IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

KENNETH J. KAVANAUGH,

Respondent-Appellant.
_____/

Case No. SC03-1899

The Florida Bar File
No.2001-51,685(17C)

RESPONDENT'S INITIAL BRIEF

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FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar." Kenneth J. Kavanaugh, Appellant, will be referred to as "respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter and "ST" will be used to designate the transcript from the sanction hearing. Lastly, the symbol "TFB" or "Resp." followed by a letter and number will designate the trial exhibits of the respective parties.

STATEMENT OF CASE AND FACTS

On November 30, 1998, Harry Pollak, leased an automobile from Tom Endicott Buick and shortly thereafter sought legal counsel concerning certain problems he had with this transaction. After having first tried to resolve these difficulties with the assistance of David Brandwein, Esquire, Pollak ultimately retained the services of Kenneth J. Kavanaugh, the Respondent herein. RR2. During his first meeting with the Respondent, Pollak agreed to draft a written chronology of his problems and to delineate his damages in that written chronology. Resp. 13. These damages totaled $14,199.00.[1]

The Respondent filed suit on behalf of Pollak against the dealership, Endicott, and via an amended complaint, the lender, GMAC. TT57. The lawsuit asserted claims under the Florida Unfair and Deceptive Trade Practices Act. Fla. Stat. §501.201, et seq. This Act provides for the payment of attorneys fees to the prevailing party. Fla. Stat. §501.2105 and Fla. Stat. §521.006.

[1] This figure is calculated by adding the down payment of $525.00; the trade in value of Pollak's previous vehicle of $12,750.00 and a car rental fee of $924.00. See Exhibit 12, Letter of March 7, 2001. TT 63-64, 108. Opposing counsel valued the actual damages at $1,000.00. TT 113-121.

After two years of litigation, the Respondent was able to secure a very favorable settlement for Pollak from each of the defendants. GMAC settled for $7,000.00[2] and Endicott paid $45,000.00[3] just before trial in March of 2001.

It is undisputed in the record that at all times during the settlement negotiations, Pollak was kept advised of each offer made by the Respondent and how the settlement offer was broken down into actual damages and the claim for statutory attorneys fees. TT59, 63, Resp. 12.

Upon settlement of the Endicott claim, Pollak executed a written distribution statement which clearly and concisely set forth the remaining costs of litigation, the $23,780.07 in attorneys fees to be paid to the Respondent and the balance to the client of $21,087.99.[4] The distribution statement is dated April 3, 2001 and is executed by Pollak and the Respondent. Pollak accepted his settlement check and the Respondent believed the case was successfully concluded and the client happy with the result.

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[2] The Bar and Pollak do not take issue with the $7,000.00 settlement and distribution of same.

[3] The Referee refers to this as a $44,868.06 settlement as she reduces the $45,000.00 by the out-of-pocket expenses not deducted from the GMAC settlement.

[4] Please note that the total monies received by Pollak on both settlements was $23,427.78 and that this exceeded his actual damages of $14,199.00 by $9,228.78. See TFB 2 and Resp. 2.

More than a month after accepting his check and executing the distribution statement, Pollak called the Respondent and sought a portion of the amount Endicott had paid as statutory attorneys fees.[5] TT74-75; Resp. 8 [Respondent's notes of this phone call.]. The Respondent advised Pollak that he was not willing to make a refund and confirmed his position in a letter dated May 11, 2001. Resp. 7. Not satisfied with the Respondent's position, Pollak placed a second call to the Respondent on May 15, 2001 and it was agreed that Pollak could have an appointment that day to discuss the fee question. TT 76-77. During that conversation Pollak demanded a refund of $3,967.00 (TT80) and further stated that unless he received the refund he would file a complaint with The Florida Bar (TT83). The Respondent respectfully declined to give the requested refund and confirmed this position with his letter of May 15, 2001. Resp. 10.

