IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	Case No. SC03-151 [TFB Case No. 2002-30,906(07B)]
Complainant,	Case No. SC03-1006 [TFB Case Nos. 2002-31,564(07B);
v.	2002-31,944(07B); 2003-30,244(07B)]
HANS CHARLES FEIGE,	Case No. SC03-1558 [TFB Case No. 2003-30,541(07B)]
Respondent.	Case No. SC04-449
_____/	[TFB Case No. 2003-30,886(07B)]

THE FLORIDA BAR'S AMENDED REPLY BRIEF AND CROSS ANSWER BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 East Jefferson Street,
Tallahassee, Florida 32399-2300
(850)561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
651 East Jefferson Street,
Tallahassee, Florida 32399-2300
(850)561-5600
ATTORNEY NO. 253847

AND

FRANCES R. BROWN-LEWIS
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida, 32804-6314
(407)425-5424
ATTORNEY NO. 503452

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on February 4, 5, 6, 19, and 24, 2004, in Case Nos. SC03-151, SC03-1006, and SC03-1558, shall be referred to as "T" followed by the volume number and the cited page number (T Vol. ____ p. ___). The transcript of the final hearing in Case No. SC04-449 held on July 22, 2004, and August 3, 2004, shall be referred to as “T Willacy” followed by the volume number and the cited page number (T Willacy Vol. ____ p. ____).

The Reports of Referee dated September 23, 2004, will be referred to as "ROR" followed by the referenced page number(s) of the Appendix, attached to the bar’s Initial Brief (ROR p. A____).

The bar's exhibits in Case Nos. SC03-151, SC03-1006, and SC03-1558 will be referred to as “B-Ex.,” followed by the exhibit number (B-Ex. __). The bar’s exhibits in Case No. SC04-449 shall be referred to as “B-Ex. Willacy” followed by the exhibit number (B-Ex. Willacy __).

Respondent's exhibits in Case Nos. SC03-151, SC03-1006, and SC03-1558 will be referred to as “R-Ex.,” followed by the exhibit number (R-Ex. __). The respondent’s exhibits in Case No. SC04-449 shall be referred to as “R-Ex. Willacy” followed by the exhibit number (R-Ex. Willacy __). Respondent’s

exhibit that he provided to the referee after the final hearing shall be referred to as "letter dated August 24, 2004" followed by the referenced page number of the Appendix.

SUMMARY OF THE ARGUMENT

The referee's legal conclusions were correct and he did not abuse his discretion in ruling on motions. The referee did not commit an error in admitting Delia. Iren's written grievance form that she signed under penalty of perjury. Such a sworn statement is analogous to an affidavit and thus allowed as evidence in bar cases. The Florida Bar v. Flowers, 672 So.2d 526, 529 (Fla. 1996). Furthermore, the referee properly weighed its probative value against respondent's testimony and the supporting testimony of other witnesses. Likewise, the referee's ruling to not allow the testimony of Dawn Nichol's assistant, Christy, was not erroneous in light of the fact that neither party listed her as an anticipated witness and respondent did not subpoena her appearance nor arrange for her to appear voluntarily.

In Charles. Shaffer's case, the referee did not draw any legal conclusion as to whether or not respondent was negligent or incompetent in not having the counterpetition verified (ROR p. A30). This was not a central issue in the bar's case and the referee merely made mention in his report of Dawn Nichols' testimony concerning her reasons for not answering respondent's counterpetition. Even if this finding was erroneous, it had no bearing on the issues of whether respondent diligently represented Mr. Shaffer and maintained adequate

communication with him. In Ms. Willacy's case, the referee's legal conclusion that Ms. Willacy had no viable cause of action in her dissolution of marriage case after her husband's death was correct. The referee considered respondent's case law that respondent argued supported his position that he could, at the court's discretion, substitute Mr. Willacy's estate for Mr. Willacy in the dissolution case. Other than his own testimony, respondent presented absolutely no evidence to support his position. Clearly, the referee found respondent's argument, case law and testimony unpersuasive.

Respondent failed to meet his burden in challenging the referee's findings of fact. Respondent failed to demonstrate that there was no evidence in the record to support the referee=s findings or that the record evidence clearly contradicted the conclusions. The Florida Bar v. Vining, 721 So. 2d 1164, 1167 (Fla. 1998). In fact, the referee's findings were clearly and definitively supported by the record.

