session to debate the issues and reach a decision in a disciplinary case, even when a court reporter is present. Further, there is no rule requiring the investigating member to contact the attorney under investigation by the grievance committee and to advise him of his rights. Due process in a disciplinary proceeding requires that the attorney be served with notice of the disciplinary charges brought against him and be afforded an opportunity to be heard to defend himself. See The Florida Bar v. Rubin, 709 So. 2d 1361(Fla.1998). Rule 3-7.4(h) does not require that Commite be given an opportunity to present live testimony. Id. at 1363. Committe was properly noticed two times of the grievance committee's hearing dates before the scheduled review of his case, including the possible rule violations that were to be considered at the hearing. See Exhibits B and C to "The Florida Bar's Reply In Opposition To Respondent's Corrected Second Motion to Dismiss the Complaint." The Amended Notice of Review lists Committe's

written statement to the grievance committee submitted on October 8, 2002 before the final hearing date.

The Notice of Finding of Probable Cause for Further Disciplinary Proceedings was sent to Committe and specifically advised him of the rule violations. Subsequent to the finding of probable cause, Committe received notice and opportunity to be heard before a referee on the same issues before being found guilty of the Rules violations. For the above reasons, Committe cannot now complain that he was denied due process under Section 286.011 or The Florida Bar Rules during the grievance committee proceedings.

Issue B

The Florida Bar's Complaint was sufficient and did not deny Committe due process of law.

Committe's argument that the insufficiency of The Florida Bar's Complaint denied him due process of law is frivolous and without merit. Rule 3-7.6 (g)(1) states that pleadings may be informal and should contain "the particular act or acts of conduct for which the attorney is sought to be disciplined."

The Florida Bar's Complaint clearly set forth the unethical acts by Committe in paragraphs 2 through 38, and referred to specific misconduct in violation of the ethical rules in paragraphs 27, 28, 29, 35, 36, 37, and 38, in conjunction with the exhibits attached to the Complaint. There is no requirement in The Florida Bar Rules to tie

each and every allegation of a disciplinary complaint to a specific rule violation. Indeed, Respondent's filing of frivolous state and federal lawsuits, and thwarting the civil rules of discovery are clearly ethical violations contained in the Rules cited in paragraph 39 of The Florida Bar's Complaint. As a member of The Florida Bar, Committe is also presumed to know and understand the ethical rules. Rule 3-4.1. See also Visible Difference, Inc. v. The Velvet Swing, 862 So. 2d 753, 755 (4th DCA 2003)(criteria for sufficiency of complaint). The Florida Bar is not required to plead every evidentiary fact, but only give sufficient notice to the opposing party of what is alleged and the relief that is being sought.

Committe's claim of violation of due process relating to the sufficiency of The Florida Bar's Complaint is also without merit. Reasonable notice is all that is required to afford due process in a disciplinary proceeding. See Rule 3-7.11(c); see also Rubin, *supra* at 1363; The Florida Bar v. Daniel, 626 So. 2d 178, 183 (Fla. 1993); The Florida Bar v. Carricarte, 733 So. 2d 975, 978-979 (Fla. 1999). Committe was not prejudiced because he conducted discovery and had the opportunity to be heard before the referee found he violated the Rules.

Issues C and D

For the sake of clarity, The Florida Bar will deal with these two issues together because a discussion of the applicable federal statutes and case law is a prerequisite to understanding Issue C.

Committe's filing of a federal lawsuit against Mr. Guttmann was frivolous because there was no good faith basis on the facts or in law, nor was there a good faith basis for an extension, modification, or reversal of existing law.

Judge Vinson's Order Granting Summary Judgment, and imposing Rule 11 sanctions, the decision of the Eleventh Circuit Court of Appeals, the plain language of the FDCPA and FCCPA, as well as the prevailing case law at the time Committe filed his two federal lawsuits, support the referee's finding that Committe violated Rule 4-3.1.

A. Judge Vinson's Orders

First, the referee properly found that Committe violated Rule 4-3.1 for the reasons stated in Judge Roger Vinson's Order Granting Summary Judgment to Mr. Guttmann in the federal case of Bruce Edward Committee v. Stephen M. Guttmann, U.S. D. Ct. Case No. 3:99cv426/RV. TFB-Exhibit 22. Second, Committe had no statutory basis to support the filing of the lawsuit. An examination of the statutory provisions of the FDCPA and FCCPA shows that Mr. Guttmann was entitled to take Committe's deposition in aide of execution, propose a settlement of Committe's

case, and use substituted service of process in a county court case under the Florida Rules of Civil Procedure. None of Mr. Guttmann's actions violated the FDCPA or the FCCPA. R Exhibits 1 and 2. Finally, Committe has held himself out as a practicing attorney since 1994 with expertise in representing clients who are plaintiff debtors bringing lawsuits based on the FDCPA and FCCPA. He knew at the time he filed the lawsuit against Mr. Guttmann that the prevailing case law did not prevent an attorney from pursuing postjudgment judicial remedies against a debtor. See "The Florida Bar's Closing Argument" submitted to the referee on January 22, 2004.