The dispute between Pollak and the Respondent is focused on the language of the written retainer agreement executed on January 11, 1999. TFB1. The retainer agreement recites that: "If there is a recovery, the fee for the professional services of the Attorney will be the greater of that amount awarded by the Court (to be paid by the

[5] At all times the retainer agreement contemplated that the Defendant (Endicott) might be required to pay the attorney fees instead of Pollak. In the settlement with GMAC, Pollak paid the fee as GMAC had no liability for statutory attorneys fees. See Interim Closing Statement. In the settlement with Endicott, Endicott paid the fee.

Defendants) or" a percentage set forth in the agreement. TFB1. The percentage applicable to this case was forty percent (40%) as the defendants had filed Answers. RR2.

It has been the Respondent's position (and confirmed by opposing counsel)[6] that the reason the case settled was the defendant's exposure to pay statutory attorneys fees and that the bulk of the settlement funds were paid as a result of this exposure. As a direct result of this fact, the Respondent, consulted with his client and on April 3, 2001 secured his permission to be paid a fee commensurate with this fact. See TFB 2. Pollak, a month later changed his mind and this grievance followed.

The grievance committee that reviewed Pollak's complaint rendered a Report of Minor Misconduct, but the Respondent, pursuant to R. Regulating Fla. Bar 3-5.1(b)(4), rejected this finding and on October 23, 2003, the Bar filed its Complaint. The Final Hearing was held on April 16, 2004, with a sanction hearing held on April 21, 2004. The Amended Report of Referee was served on May 19, 2004.

The Referee found that the Respondent secured "an exceptional result" for Pollak. TT P142, l.1-2. However, she believed that absent a Court Order approving the statutory fees, the parties could not have agreed to exceed the percentages set forth in the retainer agreement. RR3. Accordingly, the Referee has found the Respondent

[6] TT115-119.

guilty of having collected a clearly excessive fee in contravention of R. Regulating Fla. Bar 4-1.5(a). The Referee has recommended to this Court that the Respondent receive (1) a public reprimand; (2) restitution to Pollak in the amount of $4,307.83[7]; (3)revocation of the Respondent's Florida Bar board Certification in Civil Trial Law and (4) payment of the Bar's costs.

It is the Respondent's position that a lawyer and a client can amend their fee agreement and that this occurred in this case. He therefore believes that he should be found not guilty of having collected a clearly excessive fee and respectfully requests the Court to Reverse the Referee's finding of guilt in this mater.

[7] The amount of fees paid to the Respondent that exceeded forty percent of the recovery.

SUMMARY OF ARGUMENT

The Referee made a specific comment that the Respondent secured an "exceptional result" for his client, in that the client received $9,000.00 more than his actual damages. However, the Referee has also incorrectly found that the Respondent collected $4,307.83 in legal fees that she believed the Respondent was not entitled to receive. The Referee reaches this decision by ignoring the fact that the Respondent and his client modified the written retainer agreement. This modification is evidenced by correspondence drafted by the Respondent and sent to the client; contemporaneous notes of telephone conversations and the client's signature on the distribution statement wherein a total accounting of the settlement monies, the costs of litigation and the lawyers fees were set forth. The client changed his mind forty four days after he signed the closing statement and threatened to file a Bar complaint if he did not receive more money. The Respondent attempted to resolve this dispute with his client, inclusive of a personal meeting at his office, but the dispute was not resolved.

The Bar failed to present clear and convincing evidence that the Respondent collected a clearly excessive fee and failed to present any expert testimony to support the naked assertions from the Respondent's client concerning this fee dispute.

Accordingly, the Respondent should be found not guilty of collecting a clearly excessive fee.

ARGUMENT

I. THE RESPONDENT SHOULD BE FOUND NOT GUILTY OF HAVING COLLECTED A CLEARLY EXCESSIVE FEE.

At issue in this appeal is whether a lawyer, who secured "an exceptional result"[8] for a client should be found guilty of charging an excessive fee when the attorney and client reach an agreement on the fees to be paid and the client later changes his mind concerning that agreement. It is respectfully contended that the Respondent in this case collected a reasonable fee and based upon the facts of the underlying litigation and the claim for statutory fees could have collected a larger fee than that which was paid to him.

