IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

Case No. SC03-375
TFB File No. 1999-00,478(02)

DAVID A. BARRETT,

Respondent.
_____/

RESPONDENT'S INITIAL BRIEF ON CROSS-APPEAL AND ANSWER BRIEF

John A. Weiss
Attorney Number 0185229
Weiss & Etkin
2937 Kerry Forest Parkway, Suite B-2
Tallahassee, Florida 32309
(850) 893-5854
COUNSEL FOR RESPONDENT

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

Undersigned counsel does hereby certify that the Initial Brief on Cross-Appeal and Answer Brief of The Florida Bar, Complainant, v. David A. Barrett, Respondent, Case No. SC03-375, TFB File No. 1999-00,478(02), is submitted in 14-point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton Anti-Virus for Windows.

_____

John A. Weiss
Counsel for Respondent

TABLE OF CONTENTS

Page

Page

Page

Page

TABLE OF CITATIONS

Page

Page

Page

Page

OTHER

PRELIMINARY STATEMENT

Respondent, David A. Barrett, will be referred to as either Mr. Barrett or Respondent throughout this brief. Complainant, The Florida Bar, will be referred as such or as the Bar. Respondent is appellee/cross-appellant in these proceedings. References to the Report of Referee will be by the symbol "ROR" followed by the appropriate page number. References to the transcript of final hearing will be by the symbol "TR" followed by the appropriate page number. References to the grievance committee will be by the symbol "GC" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

This is a case of original jurisdiction pursuant to Articles V, VI and XV of the Constitution of the State of Florida.

STATEMENT OF THE CASE AND FACTS

The Bar's statement of the case appears to be accurate and, therefore, is accepted by Respondent. As set forth in Point I of Respondent's argument, however, the Referee's statement of facts set forth by the Bar in its statement of facts is not accepted in its entirety by Respondent. Space limitations, however, preclude Respondent setting forth his version of the relevant facts to this case. They are set forth in Respondent's arguments on appeal.

SUMMARY OF ARGUMENT

Point I - The Referee's findings of fact should not be adopted by this Court because he adopted without change the Bar's proposed language. The only independent finding by the Referee in the report submitted to this Court was his alteration of the Bar's recommendation for disbarment to a one-year suspension. In all other respects, the Referee's report is the Bar's verbatim work product. As such, it is not a disinterested judicial finding and, therefore, cannot be relied upon by this Court in its deliberations. The facts of this case should be reviewed *de novo* or, alternatively, the matter should be remanded to a different referee for a new final hearing.

Point II - The Referee erred when he denied Respondent's motion to dismiss the Bar's case after it withdrew the Frances Brown allegations. Ms. Brown's complaint was the only case pending before the Referee and, when the Bar withdrew it, it eliminated its case in chief. When the Bar withdrew her allegations, it withdrew the entire case in which these proceedings were based. In essence, the Bar stipulated itself out of the courtroom.

Point III - The Referee erred when he denied Respondent's motion to strike the Molly Glass allegations. Ms. Glass filed her grievance on December 4, 2000 for conduct that occurred in May 1994. Bar Counsel dismissed Ms. Glass's complaint on December 21, 2000 because it fell outside the six-year statute of limitations period promulgated by this Court. Her case was never re-opened. Yet, the Bar prosecuted her allegations.

The Bar's explanation that it could include Ms. Glass's complaint in the case in chief because prior Bar Counsel's conduct was irrelevant and the Bar could re-open any case at any time for any reason should be disregarded by this Court.

Point IV - The Referee erred in denying Respondent's motions to dismiss for prosecutorial delay. Ms. Brown filed her grievance in November 1998. Despite the fact that the Bar had interviewed all of the witnesses that testified at final hearing (with one minor exception) and had received all pertinent exhibits used at final hearing by

May 1999, it did not take the case to probable cause hearing until December 2002. Respondent was prejudiced by the Bar's lack of diligence because Respondent's partner, Eric Hoffman, the lawyer who handled all of the subject cases, died in July 2002. Had the case been handed with dispatch, Mr. Hoffman's testimony would have been available to Respondent. Respondent avers that testimony would have been exculpatory. The Bar's failure to prosecute this case promptly mandates this Court's dismissal of these proceedings.

Point V - The Referee erred by accepting the Bar's verbatim findings of fact when it had failed to prove its allegations of misconduct by clear and convincing evidence. The Bar is required to prove all allegations of misconduct by clear and convincing evidence, i.e., evidence of such weight that it convinces the trier of fact of the truth of the allegations "without hesitancy. . . ." The Bar must also prove intent by clear and convincing evidence. If circumstantial evidence is used, it must be inconsistent with any reasonable hypothesis of innocence. The Referee ignored those requirements in his findings.

Respondent has set forth eight specific improper findings by the Referee. When these findings are rejected, there is no basis to impose discipline.

Point VI - This point addresses Respondent's request that the Referee's recommended one-year suspension be rejected and a 20-day suspension imposed

instead. It also covers the Bar's Points I and II in its initial brief in which the Bar asked for disbarment.

Two lawyers who admitted to conduct of a similar nature, although more egregious, received 20-day suspensions pursuant to consent judgments entered into with the Bar. If Respondent is found guilty of misconduct, his discipline should be no more than a 20-day suspension.

The cases relied upon by the Bar to support its claim of disbarment are inapplicable to the factual situation before the Court today and should be disregarded.

POINTS ON APPEAL

POINT I

THE REFEREE'S FINDINGS OF FACT SHOULD BE DISREGARDED BY THIS COURT BECAUSE THEY DO NOT REFLECT THE JUDGE'S INDEPENDENT DECISIONS ON THE ISSUES BEFORE HIM BUT, RATHER, ARE THE JUDGE'S VERBATIM ADOPTION OF BAR COUNSEL'S PROPOSED, ARGUMENTATIVE FINDINGS OF FACT WHICH WERE MADE WITHOUT THE JUDGE'S PRIOR PRONOUNCEMENTS ON THE FACTUAL ISSUES BEFORE HIM.

The Referee's findings of fact in the instant case must be disregarded by this Court. The Referee's findings of fact, in fact his entire report except for the recommended discipline, is exactly the same document submitted to the Referee after he refused to make findings of fact on the record. The Referee completely

disregarded the proposed report submitted by Respondent. Indeed, not a single proposed finding on a controverted issue submitted by Respondent was adopted. In a heated case such as this, where there are myriad disputes on many questions of fact, it is beyond comprehension for the Referee to find for the Bar on every single issue.

The only change the Referee made to the report was his striking through of the Bar's recommended discipline, i.e., disbarment, and substituting therefor a one-year suspension. This act shows, if nothing else does, the inaccuracy of the Referee's findings. The Bar submitted its version of the facts with sufficient force to justify a disbarment. The Referee clearly rejected such a draconian discipline. His failure to independently review the Bar's proposed findings of fact, when he had announced no facts in open court, shows a lack of independent judicial review of the facts before the Court.

Attached as Appendix A and Appendix B to this brief are Respondent's 36-page proposed Report of Referee and the Bar's proposed 10-page report. These two reports were the first submitted to the Referee for his consideration as to factual findings and as to the rules violated. The Referee adopted the Bar's report verbatim.

Attached as Appendices C and D are the final Reports of Referee submitted by the parties. These reports were submitted after the Referee had adopted the Bar's proposed report. As before, the Referee adopted verbatim the Bar's proposed

language as to mitigation and aggravation. The only alteration was changing the discipline from a disbarment to a one-year suspension.

Florida Courts have repeatedly expressed concern about judges blindly accepting proposed findings, i.e., abdicating their duty to impartially thoroughly and fairly evaluate the factual disputes before them. They have condemned trial judges signing verbatim proposed findings without the judge's first announcing the court's preliminary findings. The practice has been condemned for two reasons: first, it denies the reviewing court a dispassionate finding of fact to draw upon; second, it demeans the entire fact-finding process in that it gives one of the parties the feeling that the court was biased from the beginning of the proceedings because it found for the opposite party on every single disputed issue. Such is exactly the situation before the Court today. The Referee refused to give preliminary findings of fact and yet adopted without a single change Bar Counsel's argumentative proposed factual findings.