Judge Vinson's's Order Granting Summary Judgment, and his subsequent Orders imposing Rule 11 sanctions supports the referee's finding that Committe filed a frivolous lawsuit asserting claims of fact and law that were nonmeritorious. In the federal case, Judge Vinson held that Committe "failed to allege facts to reasonably support any of his claims," and since none of the alleged actions by Mr. Guttmann were prohibited by the FDCPA or FCCPA, Committe's actions were "utterly without merit." TFB-Exhibit 22 at p. 8. Judge Vinson determined that Committe had no reasonable good faith basis in law or fact for bringing a lawsuit against Mr. Guttmann grounded on violations of the FDCPA or FCCPA.

Specifically, as to Committe's first federal claim of violation of the "cease communication" rule of the FDCPA, Judge Vinson concluded that Mr. Guttmann's

settlement offer was proper as an integral part of the litigation process, and Committe's assertion that it was an offer to "sell out" his clients was "totally without merit." TFB-Exhibit 22 at p. 9. At the final hearing in this matter, Mr. Guttmann testified that the encounter with Committe lasted only a few minutes, and Committe testified that as soon as Mr. Guttmann offered to settle, he "bolted out of there and left." T-68.

Committe's second federal claim was that substituted service of process of a motion for contempt in Escambia County Court that was received by Committe's father violated the third party communication rule of the FDCPA. Judge Vinson reasoned that the FDCPA specifically excluded actions "reasonably necessary to effectuate a postjudgment judicial remedy," and Florida law permitted substitute service of process. See 15 U.S.C. § 1692c(b). Judge Vinson therefore held "In light of *clearly established law,* this is a frivolous allegation." TFB-Exhibit 22 at p. 10.(Emphasis added).

Committe also claimed that Mr. Guttmann violated the FDCPA by attempting to collect a debt during a period of time when the debt had been transferred to another debt collector who had not specifically authorized him to collect on Committe's debt. Committe never submitted any proof that Mr. Guttmann had ever been notified of the transfer or that he was advised to stop his collection efforts. Judge Vinson dismissed

Committe's claim of "false, deceptive, misleading representation" under the FDCPA as having no reasonable basis in fact or law. TFB-Exhibit 22 at p. 11.

At the final hearing in this matter, Mr. Guttmann testified that he was acting under the authority of the original debt collector at the beginning and end of his collection efforts, and there was no evidence presented by Committe to show that the interim debt collection agency had advised Mr. Guttmann to stop his collection efforts once the interim debt collector had purchased the debt. T-122-123,138. A reasonable inference by the court is that the interim debt collector did not object to Mr. Guttmann continuing in his efforts to collect on the money judgment.

Committe's fourth federal claim invoking Florida law that Mr. Guttmann's above actions abused or harassed Committe and his family in violation of the FCCPA was similarly dismissed as "absurd" by the federal court. TFB-Exhibit 22 at p. 11. The court applied the criteria set forth in the 1977 case of Story v. J.M. Fields, 343 So. 2d 675 (Fla. 1st DCA 1977) to reach its conclusion.

The federal court properly concluded:

> There is no indication in the record that defendant Guttmann took any actions that could reasonably be construed as a violation of the FDCPA or FCCPA. All of his actions clearly were legitimate steps taken to execute on a judgment through the legal process. Committe's filing of this civil action amounts to an *abuse of the legal process*. Moreover, in light of

> his conduct in the state court proceeding and the fact that he filed two actions before this court which raised *the same frivolous claims*, it appears that Committe's intent in filing this action was *to harass* the defendant. Thus, it appears that *this case was brought in bad faith* and in violation of Rule 11 of the Federal Rules of Civil Procedure, in which case sanctions are warranted. TFB-Exhibit 22 at p.11. [Emphasis added.]

On February 22, 2002, Judge Vinson entered an Order imposing Rule 11 sanctions for attorney's fees and costs. See TFB-Exhibit 24. Rule 11 sanctions are imposed when attorneys file a lawsuit in bad faith, the claims are frivolous, or the attorney fails to exercise due diligence in investigating the basis for bringing the federal suit.

