IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR Case No.: SC 03-151

Complainant, **SC 03-1006**

v. SC 03-1558

SC 04-449

HANS CHARLES FEIGE

Respondent.

_____/

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE FACTS

IREN

Delia Iren failed and refused to appear in these proceedings, even though she was subpoenaed. The Bar's case rests on her allegations contained in her complaint, and her hand-written comments on the documents she provided. The Respondent was denied his right to cross-examine Delia Iren, not only as to her comments, but also as to the double hearsay contained in her complaint.

Neglect: Everyone concedes that Delia Iren was a "difficult" client, who was very angry with her Husband because of a domestic violence incident. (See: D'Amico T 368-370).

The undisputed facts were that Delia Iren signed a retainer agreement on July 31, 2000 (Bar # 80 Respd. # 17)(Feige T 492-493; 684-685), which was not funded until January of 2001 (Feige T 491). The agreement contemplated that no documents or pleadings would be filed would be filed until 2001, after her husband filed the dissolution action. Any other activity would only be on a limited basis.

It is un-contradicted that, while in England, an offer to settle for $35,000.00 was made on behalf of the Wife and rejected by the Husband. A counter-offer of $10,000.00 was made by the Husband, and rejected by the Wife. A new offer of $40,000.00 was made by on behalf of the Wife and rejected. (Conner T 423-425; 462).

It is further un-contradicted, even though she had not yet retained the Respondent, that the Wife had several conversations with the Respondent from her home in England (Feige T 516; 720; 721; 724), that the Wife received further information through her girlfriend (at the Wife's request; See Respd. #31; Bar #87).

Bar Exhibit # 98 (part of Iren's incomplete phone records) show a two and ½ minute call and a call of three minutes and eleven seconds on August 30, 2000; and a two minute and 22 second call on September 1, 2000. It is clear that Iren was satisfied with the representation as evidenced by her letter of thanks, evidencing yet another telephone communication. (Respd. # 31; Bar #87; T 718).

"Good to finally talk to you. It did set my mind at rest."

In 2001, Delia Iren wanted to go to Court. However the Husband filed his petition first, making the Wife the Respondent/Counter-petitioner.

There was a full discussion of the case with Ms. Iren at a conference in January of 2001, with follow-up discussions later that month on the phone. (See Bar Exh. 91). Ms. Iren then left for England to close on her home there and came back to Florida later than expected. (See Bar Exhibit 92).

After the filing of the matter, the Respondent obtained full and in depth discovery from the Husband. (Conner T 471; Feige T 714-715).

All pleadings were properly served and filed. The matter was noticed for final hearing in a prompt fashion. All that was left to do was go to mediation, pursuant to the Court's pretrial requirements before December of 2001. Respondent was discharged before that could happen.

The letters and testimony demonstrate that there was an attempt to schedule the mediation at various dates. (Bar Exh. #79). The November date was set and cancelled by the mediator. (Goodge T 404; 409). Another date was

abandoned due to conflicts. Reasonable attempts were made by both sides to get this matter to mediation.

Note the following phone calls: on Saturday morning (April 7, 2001) and the two back to back phone calls in the evening to my home (April 9) from Ms. Iren. (Bar Exh. # 93), the five minute discussion on April 17, 2001, the two minute discussion and the five-minute discussion on May 14, 2001, and the three-minute and two minute discussions at my home on May 15, 2001. It was typical to talk to her and receive a follow up phone call later asking for the same information. Also the two-minute phone call to my home on May 17, 2001. (Bar Exh. 95(b)). Iren's June telephone billing statement is missing, but the July statement shows another call on June 21, 2001 for two minutes. Note the reference to a phone conversation in Ms. Iren letter of May 8, 2001 not covered by the records furnished by her. (Bar Exh. #94). The letter of July 28, 2001 with an attached list of questions (Bar Exh. 96), which was discussed at length. The letter of August 14, 2001, which confirms that another conversation had taken place. (Bar Exh. 99). The call on August 30, 2001 of just over three minutes, and the call of September 5, 2001 of nine minutes. (Bar Exh. # 98). The phone call on September 6, 2001 of two minutes. (Bar Exh. #102). The phone call of October 28, 2001. (Bar