With respect to the referee's recommendation as to discipline, this court will not second guess a referee=s recommended discipline as long as that discipline has a reasonable basis in existing case law. The Florida Bar v. Spear, 887 So. 2d 1242, 1246 (Fla. 2004). The case law and Florida Standards for Imposing Lawyer Sanctions clearly do not support a public reprimand. Rather a suspension of at least one year (or arguably a suspension of two years as the bar contends) in each case, to run concurrent, is warranted under the facts of this case. Additionally,

respondent's own testimony concerning his ongoing health problems and the havoc it wreaked with his ability to maintain his law practice during the time in question supported the referee's probationary recommendations.

ARGUMENT
POINT I
THE REFEREE EXERCISED APPROPRIATE DISCRETION IN RULING ON THE ADMISSIBILITY OF EVIDENCE

In bar disciplinary proceedings, a referee has the discretion to decide whether to grant or deny motions, The Florida Bar v. Roth, 693 So. 2d 969, 972 (Fla. 1997), and this court will not disturb a referee's rulings on motions absent a clear showing that the referee abused his or her discretion. The Florida Bar v. Lusskin, 661 So. 2d 1211, 1213 (Fla. 1995). The rules of evidence are more relaxed in bar disciplinary proceedings and hearsay is admissible. The Florida Bar v. Centurion, 801 So. 2d 858, 862 (Fla. 2000). Herein, the referee did not abuse his discretion in permitting the bar to submit documentary evidence of Delia Iren's grievance without Ms. Iren's live testimony. The bar provided respondent with all the documentary evidence prior to the final hearing. Also, respondent had an opportunity to attack the credibility of the evidence and to testify concerning it. The referee appropriately weighed the evidence and its probative value in light of the supporting testimony of Timothy Conner, Richard D'Amico, and Betty Ann Goodge.

Ms. Iren's written statement concerning her allegations was presented through her grievance form that she executed under penalty of perjury on November 29, 2001 (R-Ex. 119). Respondent had no right to confront her face to

face. The Florida Bar v. Vannier, 498 So. 2d 896, 898 (Fla. 1986). Had respondent believed Ms. Iren's testimony was vitally important to the presentation of his case, he should have subpoenaed Ms. Iren as his witness rather than relying on the bar to produce her at the final hearing as its witness. A similar situation developed in Centurion, 801 So. 2d 858. The attorney argued the referee abused his discretion in considering evidence he believed should not have been admissible due to the absence of two witnesses. The attorney argued that the witnesses' absence precluded him from being able to cross-examine them. This court disagreed. Because bar proceedings are quasi-judicial administrative proceedings, the technical rules of evidence did not apply, hearsay was admissible, and Mr. Centurion could have subpoenaed the witnesses to ensure their appearance if that was necessary to not prejudice his case. See also Flowers, 672 So. 2d at 529, where the testimony of the complaining witness was presented by affidavit.

Likewise, in the case concerning the grievance of Charles Shaffer, respondent apparently believed that Dawn Nichol's assistant, Christy, should have been required to testify despite the fact that respondent had not subpoenaed her appearance or arranged for her to appear voluntarily (T Vol. I p. 142). If respondent believed her testimony was important to corroborate his argument that she had told him Ms. Nichols would file an answer to respondent's counterpetition for dissolution of marriage and file the notice for trial because respondent was still

recovering from his heart attack, respondent could have subpoenaed her appearance. Therefore, the referee did not abuse his discretion in not permitting respondent to call Christy as a witness at the final hearing (T Vol. I p. 142).

POINT II
THE REFEREE'S LEGAL CONCLUSIONS WERE CORRECT AND, IF THERE WERE ANY ERRORS, THEY WERE NOT MATERIAL

While a referee's findings of fact are presumed to be correct and will not be revisited absent a showing they were erroneous, the referee's legal conclusions are not afforded the same presumption of correctness. The Florida Bar v. Trazenfeld, 833 So. 2d 734, 736 (Fla. 2002). Respondent challenges two of the referee's legal conclusions as being erroneous: the finding in Charles Shaffer's case that Dawn Nichols did not file an answer to respondent's counterpetition because it was not verified as required by the rules of procedure governing family law cases (ROR p. A30); and the finding in Annette Willacy's case that respondent's false representations to Ms. Willacy and Walter Denis Shelley that he could pursue a valid cause of action in the dissolution of marriage case despite the death of Mr. Willacy could have prevented any recovery by Ms. Willacy (ROR p. A60).