Committe also filed a second frivolous federal suit against Mr. Guttmann that was summarily dismissed by Judge Vinson for the reasons set forth in his Order granting Mr. Guttmann's motion to strike the complaint. TFB-Exhibit 27.

B. Eleventh Circuit Court of Appeals

Subsequently, Committe appealed to the Eleventh Circuit Court of Appeals that affirmed per curiam the District Court's decision. See TFB-Exhibit 28. Committe's claim that his case was a case of first impression is not supported by the unpublished opinion of the 11th Circuit Court of Appeals that addressed only two issues that were raised below. The court agreed that a settlement offer did not fall within the abusive

practices that the FDCPA was intended to remedy, and affirmed Judge Vinson's conclusion that there was no proof to substantiate Committe's claim that Mr. Guttmann violated the FDCPA by continuing to represent the debtor.

Committe had no statutory good faith basis for the federal lawsuits under the FDCPA or the FCCPA, or for filing motions for protective order in Escambia County Court.

Committe's actions were not an aberration, or a single lapse in judgment based on unfamiliarity or inexperience in pursuing lawsuits based on the FDCPA and FCCPA. Committe's testimony reflects that he believed he had an expertise in this area, and, at the time he filed the federal lawsuits against Mr. Guttmann in 1999, he had been practicing in the area of representing plaintiff debtors for almost five years. T-21.

The clear purpose of the FDCPA was "to eliminate abusive debt collection practices by debt collectors," not to prohibit litigation by attorneys against debtors. See 15 U.S.C. § 1692(e). Mr. Guttmann admitted that he was a "debt collector" under the definition in the FDCPA. T-125; see 15 U.S.C. § 1692a(6). The FDCPA also clearly defines the use of the word "communication" in the federal law. It is "the conveyance of information *regarding a debt* directly or indirectly to any person through any medium." See 15 U.S.C. § 1692a(2)(Emphasis added). A process server is also specifically exempted from the statute. See 15 U.S.C.§ 1692a(6)(D). The prohibition in the FDCPA against communicating with third parties that

constituted one of Committe's factual allegations in federal court expressly allows communication in order to effectuate a postjudgment judicial remedy which is precisely what Mr. Guttmann was doing--serving a notice of deposition and a subpoena in aid of execution on a Virginia judgment that had been domesticated in Florida in a 1994 lawsuit against Committe. 15 U.S.C. § 1692c(b). Under the "cease communication" rule which Committe contended was violated by Mr. Guttmann, there are two exemptions for a debt collector that apply to Mr. Guttmann's actions, namely, "to notify the consumer that the debt collector or creditor may invoke specific remedies which are ordinarily invoked by such debt collector," and "to notify the consumer that the debt collector or creditor intends to invoke a specified remedy." 15 U.S.C. § 1692c(c)(2)(3). Offering to settle a case in litigation, and serving pleadings on the opposing party via substituted service of process on a motion for contempt under the Florida court rules at Committe's address are certainly "specific remedies" that a lawyer would reasonably invoke to represent a debt collector. Moreover, neither the FDCPA nor the FCCPA require that a consumer be served by restricted process of service.

There is no provision in the FDCPA or FCCPA that proscribes a deposition in aide of execution. Each statute specifically states what conduct or activities are prohibited, and the enforcement of a judgment through litigation is not included.

Further, the FDCPA also prohibits communications that are "abusive debt collection practices" carried on through interstate commerce. Nowhere does the FDCPA mention a prohibition against the service of judicial pleadings. Settlement offers and negotiations to resolve disputes are encouraged by both the federal and state courts. A mere offer to settle with no other explicit terms that resulted in an encounter between Committe and Mr. Guttmann for a matter of minutes is not a violation of the FDCPA.

The FDCPA and the FCCPA did not prohibit the conduct that Committe alleged in his federal lawsuits. He had no good faith basis for bringing the lawsuits on statutory grounds much less any good faith basis for arguing for an extension, modification or reversal of any part of the federal or state law.

C. County Court Litigation

The relevant case law did not support Committe's federal lawsuits or his motions for protective orders in Escambia County Court.

Committe held himself out to the public as having expertise as a lawyer representing plaintiff/debtors for almost five years, and still claims that it is one of his areas of practice. The controlling case law on the FDCPA at the time he filed his federal lawsuits against Mr. Guttmann did not support his federal or state claims.