Exh. #104). The phone call of November 5, 2001of three minutes. (Bar Exh. # 105). The phone call of November 7, 2001 of three minutes. (Bar Exh. # 105). The phone call of November 8, 2001 of two minutes (Bar Exh. # 105). And also the other phone calls on Respondent's time sheet (sixteen calls). (Bar Exh. # 85).

Nineteen phone calls and an office conference (May 17, 2001) from April to the start of November (seven months) evidenced just from the Bar's exhibits hardly demonstrates a lack of communication. This did not include the numerous phone calls to Respondent's home not covered by the time sheets and the missing phone records, which were testified to by Marilyn Feige. (Marilyn Feige T 162-169).

When Delia Iren requested that pension records be subpoenaed from the plan in California, she was told that this was unnecessary work, since all of the records had been produced. (Conner T 471-472). She was furnished a copy of all of these records (see her reference to the earlier trip in her discussion notes of July 28, 2001 Bar Exh. 96). Her new counsel either obtained the same records from opposing counsel through discovery or from the detailed

file furnished to him from the client. (D'Amico T 376). He never had the need to subpoena any of these records. (D'Amico T 378-379).

Delia Iren was furnished with a blank family law affidavit, request for production, and interrogatories on two occasions. (Bar Exh. #90 as to the first time; Conference of May 17, 2001 as to the second time). She refused to furnish any of the information for almost six months resulting in Motions to Compel Discovery, copies of which were furnished to her. Even then Ms. Iren only furnished incomplete information. Respondent refused to submit either incomplete or fraudulent information just to avoid the further Motions to Compel. (Feige T 28). Ms. Iren finally furnished the information through her new counsel, who seemed to have more control over her actions. Note that none of this information was even relevant to the issues as then framed in the divorce action.

Inadequate Communication: The record demonstrates that the Respondent had dozens of phone calls (Marilyn Feige T 162-169; Bar #83-86; (Feige T 516; 522; 528, 716, 720; 721; and six or more conferences (Feige T 522; 716) [See Time Sheet Respd. # 46].

Failure to Provide Accounting: The retainer of $1,200.00 was more than earned in this matter, even if only by the volume of phone calls made and returned.

Deceit and Misrepresentation: Delia Iren had a history, for whatever reason, of not remembering previous conversations. A last minute message was calculated to avoid an unnecessary trip by Delia Iren from Tampa to Daytona Beach. The September mediation date was discussed and was not agreed upon between counsel. Ms. Iren was informed of these conversations.

Failure to Respond to Bar Complaint: Respondent responded in writing on August 8, 2002, admittedly late. The testimony as to why speaks for itself. Martha Fedele testified that the Respondent was having medical problems, which finally resulted in a major heart attack and prolonged recuperation period. (Fedele T 747-752) Respondent was out ill for most of February of 2002. Respondent was sick in March with muscle pains and flu symptoms. The illnesses and heart attack were not predicted occurrences.

BURGESS

Incompetent Representation; Failure to Abide by Client's Decisions; Neglect: Ms. Burgess wanted her Husband to agree that he was not the father, give up any rights he may have to the child, pay one-half of the martial debt, and go away. The Husband refused. (Burgess T 314; 334; 336).

The Husband spent substantial time to fight over every detail of this case, whether it is custody and/or the payment of the martial debt. (Burgess T 334-335). When the Husband was afforded the opportunity to resolve the matter by agreeing that the child was not his, he refused. (See his answer to the counterclaim; Feige T 765). It was only after a long mediation that he finally agreed to the DNA testing. (Burgess T 334-354; Feige T 765).