The Third District Court of Appeal in footnote 4 of its opinion in *Waldman v. Waldman*, 520 So.2d 87, 88 (Fla. 3d DCA 1988), stated:

> At the conclusion of the proceeding and without indicating what its judgment would be, the trial court requested counsel for both parties to submit written final argument and orders. Thereafter, and without a hearing, the trial court adopted verbatim the final judgment drafted by counsel for Mrs. Waldman. We condemn this practice. We admonish the bench and the bar that, particularly in domestic relations

> cases, *findings of fact and conclusions based thereon are of critical importance.* (e.s.)
>
> > When an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming. *Colony Square Company v. Prudential Insurance Company of America*, 819 F.2d 272 (11th Cir. 1987). The trial court's order is replete with "argumentative overdetailed partisan matter." *Roberts v. Ross*, 344 F.2d 747 (3d Cir. 1965).

The better practice, indeed the preferred practice, is for the trial court to indicate on the record its findings and conclusions.

> The reviewing court deserves the assurance that the trial court has come to grips with apparently irreconcilable conflicts in the evidence and has distilled therefrom true facts and the crucible of his conscience.

Keystone Plastics, Inc. v. C&P Plastics, Inc., 506 F.2d 960 (5th Cir. 1975). The parties to this disciplinary action are no less deserving of such assurances. In the case at the bar, the Referee refused to indicate on the record its findings and conclusions. Thereafter, he first signed the Bar's proposed findings of fact and then he signed the Bar's proposed order on mitigation and aggravation. The only work product submitted to this Court by the Referee that was not written by Bar Counsel is the Referee's change of the recommended discipline from disbarment to a one-year's

suspension. Under these circumstances, how can this court be convinced that the Referee

> [came] to grips with apparently irreconcilable conflicts in the evidence . . . and has distilled therefrom clear facts in the crucible of his conscience.

This Court relies on a dispassionate consideration of the facts in making its decisions in these important disciplinary proceedings. It is therefore essential that a referee fairly and dispassionately weighs all of the evidence in an effort to come up with the true facts. When, as here, the Referee in a case involving many, many disputed issues, some of which are only shown by circumstantial evidence, rules against one party on every single disputed fact, this Court cannot rely on those findings. The proposed order submitted by Bar Counsel, and the order submitted by Respondent's counsel as well, were not an objective recitation of the facts proven and the conclusions to be drawn therefrom. They were, by their very nature, argumentative. For the Referee to choose one proposed report in its entirety over the other is an abdication of the Referee's objectivity.

In *Corporate Management Advisors, Inc. v. James Boghos*, 756 So.2d 246 (Fla. 5th DCA 2000), the Court reversed judicial findings and in part stated:

> It is the [trial] court's unique responsibility to make the decisions in the various issues of the case based on the pleadings before it and its view of the evidence presented.

> The Court does not fulfill this responsibility by merely choosing the better proposed judgment or the better option or options contained in the competing proposed judgments presented by the attorneys. Often the attorneys, without appropriate guiding instructions, will make findings of fact and even rulings of law that the Court, without such prompting, would never have considered.

Subsequently, the 5th DCA reaffirmed *Boghos* in *Rykiel v. Rykiel*, 795 So.2d 90 (Fla. 5th DCA 2000). There the Court stated:

> Although a trial court may request, as it did in this case, that counsel for both parties submit a proposed final judgment, the court may not adopt the judgment verbatim, blindly, or without making in-court findings. [Citations omitted.] Review of the findings and conclusions of such a judgment is hampered or made impossible by the trial court's lack of participation. *Boghos.*

In the instant case, the record contains no findings or conclusions by the trial court, and the final judgment has no corrections, additions or deletions on its face. Under these circumstances, meaningful review by this court is impossible. The Referee's report in this cause, therefore, should not be adopted. It is nothing more than Bar Counsel's argumentative proposed findings. In proceedings of such import as these, where a lawyer's unblemished 30-year career is in jeopardy, this Court must not accept the Bar's arguments as gospel. The Referee's findings of fact should be disregarded and the record should be reviewed *de novo* by this Court or the case should be remanded for a new trial before a different referee.

POINT II

THE REFEREE ERRED WHEN HE DENIED RESPONDENT'S MOTION TO DISMISS AT THE CONCLUSION OF THE BAR'S CASE BECAUSE THE BAR VOLUNTARILY WITHDREW THE ONLY CASE PENDING IN THE INSTANT PROCEEDINGS.

At the end of the first day of the final hearing, the Bar announced:

> Your honor, before we proceed, I would like to advise the Referee that The Florida Bar will no longer pursue in the complaint paragraphs 12, 13 or 14. Mr. Cooper's testimony today comports with what he told me last night. I believe him. (TR 198).

In essence, the Bar withdrew the allegations made by Frances Brown on November 12, 1998 against Respondent and his former partner, Eric Hoffman. It involved conduct that occurred on June 1997. Respondent's case was assigned Bar file number 1999-00,478(02); the only file number under which the instant proceedings progressed.

Paragraphs 12, 13 and 14 of the Bar's complaint alleged that Chad Cooper gave Ms. Brown Respondent's card at the scene of her June 1997 accident.

Bar Counsel's withdrawal of the Brown allegations was predicated on the testimony of Chad Everett Cooper earlier that day. Mr. Cooper testified that Ms. Brown's accident happened right in front of the church at which he was a pastor. Mr.

Cooper was outside of his church when the accident happened. All he did was to give Ms. Brown his church office number. TR 147, 148, 176, 177.

Ms. Brown's case is the only case that went to a grievance committee probable cause hearing. That hearing took place on the December 5, 2002. (During that time frame, Chad Everett Cooper was interviewed by Bar representatives on at least May 5, 1999 and December 20, 2000. There is no indication that Mr. Cooper ever changed his story regarding the Brown accident).

The Bar included in its probable cause proceedings and in the instant proceedings, the Molly Glass complaint, filed on December 4, 2000. Respondent's deceased partner, Eric Hoffman, was Ms. Glass's lawyer. When she filed the grievance, however, Mr. Hoffman had died and only Respondent was named. The complaint filed by Ms. Glass concerned alleged solicitation that took place in March or April 1994, over nine years prior to the final hearing in this case.

The Bar assigned Ms. Glass's file case number 2001-00, 716 (02). After considering her complaint, Bar Counsel dismissed it by letter dated December 21, 2000 because her allegations did not fall within the six-year limitations period set down by this Court in Rule 3-7.16 of the Rules of Discipline.

The Glass file was never re-opened. Yet, Bar Counsel took the Glass matter to the grievance committee on December 5, 2002, and then included her allegations in the

formal complaint filed in this Court. Bar Counsel had access to Ms. Glass's sworn statement taken on June 1, 1999 at the time that he dismissed her grievance in December, 2000.

The Bar's justification for including the Molly Glass allegations in the Bar's complaint was summarized as follows:

> Your Honor, The Florida Bar, once it closes a file, can re-open the file at any time for any reason. And just because Mr. Spangler [the Bar Counsel that dismissed the Glass complaint on statute of limitation grounds] closed a file does mean (sic) that I cannot re-open that file at any time. And so the fact that he closed it is really irrelevant.

Incredibly, the Bar argues that the statute of limitations rule adopted by this Court is "irrelevant" and that it can re-open any file at any time "for any reason."

This Court has never given the Bar *carte blanche* to ignore this Court's rules. If, as the Bar argues, Mr. Spangler's dismissal of the case because it was filed more than six years after the misconduct occurred is "irrelevant", this Court's adoption of Rule 3-7.16 was a meaningless exercise. The Bar takes the position that it can freely ignore that rule. Fortunately, this Court has long held that this Court, not the Bar, controls disciplinary proceedings and that it will not tolerate the Bar's failure to comply with the rules promulgated by this Court. For example, in *Florida Bar v. Rubin*, 362 So.2d 12 (Fla. 1978), this Court dismissed two guilty findings by referees

against a lawyer for the Bar's rule violations. Specifically, the Bar violated the confidentiality rule then in effect and it also "saved up" for a year a guilty finding by one referee in the hope that a second case would also result in a guilty plea. The two cases could then be used for an argument for an enhanced discipline.

Additional examples of this Court requiring the Bar to abide by its rules are *Florida Bar v. Catalano,* 651 So.2d 91 (Fla. 1995)(complaint dismissed because the grievance committee did not meet its quorum requirement) and *Florida Bar v. Calvo,* 601 So.2d 1194 (Fla. 1992) (rejecting the Bar's position that an SEC suspension was a final adjudication of discipline by a foreign jurisdiction).