The Supreme Court case of Heintz v. Jenkins, 115 S. Ct. 1489 (1995) had moved through lower court appeals and was decided by the U.S. Supreme Court several years before Committe filed his federal lawsuits. Committe testified that he had

researched the case law after the July 1998 county court hearing before Judge Roark, and knew about the Heintz case. T-159, 179-180. In Heintz, the Court decided that the term "debt collector"applied to an attorney engaged in debt collection litigation because of the changes to the statute, and the definition of "debt collector" in the FDCPA.

While rejecting Heintz' argument that the FDCPA implied a broad exception for all attorneys engaged in litigation, nevertheless, the Supreme Court reasoned that "it would be odd if the Act empowered a debt-owing consumer to stop the 'communications' inherent in an ordinary lawsuit, and thereby cause an ordinary debt-collecting lawsuit to grind to a halt." Heintz at 1491. This is precisely what Committe attempted to do in the Escambia County Court, the federal court, and through filing a Chapter 7 bankruptcy petition.

The Heintz court stated that there was no reason to read 15 U.S.C. § 1692c(c) that way because there were specific exceptions in the statute, and a court could read these exceptions to imply that the exceptions authorized judicial remedies to collect a debt. The Court stated that the statute also was not intended to abrogate all creditors' judicial remedies. The Court declined to specifically enumerate all the types of conduct that could be covered by the exceptions in the statute, but did agree that it

based its conclusions in Heintz in reliance on the exceptions contained in 15 U.S.C.§ 1692c(c). Heintz at p. 1492.

As a practitioner in the debt collection field, Committe should have also known about the Sixth Circuit case of Lewis v. ACB Business Services, 135 F. 3rd 389 (6th CCA 1998) before filing his federal lawsuits against Mr. Guttmann. See Committe's Exhibit 3. The Sixth Circuit held that a collection letter sent to the debtor after he had invoked the "cease communication" rule did not violate the FDCPA because of the exception found in 15 U.S.C. § 1692c(c)(2). Further, ACB's letter was also construed as a settlement offer, and the court reasoned that the FDCPA did not prohibit "noncoercive settlement remedies" under 15 U.S.C. § 1692c(c)(2). Lewis at p. 399. More importantly, the court held that to prohibit such remedies would be "clearly at odds with the language and purpose of the FDCPA." Id.

After the decisions in Heintz and Lewis, for Committe to argue in a federal lawsuit in October 1999 that Mr. Guttmann's brief mention of an offer to settle or attempts to depose Committe were in violation of the FDCPA was frivolous and entirely without merit both under the clear terms of the statute and the prevailing case law.

Committe's motions for protective order in county court were frivolous and without merit.

When Mr. Guttmann was hired to represent Security Pacific to enforce the Virginia judgment on Committe's debt, he filed and served on Committe a Notice of Taking Deposition in Aide of Execution and Subpoena to Appear at Deposition. TFB Exhibits 1-2. Committe replied by filing a motion for protective order on the grounds that the deposition date was inconvenient, and enumerated alternative dates when he would be available. TFB Exhibit 3. Mr. Guttmann was amenable to amending the deposition to one of Committe's alternative dates, and reset the deposition in aid of execution pursuant to Committe's motion dates. TFB Exhibit 4. Within 24 hours of receiving the amended deposition notice, Committe filed a second motion for protective order, but did not set it for hearing before the deposition date, and did not appear pursuant to the subpoena. TFB Exhibits 4-5.

Committe's second motion for protective order cited to the FDCPA as "good cause" stating that the federal law prohibited Mr. Guttmann from communicating with him once he had invoked the "cease communication rule" of the FDCPA, and therefore the FDCPA prevented Mr. Guttmann from taking his deposition. TFB Exhibit 5. In July 1998, Judge Roark denied Committe's motion for protective order on FDCPA grounds holding that the FDCPA did not prevent an attorney who was considered a "debt collector" under the Act from engaging in litigation activity. TFB Exhibit 8.

In August 1998, Committe filed a motion for rehearing on the judge's order, citing to the Heintz case as grounds for reversing the judge's prior ruling. TFB Exhibit 9. When Committe failed to set his motion for hearing, Mr. Guttmann set the motion for rehearing in May 1999 before Judge Roark who denied it. TFB Exhibits 10-11.

In June 1999, Mr. Guttmann filed a third Notice of Deposition in Aide of Execution and Subpoena To Appear for August 2, 1999, and properly served Committe with the pleadings. TFB Exhibit 12. Again for the third time, Committe filed a motion for a protective order and failed to appear for his deposition. TFB Exhibits 13-14. In his motion, Committe cited as "good cause" for a protective order and stay that he wanted to appeal Judge Roark's ruling on his motion for rehearing, even though he failed to file any interlocutory appeal.