The Wife's mother paid a retainer fee of $500.00, which was earned early in the case. (Burgess T 338; Feige T 764). In spite of not being paid, as promised, any additional monies (Burgess T 345-346; 348) the Respondent continued to fully represent Ms. Burgess through a series of three proposed agreements, fighting over $250.00. (Burgess T 349-351).

The record is clear that each and every offer to settle was discussed with the client. (Burgess T 349-351) Each response was relayed to opposing counsel. (Simpson T 292-293; 295-298; 299-300). First it was the Husband who refused to settle this matter in a reasonable time and method. (Simpson T 271-273; 294-295; Feige T 770-771). The Husband received the Wife's proposal to settle this matter in a letter dated April 30, 2001. (Simpson T 270; Bar # 39). A letter was sent to the Husband on May 11, 2001 concerning this offer. (Simpson T 272). He did not respond until October 25, 2001. (Simpson T 272-273). When the Husband learned that Ms. Burgess wanted to be paid for the marital debts (even though he had agreed to pay his share of the same) his response was:

> "… my client freaked out. There was a scene in the office where he said he had put up with enough from her. This is all emotional issues between them." (Simpson T 277).

Then it was Ms. Burgess who prolonged the case over $250.00. (Burgess T 319; Simpson T 299-300). Ms. Burgess knew about each offer to settle at about the time it was made and rejected each offer (Burgess T 349-351).

After November 20, 2001 Ms. Burgess could have signed the marital settlement agreement. She testified that she rejected that offer and still wanted to be paid $250.00 (T351). Ms. Burgess did not change her position until the April 1, 2002. (Burgess T 351; Simpson T 301).

> Q. And the next thing that you heard is basically when Ms. Nunziato (Burgess) called your office and said, "I'm going to settle this case without my lawyer"?
>
> Q. And , in fact, that happened in April of 2002?
>
> A. Yes. That's the date of that message.
>
> Q. …(she) told you she wanted to get married to somebody else and she just wanted to get it done <u>at that point</u>?
>
> A. Yes. (Simpson T 301-302).

On April 1 of 2002 Burgess claims she called the Respondent's office twice (a Flagler county phone number, not Volusia), went to the wrong office.

(Ormond Beach), called the Florida Bar, and then called Ms. Simpson's office to settle this matter on her own.

Ms. Burgess says that she called the Ormond Beach office each and every time (Burgess T 355-356), when in fact the Respondent had relocated to Palm Coast in March of 2001. In fact, Ms. Burgess met with the Respondent at his Palm Coast office on March 17, 2000. (Burgess T 343). And she had the Palm Coast phone number (Feige T 775-776) as well as Respondent's home number. (Burgess T 356).

From this point on, she made no further attempt to contact the Respondent. The paperwork was completed without copies going to the Respondent. (Note: There was no copy to Respondent on the Letter dated April 15, 2002, Bar Exh. # 32). The final judgment was sent directly to Ms. Burgess in the envelope provided by Ms. Simpson's office.

Inadequate communications: There were the two conferences before service of process by the Husband. (Burgess T 334; 338). Then two conferences concerning the pleadings, including one at her parent's home. (Burgess T338-339). The March 17, 2000 meeting concerning mediation

(which meeting was at the Palm Coast office). (Burgess T 343). The discussion concerning mediation. (Burgess T 344). The Mediation on June 19, 2000, at David Beck's office from 9:30 in the morning till 12:30 in the afternoon. The telephone conversations about the money for the DNA testing. (Burgess T 346; Feige T 767-768). Conversation about results of the DNA test. (Burgess T 348). Conversation about Judge deLarouche. (Burgess T 349). Conversation about settlement offer. (Burgess T 349-350). Conversation where Burgess was informed that Husband had rejected offer. (Burgess T 350-351). Conversation where Ms. Burgess rejected Husband's agreement where she was to pay $250.00. (Feige T 773). Conversation where Ms. Burgess rejected Husband's offer to call it even. (Burgess T 351). Conversation about pretrial and being only $250.00 apart. (Feige T 774).