The Referee should have dismissed this case once the Bar voluntarily withdrew the allegations pertaining to the Frances Brown complaint. Her complaint was the vehicle that drove these grievance proceedings. The probable cause hearing was captioned the Frances Brown complaint; the case number used throughout these proceedings was the Frances Brown complaint; and once the Bar dismissed her complaint, albeit four years after she filed it, the Bar had in essence stipulated itself out of court. The Molly Glass allegations had been dismissed by predecessor Bar Counsel. They should never have been resuscitated.

POINT III

THE REFEREE ERRED WHEN HE DENIED RESPONDENT'S MOTION TO STRIKE THOSE ALLEGATIONS IN THE BAR'S COMPLAINT RELATING TO MOLLY GLASS.

On December 4, 2000, Molly Glass filed a grievance against Respondent alleging solicitation. Although she had never met David Barrett, and her case was handled entirely by Eric Hoffman, Respondent's deceased partner, she filed a grievance against Respondent. The basis for her grievance was her mistaken belief that the firm had paid a $200.00 fee to Chad Cooper for soliciting her case. The evidence was unrefuted that the $200.00 investigative fee listed on Ms. Glass's closing statement was for investigative services unrelated to Mr. Cooper's actions. In fact, Ms. Glass had been so happy with Mr. Hoffman's representation of her that she had named a subsequently born child after Mr. Hoffman.

On December 21, 2000, Ms. Glass's complaint was dismissed by Bar Counsel Donald M. Spangler because the six-year statute of limitations had expired. In that letter, Mr. Spangler said:

> I have received and reviewed your inquiry/complaint. The matter giving rise to your inquiry/complaint is greater than six years old and therefore this file is being closed pursuant to Rule 3-7.16 of Rules of Discipline of The Florida Bar. A copy of Rule 3-7.16 [the six-year statute of limitations] is enclosed for your review.

> As there is nothing further The Florida Bar can do with respect to this case, this file has been closed. The computer record will be purged and the file destroyed one year from the date of closing.

The Florida Bar never reopened the complaint filed by Ms. Glass. Nevertheless, the Bar included her allegations in the formal complaint filed in this Court. At the August 4, 2003 hearing on Respondent's motion to strike the Molly Glass allegations, the Bar justified the inclusion of her allegations as follows:

> Your Honor, The Florida Bar, once it closes a file can re-open the file for any time for any reason. And just because Mr. Spangler closed a file does [not] mean that I cannot reopen that file at any time. And so the fact that he closed it is really irrelevant.

Incredibly, the Bar takes the position that Rule 3-7.16 promulgated by this Court is "irrelevant". The Bar takes the position that it can reopen a file dismissed for not meeting the requirements of this Court's Rule 3-7.16 "at any time for any reason." If so, what is the reason for the rule? Does the Bar have unfettered discretion to ignore Rule 3-7.16. According to the Bar, the rule is irrelevant and can be superceded by Bar Counsel for any reason at any time.

As argued more extensively in Point II above, this Court has held that the Bar must adhere to the rules promulgated by this Court. If the Bar is to accuse lawyers of improper conduct by failing to adhere to this Court's rules, the Bar must also adhere

to those very same rules. Rules promulgated by this Court are *not* irrelevant. They are not to be ignored by The Florida Bar at any time for any reason. Any allegations relating to Molly Glass's complaint should be stricken from the record. This Court should reverse the Referee's ruling to the contrary.

POINT IV

THE REFEREE ERRED IN DENYING RESPONDENT'S MOTION TO DISMISS DUE TO THE BAR'S UNWARRANTED DELAY IN BRINGING THESE DISCIPLINARY PROCEEDINGS.

On April 7, 2003, Respondent filed his motion to dismiss for prosecutorial delay. A hearing on that motion was held on August 4, 2003. The motion was subsequently renewed on the same basis on September 18, 2003. Both motions were denied.

The predicate for Respondent's motions was the Bar's failure to bring disciplinary proceedings within a "reasonable time after it obtains jurisdiction to proceed." *Florida Bar v. Walter*, 784 So.2d 1085 (Fla. 2001), citing *Florida Bar v. Lipman*, 497 So.2d 1165 (Fla. 1986), and *Florida Bar v. McCain*, 361 So.2d 700 (Fla. 1978). In the instant proceedings, the Bar took over four years from the time it received the initial complaint on November 24, 1998 until it took the matter to probable cause hearing on December 5, 2002. By the time this case went to final hearing, the events described in the Frances Brown complaint were over six years old. The events

in the Glass case were over nine years old. The Bar's failure to bring disciplinary proceedings promptly resulted in severe prejudice to Respondent. His former partner, Eric Hoffman, passed away on July 3, 2000. *All* of the allegations against Respondent were the direct result of Mr. Hoffman's representation of the pertinent people involved. Mr. Hoffman was also Chad Cooper's immediate supervisor. Mr. Hoffman's testimony was crucial to Respondent's defense.

With one minor exception, every one of the Bar's witnesses at final hearing had been interviewed by the Bar in 1999. They included:

A. Molly Glass; interviewed on June 1, 1999 and March 27, 2001.

B. Sandra Scott; interviewed on January 26, 1999, April 14, 1999, and February 26, 2001.

C. William D. Hall; interviewed April 14, 1999 and July 7, 1999.

D. Anthony Bajoczky; interviewed July 6, 1999.

E. Charles Vanture; interviewed May 19, 1999.

F. Chad Cooper; interviewed May 5, 1999 and December 20, 2000.

By the middle of 1999, the Bar had interviewed all of its witnesses except Randy Pelham (one of Respondent's former partners - whose testimony added little to the Bar's case). Yet, the Bar did not take its case to probable cause hearing until the very end of 2002, over three years after it started interviewing individuals. The delay in this

case was completely unreasonable and inured to Respondent's detriment through Mr. Hoffman's death.

This Court's dismissal in Bar disciplinary proceedings in *Walter* for its failure to bring disciplinary proceedings within a reasonable time is but the latest declaration by this Court that disciplinary proceedings should be handled with dispatch. This Court has been chastising The Florida Bar for failure to responsibly bring disciplinary proceedings for over 40 years. In 1960 this Court noted with disfavor in *Murrell v. Florida Bar,* 122 So.2d 169 (Fla. 1960) at 174, the fact that Mr. Murrell's case had been pending for five years. There the Supreme Court noted that:

> [T]he minute such a proceeding is instituted the lawyer's professional reputation is shattered and in danger of being permanently impaired. Such charges should not be suspended in limbo. They should be dispatched and if found to be without merit, the lawyer charged should be exonerated.

In the case at bar it took The Florida Bar almost five years to exonerate Respondent of the charges brought against him by Frances Brown.

In *State ex rel. The Florida Bar v. Oxford*, 127 So.2d 107, 112 (Fla. 1960), this Court noted that a four-year delay in disciplinary proceedings was unacceptable. The Court admonished the Bar with the following statement:

> Disciplinary proceedings should be handled with dispatch. While they are pending, the defendant is suspended in limbo and should he expire while so suspended, it would be a tragedy.

In 1967 the Court once again chastised the Bar and pointed out that "the responsibility for diligence [in bringing disciplinary proceedings] must rest with the Bar." *Florida Bar v. Wagner*, 197 So.2d 823, 824 (Fla. 1967).

In 1970 in its opinion in *Florida Bar v. Randolph*, 238 So.2d 635 (Fla. 1970), on page 638, the Court observed that:

> Such inordinate delays are indeed unfair and even unjust to the one accused. They permit violators to remain active in the practice. They dim the memories of witnesses. They mar effective and efficient enforcement of the canons of ethics. Worst of all, perhaps, they undermine the public confidence in the bar's announced determination to keep its own house in order.

In 1979 this Court rejected a "speedy trial rule" recommended by a Supreme Court committee studying Bar disciplinary proceedings. In rejecting the proposal for a speedy trial rule, this Court said:

> We find that such a speedy trial rule is not necessary at this time since the revisions to Article XI, which we approved, are expected to expedite disciplinary matters. Petition of Supreme Court Special Committee etc., 373 So.2d 1, 4 (Fla. 1979).

