IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DANIEL EVERETT ABRAMS,

Respondent.
_____/

SUPREME COURT CASE NO. SC04-1433

THE FLORIDA BAR
FILE NO. 2002-51,779(15E)

INITIAL BRIEF OF RESPONDENT, DANIEL EVERETT ABRAMS

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PREFACE

1. Citations to Respondent's Appendix on appeal shall appear as (A.__).

2. The Florida Bar formal complaint referred to herein and which is part of the Appendix is without the attachments/exhibits thereto.

3. Citations to the Transcript of the Referee Proceedings shall appear as (T.__).

4. The Respondent, DANIEL EVERETT ABRAMS, is referred to herein as "Abrams." The Complainant, THE FLORIDA BAR, is referred to herein as (The Florida Bar."

TABLE OF CITATIONS AND AUTHORITIES

OTHER AUTHORITIES

RULES REGULATING THE FLORIDA BAR:

STANDARDS FOR IMPOSTING LAWYER SANCTIONS

JURISDICTION

This Honorable Court has jurisdiction over this Petition for Review pursuant to Rules 3-1.2; 3-3.1; and 3-7.7, R. Regulating Fla. Bar.

STATEMENT OF THE CASE AND FACTS

In November of 1999, Mr. Abdullah Ziya and Ms. Olga Ulershperger, husband and wife and non-U.S. citizens, left Turkey and entered the United States of America with tourist visas (T. 18-19;61- 62). Thereafter, in the spring of 2000, Mr. Ziya and Ms. Ulershperger sought lawful immigration status to remain in the United States of America and consulted with, and ultimately retained, an entity known as U.S. Entry, Inc. to which Daniel Everett Abrams, hereinafter referred to as "Abrams", was then associated (T.63).

Abrams , a married man with a fourteen month old son at the time of the December 13, 2004 disciplinary trial (T. 128), graduated from Hofstra University School of Law in 1988 and was admitted to the New Jersey Bar that same year (T. 126). In 1991, Abrams was admitted to the New York and District of Columbia Bars and, thereafter, in 1997, admitted to The Florida Bar (T. 126-127). Abrams commenced practicing law in Florida in 1997 by committing to public service by accepting court appointments, which was the same way he commenced the practice of law when he first became an attorney in New Jersey in 1988 (T. 127-128).

US Entry, Inc., Ms. Suzanne Akbas its paralegal and principal, sought lawful status for Mr. Ziya and Ms. Ulershperger by way of O and H based employment visas (T. 81-83; 102; 104-105; 122-123; 139-141); the issue of asylum and persecution never arising (T. 121). It should be noted, however, that Mr. Ziya and Ms. Ulershperger were aware that Ms. Akbas was not an attorney and, moreover, did not even know an attorney, in this case Abrams, was even involved in their matter (T. 66; 72). After there was an issue with their employment based visas, including Ms. Ulershperger's failure to respond to a request for further information from the U.S. Immigration and Naturalization Service (T. 105), Mr. and Mrs. Ziya terminated their relationship with US Entry, Inc. in April of 2002 and sought legal counsel from a Mr. Capeci; the issue of asylum thereafter arising for the first time

(T. 35-37). Without an employment based visa available to Mr. Ziya and Ms. Ulershperger, both having university degrees (T. 35), and inasmuch as the deadline for an asylum claim expiring, to overcome the hurdle of an expired deadline and obtain an extension of time to proceed with an asylum claim, incapacity or ineffective assistance of counsel was required to be pursued which, as a condition precedent, required the filing of a Bar complaint against Abrams (T. 148-149).

In mid 2002, a Florida Bar complaint, The Florida Bar File No. 2002-51,779 (15E), was filed against the Respondent, Abrams, arising from his association with U.S. Entry, Inc. and alleged conduct relating to Mr. Ziya and Ms. Ulershperger. On February 26, 2003, the Fifteenth Judicial Circuit Grievance Committee "E" met, and by a majority vote of the eligible members present, found probable cause that Abrams violated Rules 3-4.2; 4-1.1, 4-5.3(a), (b), and (c); 4-5.4(d); 4-5.5(b); and 4-8.4(c), R. Regulating Fla. Bar. On February 27, 2003, The Florida Bar served its notice of finding of probable cause for further disciplinary proceedings and record of investigation, which also directed The Florida Bar to draft and file a formal complaint against Abrams pursuant to Rule 3-7.4(l), R. Regulating Fla. Bar (A. 1). On or about July 19, 2004, The Florida Bar filed its formal complaint against Abrams commencing this cause (A. 2).

The formal complaint filed in this cause contained two counts. Count I alleged that Abrams violated Rules 4-5.4(a); 4-5.4(d); Rule 4-5.5(b), and Rule 4-8.4(c), R. Regulating Fla. Bar (A. 2). Count II alleged that Abrams violated Rules 4-1.1; Rule 4-5.3(a); Rule 4-5.3(b); and Rule 4-5.3(c), R. Regulating Fla. Bar (A. 2).