Response to Bar: Respondent received the complaint on May 21, 2002. He responded on June 4, 2002, eleven days after receipt of the same. No additional response was required by the bar rules.

HALL

Neglect: Mr. Hall came to see the Respondent six times concerning a $400,000.00 lien (Hall T 184) on his properties levied by the City of

Ormond Beach. Respondent reviewed a large file of documents furnished by Mr. Hall (Hall T 179).

Mr. Hall had conferences in Ormond Beach concerning this matter. (Hall T 197), but did not "hire" the Respondent until Mr. Hall's fifth visit in Palm Coast when he gave Respondent a large file of documents, photos, and paid the retainer fee. (Hall T 179-180).

On Mr. Hall's sixth visit, the Respondent told Mr. Hall that the declaratory relief action was no longer available. (Hall T 176). The violations had occurred from 1990 to 1992. (Hall T 204). No court reporter was present at the Code Violation Board meeting. (Hall T 204). His lawyer at the time did not file a lawsuit within the thirty day required time period. (Hall T 205-206).

Respondent advised Mr. Hall to remove the offending items to stop the liens from increasing. Mr. Hall refused. (Hall T 208). Respondent advised Mr. Hall to apply for a variance, since the City opened this door by their response to the mandamus action. (Hall T 210; 216). Mr. Hall refused. (Hall T 217-218). Respondent told Mr. Hall is only other avenue of relief was to

apply to the city commission for relief from the fine. (Hall T 216); (See: Feige T 587-590). Mr. Hall suggested that Respondent was supposed to contact the commissioners on his behalf before the elections. (Hall T 216) This assertion is belied by the comments made by his Wife to the Bar investigator as contained in his report dated December 13, 2002. (Feige T 625; 812; Respd. # 67). Respondent called Mr. Hall after the elections and was told that the staff had not changed and that the political solution would not fair well. (Feige T 809).

When Respondent would not file a lawsuit for him, he went to the Florida Bar and filed a complaint. He called Respondent and told him that he would drop the complaint if Respondent would file the unwarranted lawsuit. (Hall T 187-188).

The record is replete with testimony by Mr. Hall that he continued to seek and receive legal advice, contrary to his testimony that he never heard from the Respondent again. (See Hall: T 176; 186; 208-210 216; Feige T 588-590).

Inadequate communications: Six conferences and phone calls, including a follow up phone call after the elections was more than adequate. (Feige T 583).

Failure to communicate the basis or rate of fee: Mr. Hall knew that he was being charged for the time to review the file and give advice. (Feige T 583).

> Q. And, sir, you knew that I was charging you for the time it took to do the work, that is to review the file and to give you legal advice?
>
> A. I knew you were going to.
>
> Q. You didn't think that I was doing any of that for free, did you?
>
> A. Of course not. (Hall T 220)

And note this testimony about the previous matter that Respondent handled for Mr. Hall:

> A. …. I had paid him in cash up front by way of check before he took the case, which is generally typical of lawyers. I never heard of a lawyer giving anybody any credit. (Hall T 194).

Mr. Hall agreed that the gold coins were payment for the review of the file and the advice rendered.

> A. He said he wasn't in the gold business, and I understand that, but I wanted this case going on as quick as I could, and I said "how about holding these gold coins and then within 30 days, you know, when you tell me something, then I'll just cash those coins in." (Hall T 180).
>
> THE COURT: Was Mr. Feige to use the gold coins as his fee…?
>
> A. It was up to him. (Hall T 188-189).

Contrary to his testimony on Page 223, Mr. Hall then made good on his promise to pay by turning the coins over to the Respondent's Wife.

> A. … He came into the office and he said he did not have the money to pay him and he should take the coins and cash them in. (Marilyn Feige T 152).

> A. He basically said he did not have the money to pay my husband, to turn in the coins if we so desired. "They were ours to keep" were his words. (Marilyn Feige T 156).