Three years after it refused to adopt a speedy trial rule, this Court rejected an accused lawyer's claim of undue delay, although it was "regrettable," because "it was

not prejudicial and would not happen under the new set of rules". *Florida Bar v. Davis*, 419 So.2d. 325, 327 (Fla. 1982). In Mr. Barrett's case, the Bar's delay was more than regrettable; it severely prejudiced Respondent's ability to defend himself.

In 2001, this Court imposed the only option that will guarantee accountability by the Bar. It dismissed disciplinary proceedings in *Florida Bar v. Walter*, 784 So.2d 1085 (Fla. 2001). Although the delay in *Walter* lasted for seven years, and although the Court acknowledged that its dismissal was a "close call", the philosophy behind that decision is equally applicable to the instant proceedings. Simply put, the Bar did not move either the *Walter* case or this case with dispatch. While the Bar claims that it was actively investigating the case throughout the entire four-year period, all of its primary witnesses were interviewed in 1999 and there was no valid reason for delaying the probable cause hearing for over three years after that point. In essence, the Bar was digging for additional evidence in an attempt to take an extremely shaky case and turn it into something with merit.

The ineffectiveness of the Bar's investigation is manifested by its withdrawal of the Frances Brown complaint in August, 2003; almost five years after she filed her grievance.

In the *Walter* case, this Court found that it was "unjust or unfair" to require Mr. Walter to respond to respond to the Bar's charges. The Court specifically noted that

the Bar is required to bring disciplinary proceedings within a "reasonable time after it obtains jurisdiction ". *Florida Bar v. McCain*, 361 So.2d 700, 704-05 (Fla. 1978); *Florida Bar v. Lipman*, 497 So.2d 1165 (Fla. 1986), and it did not do so.

In Mr. Barrett's case, the Bar obtained jurisdiction in November 1998. It did not proceed with the case until December 2002. The delay was unreasonable, it was unjust to Respondent, and the death of his partner in July 2000 materially prejudiced his defense. Until the Bar knows that this Court will truly hold it accountable for responsible, diligent prosecution, they will continue to dally when it suits them. The only way to ensure that this will not happen is the dismissal of disciplinary proceedings when the Bar does not act within a reasonable time.

POINT V

THE REFEREE'S STATED FINDINGS ON MATERIAL CONTESTED ISSUES, WHICH ARE IN ACTUALITY THE VERBATIM ADOPTION OF BAR COUNSEL'S PROPOSED ARGUMENTATIVE FINDINGS, ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE TO MEET THE REQUIREMENT THAT A LAWYER'S MISCONDUCT MUST BE PROVEN BY CLEAR AND CONVINCING EVIDENCE AND, THEREFORE, SHOULD BE REJECTED BY THIS COURT.

As argued above in Point I, the Referee, using the language promulgated by the Bar, found against Respondent on every disputed question of fact. He did so notwithstanding the fact that there was either no evidence or virtually none to support

his conclusions. While space limitations prevent Respondent from pointing out every error, the most egregious mistakes are set forth below. In considering the arguments below, Respondent implores this Court to adhere to its pronouncements on the burden placed on The Florida Bar in disciplinary proceedings. Specifically, the Bar must prove misconduct by clear and convincing evidence; a burden more stringent than the preponderance standard used in civil cases. *Florida Bar v. Rayman*, 238 So.2d 594 (Fla. 1970). The Court further defined clear and convincing evidence in *Inquiry Concerning a Judge re: Davey*, 645 So.2d 398 (Fla. 1994). On page 404 of that opinion, the Court refined its definition of clear and convincing evidence as:

> [S]uch weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In cases involving intent, such as the one at bar, the Bar must prove that additional element by clear and convincing evidence. *Florida Bar v. Lanford*, 691 So.2d 480 (Fla. 1997). While recognizing that intent can be proven by circumstantial evidence:

> However, in order to be legally sufficient evidence of guilt, circumstantial evidence must be inconsistent with any reasonable hypothesis of innocence.

Florida Bar v. Marable, 645 So.2d 438, 443 (Fla. 1994).

In adopting as his own the Bar's findings of fact, the Referee completed disregarded *Rayman, Davey, Lanford* and *Marable*.

Respondent specifically takes issues with the following findings of fact:

A. The allegation that Chad Everett Cooper's job did not involve paralegal work but that his duty was solely to bring in clients to the firm was not proven. ROR p. 6. Chad Everett Cooper was hired in 1993 after being interviewed by an associate in the firm, Carlton Enfinger, and then after being secondarily interviewed jointly by Respondent and Mr. Hoffman. TR. 95. His hiring memo, dated March 4, 1993 (TFB Ex. 4, Tab M), indicated that his immediate supervisor would be Eric Hoffman and that any actions that he took were to be "solely with the explicit authority of Mr. Hoffman . . . ."

Mr. Cooper had previously worked for lawyer Harold S. Richmond in Gadsden County. Mr. Richmond testified that Mr. Cooper's duties at the firm had included answering the phone, retrieving documents from the courthouse and locating witnesses. Mr. Cooper had also been jointly appointed, with Mr. Richmond's nephew, by the Court to do investigation on a murder case. TR. 466, 467. Prior to being hired by the Barrett, Hoffman firm, Mr. Cooper already knew how to photograph a scene, photograph injuries, interview clients and witnesses and how to review an accident report. Mr. Cooper confirmed that he had been assigned as an investigator in a murder case. TR. 94, 152, 153.

While Mr. Cooper acknowledged that during his employment he properly brought in approximately 100 clients into the firm, he was never paid a referral fee at any point during the time that he was an employee in the firm. TR. 99, 170. This was confirmed by the bookkeeper for the Barrett, Hoffman firm, Cynthia Maxwell. TR. 395, 396. Mr. Cooper testified that every client he brought into the firm prior to his dismissal in September 1997 was the result of the individuals having a proper legitimate relationship with him, i.e., a relative or good friend, a member of the church at which Mr. Cooper was a pastor or a referral as a result of one of the afore-mentioned relationships. TR. 98. With the exception of the Molly Glass allegations, the Bar presented no evidence showing otherwise.

Bar witness Bill Hall, who had worked in the Barrett, Hoffman firm from August 1989 until May 1998, although he acknowledged that Mr. Cooper was hired because he was well known in his community, testified that he saw nothing unusual with Mr. Cooper's activities. TR. 304. It is noteworthy that during the nine years that Mr. Hall worked at the firm, there is no evidence that he ever brought to the Bar's attention any improper conduct by Mr. Cooper.

Simply stated, the Referee's conclusion that Mr. Cooper's only duty was to bring clients into the firm is not supported by clear and convincing evidence.

B. The allegation that Respondent "devised a plan" to bring in more

clients was not proven. ROR p. 6. The Referee adopted the Bar's argument that Mr. Cooper was sent to a chaplain's course at Tallahassee Memorial Hospital (TMH) so that he could gain access to hospital patients in order to improperly solicit their business. The only evidence to support this "plan" were the allegations in the Molly Glass case (which should be completely disregarded as argued in Point III above). This does not constitute clear and convincing burden evidence as required by *Rayman* and *Davey*.

The only facts that the Bar conclusively proved in this case was that Mr. Cooper attended a chaplain's course at TMH while still employed at the Barrett, Hoffman firm and that he ministered to patients and their families at the hospital. The evidence as to whose idea it was for him to attend the course was inconclusive. Mr. Cooper initially testified during final hearing that it was Respondent's idea for him to attend the course. He acknowledged during cross-examination, however, that he had previously testified that it was his own idea to take the chaplain's course. TR. 107, 179. He further acknowledged that it was quite possible that he and Mr. Barrett had spoken about a chaplain course sometime prior to Mr. Barrett allegedly advising him about the course being offered at TMH. TR. 181. Mr. Cooper admitted that it was common practice among ministers and even members of Mr. Cooper's church to

minister to individuals in a hospital. TR. 167. Such wishy-washy testimony should never be considered clear and convincing evidence.

The Bar presented but one instance of a case that came into the firm as a result of Mr. Cooper's conduct, i.e., the Molly Glass case. The Bar cannot be said to have proven up an unethical plan to improperly solicit patients of TMH by virtue of one single, disputed, incident.

Perhaps the most important testimony was Mr. Cooper's own testimony that he spent most of his time at the hospital performing chaplain duties in the cancer ward. TR. 165. Respondent would argue to the Court that the cancer ward is not an area that results in clients for personal injury lawyers. Mr. Cooper also testified, quite adamantly, that he was not at the hospital to hand out business cards. TR. 166. In fact, he met the Glasses because the head chaplain ordered him to attend to them.