The bar submits that the referee based his finding in Mr. Shaffer's case on Ms. Nichols' testimony. Respondent did not submit case law nor did he cite to any rules of procedure or statutes to refute her testimony, which was based on her eleven years of practice as a family law practitioner, that, in her opinion, counterpetitions were required to be verified (T Vol. I p. 123).

Ms. Nichols, who represented the opposing party, testified that she did not

file an answer to respondent's counterpetition for dissolution of marriage because his counterpetition did not seek any affirmative relief (T Vol. I p. 137). She went on to explain that, in her opinion, respondent's counterpetition was technically deficient because it was "not verified under the family law rules of procedure. . ." (T Vol. I p. 138). Respondent would have this court believe this was the central issue of the bar's case. In fact, the bar did not allege in its Complaint that respondent failed to have the counterpetition verified. In his report, the referee merely restated Ms. Nichols' testimony regarding her reason for not filing an answer to respondent's counterpetition. The referee did not draw any legal conclusion as to whether or not respondent was negligent or incompetent in not having the counterpetition verified (ROR p. A30). He did note that there was no evidence or testimony that respondent filed a motion to compel an answer or sought a default (ROR p. A30). Finally, regardless of whether Ms. Nichols was correct in her assessment that the counterpetition needed to be verified, such was not a material issue in this matter. What was important was whether respondent followed his client's directives and whether he diligently handled the case.

With respect to Ms. Willacy's case, respondent argues in his brief that "two attorneys decided that Mrs. Willacy had a 'long shot' argument that survived her husband's death." He also refers to Mr. Shelley as the "lead counsel" in requesting that respondent file the motion seeking substitution of the estate for Mr. Willacy in

the divorce case. Respondent does not cite to the record for support of his position that two attorneys decided that Ms. Willacy had a "long shot" argument. Presumably, the "two lawyers" to whom respondent refers are himself and Mr. Shelley. This is a gross mischaracterization of Mr. Shelley's testimony. Mr. Shelley testified that he did not practice in the area of family law (B-Ex. Willacy 12 p. 6) and therefore relied on respondent's expertise with respect to the best approach to take in obtaining marital assets for Ms. Willacy (B-Ex. Willacy 12 pp. 12-13, 34-35). In fact, Mr. Shelley testified that he was "skeptical of the ability to pursue that claim" (B-Ex. Willacy 12 p. 12) but that if respondent believed it could succeed, it was worth pursuing (B-Ex. Willacy 12 p. 13). Mr. Shelley never testified that he "decided Ms. Willacy had a 'long shot' argument that survived her husband's death" in the dissolution of marriage case.

The referee made his finding in Ms. Willacy's matter after reviewing the case law respondent cited to support his argument that Ms. Willacy had a continuing cause of action in the dissolution action and that the matter was not required to be abated by the death of Mr. Willacy. Clearly the referee found the case law to be unpersuasive. None of the cases respondent cited in his brief are on point with the facts in Ms. Willacy's matter. None of the cited cases concerned a situation where a surviving spouse was able to substitute the deceased spouse's estate as a party to the dissolution of marriage action filed shortly before the death

of the deceased spouse. The Willacys' dissolution case was not ripe for judgment at the time of Mr. Willacy's death and was unlike the situations presented in Becker v. King, 307 So. 2d 855 (Fla. 4th DCA 1975), Emerson v. Emerson, 593 So. 2d 1160 (Fla. 2d DCA 1992), and Gaines v. Sayne, 727 So. 2d 351 (Fla. 2d DCA 1999). The court in Gaines found that the wife's death did not abate the dissolution of marriage proceedings only because she died after the marriage was dissolved and the case had been resolved due to the court entering a final judgment that the marriage was irretrievably broken. In the case, the parties were seeking a rehearing on certain financial issues at the time of Ms. Gaines' death. In Rosenhouse v. Ever, 150 So. 2d 732 (Fla. 3d DCA 1963), the appellate court upheld the lower court's ruling that the wife's death abated the dissolution of marriage proceedings. MacLeod v. Hoff, 654 So. 2d 1250 (Fla. 2d DCA 1995), also does not support respondent's position. The court found that the trial court could retain jurisdiction to determine property rights after a party's death only if it had reserved jurisdiction to do so in the final judgment of dissolution of marriage. The case of Copeland v. Copeland, 65 So. 2d 853 (Fla. 1953), provided that the court was able to retain jurisdiction only with respect to custody issues after the husband's death. The remainder of the case concerned a related cause of action the minor child filed through his next of friend seeking to define the child's interests in certain real properties. Taylor v. Wells, 265 So. 2d 402 (Fla. 1st DCA 1972), is