Committe's three motions for protective orders were nothing more than frivolous pleadings containing nonmeritorious grounds for the same reasons that were listed above regarding Committe's frivolous federal lawsuits. They were merely a ruse to prevent Mr. Guttmann from the exercise of an appropriate judicial remedy, i.e, taking Committe's deposition in aide of execution on a money judgment. At the time Committe filed the motion claiming the protection of the FDCPA, he was practicing for almost 4 years in the field and should have known that the FDCPA did not apply under the Heintz and Lewis cases.

Even if *arguendo* Committe was prevented by time constraints from obtaining a protective order in June 1998 as to the first two deposition notices and subpoenas, the same cannot be said about the third notice of deposition and subpoena to appear filed in June 1999.

By the third notice and subpoena, Judge Roark had rejected Committe's FDCPA arguments two times. Further, Committe had ample time and notice that Mr. Guttmann intended to take his deposition such that Committe could have filed a motion for a protective order and set it for hearing before the August 2, 1999, deposition date. Indeed, Committe never attempted to set his motion even up through the October 22, 1999, contempt hearing date, and never appealed Judge Roark's denial of his motion for rehearing which Committe alleged was the "good cause" basis for his motion for protective order.

Committe admitted that he had done some research and "discovered" the Heintz case after the county court hearing in July 1998. T-179-180. Yet, on August 22, 1998, Committe filed a motion for rehearing again contending that Heintz stood for the proposition that the FDCPA applies to attorneys who regularly engages in "consumer-debt-collection activity even when that activity consists of litigation." Heintz at p. 1493. See TFB Exhibit 9. Committe argued, however, that since the FDCPA applied to Mr. Guttmann as a "debt collector" under the Act, he could not take his deposition

because the "cease communication" rule of the FDCPA prevented him from engaging in discovery.

Heintz, however, did *not* stand for the proposition that all lawyers who were considered a "debt collector" under the FDCPA were prohibited from engaging in postjudgment litigation activities to collect on a judgment. An attorney might meet the definition of a “debt collector” under the FDCPA, but then the court must go to step 2 and determine if the attorney has violated a provision of the FDCPA before imposing any sanctions or granting any damages allowed by the Act. See Jenkins v. Heintz, 25 F.3d 536(7th CCA 1994)("...in order for lawyers to be subject to liability under the Act, the litigation must entail some proscribed debt collection activity. Id. at 539). The plain language of the “cease communication” rule invoked by Committe was not intended to prohibit all litigation activity by an attorney who was attempting to collect on a debt because it contained an express exceptions for notifying the consumer of the debt collector's intent to invoke "specific remedies." 15 U.S.C. § 1692c(c)(1)(2).

On October 9, 1999, Committe served a motion for contempt, and notice of hearing for October 22, 1999, before Judge Roark for Committe's failure to appear at his deposition in August. TFB-Exhibit 15. The process server delivered the pleadings to Committe's address of 8870 Thunderbird Drive, Pensacola, where he lived with his

mother and father.[3] The affidavit of service indicates that the pleadings were left at that address with Committe's father.

Despite service on Committe, he failed to appear at the contempt hearing, and did not file any responsive pleadings to explain his absence to the court. On October 22, 1999, Judge Roark entered an Order Adjudicating Committe in contempt of court and incarcerating Committe for 60 days with 35 days for Committe to purge the contempt by appearing at his deposition on November 22, 1999. TFB Exhibit 16.

Committe failed to set his three motions for protective order from June 1998 through July 1999, and to obtain an order granting his motions before refusing to comply with the subpoena duces tecum, and the Notice of Deposition in Aide of Execution. See Stables v. Rivers, 559 So. 2d 440 (Fla. 1st DCA 1990).

When Committe filed his third motion for protective order, he knew that Mr. Guttmann intended to take his deposition. He had ample time to obtain a protective order or and order to quash. Instead, Committe made no attempt to appear at the deposition, object on the record, ask for a continuance, or to comply with the terms of the subpoena. Moreover, Committe never set the motion for protective order even after the deposition date. Committe's actions support the referee's finding of a violation of Rule 4-3.4(c).

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[3] This was the address listed on all of Committe's signed pleadings in county court.

Committe intentionally failed to comply with a legally proper discovery request by an opposing party in violation of Rule 4-3.4(d). Committe failed to appear pursuant to the rules of court and in violation of the subpoena duces tecum that was served on him not once, but three times. Committe's filing of three motions for protective order on nonmeritorious grounds, failing to set the motions for hearing and to obtain a protective order before the deposition leads to the reasonable inference that he had no intention of ever complying with any deposition notice or subpoena to appear but he intended to obstruct discovery at every point in the civil proceeding.