Respondent respectfully submits that this vital conclusion by the Referee is unsupported by the evidence and, therefore, cannot be accepted by this Court.

C. The Molly Glass case. The Referee erred when he adopted the Bar's language in the paragraph beginning at the end of page 7 and extending onto page 8, to the effect that Mr. Cooper was Respondent's agent when he solicited Molly Glass, that Respondent had "direct supervisory authority over Cooper", that he ordered the

conduct, and that he ratified Mr. Cooper's conduct. The Bar did not prove any of these allegations by clear and convincing evidence.

The following facts are undisputed:

i. Mr. Cooper only handed Eric Hoffman's card to Ms. Glass;

ii. Mr. Cooper's March 4, 1993 (TFB Ex. 4, Tab M) hiring memo specifically indicated that Mr. Hoffman was Mr. Cooper's supervisor;

iii. Respondent did not work on Ms. Glass's case, although Mr. Hoffman, Bar witness Bill Hall and another lawyer did;

iv. Mr. Cooper received no referral fee or bonus for Glass;

v. There is absolutely no evidence in the record that Mr. Cooper received *any* referral fees for any cases while working at the firm;

vi. The Molly Glass is the only case mentioned in the record below that allegedly was improperly brought into the firm prior to Mr. Cooper's being fired on September 19, 1997; and

vii. There is no evidence in the record that any of Mr. Cooper's bonus were the result of improperly bringing cases into the firm.

If Mr. Cooper was acting as the agent of a lawyer for the Barrett, Hoffman firm when he gave Ms. Glass Mr. Hoffman's card, he was working solely for Mr. Hoffman. Mr. Hoffman, who was a drug addict (all witnesses agreed that Mr. Barrett tried on

numerous occasions to get Mr. Hoffman into treatment for his drug impairment, although he was ultimately unsuccessful), did a wonderful job on the case. Ms. Glass even named one of her subsequently born children after Mr. Hoffman.

The evidence is persuasive that neither Ms. Glass nor any family member was in any way pressured to take their case to the Barrett, Hoffman firm from the time that Ren Glass, Ms. Glass's son, was hospitalized at TMH in April 1994 until he died 32 days later on May 2, 1994. The evidence is conclusive that Ms. Glass did not contact the Barrett, Hoffman firm for several weeks after meeting Mr. Cooper and she did so only after receiving by facsimile at 3:00 in the morning a release for $10,000 from Budget Rent-A-Car, the owner of the vehicle that struck Ren Glass. Ms. Glass had been advised by a family friend, a Florida highway patrolman, that she should sign no papers until she had consulted with a lawyer. Ms. Glass testified that she contacted Mr. Hoffman only after checking him out with various Bar authorities and learning that he was a reputable lawyer.

Contrary to conduct that one would expect from a lawyer or a law firm that was improperly soliciting clients, Ms. Glass was not even presented with a contract to retain the firm when she met with Mr. Hoffman. She received advice and left. It was only after Ren died that she went back to the firm and signed a contract for

employment. It had been over one month since Mr. Cooper had prayed with the family before Ms. Glass retained the firm.

Ms. Glass never met Respondent other than, perhaps, in passing. He did absolutely no work on her file.

The evidence was conclusive that Respondent was not familiar with the cases pending in Mr. Hoffman's department. Witnesses Anthony Bajoczky, TR. 321, and Joseph Boyd, TR. 369, testified that Respondent did not participate in the individual lawyers' cases. Bill Hall confirmed those statements. TR. 292, 304. In fact, Mr. Hall testified that Mr. Hoffman's control over the personal injury department was absolute; he would not even allow the receptionist to direct calls to Mr. Hall or Mr. Barrett if it was a case pending in Mr. Hoffman's department. TR. 313, 314.

D. The purpose for Cooper's 1996 bonuses. The Bar has stipulated that the Terry Charleston case was properly brought into the Barrett firm. He had been rendered a quadriplegic from an automobile accident in April 1994. The accident was not his fault. He retained the firm in May 1994. In April 1996, Mr. Charleston's case settled for $3,600,000.

Mr. Cooper spent an extraordinary amount of time with Mr. Charleston. He attended to his most basic needs, including personal hygiene. Mr. Cooper would spend entire days with him. In addition to feeding and washing Mr. Charleston, he

would take him on various errands, insure that he took his medicine and, not insignificantly, see to spiritual needs. TR. 153.

The Referee, incredibly, found that Respondent lied during his testimony about the reasons for the three bonuses, totaling $47,500, that Mr. Cooper received in 1996. The Bar in its proposed Report of Referee mischaracterized Respondent's testimony, which was adopted by the Referee in page 8 of his report, when they proposed language that said Mr. Barrett testified that the bonus was given for three reasons: (1) Mr. Cooper's personal services to Mr. Charleston; (2) his companionship to Mr. Charleston; and (3) his pastoring services to Mr. Charleston. In fact, Mr. Barrett also stated a fourth reason -- Mr. Charleston's expressed desire to Mr. Barrett and Mr. Hoffman that Mr. Charleston wanted to give Mr. Cooper a substantial bonus for his services. Respondent and Mr. Hoffman agreed that it was their responsibility, not Mr. Charleston's, to reward Mr. Cooper for his extraordinary efforts. Accordingly, they gave Mr. Cooper a $12,500 bonus in April 1996. TR. 530. The balance of the bonuses were given to Mr. Cooper in December 1996 after the firm's finances were determined. TFB Ex. 4, Tab M.

The Bar has not proven by clear and convincing evidence that Respondent lied when he testified to the Referee. First, the three stated reasons contained in the report were not the only reasons that Respondent gave for the bonus. Second, the only

witness who testified on the matter gave consistent testimony: the bonus was the result of Mr. Cooper's extraordinary health care.

It was improper for the Referee to have found Respondent guilty of serious misconduct, i.e., lying to the Referee, when no such charges were made against him. A lawyer's "claim of innocence cannot be used against him." *Florida Bar v. Corbin*, 701 So.2d 334, 337 (Fla. 1997), at fn. 2. While the primary thrust of the footnote cited above in *Corbin*, and the case cited therein, *Florida Bar v. Lipman*, 497 So.2d 1165, 1168 (Fla. 1986), deals with denial of wrongdoing in the sentencing phase, the point applies equally well to the Referee's finding in the instant proceedings that Mr. Barrett lied. Here, the Bar is arguing that Mr. Barrett's claims of innocence are blatantly untrue although they have shown little evidence to the contrary. This is a conclusion, not a finding of fact. That conclusion should not be the basis for a finding of misrepresentation.

E. The reason for Chad Everett Cooper's dismissal. On September 19, 1997, Respondent fired Chad Everett Cooper. There were three reasons for the firing stated to the Referee. First, Respondent testified that Mr. Cooper was fired because he persuaded Terry Charleston, after the latter was no longer a client with the firm, to pledge one of Mr. Charleston's certificates of deposit as collateral for a business Mr. Cooper was setting up. The business failed and Mr. Charleston lost his CD. CG 28,

29. Mr. Cooper testified that he was fired because the bank at which he did business, Guaranty National Bank (GNB), was threatening to send him to the State Attorney for financial irresponsibility. Mr. Barrett, who was an official of GNB, was allegedly embarrassed by Mr. Cooper's actions and, therefore, fired him. TR. 110. The third reason, and the one adopted by the Referee, was the firing memo in Mr. Cooper's file, authored by Eric Hoffman (and unseen by Mr. Barrett until the year 2000. GC 30, 32), to the effect that Mr. Cooper was fired because "it was getting pretty hot and he was afraid that everyone would get caught." ROR p. 8. The latter conclusion was based on Mr. Cooper's firing memo. Because Mr. Hoffman died in July 2000, he could not authenticate the basis for the memo. Messrs. Barrett and Cooper both denied that Mr. Hoffman's stated reason was the basis for the termination. There was no evidence before the Referee that Respondent in any way participated in the preparation of the memo, the winding down of Mr. Cooper's employment or the financial circumstances of his severance.

This is but one other example that a "factual finding" being made by the Referee when there was not clear and convincing evidence to support the finding. It was up to the Bar to prove the validity of the memo placed in the Cooper firing file; it was not the burden of Respondent to disprove it. The Bar failed to do so.