The coins, which had a set value as of the date tendered for payment, paid for six conferences, several phone calls, review of the file, research, and the rendering of legal advice. (Feige T 581).

Conflict of interest: The gold coins in question are currency, not collectables. They have a set value as of any particular day, which is published and ascertainable. (Hall T 219-220; Marilyn Feige T 157). One

need only read the financial page of any major paper to obtain the price of gold.

Failure to hold property in trust: The coins were released by Mr. Hall as payment for services. (Feige T 585-586).

The first coin was released at the fifth conference with the permission of Mr. Hall. (Hall T 180-181). Mr. Hall released the remaining coins at the next conference. (Marilyn Feige T 153-158). The coins were sold in December of 2001.

Mr. Hall's complaint was not filed until late in 2002. There was not any fee dispute until Mr. Hall went to the Florida Bar, long after the representation had been concluded and fees earned, and the coins had been properly sold.

SCHAFFER

Competent representation; Lack of Diligence: Mr. Shaffer was served on May 5, 2001 with a Petition for Dissolution seeking alimony. (T 780; Bar Exh. 15). An Answer and Counterclaim were timely and properly filed.

Ms. Nichols testimony, that a counterclaim had to be sworn to, was an excuse her own failure to file an answer to the counterclaim. The law does not support this testimony. (See: Nichols T 138). There is no such requirement for sworn complaints and/or counterclaims in the family law rules. Rule 12.110, Family Law Rules of Procedure states that Rule 1.110 of the Rules of Civil Procedure will apply to all pleadings (except for modifications, which still do not require a sworn pleading). Florida Statute 61.043 only requires that a family law action "shall be commenced by the filing of a petition." See also F.S. 61.052.

The Wife, who was angry that her Husband had cheated on her, with the aid of her counsel, stalled. (Nichols T 140).

Besides filing the answer and counterclaim, and reviewing Schaffer's records. Respondent attended a domestic violence hearing at Schaffer's request due to the problems with his Wife and his girlfriend. (Feige T 786; See Badges T 118).

Then health problems set in, disrupting the Respondent's practice. (Conner T 474).

However, on May 1, 2002, less than a month after his hear attack, the Respondent, at the client's request (the Respondent was driven to the office by his Wife for a conference with Mr. Schaffer, even after Mr. Schaffer was notified of the heart attack in a phone conversation) called Christy at Dawn Nichols office and asked them to please answer the Counterclaim and file the Notice for Trial, since I was still recovering from a heart attack. (Nichols T 136).

Christy, who never testified even though she was available (Nichols T 142), said they would. Instead Nichols withdrew from the case. Mr. Schaffer terminated the services of Respondent shortly thereafter, around July of 2002. (Badges T 108), while Respondent was still recuperating from his heart attack.

Response to Bar: Respondent received the Bar's request on October 7, 2002. He responded on October 10, 2002 in a timely fashion.

CLARK

Ms. Clark hired the Respondent to sue for money for her property, which was not delivered to her by Bekins Van Lines, LLC.

Incompetent representation: The basic premise of the Bar's case was that service of process was on the wrong individual, and therefore the judgment is worthless.

The Bar's own witness testified that:

> A. I don't know, again, without researching the issue.
>
> (Rose T 101).

> A. Well, certainly it's possible they could be their agent. That's a possibility. Again I don't know one way or the other.
>
> (Rose T 102).

In ***Baker v Petway***, 740 So.2d 1235 (Fla. 1st DCA, 1999), the Court permitted service on an "agent" of a partnership. Service on any agent or employee is enough when the company does not follow the statutory

requirements and does business in Florida. See also: ***Ludwig v Schweigel***, 701 So.2d 1256 (Fla. 5th DCA, 1997). See: F.S. 48.071.

Neglect: The Respondent wrote a letter to Bekins Van Lines LLC requesting payment. Not unexpectedly, they did not respond. (Clark T 76). Respondent asked Ms. Clark to research the value of her property, which she did. (Clark T 77). Respondent called the local Bekins office to attempt to get help for Ms. Clark, but to no avail. (Clark T 77-78).