also distinguishable from the Willacy case. In Taylor, the husband died after the final judgment of dissolution of marriage had been entered. The trial court was authorized to set aside its final order only because the wife was able to demonstrate that her motion to set aside the default was based on good grounds. All of the aforementioned cases are distinguishable from Ms. Willacy's case which, at the time of Mr. Willacy's death, had not proceeded beyond the initial stages. Therefore, the referee's legal conclusion that Ms. Willacy did not have a valid cause of action under respondent's theory was correct.

POINT III
THE REFEREE'S FINDINGS OF FACT WERE SUPPORTED BY THE EVIDENCE

Respondent=s burden on review is to demonstrate that there is no evidence in the record to support the referee=s findings or that the record evidence clearly contradicts the conclusions. Vining, 721 So. 2d at 1167. Respondent cannot satisfy his burden of showing that the referee=s findings are clearly erroneous Aby simply pointing to the contradictory evidence where there is also competent, substantial evidence in the record that supports the referee=s findings.@ Vining, 761 So. 2d at 1048. The standard of proof in a bar disciplinary proceeding is clear and convincing evidence. The Florida Bar v. Niles, 644 So. 2d 504, 506 (Fla. 1994), citing The Florida Bar v. Rayman, 238 So. 2d 594 (Fla. 1970). The bar has met its burden of proof by clear and convincing evidence while the respondent has failed to meet his burden of establishing that the record is wholly lacking in evidentiary support for the referee=s findings. This court has consistently held that where a referee=s findings are supported by competent substantial evidence, it is precluded from reweighing the evidence and substituting its judgment for that of the referee. Vining 721 So. 2d at 1167, quoting The Florida Bar v. MacMillan, 600 So. 2d 457, 459 (Fla. 1992). The referee herein was in the best position to assess credibility and to determine guilt, and his findings and recommendations are clearly supported by the record. The referee supported his findings of fact with citations to the

record (except in Ms. Willacy's case because the transcript was not available). In his brief, other than alleging that most of the referee's controlling findings of fact were not supported by the evidence, respondent fails to delineate which findings he believes are unsupported.

In his statement of the facts in his brief, respondent asserted as a fact, which was not found by the referee, that Delia Iren "had a history, for whatever reason, of not remembering previous conversations." Given respondent's clear belief that Ms. Iren seemed to be experiencing difficulty recalling conversations with him, the bar submits this is all the more reason for respondent to have put his communications with her in writing. Respondent did not do this, a fact clearly supported by the evidence (ROR pp. A4-A5, A10, B-Ex. 82, R-Ex. 32, B-Ex. 84, R-Ex. 33, B-Ex. 86, R-Ex. 34, B-Ex. 87, R-Ex. 35, B-Ex. 88, R-Ex. 36, B-Ex. 89, R-Ex. 38, B-Ex. 90, R-Ex. 37, B-Ex. 91, R-Ex. 40, B-Ex. 92, B-Ex. 93, B-Ex. 94, B-Ex. 95, R-Ex. 45, B-Ex. 96, B-Ex. 97, R-Ex. 42, B-Ex. 98, B-Ex. 99, B-Ex. 101, B-Ex. 102, B-Ex. 103, B-Ex. 104, B-Ex. 105, B-Ex. 119, R-Ex. 38,T Vol. III pp. 510-511, T Vol. IV p. 633, T Vol. V pp. 723-724, 733, 736).