Committe's conduct throughout the county court case, his attempts to obstruct the judicial process in county court debt collection action against him, and as well as the filing of frivolous pleadings in federal court is an abuse of the legal process and is conduct prejudicial to the administration of justice.

Even more egregious than the multiplicity of frivolous pleadings, is the July 26, 1999, letter Committe sent to William E. Gardner, the Virginia attorney who had originally obtained the money judgment against Committe, claiming violations of the FDCPA and FCCPA and demanding money damages because Mr. Guttmann had talked to him about a settlement offer after he had told him to "cease communications." Committe informed Mr. Gardner that the FDCPA and FCCPA gave him an estimated claim of $25,000, but Committe would settle for half of that

amount, and urged Mr. Gardner to see that Mr. Guttmann's notice of taking deposition in aide of execution be withdrawn. Committe engaged in tactics that could be characterized as "litigation by extortion" by threatening to sue Mr. Gardner if he did not remove Mr. Guttmann as the attorney in his case. Committe's letter to Mr. Gardner is conduct contrary to the administration of justice. TFB Exhibit 19.

At the time Committe sent the letter to Mr. Gardner, Judge Roark had already ruled twice on Committe's motions holding that the FDCPA did *not* apply to Mr. Guttmann's litigation activities. Further, after Mr. Guttmann served Committe with a motion for contempt on October 9, 1999, Committe carried out his threat and named Mr. Gardner as a co-defendant in the same federal lawsuit against Mr. Guttmann on October 15, 1999. TFB Exhibit 20.

Committe filed a $3 million frivolous lawsuit against Mr. Guttmann and Mr. Gardner on October 15, 1999, claiming "actual damages" of $500,000 for "noneconomic" mental anguish, injury to dignity, emotional distress, injurious effects of filing bankruptcy, invasion of privacy, costs, attorney's fees, and for liquidated damages of $1,000 for two counts under the FDCPA and similar damages under the FCCPA. Committe also requested punitive damages of $1.5 million. TFB Exhibit 20. Committe could prove no "actual damages." Further, in his deposition in the federal lawsuit, he could present no basis for any reimbursement for "noneconomic" damages.

TFB Exhibit 34. He described the basis of his total claim as "general upsetedness" because Mr. Guttmann offered to settle his money judgment, and engaged in substitute service of process to serve his motion for contempt on Committe. TFB Exhibit 34 at p. 6-7, 14-19, 29-30, 33-37.

In Lewis, the court addressed similar circumstances regarding damages. See Lewis, supra at p. 404. Plaintiff did not prove either actual or "noneconomic damages" by submitting any medical evidence. Committe testified in his deposition that he did not see any medical doctor, and had no medical records to support his claims. TFB Exhibit 34 at p. 7. The Lewis court held that there was "no competent testimony linking his [Lewis']distress to those parts of ACB's efforts which he challenged as unlawful" and concluded that, since Lewis could not remember the exact details of any correspondence or contacts from ACB that could be linked to his "admitted upset", it was "not an adequate factual basis for an award of mental damages." Lewis at p. 404. Committe's deposition clearly shows that his basis for any award of economic or noneconomic damages was extremely tenuous at best. TFBExhibit 34.

One month after Committe filed his federal lawsuit, he sent a letter to Mr. Guttmann's attorney, Glenn Arnold, offering to settle the lawsuit for $4500. TFB-Exhibit 21. On his bankruptcy petition, Committe listed the market value of his federal

lawsuit at $1,000 and wrote "speculation." TFBExhibit 30. These subsequent actions give credence to the inference that Committe abused the legal process, and filed a frivolous federal lawsuit solely to harass Mr. Guttmann.

Issue E

There is competent substantial evidence in the record to support all of the referee's findings of fact and conclusions of law.

The Florida Bar's first legal argument addressed the issue of competent substantial evidence to support all of the referee's findings of fact. Committe's arguments, however, will be addressed briefly according to the referenced paragraph numbers in the referee's report.

Paragraph 20 states what is claimed in Committe's federal complaint. See TFB Exhibit 20. A reasonable inference can be drawn from Committe's Bankruptcy petition and the transcript of the creditors' meeting, the November 16, 1999, letter to Guttmann's attorney, and Committe's own deposition in the federal lawsuit that the $3 million claim was highly speculative and nonmeritorious. See TFB Exhibits 21, 30, 31, and 34.

Paragraphs 23 and 24 are supported by TFB Exhibits 21 and 30.