For a fee of $150.00, Respondent then filed a lawsuit, went to Court on June 29, 2001 with Ms. Clark (Clark T 79) (there were no other hearings held in this matter), prepared an affidavit of loss (in October of 2001) (Clark T 81), and filed the affidavit with the Court. Note that a Motion to Dismiss for Lack of Prosecution was never a reality.

Ms. Clark filed a complaint at the behest of the Florida Bar (Clark T 53), because she was unable to contact Respondent after February of 2002, while he was ill, (Clark T 87) to discuss post judgment collection techniques. There was never any expectation by Ms. Clark that Respondent was going to collect the judgment for her. (Clark T 86-87).

While the Respondent could and should have filed the affidavit sooner, he did all the work promised to Ms. Clark. Now she needs to collect her money by using the collection techniques authorized by Florida law. (See Clark T 90, where Ms. Clark testified that she sees Bekins' trucks all the time here in Florida).

Response to Bar: The Bar's letter was signed for on August 16, 2002 and sent a timely response was sent on August 23, 2002.

WILLACY

Mrs. Willacy hired Respondent in July of 2001 to represent her in a contested custody matter. (Willacy T 109; 135). She paid a retainer of $1,000.00 that date. (Wall T 21; Willacy T 103-104).

Respondent recommended that Mrs. Willacy get help for her mental problems. (Willacy T 108; 136; 141).

Mr. Willacy passed away on October 6, 2001. (Willacy T 112). Mrs. Willacy had a conference several days later with Respondent. (Willacy T112). Mrs. Willacy then terminated Respondent's services (Willacy T 118) and hired another lawyer (Mr. Shelly) to represent her in the matter in November of 2001. (Willacy T 116-117; 146). Please note that Respondent has not been furnished with a copy of the transcript of the Shelly deposition.

Mr. Shelly and Mrs. Willacy contacted Respondent in March of 2002 to discuss the possibility of making a claim in the divorce case. After a discussion Mr. Shelly filed a Statement of Claim in the estate matter in April of 2002. The Claim was objected to on April 16, 2002. At Mr. Shelly's request dated May 7, 2002, the Respondent served a Suggestion of Death and Motion For Substitution Of Party in the dissolution style on May 8, 2002. Respondent came into his office for a conference with Ms. Willacy even though he was still recovering from his heart attack.

Due to Respondent's recent heart attack, the matter was not set for hearing at that time. Both Mr. Shelly's office and the client were informed of the heart attack, and the inability of the Respondent to do anything further at that time.

Time was obtained for a hearing in late October 2002 from the Court's Judicial Assistant. Upon discovering that a visiting judge was conducting the hearings on the day in question, Respondent cancelled with the same person, not the Clerk's office.

Respondent informed the client that the matter would be reset for sometime in December. The client, through her boyfriend, Roger Wall, then instructed the Respondent to do nothing further and terminated his services. Ms. Willacy confirmed that termination.

Dissolution actions normally terminate upon the death of either party. But there are exceptions to this rule. *Becker v King*, 307 So.2d 855 (Fla. 4th DCA, 1975); *Emerson v Emerson*, 593 So.2d 1160 (Fla. 2nd DCA, 1992); *Gaines v Gaines*, 727 So.2d 351 (Fla. 2nd DCA 1998). In at least four reported cases the Court has found that when "exceptional circumstances" occur, the Court will retain jurisdiction and provide relief. See: *Rosenhouse v Ever*, 150 So.2d 732 (Fla. 3rd DCA, 1963); *MacLeod v Huff*, 654 So.2d 1250 (Fla. 2nd DCA, 1995); *Copeland v Copeland***,** 65 So.2d 853 (Fla. 1953); and *Taylor v Wells*, 265 So.2d 402 (Fla. 1st DCA, 1972).