In the statement of the facts concerning Mr. Hall's case, respondent mischaracterized Mr. Hall's reason for filing the bar grievance. The referee did not find as a fact that Mr. Hall filed the grievance because respondent would not file a lawsuit on his behalf. Mr. Hall testified that he filed the grievance only after being

unable to contact respondent for a protracted period of time (T Vol. I p. 187). Mr. Hall further testified that after he filed the grievance, he spoke to respondent and advised respondent that if respondent wanted to complete Mr. Hall's case, he would give respondent thirty days to do so (T Vol. I pp. 187-188). Mr. Hall never testified that he told respondent he would "drop the complaint" if respondent would file an "unwarranted lawsuit" (Respondent's Initial Brief at page 14). Obviously, this was respondent's characterization of Mr. Hall's motives which, even if true, do not change the referee's findings that respondent's conduct in the Hall case was unethical.

In the statement of the facts regarding Ms. Clark's case, respondent argued that service on any agent or employee is sufficient when a company does not follow the statutory requirements and conducts business in Florida. However, the referee found that respondent failed to verify in writing that the person to whom he spoke at Bekins Van Lines, LLC, located in Daytona Beach, Florida, was authorized to accept service of process on behalf of Bekins Van Lines Co. More importantly, the referee found respondent failed to sue the entity responsible for the damages Ms. Clark suffered while her property was stored in Illinois (ROR p. A26, T Vol. IV pp. 628, 633, T Vol. V pp. 796-797, R-Ex. 1, R-Ex. 5).

In his statement of the facts regarding Ms. Willacy's case, respondent stated that he obtained the time for the hearing on his motion to substitute Mr. Willacy's

estate in the dissolution of marriage case from the judicial assistant. The referee found respondent had not set his suggestion of death and motion for substitution of party for hearing based upon Ms. Willacy's testimony that she determined from the clerk's office that there was no record of any hearing being set in the case (ROR p. A59, T Willacy Vol. I pp. 55-56, 125). Respondent presented no evidence to rebut the testimony of Roger Wall and Ms. Willacy to this effect other than his own self-serving testimony (T Willacy Vol. II p. 208). Respondent did not produce a notice of hearing nor did he submit any testimony from the judicial assistant that he had in fact scheduled a hearing in October or December 2002, as he claimed (ROR p. A59). The referee was in the best position to determine the credibility of the witnesses and he chose to believe Ms. Willacy. The Florida Bar v. Batista, 846 So. 2d 479, 483 (Fla. 2003).

POINT IV
A PUBLIC REPRIMAND UNDER THE FACTS OF THIS CASE IS NOT SUPPORTED BY THE CASE LAW. THE OTHER MEASURES IMPOSED BY THE REFEREE WERE REASONABLE AND HAD A BASIS IN THE FACTS OF THE CASE.

In attorney disciplinary proceedings, this court will not second guess a referee=s recommended discipline as long as that discipline has a reasonable basis in existing case law. Spear, 887 So. 2d at 1246 (Fla. 2004). The bar submits that based on the available case law and the Florida Standards for Imposing Lawyer Sanctions, a reprimand is unsupportable under the facts of this case. At a minimum, a one year period of suspension in each case to run concurrent is the appropriate level of discipline. The referee herein recommended this discipline after considering the evidence, relevant case law, Florida Standards for Imposing Lawyer Sanctions, and aggravating factors.

In The Florida Bar v. Boland, 702 So. 2d 229 (Fla. 1997), an attorney was suspended for two years for engaging in multiple offenses of incompetent representation in connection with challenging an out-of-state child custody order, for counseling a client to engage in fraudulent conduct and conversion. In aggravation the attorney had a prior disciplinary history, exhibited a selfish or dishonest motive, was indifferent to making restitution to the client, refused in the past to obtain treatment for his admitted alcoholism, and the client was particularly vulnerable. In The Florida Bar v. Elster, 770 So. 2d 1184 (Fla. 2000), an attorney

was suspended for three years for failing to accomplish any meaningful work on behalf of his clients, for making misrepresentations to clients, and for issuing a misleading business card. The attorney's misconduct occurred in four separate cases and the clients, who were foreign nationals, were very vulnerable. Herein, several of respondent's clients could arguably be considered vulnerable, namely Ms. Iren, Ms. Clark and Ms. Willacy and, like attorney Boland, respondent was found guilty of engaging in multiple offenses, had a prior disciplinary record and refused to obtain continued treatment for various medical illnesses (T Vol. V p. 820).