As to paragraph 24, Committe filed his multimillion dollar lawsuit on October 15, 1999. See TFB Exhibit 20. As TFB Exhibit 21 demonstrates, a reasonable inference could be drawn that the lawsuit was primarily a ruse to get money out of

Guttmann because within weeks of filing the lawsuit, Committee demanded $4500, allocating only $500 to damages and $4,000 to his attorney fee. Also, Committe had filed a bankruptcy petition on November 1, 1999, and therefore had no authority to collect any assets from any pending lawsuits that might bring damages, and assets to the bankruptcy trustee. This allocation appears to be an attempt to allocate only $500 into bankruptcy assets and keep the rest for himself as fees. After he filed the bankruptcy petition, the right to sue, and any damages, belonged to the bankruptcy trustee, not to Committe.

Paragraph 42 does state that the reason the July 26, 1999 letter was prejudicial to the administration of justice (Rule 4-8.4(d)), i.e., because "Committe threatened to sue Mr. Gardner if he didn't pay him, and then when Mr. Gardner ignored his letter, Committe filed suit against him in November." See TFB Exhibits19 and 20.

Amazingly, Committe now contends that"The FDCPA anticipates such conduct (offering a settlement instead of, or in substitute for, a lawsuit) and condones it as long as the debt collector intends to pursue a court claim at the time he threatens such. 15 U.S.C. §1692e(5)....It is not prejudicial to attempt to settle a claim that is valid on its face in light of such unambiguous federal FDCPA language." He contends that an offer of settlement is contemplated by the FDCPA even *before* a claim is reduced to judgment. But he argued just the opposite in his county and federal lawsuits, when

Guttmann tried to pursue *a court judgment* against him, even going to the extreme of filing frivolous motions for protective orders and two federal lawsuits claiming that Guttmann could not mention any offer to settle because it was prohibited by the FDCPA.

CROSS PETITION ARGUMENT

In its Cross Petition for Review, The Florida Bar objects to the recommendation of a private reprimand in the referee's report, and would contend that a 91-day suspension would be more appropriate under the facts and circumstances of this case. The referee also made no mention of taxable costs in his report. The Florida Bar contends that it is entitled to taxable costs based on its affidavit of costs and Rule 3-7.6(q) because it has prevailed on the case.

II. A PRIVATE REPRIMAND IS NOT A PERMISSIBLE DISCIPLINE

The referee recommended a private reprimand as an appropriate disciplinary sanction for violation of Rules 4-3.1, 4-3.4(c), 4-3.4(d), 4-8.4(a), and 4-8.4(d). The Florida Bar challenges the recommended discipline on two grounds. First, a private reprimand is not a permissible discipline under the applicable rules. Second, Commite should receive a higher discipline based on the findings of fact, the nature

of the rule violations, the aggravating factors found by the referee, and the Florida Standards for Imposing Lawyer Sanctions.

Permissible disciplinary measures are cited in Rule 3-5.1(a) through (j). A private reprimand is not listed in this Rule. In 1990, the Court changed Rule 3-5.1(a) and substituted the word "admonishment" for the word "private reprimand." See The Florida Bar Re Amendments to The Rules Regulating The Florida Bar, 558 So. 2d 1008, 1009-1010, 1112(Fla. 1990). Further, the referee did not indicate whether the private reprimand should be administered before the referee or the board of governors.

Based on the referee's findings of fact, the rule violations, and the aggravating factors are listed in the referee's report, The Florida Bar submits that Standard 6.22 of the Florida Standards for Imposing Lawyer Sanctions applies in this case. Committe's actions to continually thwart the discovery process in the Escambia County Court by failing to comply with three notices of deposition and subpoena duces tecum, as well as filing frivolous pleadings in federal court is a clear abuse of the legal process by an attorney in The Florida Bar, and is conduct prejudicial to the administration of justice. In addition, Committe's July 26, 1999, letter to William Gardner demanding money damages based on the FDCPA and FCCPA and threatening to sue Mr. Gardner if he did not remove Mr. Guttmann as the attorney in the county debt collection case could is also an abuse of process.

III. THE COURT SHOULD IMPOSE A 91-DAY SUSPENSION AS AN APPROPRIATE DISCIPLINE

Generally, the Court will not second-guess a referee's recommended discipline as long as there is a reasonable basis in the case law and it comports with the Florida Standards for Imposing Lawyer Sanctions. The Court's scope of review as to the referee's recommended discipline is broader than that afforded to the referee's findings of fact because it is the final arbiter of the appropriate disciplinary sanction. The Florida Bar v. Miller, 863 so. 2d 231, 234 (Fla. 2003). The Florida Bar would submit that the Court should impose a recommended discipline of 91-days based on the case law, the record, the aggravating and mitigating factors found by the referee, and the Florida Standards for Imposing Lawyer Sanctions.