Failure to obtain temporary relief: The husband was supporting the wife and the children. There was no economic basis to request temporary relief.

The marital home belonged to the husband as his premarital property. The husband was not suffering from any mental problems, unlike the wife, which may have interfered with parental responsibilities. And the husband was already the prime caregiver of the children. These facts taken as a whole, presented a great concern that the Court could well award temporary custody, use of the home, and even support to the husband.

Failure to conduct an asset search: Faced with the risk of losing temporary custody, it was decided to wait until the wife had obtained some effective counseling for her mental problems before engaging in more aggressive litigation. Respondent already knew that the major assets were pre-marital in nature. This was primarily a case of child support and alimony, rather than division of property.

Failure to pursue the after death claim: It was understood that this was a "long shot." (See Shelly Deposition). Both lawyers, as well as the client, knew that the claim was not guaranteed. As noted above, there are several

cases, which permit the Court to exercise continued jurisdiction after death. The issue before the Court was: Does a transfer of almost all of the family property to a trust a year before the filing of a divorce action a sufficient basis to exercise extraordinary jurisdiction. It was an arguable position. The Motion was timely filed one day after requested by lead counsel, W. Denis Shelly, Esq.

The late October hearing date was cancelled for a sound reason. A visiting judge may not have been inclined to rule favorably on this "uphill" argument. Again it was a sound decision to come back another day and have Judge Hammond decide.

In the meanwhile Ms. Willacy and the children were being supported by the trust, social security, and her income, in the home, which belonged to her deceased husband.

The fee: Rule 4-1.5 (e) does not require a written fee agreement in domestic relations cases. The fee arrangement was discussed twice. The retainer of $1,000.00 was reasonable and earned.

SUMMARY OF ARGUMENT

I

The referee erred in admitting the written complaint of Mrs. Iren.

II

The Referee's findings of law are erroneous.

III

The Referee's findings of fact are clearly erroneous.

IV

The disciplinary measures imposed are not warranted.

ARGUMENT

The Florida Bar is required to prove each and every element of their complaint by clear and convincing evidence. ***The Florida Bar v McCain***, 361 So.2d 765 (Fla., 1990). Each matter has to stand on its own merits (or fall from the lack thereof). It is clear that the Bar has failed in their burden of proof as to the substantive charges.

I

The referee erred in admitting the written complaint of Mrs. Iren.

Since at least 1956 (***Petition For Revision***, 103 So.2d 873 (Fla. 1956)) the respondent in a Bar proceeding has a right to cross-examine any and all witnesses presented by the Florida Bar. ***The Florida Bar v Grant***, 85 So.2d 232 (Fla., 1965). In ***The Florida Bar v Weed***, 559 So.2d 1094 (Fla., 1990), the Court ruled that evidence received before a grievance committee could be introduced at the referee level when (and only when) the Respondent had

the opportunity to cross-examine the witnesses at the grievance committee hearing.

No such opportunity was ever afforded to the Respondent at the grievance committee in these matters. No evidentiary hearing was ever conducted. When the Respondent requested permission to attend and speak with the committee, he was told that he had no right to do so under the new rules and was turned away. Bar Counsel wrongfully took the position that it would be unfair to the complainant to allow the Respondent to appear and defend at the committee level. Rule 3-7.6 (j) suggests otherwise. The rule states that the complaining witness is not a party and has no rights in these matters. Bar counsel mislead the committee into thinking otherwise.

While properly authenticated documents, which have independent evidentiary value, can be introduced into evidence under a "relaxed" version of the rules of evidence, ***Florida Bar v Vannier***, 498 So.2d 896 (Fla., 1986), no case permits the introduction of hand written comments on exhibits made by a witness who failed to appear before this Court, or documents which contain double hearsay. In ***The Florida Bar v Baker***, 810 So.2d 876 (Fla.,

2002) the Court permitted a letter, only after a witness testified to the predicate that she sent the same.