In The Florida Bar v. Williams, 753 So. 2d 1258 (Fla. 2000), an attorney was suspended for one year for neglecting legal matters, failing to maintain adequate communication with clients, failing to follow trust accounting procedures, issuing a worthless check and failing to respond to the bar. This court found the suspension was warranted due to the cumulative nature of the misconduct. Likewise, cumulative misconduct as an aggravating factor is present in respondent's case because he has engaged in multiple acts of similar misconduct.

In The Florida Bar v. Jordan, 705 So. 2d 1387 (Fla. 1998), in light of the attorney=s prior disciplinary convictions, he received a one year suspension for allowing a client=s case to be dismissed for lack of prosecution, for failing to

respond to his client=s attempts to communicate with him, and for failing to inform the client of the case dismissal. This court specifically found the attorney=s prior disciplinary record relevant in determining the appropriate discipline to be imposed. Likewise, respondent has a significant disciplinary history. Unlike Mr. Jordan, respondent neglected six client matters and failed to maintain adequate communication in each instance. Ms. Iren and Ms. Burgess were so desperate for information that they found it necessary to turn to opposing counsel for information because of respondent's complete abandonment of them (T Vol. II pp. 324, 406-407).

In The Florida Bar v. Knowles, 534 So. 2d 1157 (Fla. 1988), an attorney was suspended for three years for misappropriating client funds, for neglecting his work, and for being unavailable to clients. This court found that the cumulative nature of the attorney's misconduct involving neglect and failure to maintain communication with clients warranted the imposition of a severe penalty. Similarly, respondent should be severely penalized for his neglect and for his lack of communication herein.

In The Florida Bar v. Peterman, 306 So. 2d 484 (Fla. 1975), an attorney was suspended for three years for withdrawing from employment without promptly refunding the unearned portion of a fee as ordered by a court, for refusing to keep clients informed as to the progress of their cases, for refusing to answer clients'

telephone calls, and for misleading clients. Likewise, respondent engaged in a course of conduct whereby he failed to maintain adequate communication with his clients. The bar submits the evidence was clear and convincing that respondent failed to communicate effectively with Ms. Iren despite her repeated attempts to communicate with him (T Vol. V p. 720, B-Ex. 82, B-Ex. 83, R-Ex. 32, B-Ex. 84, R-Ex. 33, B-Ex. 86, R-Ex. 34, B-Ex. 87, R-Ex. 35, B-Ex. 88, R-Ex. 36, B-Ex. 89, R-Ex. 38, B-Ex. 90, R-Ex. 37, B-Ex. 91, R-Ex. 40, B-Ex. 92, B-Ex. 93, B-Ex. 94, B-Ex. 95, R-Ex. 45, B-Ex. 96, B-Ex. 97, R-Ex. 42, B-Ex. 98, B-Ex. 99, B-Ex. 101, B-Ex. 102, B-Ex. 103, B-Ex. 104, B-Ex. 105). Respondent even admitted that his communication with Ms. Iren while she was living in Great Britain was Asplotchy at best@ (T Vol. I p. 25). Ms. Burgess also had communication problems with respondent (T Vol. II pp. 322-323). At a point, her communication with respondent completely collapsed and she was unable to contact him despite numerous attempts to do so by telephone and several trips to his office in Ormond Beach (T Vol. II pp. 320-321). In Ms. Clark's case, respondent ceased communicating with her after October, 2001, when she executed the affidavit for damages (T Vol. I pp. 45, 50, 53, 87). In Mr. Shaffer's case, the communication problems existed for about one year prior to respondent=s heart attack (T Vol. II p. 393). In fact, over a two and one-half year period, respondent communicated only twice with him (T Vol. II p. 395). Mr. Hall=s testimony concerning his difficulties

in contacting respondent mirrored those of the other complainants (T Vol. I p. 179).

The Florida Standards for Imposing Lawyer Sanctions also support a suspension in this case.