It is well settled that a referee's findings of fact and guilt are presumed to be correct and the appealing party has the burden to demonstrate that these findings are "clearly erroneous and lacking in evidentiary support." The Florida Bar v. Canto, 668 So.2d 583 (Fla. 1996); The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996). The Respondent will more than meet this standard and will further demonstrate that the Bar failed to meet its burden of proof by clear and convincing evidence.

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[8] Referee's comment at TT P142, l.1-2

Of necessity we start with a short recitation Pollak's claim. In November of 1998, Pollak leased an automobile and shortly thereafter retained an attorney concerning his belief that he had been cheated by the automobile dealership. He first retained David Brandwein, Esquire, but the matter did not get resolved and Pollak retained the Respondent to seek a recovery against the automobile dealership.

While the Respondent's initial retention was for a minimal flat fee to write a demand letter in an attempt to resolve the matter short of litigation, the parties ultimately executed a January 11, 1999 retainer agreement. TFB1. The portion of the fee agreement relevant to this matter reads as follows: "If there is a recovery, the fee for the professional services of the Attorney will be the greater of that amount awarded by the Court (to be paid by the Defendants) or" a percentage set forth in the agreement. TFB1. As the defendants filed Answers the correct percentage, if the contingency provision applies to the fee charged in this case,[9] would be forty percent (40%). However, it is the Respondent's position that he and his client, in accordance with the language in the fee agreement concerning a statutory fee awarded by the Court, agreed that the Respondent's total fee would be $23,780.07 with a net to the client of $21,087.99 when his actual damages were only $14,199.00. TFB1.

[9] A point that is not conceded by the Respondent.

On March 7, 2001, the Respondent talked to the client and the expert to establish the basis for the largest element of damages, the value of the trade in vehicle based on the client's description of the features present on the vehicle. Resp. 3, notes of the telephone conversations. The Respondent then sent a formal demand letter, setting out all possible elements of damages claimed, $24,199, and statutory attorneys fees, $27,750, for 111 hours of work performed as of that date. Resp. 12, letter from Respondent to Endicott's attorney dated March 7, 2001.

Endicott's attorney countered with an offer of $10,000, explaining that GMAC, the lender who had settled, was going to seek reimbursement from Endicott for the $7,000 paid in settlement. Resp. 12, letter from Endicott's attorney dated March 22, 2004.

The Respondent discussed the weakness of one element of claimed damages, damage to credit, with the client. The client's recent financing of his new automobile at favorable rates, "1.0" with a "3.9 incentive," established that his credit reputation had not been damaged. Pollak deposition exhibit 16.

The Respondent then made a counteroffer of $45,000 in a detailed demand letter explaining his analysis. Resp. 12, letter from Respondent to Endicott's attorney dated March 22, 2001.

The Respondent then sent copies of the three letters to the client. Resp. 12, cover letter to the client dated March 22, 2001, enclosing the three letters.

On March 28, 2001, Endicott's attorney called and accepted the offer of $45,000. The Respondent immediately called the client, advised him that the offer had been accepted, and confirmed that the client would receive "21,120" dollars. Resp 5.

The Referee discounted all of this testimony and evidence and instead decided at the Bar's urging that there needed to be some form of Court approval for the fee. See RR3. In essence the Bar and the Referee, without the benefit of expert testimony, engaged in contract interpretation and reached the conclusion that the language in the contract trumped the parties subsequent agreement on fees, as established by the closing statement and the documents referenced above.