F. Chad Cooper's solicitation of clients was after he was fired by Respondent and Respondent neither knew nor ratified the actions of Messrs. Cooper and Hoffman. ROR pp. 8-9. The Bar did not prove clearly and convincingly that Respondent knew that Chad Cooper solicited clients for the firm after he was fired by Respondent on September 19, 1997. The only evidence supporting this assertion was Respondent's signature on ten checks dated November 26, 1997 and signed by Respondent and Eric Hoffman. Those checks are discussed below.

The evidence is uncontroverted that immediately after his dismissal from the firm by Mr. Barrett, Mr. Hoffman called Mr. Cooper with a golden job opportunity. Specifically, Mr. Hoffman had made arrangements for Mr. Cooper to go to work for local physician Mladen Antolic for $10,000 per month. His job was to bring patients into Dr. Antolic's practice. TR. 112. Mr. Cooper testified that Dr. Antolic had paperwork from a firm other than Respondent's indicating that it was legal for a physician to use accident reports to contact individuals as potential patients. TR. 112. Mr. Cooper also did similar work for Dr. Perkins, who had a similar legal opinion.

The Bar alleged that Dr. Antolic improperly referred patients to Mr. Hoffman for representation of them in their personal injury cases. The Bar offered no evidence, however, to indicate that the patients were improperly referred. Mr. Cooper did not

so testify. Dr. Antolic was not called. There is no evidence in the record that Dr. Antolic's solicitation was improper. There is evidence in the record that Dr. Antolic referred patients to different lawyers in Tallahassee. TR. 113. The fact that Mr. Cooper claimed responsibility, and received a $200 fee from patients that ultimately hired Mr. Hoffman as their lawyer, does not mean there was any impropriety therein. Mr. Cooper testified that he did the initial intake, including taking pictures on each of the new clients. TR. 118.

M. Hoffman accepted as clients patients of Dr. Antolic's who were injured in 15 motor vehicle accidents. The Bar's sole evidence that Mr. Cooper solicited clients for Respondent is Mr. Barrett's signature on ten checks delivered to Mr. Cooper on November 26, 1997 and signed by Respondent and Mr. Hoffman. Those ten checks were all for individuals represented by Mr. Hoffman whose cases had come from Dr. Antolic's office. Mr. Barrett authorized the checks only after he was assured by Mr. Hoffman that the expenditures were legitimate and only after an invoice was provided. TR. 136, 555, GC 31, 31.

Mr. Barrett's signing ten checks to Mr. Cooper, along with his partner, does not prove either that Mr. Cooper was soliciting clients for Mr. Barrett or that Mr. Barrett knew that Mr. Cooper was soliciting clients for Mr. Hoffman. In fact, the evidence is persuasive that Mr. Barrett knew nothing about improper solicitation.

The first, and perhaps the most important factor for this Court to consider in reviewing this finding is the evidence that Mr. Cooper avoided all contact with Respondent after he was fired. The testimony of Karline Phillips in this regard is telling. Ms. Phillips, the firm's receptionist from fall 1996 through late 1997, testified convincingly that Mr. Cooper avoided Respondent at all costs. Mr. Cooper would first call the office to see if Mr. Barrett was in. If he was told that Mr. Barrett was gone, Mr. Cooper would visit Mr. Hoffman the office about 5 to 10 minutes later. TR. 460. Ms. Phillips knew that while employed at the firm Mr. Cooper had worked primarily with Mr. Hoffman, although sometimes he worked with Bill Hall. TR. 458.

Ms. Phillips' testimony about Mr. Cooper's avoidance of Mr. Barrett was corroborated by current employee and bookkeeper Cynthia Maxwell. TR. 413, 414. It was during that same time frame that Mr. Cooper referred to Mr. Barrett in derogatory and extremely crude terms. TR. 415.

Ms. Maxwell was the individual in the firm who cut all of the firm's checks. She, Mr. Barrett and Mr. Hoffman were the only individuals authorized to sign checks. The system set up by the firm required that at least two of those three individuals signed all checks. It was standard policy in the office that if the two lawyers were available they would sign the checks, rather than Ms. Maxwell.

Ms. Maxwell testified that the ten $200.00 checks that Respondent and Mr. Hoffman signed payable to Chad Cooper on November 26, 1997 were prepared at Mr. Hoffman's request. Her usual practice was to sign checks if Mr. Hoffman specifically told her to do so, as was the case in this instance. Because Mr. Cooper was no longer working for the firm, however, and because Mr. Barrett was present, she took the ten checks into Mr. Barrett's office for his signature. Upon seeing the checks, Mr. Barrett became upset, cursed, went into Mr. Hoffman's office and slammed the door. Shortly thereafter, Mr. Hoffman's secretary, Sandra Scott, told Ms. Maxwell that Mr. Cooper was not to be paid until he brought supporting documents in to verify the funds that he was to be paid. TR. 405, 406, 407.

Mr. Barrett acknowledged signing the ten checks on November 26, 1997. He testified to the Referee that he signed them only after being told by Mr. Hoffman that the checks were for investigative services performed by Mr. Cooper. TR. 555. Mr. Barrett had testified similarly before the grievance committee. GC 31, 31.

Respondent also testified that he knew nothing about any checks being delivered to Chad Cooper after Mr. Cooper was fired other than the ten checks cut in November, 1997. GC 43.

The ten $200.00 checks referred to above were all for clients that retained the firm after Mr. Cooper was fired.

On December 8, 1997, two $200.00 checks were delivered to Mr. Cooper. Ms. Maxwell and Mr. Hoffman signed those checks. TR. 407.

On January 30, 1998, 21 checks were cut to Mr. Cooper. They were signed by Mr. Hoffman and Ms. Maxwell. Ms. Maxwell testified that Mr. Barrett was not in the office at the time but that Mr. Cooper was there. TR. 413, 414. The checks were cut as a result of invoices submitted by Mr. Cooper. Ms. Maxwell testified that she was upset about the fact that Mr. Cooper's invoices, which were dated December 14 and December 24, 1997, were not submitted to her for payment until late January 1998. TR. 424.

There is no evidence in the record that Respondent knew anything about the December 1997 and January 1998 checks paid to Mr. Cooper.

The most persuasive evidence that Respondent knew nothing about any improper arrangement between Mr. Hoffman and Mr. Cooper is the fact that most of the $200.00 checks given to Mr. Cooper were signed over to Mr. Hoffman. Specifically, of the 21 checks dated January 30, 1998, TFB Ex. 4, Tab C, 15 of them were endorsed over to Mr. Hoffman's benefit as payment of $4,000 owed to Mr. Hoffman by Mr. Cooper. TR. 115. Of the remaining checks, some of them were cashed by Mr. Cooper so he could give the money to Mr. Hoffman. TR. 115. There is no evidence whatsoever that Respondent knew of this arrangement. The obvious

conclusion to be drawn from Mr. Cooper's endorsing checks over to Mr. Hoffman is that it was a mechanism to defraud the firm by using investigative invoices as a vehicle to get Mr. Cooper funds so he could repay his debt to Mr. Hoffman. In fact, Mr. Cooper himself testified that the referral fee arrangement was Mr. Hoffman's idea. TR. 161.

G. The Referee erroneously found that Respondent improperly solicited 21 clients. On page 9 of his report, the last paragraph on the page, the Referee found that Mr. Cooper, while acting as an independent contractor, permissibly brought many friends and relatives to Respondent, apparently as clients. There is no evidence to support this assertion. The evidence clearly shows that any clients brought to the firm after Chad Cooper became an independent contractor, i.e., after he was fired by Respondent on September 19, 1997, were brought to Eric Hoffman.

The Referee on page 9, the second sentence of the last paragraph, named 21 clients allegedly "improperly solicited by Respondent. . . ." There is no evidence that Respondent solicited any of the 21 named individuals.

It is quite possible that in adopting the verbatim language of The Florida Bar, the Referee adopted the Bar's mistaken language regarding the 21 named individuals being solicited by Respondent; the Bar may well have meant the 21 individuals were improperly solicited by Mr. Cooper. If such is the case, it further bolsters

Respondent's argument made above that the Referee exercised no independent judgment in this case whatsoever. Such a glaring mistake should have been caught by the Referee. In fact, there is no evidence that Respondent ever solicited any cases.