In a similar case, The Florida Bar v. Kelly, 813 So. 2d 85 (Fla. 2002), the attorney was charged with multiple offenses including filing a frivolous and harassing lawsuit against his former client. The Florida Bar contended that the referee's recommendation of a sixty-day suspension was insufficient, and that a 91-day rehabilitative suspension was appropriate in light of other aggravating factors in the Kelly case. The Court differentiated the facts of The Florida Bar v. Richardson, 591 So. 2d 908(Fla.1992), where the referee imposed a 91-day suspension, noting that a sixty-day suspension for filing a frivolous and malicious claim was appropriate

because the attorney had been previously suspended for 91-days on the same set of facts. Contrary to Richardson, in The Florida Bar v. Thomas, 582 So. 2d 1177(Fla. 1991), the court increased the discipline from a private reprimand to a public reprimand because the attorney filed a frivolous lawsuit in retaliation for opposing counsel representing clients who opposed the attorney in another legal case.

As in Kelly, Committe has not been previously disciplined and the facts of this case go beyond mere mistake in judgment for filing a frivolous and nonmeritorious lawsuit. The federal court found that the federal lawsuit was filed in "bad faith" imposing Rule 11 sanctions, and that the sole purpose of the federal lawsuit was to "harass" Guttmann. Further, the July 26, 2002, letter to Mr. Gardner was particularly egregious because Committe threatened action under the FDCPA if Mr. Gardner did not meet his settlement claim of $12,500. Committe sent the letter after Judge Roark had ruled two times that the FDCPA did not apply to Guttmann's attempts to obtain a deposition in aide of execution in the county court debt collection case. In addition to Committe's attempts to obstruct the discovery process in county court debt collection case, he then carried out his threat by filing two frivolous lawsuits based on the FDCPA against Guttmann and Gardner claiming $3 million in damages.

IV. THE FLORIDA BAR WAS SUCCESSFUL IN THE DISCIPLINARY CASE AND SHOULD BE ENTITLED TO TAXABLE COSTS UNDER THE RULE

Rule 3-7.6(m)(1)(E) requires the referee to include in the referee's final report a statement of costs incurred and recommendations as to the manner in which such costs should be taxed. In the referee's final report, however, there was no mention of taxable costs. After the parties submitted proposed findings of fact and conclusions of law, the referee issued his final report.

Under Rule 3-7.6(q)(3), when The Florida Bar is successful in pursuing its disciplinary case, then the referee has discretion to award taxable costs. The referee's report indicates that he found in favor of The Florida Bar on most of the original allegations in the Complaint. The costs are not unnecessary, excessive. or improperly authenticated. See Rule 3-7.6(q)(3). The Florida Bar submitted an Affidavit of Costs to the Court in the amount of $4,252.55 delineating the taxable costs.

This Court has held that the costs of the disciplinary proceeding should be borne by the member who has violated the rules. See The Florida Bar v. Lechtner, 666 So. 2d 892, 894(Fla. 1996). In Lechtner, the Court held that it was "an abuse of discretion for the referee not to assess costs against a guilty party based upon the Committe's ability to pay." Id. at 895. "Final discretionary authority to assess costs in attorney disciplinary proceedings rests with this Court." See The Florida Bar re Walter Benton Dunagan, 775 So. 2d 959 (Fla. 2000). Since The Florida Bar was

successful in the disciplinary proceeding, its taxable costs should be recoverable under the Rule, and the Court should award taxable costs to The Florida Bar.

CONCLUSION

For the foregoing reasons, The Florida Bar would respectfully request that the Court approve the report of referee as to the findings of fact and determination of guilt in violation of specific ethical Rules, but reject the disciplinary recommendation of the referee as to a private reprimand, impose a 91-day suspension on Committe, and grant taxable costs to The Florida Bar.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Bar's Answer Brief and Cross Petition for Review, regarding Supreme Court Case No. SC03-1203, TFB File No. 2002-01,100(1A) has been forwarded by U.S. Mail, to Respondent, Bruce Edward Committe, at 17 South Palafox Place, Suite 306, Pensacola, Florida, 32502, this_____ day of _____2003.

_____
OLIVIA PAIVA KLEIN
BAR COUNSEL

CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210(a)(2)

The undersigned counsel hereby certifies that The Florida Bar's Answer Brief and Cross Petition for Review dated August 27, 2004, is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

_____
OLIVIA PAIVA KLEIN
BAR COUNSEL