The case at hand is different from that found in The Florida Bar v. Hollander, 594 So. 2d 307 (Fla. 1992). In Hollander the lawyer was found guilty of taking an excessive contingent fee. One of the issues litigated therein was Hollander's claim of modification of the contingent fee agreement but the Referee found that while there were discussions, the client had not agreed to the change in the fee. Id., at 307. In the case at hand we have clear evidence of the agreement between the lawyer and the client as to the amount of fees and that is the client's signature on the closing statement. TFB1. While Pollak now states that he did not have his correct glasses on at the time he signed the closing statement in an effort to try and show there was no agreement, he does not deny the conversations leading up to the actual settlement of the case, he

admits knowledge of his agreed upon net settlement and there are ample letters from the Respondent reminding Pollak what he agreed to do.

One could argue that there are similarities to The Florida Bar v. Barley, 831 So. 2d 163 (Fla. 2002). The lawyer, in Barley, was found guilty of serious misconduct unrelated to the issues before the Court at this time. However, he was found not guilty of charging and collecting an excessive fee. Id., at 170. In fact the Court in commenting on the evidence noted that:

> In the instant case, the Bar presented no expert testimony or any evidence other than Mr. Emo's testimony, challenging the legality or the reasonableness of the fees Barley charged. Moreover, the record shows that Barley consistently provided Mr. Emo with billing statements which detailed the work Barley did and the hourly rate he was charging. As Barley argued, Mr. Emo consistently paid these statements without challenging the reasonableness of the fees. Although we find Mr. Emo's testimony reliable, in and of itself, his testimony does not constitute competent, substantial evidence that Barley's fees were clearly excessive. Thus we reject the referee's recommendation that Barley be found guilty of violating rule 4-1.5(a). Id.

While the Referee in this case may have found Pollak's "testimony reliable[10] in and of itself, his testimony does not constitute competent, substantial evidence" that the Respondent's fees were excessive. The Bar only presented Pollak's testimony[11] and failed to present any expert testimony. The lack of an expert in Barley established a failure of the Bar to meet its burden of proof on the excessive fee claim and the lack of an expert in this case should result in the same finding by this Court. This finding would be consistent with general law when a trial court is considering a fee award. See for example Rakusin v. Christiansen & Jacknin, 863 So. 2d 442 (Fla. 4th DCA 2003); Tutor Time Merger Corp. v. McCabe, 763 So. 2d 505 (Fla. 4th DCA 200).

In this case the Respondent can point to the lack of expert testimony and can also present the testimony of Thomas Guzda, Esquire, the opposing counsel from the underlying litigation who testified that the only real issue in the case was the statutory

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[10] It appears that the Referee accepted everything that Pollak had to say at face value and gave no weight to the significant impeachment evidence available in the record. For example Guzda testified that Pollak's written statement of the events giving rise to his cause of action was a "substantial and fundamental misrepresentation of fact" when compared to the evidence in the case. TT 101, 106. The Guzda proffer would have established that Pollak was experienced and knowledgeable in an automobile lease transaction and that his demeanor to the contrary was disingenuous. TT128.

[11] It appears that Pollak's son was called to support the timing of his father's request for a refund and the other witness for the Bar, Michael Lemaire, Esquire, testified about a hearing before Judge Andrews where he ruled that he had no jurisdiction to consider the fee dispute. TT88-96.

award of fees (TT p. 115, l. 6-8; p.121-122); that he would not have been surprised if the Respondent had been awarded $80,000.00 to $100,00.00 in fees (TT p.119, l.8-12) and testified under cross examination by the Bar that at one point in time he believed that the Respondent had already expended more than $50,000.00 in time in the case.[12] TT 121.

It is respectfully submitted that based upon all of the evidence presented in this case that The Florida Bar failed to introduce clear and convincing evidence of an excessive fee in violation of R. Regulating Fla. Bar 4-1.5(a) and that therefore the Respondent should be found not guilty of such charge.

II. THE REFEREE'S PROPOSED SANCTION OF A PUBLIC REPRIMAND, RESTITUTION AND REVOCATION OF A BOARD CERTIFICATION IS UNWARRANTED UNDER THE FACTS OF THIS CASE.