H. There is no evidence indicating that in May 1996 Respondent sent Chad Everett Cooper to Miami or Chicago. On page 10, the third paragraph, the Referee found that Respondent "sent Chad Everett Cooper to Miami and Chicago . . ." to solicit business. Other than a travel expense voucher for $974.24, there is no evidence indicating that Respondent sent Mr. Cooper to Miami and Chicago.

POINT VI

SHOULD THIS COURT FIND RESPONDENT GUILTY OF MISCONDUCT, THE APPROPRIATE DISCIPLINE IS THE 20-DAY SUSPENSION METED OUT TO LAWYERS VANTURE AND FLOWERS FOR MORE EGREGIOUS MISCONDUCT, ESPECIALLY SINCE THE LAST ACT OF MISCONDUCT IN THE RECORD OCCURRED IN JANUARY 1998, OVER SIX YEARS AGO, IN LIGHT OF THE FACT THAT THE MISCONDUCT AT HAND WAS THE DIRECT RESULT OF THE ACTIONS OF RESPONDENT'S PARTNER, AND IN LIGHT OF THE VARIOUS OTHER MITIGATING CIRCUMSTANCES.

A. Respondent should receive no more than a 20-day suspension. Respondent acknowledges that this Court has stated that a referee's recommended discipline will be upheld unless "clearly off the mark". *Florida Bar v. Vining*, 707

So.2d 670, 673 (Fla. 1998), *Florida Bar v. Lecznar*, 690 So.2d 1284, 1288 (Fla. 1997), *Florida Bar v. Dunagin*, 731 So.2d 1237, 1242 (Fla. 1999).

Respondent submits, however, that if misconduct is found, the two 20-day suspensions handed out by This Court in *Florida Bar v. Vanture*, Case No. 02-695 (November 21, 2002), and *Florida Bar v. Flowers*, Case No. SC02-694 (August 29, 2002), is the appropriate discipline to impose in the case at bar.

While the Bar characterizes the conduct engaged in by Messrs. Vanture and Flowers as being minor, it is more egregious than that proven to be engaged in by Respondent. Both of these lawyers personally hired a runner to solicit cases for them. Unlike the case at bar, those gentlemen knew with absolute certainty, according to their pleas, that they were illegally hiring a runner. As to Mr. Vanture, Chad Cooper testified that he was paid $2,000 in referral fees by Mr. Vanture. TR. 111. Notwithstanding their deliberate conduct, Messrs. Vanture and Flowers received but 20-day suspensions. Respondent should get no more.

In the case at bar, Respondent did not handle any of the cases brought into his office by allegedly improper means. Partner, Eric Hoffman, now deceased, handled every case. Eric Hoffman, who was Mr. Cooper's direct supervisor, handled all intake matters and, as testified to by Bar witness Bill Hall, Mr. Hoffman would not allow personal injury clients to speak to any other lawyers in the office. TR. 313. The only

case allegedly improperly brought into the firm before Respondent fired Mr. Cooper (and the only hospital case) was the Molly Glass case. It is uncontroverted that Respondent never met Ms. Glass. Every other allegedly improperly obtained case was brought into the firm after Respondent fired Mr. Cooper. The evidence is uncontroverted that Mr. Cooper did not speak to or have any communications with Respondent after he was fired. TR. 118, 162. In fact, as Ms. Phillips testified, Mr. Cooper avoided all contact with Mr. Barrett. TR. 460. The subterfuge engaged in by Mr. Cooper and Mr. Hoffman to use firm funds as a means for Mr. Cooper to repay Mr. Hoffman is additional proof that Respondent did not know anything about the Cooper/Hoffman relationship that arose after Respondent fired Mr. Cooper. It is clear that the $200 referral checks were merely a means for Mr. Cooper to repay to Mr. Hoffman the $4,000 the former owed the latter.

Basically, Mr. Barrett did not solicit cases or knowingly use a runner. Messrs. Vanture and Flowers did. Mr. Barrett should not get a discipline more severe than theirs.

The starting point for the imposition of all discipline is set forth in *Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1970). There, the Court stated:

> In cases such as these, three purposes must be kept in mind in reaching our conclusions. 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 public does not need to be protected from Mr. Barrett. He has practiced law for 31 years without any disciplinary sanctions. As testified to by his numerous character witnesses, his reputation is impeccable and he is held in high esteem by both the legal community and the business community in which he practices.

Secondly, it would patently unfair to the Respondent to suspend him for one year, or longer as urged by the Bar, for conduct that resulted in but two 20-day suspensions by other lawyers.

Finally, the Bar, by accepting consent judgments for 20-day suspensions for two lawyers guilty of paying runners, has acknowledged that such a discipline is sufficient deterrent to prevent other lawyers from engaging in similar conduct.

The mitigating circumstances present in the instant case support Respondent's argument that the Referee's one-year suspension is too harsh. Specifically, Rule 9.32 lists the mitigating factors pertinent to this case. They include:

Rule 9.32(a). Absence of a prior disciplinary record. Respondent has practiced 31 years without prior discipline.

Rule 9.32(e). Cooperation. Respondent has fully cooperated with both the Bar and the investigation by the Department of Insurance (DOI). At final hearing, Grady Jordan, now with the Leon County Sheriff's Department, testified that in May 1999 he was employed by DOI and participated in the issuance of a search warrant on the Barrett, Hoffman firm. Det. Grady testified about Mr. Barrett's meaningful cooperation. Upon request, Det. Jordan had within minutes all of the documents that he needed. TR. 362.

Respondent's cooperation with the Bar is manifested by his providing to the Bar in May 1999 all of the documents that were given to DOI. They included every single document in Respondent's office pertaining to Chad Everett Cooper. Those documents comprised Ex. 4 at final hearing, the most important exhibit entered into evidence.

There is no evidence that during the four and one-half years the Bar investigated this case that Respondent impeded the investigation.

Rule 9.32(g). Character and reputation. Respondent had eight witnesses testify as to his good character and excellent reputation in the legal and business community. In addition, there were 13 letters of support submitted of similar ilk.

Rule 9.32(i). Unreasonable delay in disciplinary proceedings. As argued in Point IV above, this case was unreasonably delayed. If this Court should decide that dismissal of these disciplinary proceedings is not appropriate, then Respondent urges the Court to mitigate discipline due to the Bar's unreasonable delay. As argued above, the Bar took from November 1998 until December 2002 to take this matter to probable cause hearing. With the exception of Mr. Pelham, every witness that testified against Respondent was interviewed by the Bar during 1999. Bar Ex. 4, the most crucial piece of evidence presented to the Referee was provided to the Bar in May 1999. The last alleged act of misconduct by Respondent occurred in January 1998, over six years ago.

Respondent was materially prejudiced by the Bar's delay. Eric Hoffman, the primary figure in all of the allegations against Respondent, died in July 2000, 19 months after Ms. Brown filed her complaint. Respondent submits that his testimony would have been exculpatory.

This Court has held in the past that unreasonable delay by the Bar in disciplinary proceedings is grounds for mitigation of discipline. *See, for example, Florida Bar v. Papy*, 358 So.2d 4, 7 (Fla. 1978). There the Court pointed out that it has repeatedly emphasized that it is the Bar's responsibility for exercising diligence in the prosecution of disciplinary matters. Noting that "inordinate delays are unfair, unjust and may even

be prejudicial to the accused . . .” the Court pronounced on page 7 that the ultimate judgment of discipline “must not only be just to the public but also must be fair to the accused.” The Court then reduced the referee’s recommended discipline from disbarment to one year observing:

> The totality of the circumstances in this cause, which include the inordinate delay caused by the Bar, no previous record of any disciplinary activity and his good behavior subsequent to the charged incident, mandate that the recommendation of disbarment by the referee be rejected and, in lieu of such penalty, Respondent be, and is hereby suspended for one year, beginning March 2, 1978.

The exact same language should be used in the case at bar. Similar cases include *Florida Bar v. Fussell*, 474 So.2d 210, 212 (Fla. 1985), and *Florida Bar v. James*, 478 So.2d 27 (Fla. 1985).

Rule 9.32(j). Interim rehabilitation. In the six years since the last allegation of misconduct occurred, Respondent has practiced without any hint of misconduct.

Rule 9.32(l). Remorse. Respondent recognizes that in hindsight there were warning signals that he could have observed. He regrets not catching them.