The Respondent has the right of cross-examination of any witness presented by the Bar. Even in ***The Florida Bar v Centurion***, 810 So.2d 858 (Fla., 2000) the Court only allowed the complaint letters to be used to document otherwise uncontested matters.

In this case the complaint letter in question is not only hearsay (which is properly admitted), but also double hearsay, which is not, even under the relaxed rules of evidence. The letter recites matters that are alleged to be told to the writer by others, who are not even on any of the witness lists.

What makes this even more intolerable is that the Bar had told the Court and Respondent that she was calling Delia Iren as a witness. It was not until the early afternoon of February 6, when Ms. Iren was scheduled to testify and failed to appear, that Bar counsel informed the Court and Respondent that Delia Iren has refused to show. (T 482).

The prejudice is apparent.

II

The Referee's findings of law are erroneous.

Rulings and findings of law are not afforded the same weight as findings of fact. They are not clothed with the presumption of correctness. ***The Florida Bar v Trazenfeld***, 833 So.2d 734 (Fla., 2002).

The finding that an answer in a divorce action (Shaffer) needs to be verified is not supported by the law.

As set forth in the statement of facts, two attorneys decided that Mrs. Willacy had a "long shot" argument that survived her husband's death. The referee had no evidentiary basis to decide that this argument had no merit as a matter of law.

III

The Referee's findings of fact are clearly erroneous.

Most of the Referee's controlling findings of fact are not supported by evidence, as set forth in the Statement of Facts. These findings are clearly erroneous.

It is not unethical conduct not to reduce communications to writing and not return every phone call the same day. ***The Florida Bar v Vernell***, 374 So.2d 473 (Fla., 1979).

IV

The disciplinary measures imposed are not warranted.

The measures, in large part, rest on the factual findings. Since these findings are at issue, it becomes hard to address.

However, there is no authority for the Court to require a physical examination.

There is no basis to require the refund of all fees paid by the various clients. Respondent provided services to each and every client, and is entitled to be paid for the same.

“A lawyer’s stock and trade are his time and advice.” Abraham Lincoln.

The referee has bought the argument that a lawyer only gets paid if he produces a positive result for his client, unless agreed otherwise. Not so. When a client asks for services, he or she has an implied agreement to pay for the same.

The Court should never have been advised by the Bar nor considered one of the prior disciplinary matters, which was a product of perjury as evidenced by the letter from former Bar Counsel. Note that the “public reprimand” never appeared in the Southern Reporter, due, in part, to the efforts of that Bar Counsel to do right.

As to the other two prior disciplinary matters:

The private reprimand was for Respondent’s failure to initiate a fee arbitration proceeding.

The suspension was for failing to inform the former husband that his former wife had remarried (even though he was sent a wedding invitation addressed

to his son and the event was published in the local newspaper), and representing the former wife, at her request, in the lawsuit for alleged overpaid rehab alimony (based on a theory of impermissible conflict of interest).

The Bar had full knowledge that Respondent was going to argue that his illness was a mitigating factor in some of these matters. The Court should not have ignored the same in Iren as to the timing of the response to the Bar, when there was full disclosure in the other companion cases.

Considering all the relevant facts, the discipline imposed is not justified and should, if the Court finds wrongdoing, be reduced to a reprimand.

CONCLUSION

As set forth in the Motion to Strike, filed together with this Brief, many of the Bar's comments are not supported, either by the evidence, or even the findings. The Bar presented a "shotgun" case, hoping the referee would buy in. He did. The record shows that the referee bent over backwards for the

Bar, but did not extend the same consideration to the Respondent. His findings are not supported by clear and convincing evidence.

The measures imposed are not supported by the facts.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Respondent's Brief was mailed this 10th day of December, 2005 to Francis Lewis-Brown, Esq., Attorney for the Florida Bar.

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CERTIFICATE OF COMPLIANCE OF TYPE, SIZE AND STYLE

I hereby certify that this brief is submitted in 14 point proportionately spaced Times New Roman font.

_____

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