If the Court believes that the Respondent should be found guilty of having collected an excessive fee, it is evident that such action was taken under the belief that the Respondent had the initial agreement of his client to have accepted such fee and that such a good faith mistaken belief should not result in a public reprimand and the

[12] Please remember that the total fee paid from this settlement was $23,780.07. TFB 2.

loss of a Board Certification. In reaching a proper disciplinary sanction the Supreme Court of Florida, has been consistently guided by the following precepts:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970).

Applying these standards to the case at hand it is evident that the recommended sanction is too harsh of a sanction under the circumstances. This Court has consistently held that it has a broader discretion when reviewing a sanction recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. The Florida Bar v. Thomas, 698 So. 2d 530 (Fla. 1997). The Court should exercise that discretion and reduce the sanction to an admonishment for minor misconduct with the requirement of a $4,307.83 refund to the client.

Prior to an examination of the case law and other sanction precedent it is important to consider the mitigation and aggravation that is present in this case. Surprisingly the referee found five aggravating factors and ignored three mitigating

factors that are clearly established in the record of this case. The Respondent does not take issue with the aggravating factor related to a substantial experience in the practice of law. Standard 9.22(j).[13] However, he takes strong issue with the remaining claims of aggravation.

The Referee takes this simple dispute between a lawyer and a client who changed his mind 44 days after making an agreement on the agreed upon fee and finds three aggravating factors that allegedly flow from the Respondent's decision not to provide a fee refund. These factors as claimed by the Referee are:

1. Standard 9.22(b) - dishonest or selfish motive;

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

3. Standard 9.22(j) - indifference to making restitution.

As is clear from the evidence presented in this case, the Respondent verily believed that he had the client's full consent for the fee that was collected and when the client made inquiry about a refund, the Respondent had several lengthy conversations with the client and even made a same day appointment to go over all of the figures again. This is hardly evidence of a lawyer who overreached and refused to be responsive to the client. Instead it is evidence of a lawyer who made a principled

[13] All references are to the Fla. Standards for Imposing Lawyer Sanction.

decision that the client had made a knowing consent to the modification of the fee agreement based upon the "exceptional result" secured by the client and this later request for money was nothing more than evidence of a pattern to get a "little extra" from all of his business transactions.[14] One must also consider the close to extortionate demand by Pollak after the Respondent declined to make a refund, wherein Pollak demanded a refund or he was going to file a Bar complaint.[15] TT83; Resp. 9.

While the foregoing aggravating factors should not have been found, at least the Respondent was allowed to present testimony concerning same because he was prevented from presenting evidence concerning the last aggravating factor - Standard 9.22(g) vulnerability of victim. The respondent attempted to introduce testimony from Mr. Guzda and from Pollak concerning Mr. Pollak's business sophistication and was prevented from doing so by the referee. See TT 55; 104-108; 119-121. In fact the record includes a proffer of Mr. Guzda's testimony concerning his investigation into

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[14] See Guzda letter of February 3, 199 wherein he explains that Pollak "is very skilled at squeezing money out of car dealerships" and discusses a $2,000.00 episode on his first purchase from Endicott. Resp. 6 (Guzda deposition exhibit).

[15] Pollak's decision not to allow the Respondent a credit for an $1,800.00 expert cost that the Respondent ultimately paid from his fee should also be taken into account. ST17.

Pollak's prior litigation. TT120-121. This Court has previously held that a respondent's cross examination as to a witness's business affairs and sophistication is proper and should be allowed. The Florida Bar. v. Carlon, 820 So. 2d 891, 897 (Fla. 2002). Accordingly, it is error on the one hand to find "vulnerability of victim" due to his age but deny the Respondent an ability to cross examine on that issue.

Not only did the Referee fail to allow proper cross examination of the Bar's key witness, she also ignored several mitigating factors squarely before her and established in the record. They are:

1. Standard 9.32(a) - absence of a disciplinary record (ST20);

2. Standard 9.32(c) - full and free cooperation with The Florida Bar;

3. Standard 9.32(g) - otherwise good character and reputation (TT115-116; ST20).

The Respondent would also contend that he had no dishonest or selfish motive in his dealings with Pollak and that Standard 9.32(b) should also apply.