An additional element of mitigation that should be considered by this Court is the incredible effort by Respondent to get his partner, Eric Hoffman, into a drug rehabilitation facility. TR. 252, 254, 312, 441.

B. Disbarment is completely unwarranted in the case at bar (addressing The Florida Bar's Issues I and II in its amended initial brief). The Bar's demand for disbarment flies in the face of this Court's repeated pronouncements "that disbarment is an extreme form of discipline and should be reserved for the most egregious misconduct." *Florida Bar v. Summers*, 728 So.2d 739, 742 (Fla. 1999). *See, also, Florida Bar v. Kassier*, 711 So.2d 515, 517 (Fla. 1998) ("extreme sanction of disbarment is only to be imposed in those rare cases where rehabilitation is highly improbable.") In *Florida Bar v. Hirsch*, 342 So.2d 970, 971 (Fla. 1977), this Court stated that:

> Disbar is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved, as the rule provides, for those who should not be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the society of which they are a part.

By that standard, disbarment is clearly inappropriate.

The cornerstone of the Bar's demand for disbarment is *Florida Bar v. Weinstein*, 624 So.2d 261 (Fla. 1993). The factual situation in that case is not even remotely similar to the instant case. Mr. Weinstein entered a hospital room, retainer

contract in hand, after lying to a nurse and to the injured party's brother, with the specific intent of soliciting a brain-damaged patient. He also mailed solicitation letters to four other individuals which contained false statements. Finally, he lied under oath the information in two of the letters. Mr. Weinstein had also been disciplined for various trust account offenses.

As argued, Respondent submits The Florida Bar did not prove Respondent's participation in or knowledge of any scheme to solicit patients from a hospital. If, indeed, there was improper solicitation, it was done by Respondent's partner, Eric Hoffman, and was clearly an isolated incident. Specifically, Molly Glass is the only case that was obtained by the Barrett, Hoffman firm as a result of contact in a hospital.

Unlike Mr. Weinstein's case, there was absolutely no pressure on the potential client to hire the firm. Ms. Glass had Mr. Hoffman's card for over two weeks before she even pulled it out. She sought counsel only because the insurance company was trying to get her to sign a $10,000 release at 3:00 a.m. Ms. Glass checked Mr. Hoffman's credentials and then visited him in his office. She was not even presented a contract during the visit. It was only after Ren died, some 32 days after the accident and about one month after she received Mr. Hoffman's card, that she retained the firm.

The facts of the case do not support the Bar's argument that an improper scheme was hatched by Mr. Barrett. Mr. Cooper spent the bulk of his time in the hospital in the cancer ward ministering to those patients. TR. 165. He was not at the hospital handing out business cards to patients. TR. 166.

The Bar insists on arguing that Mr. Barrett offered Mr. Cooper $100,000 to bring in a big case. (Actually, he said Mr. Barrett *and* Mr. Hoffman. TR. 106.) The facts simply do not support that allegation. In actuality, Mr. Cooper characterized such conversations as "comical." TR. 174.

The discipline imposed in *Florida Bar v. Stafford*, 542 So.2d 1321 (Fla. 1989), was a six-month suspension – half of what the Referee recommended in the instant case and a quantum leap lower than disbarment. Mr. Stafford, over an 18-month period, personally made arrangements with a police officer to refer him 10 and 11 personal injury cases. In return, Mr. Stafford paid the police officer 15 percent of Mr. Stafford's fees. There was no doubt about Mr. Stafford's culpability in his case. He personally made the arrangements with the police officer, worked on the cases, and then paid the police officer a percentage of the fees. For such conduct, he received but a six-month suspension.

In the case at bar, there is a great deal of controversy about whether Respondent personally participated, or knew about any improper solicitation. The

primary witness that could have testified about all of this, Eric Hoffman, died 19 months after the Bar opened its investigation. Mr. Hoffman was Mr. Cooper's supervisor; Mr. Hoffman worked on all of the cases that Mr. Cooper brought in; and, Mr. Hoffman deliberately hid from Respondent that scheme that he hatched to enable Mr. Cooper to pay him back the $4,000 Mr. Cooper owed Mr. Hoffman.

The Bar argues that Mr. Barrett "hired Chad Everett Cooper as an independent contractor. . ." after Mr. Barrett fired him. There is absolutely no evidence in the record to support this supposition at all! Mr. Cooper himself testified that Eric Hoffman called him the Monday after Mr. Cooper was fired and told him about a job opportunity with Dr. Antolic. TR. 112. Mr. Cooper never communicated with Mr. Barrett after he was fired in September 1997. TR. 162, 176. Of the 33 checks delivered to Mr. Cooper after he was fired, only ten of them were signed by Respondent. As argued above, Respondent authorized those checks only after receiving assurances from Mr. Hoffman that Mr. Cooper did legitimate work and only after Mr. Cooper presented invoices.

At worst, Respondent relied on assurances by his partner that Mr. Cooper deserved the ten checks that Respondent signed in December 1997. The subsequent 23 checks were issued without Respondent's knowledge or consent.

The myriad cases cited by the Bar as support for its argument that disbarment is appropriate all involve deliberate, personal solicitation or the knowing and deliberate use of runners, such as bail bondsmen, to solicit cases. As stated in *State ex. rel. The Florida Bar v. Dawson*, 111 So.2d 427, 431 (Fla. 1959), each solicitation case must be viewed "on the basis of the factual situation presented by each particular case." As argued in Point A of this point on appeal, the circumstances of this case do not warrant any discipline above that meted out to Messrs. Flowers and Vanture.

In Point II, the Bar points to the Standards of Discipline to support its argument for disbarment. Most importantly, the Bar points to the Referee's supposed finding that Respondent lied to the Referee. The actual misrepresentation is not specified. The three reasons stated by Respondent for the bonus given to Mr. Cooper in 1996 were not the only reasons for the bonus. And, Mr. Cooper supported Mr. Barrett's position.

More significantly, as emphasized by this Court in *Florida Bar v. Corbin*, 701 So.2d 334, 337 (Fla. 1997), at fn. 2, and *Florida Bar v. Lipman*, 497 So.2d 1165, 1168 (Fla. 1986), a referee cannot use as a basis for aggravation the respondent's "claim of innocence".

The cases cited by the Bar do not support the proposition that Respondent's testimony should be used as an aggravating factor. The *Kleinfeld* decision certainly

does not support the Bar's position. The Bar alleged beforehand and then proved that Ms. Kleinfeld submitted a false affidavit. Ms. Kleinfeld only received a three-year suspension for (1) failing to appear in court , resulting in dismissal of the case with prejudice; (2) failing to appear at a contempt hearing; and (3) filing a false affidavit accusing the presiding judge of making threats.

Florida Bar v. Budnitz, 690 So.2d 1239 (Fla. 1997), is equally inappropriate. Mr. Budnitz was disbarred in Florida after he had been disbarred in New Hampshire for making false statements to the Bar and to a grand jury. He was formally accused of lying and had the opportunity to defend himself.

Respondent first learned that he was accused of making false statements to the Referee during closing arguments in the case at bar. He has never had the opportunity to defend himself against those accusations. His testimony, therefore, cannot be used as aggravation.

CONCLUSION

The Referee's report is not a true, independent decision by the Court. Rather, it is an acceptance without criticism of the Bar's arguments. As such, its accuracy is tainted and should not be relied upon by this Court.

The Referee erred in not dismissing disciplinary proceedings against Respondent for the Bar's four-year delay in bringing its case. The Referee also erred

in not dismissing the case because the underlying allegations against Respondent, those by Frances Brown, were withdrawn by the Bar during final hearing. The withdrawal of those charges eliminated the basis for the entire disciplinary proceeding. Finally, the Referee erred in not striking all of the allegations made by Molly Glass because they were previously dismissed on statute of limitations grounds. For all of these reasons, this Court should dismiss this case.

If the Court should find misconduct, the 20-day suspensions meted out to two lawyers who engaged in similar misconduct should be the discipline imposed.

WEISS & ETKIN

John A. Weiss
Attorney No. 0185229
2937 Kerry Forest Parkway, Suite B-2
Tallahassee, Florida 32309
850-893-5854
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's brief has been furnished by U. S. Mail to James A. G. Davey, Jr., Bar Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, and by U.S. Mail to John Anthony

Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this 30th day of March, 2004.

_____

John A. Weiss