Standard 4.12 calls for a suspension when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. Standard 4.42(a) calls for a suspension when: a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. Standard 4.42(b) calls for a suspension when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Standard 4.52 calls for a suspension when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client. Finally, Standard 7.2 calls for a suspension 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 aggravation, respondent has a prior disciplinary history, Standard 9.22(a). Also, respondent exhibited a pattern of misconduct throughout these cases, Standard 9.22(c) ,and he has displayed a bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency by failing to respond to the bar's investigative inquiries in

these matters, Standard 9.22(e). Finally, respondent has substantial experience in the practice of law, Standard 9.22(i) [ROR p. A33, T Vol. V p. 662, T Willacy Vol. II p. 167).

The referee found no mitigation because respondent failed to list any, including his various illnesses, in his answer to the bar's Interrogatory concerning mitigation (ROR pp. A15, A38, A51, A64). The referee however did permit respondent to submit his argument as to mitigation (Letter of August 24, 2004 p. A68). The bar would submit that even had the referee considered respondent's various illnesses as mitigation, the appropriate discipline would still be at least a one year suspension. The Florida Bar v. Smith, 866 So. 2d 41 (Fla. 2004).

The bar further submits that the referee's rehabilitation and probationary recommendations are reasonable. The referee recommended that respondent undergo a physical examination as part of the reinstatement proceeding based upon respondent's own testimony concerning his ongoing health problems and their adverse impact on his current ability to maintain a full time law practice (T Vol. V pp. 820-821). Respondent presented no testimony or evidence from any treating physician that his health problems will not adversely affect his ability to continue practicing law and, in fact, testified that his doctor wanted him to come in for periodic examinations but that he has failed to do so (T Vol. V p. 820).

The purpose of reinstatement proceedings is to protect the public by

ensuring a lawyer is fit to resume the privilege of practicing law. Petition of Wolf, 257 So. 2d 547, 548 (Fla. 1972). An attorney's mental and/or physical condition is an appropriate factor to consider in determining reinstatement. The Florida Bar re Kay, 576 So. 2d 705 (Fla. 1991). The practice of law is a privilege, not a right, and protection of the public is of paramount concern. Wolf 257 So. 2d at 548. The bar submits the referee's recommendation of reinstatement conditioned on respondent undergoing a physical examination followed by a two year period of conditional probation will best meet the need of protecting the public without being unduly burdensome to respondent.

The referee also recommended respondent refund to certain clients the unearned fees. The bar submits the referee's recommendation was warranted given the fact that respondent failed to complete the legal matters for which he was hired, failed to provide accountings for the fees paid, and, in the case of Mr. Hall, resorted to self-help fee collection by selling the gold coins he was holding as collateral for the fee without Mr. Hall's knowledge or consent. Permitting respondent to keep the fees in these cases would result in his unjust enrichment at expense of the clients. Rule 3-5.1(i) of the Rules Regulating The Florida Bar provides that a referee may recommend restitution if "respondent has received a clearly excessive, illegal, or prohibited fee or that the respondent has converted trust funds or property." The clients here paid fees in good faith but did not

receive legal services from respondent that were commensurate with the amounts paid and thus restitution is permissible. The Florida Bar v. Carlon, 820 So. 2d 891 (Fla. 2002).

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's recommendation of a one year suspension, to run concurrent in each case, and instead impose a two year suspension, to run concurrent in each case, and a two year period of probation as recommended by the referee with reinstatement to be had only upon proof of rehabilitation and upon meeting the conditions recommended by the referee and payments of costs.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 East Jefferson Street,
Tallahassee, Florida 32399-2300
(850) 561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
651 East Jefferson Street,
Tallahassee, Florida 32399-2300
(850) 561-5600
ATTORNEY NO. 253847

AND

FRANCES R. BROWN-LEWIS
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida, 32804-6314
(407) 425-5424

ATTORNEY NO. 503452

By:

_____
Frances R. Brown-Lewis
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Reply Brief and Cross Answer Brief have been sent by regular U.S. Mail to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by electronic filing to the Clerk of the Court; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent, Hans Charles Feige, 2 Office Park Dr Ste D, Palm Coast, FL 32137-3850; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this _____ day of February, 2005.

Respectfully submitted,

_____
FRANCES R. BROWN-LEWIS
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE

Undersigned counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font.

_____

FRANCES R. BROWN-LEWIS
Bar Counsel
ATTORNEY NO. 503452

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