In an attempt to support her sanction recommendation, the Referee's Report makes reference to three disciplinary matters. All three are inapposite to the case at hand. The first one, The Florida Bar v. Saqrans, 388 So. 2d 1040 (Fla. 1980) is not an excessive fee case. Rather the issue in that case was an unethical sharing of legal fees with a nonlawyer. Id. The second case did mention excessive fees but it was

occasioned by the lawyer charging a contingent fee in a criminal matter and was not a dispute over how to calculate the fee. In the Matter of Donald L., 444 N.E. 2d 849 (Ind. 1983). The last case was really an excessive cost case as that particular lawyer was convicted of improperly adding investigative costs. Russel Jr., DP 63 (Mich. Atty. Dis. Brd. 1983).

The cases cited by the Bar at trial are even more off the mark. For example in The Florida Bar v. McAtee, 601 So. 2d 1199 (Fla. 1992), the lawyer had significant trust account issues and a conflict of interest to go with an excessive fee and in The Florida Bar v. Richardson, 574 So. 2d 60 (Fla. 1990), the lawyer had two distinct and very gross excessive fee cases.

The Bar also made reference to a second Hollander case. The Florida Bar v. Hollander, 638 So. 2d 516 (Fla. 1994). In this particular Hollander case, the Court confirmed the revocation of his Board Certification as he had received two public reprimands in a two year period of time for charging excessive fees and as is explained above in the first Hollander case the lawyer kept all of the settlement monies as a fee. In the case at hand the client received more than his actual damages and agreed to the revision of the fee agreement and the fee paid to the lawyer, but waited 44 days to change his mind and seek a refund.

It is respectfully contended that the case law cited by the Bar and the Referee do not set forth valid reasons for the imposition of a public reprimand and revocation of the Respondent's Board certification.[16] Unfortunately, the Standards for Imposing Lawyer Sanctions does not have a standard directly on point for a fee violation. However, Standard 7.4 provides some guidance and this Standard states that:

> Admonishment is appropriate when a lawyer is negligent in determining whether the lawyer's conduct violates a duty owed as a professional and causes little or no actual or potential injury to a client, the public or the legal system.

It is evident on the record of this case that the Respondent provided superior representation and that he believed the agreed upon modification of the fee agreement was proper and that a refund of the disputed fee amount would make the client whole from any harm caused him.

The last important fact that needs to be considered by the Court, is the procedural history of this case. As is set forth in the procedural history of this case, the Bar is proceeding upon a Complaint of Minor Misconduct and that at the beginning

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[16] The Respondent was a member of a group of attorneys who were certified by the National Board of Trial Advocacy and selected in 1983 to prepare and administer the first Florida Bar Examination for the Certification Civil Trial Lawyers. The attorneys who prepared and administered the examination were certified by the Florida Bar as Civil Trial Lawyers. Hereafter, the Respondent was an examination question author and an examination question grader in two subsequent certification examinations. TT15.

of this case a Grievance Committee was convinced that the appropriate sanction was an Admonishment for Minor Misconduct, payment of a fee refund and no revocation of a Board Certification. Absent a finding of no guilt, there is no reason to deviate from the original Grievance Committee recommendation.

CONCLUSION

For all of the reasons set forth above, the Referee's findings of guilt are clearly erroneous and lacking in evidentiary support. Thus, this Court should find that the Respondent did not charge and collect a clearly excessive fee in violation of R. Regulating Fla. Bar 4-1.5(a).

WHEREFORE, the Respondent, Kenneth J. Kavanaugh, respectfully requests this Court to find him not guilty of the Bar's complaint and if the Court affirms the Referee's finding of guilt then to impose an admonishment for minor misconduct coupled with a fee refund of $4,307.83 as a sanction therefore.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished served via U.S. Mail on this ____ day of September, 2004 to Lillian Archbold, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Brief of The Florida Bar 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 McAfee.

_____
KEVIN P. TYNAN