After the formal complaint was filed by The Florida Bar, pursuant to administrative order 04-12.113-8/04 entered on August 16, 2004 by The Honorable Edward H. Fine, Chief Judge of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, the Honorable Richard I. Wennet, Palm Beach County

Circuit Judge, was appointed referee in connection with the matter (A. 3). Thereafter, on December 13, 2004 trial occurred resulting in a Report of the Referee being entered on January 5, 2005 (A. 4).

The Report of the Referee made several findings, recommendations as to guilt, and imposed sanctions upon Abrams (A. 4, T. 204-221). In connection with those issues solely associated with Abrams' petition for review, the Referee made the following findings:

> Allowing Miss - - Ms. Akbas to appear to - - to represent or to be a - - to have the benefit of Mr. Abrams as a managing lawyer is - -is, uh, conduct involving dishonesty and misrepresentation (T. 212).
>
> *****
>
> Mr. Abrams negligence, and - - and gross negligence in this regard, uh, regarding his representation or lack of representation of this couple is really clear when one reads the deposition of - - Miss Brasil who is a - - who restricts her work solely to - - to immigration matters (T. 214).

Upon completing his findings, the Referee recommended that Abrams be found guilty of violating all of the Rules Regulating the Florida Bar that were set forth in The Florida Bar's formal complaint (A. 2; A. 4), inclusive of Rules 4-8.4(c) and 4-1.1, R. Regulating Fla. Bar, that are the subject of this petition for review, and imposed a rehabilitative suspension from the practice of law for one (1) year upon Abrams which is also a subject of this petition for review. Although the Referee noted as a mitigating factor, pursuant to 9.32(a), Fla. Stds. Imposing Law. Sancs., that Abrams had no prior history of discipline, the Referee overlooked that Abrams was apologetic and that he never intended anyone to get hurt; that he did the best he could; and that he did not become an attorney to hurt people (T. 203). The Referee focused primarily on his perceived findings of dishonest or selfish motive pursuant to 9.22(b); pattern of misconduct pursuant to 9.22(c); vulnerability of

victim pursuant to 9.22(h); and Abrams' substantial experience in the practice of law pursuant to 9.22(i), Fla. Stds. Imposing Law. Sancs., to arrive at a one year rehabilitative suspension. After imposing his sanction, the Referee thereafter taxed costs against Abrams in the sum of $1,663.70 (T. 220), despite the written Report of the Referee requiring Abrams to pay costs in the amount of $2,618.10 (A. 4), and also required Abrams to pay $2,400.00 in restitution to Mr. Ziya and Ms. Ulershperger (A. 4; T. 220).

In response to the Report of the Referee that was entered on January 5, 2005, Abrams served a motion for rehearing on January 11, 2005 (A. 5). The motion for rehearing was outright denied on January 24, 2005 (A. 6). Accordingly, on March 2, 2005, Abrams served his petition for review requesting that this Honorable Court review certain findings, determinations, and disciplinary measures imposed by the Referee, the Honorable Richard I. Wennet (A. 7).

SUMMARY OF ARGUMENT

Abrams challenges those specific findings of fact necessary to arrive at a determination of guilt regarding Rules 4-8.4(c) and 4-1.1, R. Regulating Fla. Bar. The record evidence relied upon by the Referee fails to satisfy the legal burden necessary to sustain such findings and conclusions.

The only finding made by the Referee in connection with Rule 4-8.4(c), R. Regulating Fla. Bar, that Abrams engaged in some form of fraud, dishonesty, and misrepresentation is:

> Allowing Miss - - Ms. Akbas to appear to - - to represent or to be a - - to have the benefit of Mr. Abrams as a managing lawyer is - -is, uh, conduct involving dishonesty and misrepresentation (T. 212).

This finding by the Referee, however, is legally insufficient to support an adjudication that Abrams violated Rule 4-8.4(c), R. Regulating Fla. Bar, and there is nothing further in the record to support such a determination.

The finding by the Referee that Abrams violated Rule 4-1.1, R. Regulating Fla. Bar, is equally legally insufficient to support an adjudication that Abrams violated same. The Referee makes no findings, but concludes that Abrams acted with gross negligence, ergo incompetently, based upon the testimony of Elisa Brasil, a California attorney who restricts her work solely to immigration matters (T. 214). Ms. Brasil's testimony relied upon by the Referee, however, reflects nothing more than an opinion that all requests for relief should be pursued and whichever proves itself by the facts over time should be the one ultimately pursued (T. 214-215). Pursuant to 4-3.1, R. Regulating Fla. Bar, only claims with merit should be pursued and at the time Mr. Ziya and Ms. Ulershperger retained U.S. Entry, Inc. there was never any claim for asylum presented nor any existing (T. 120-121).

The recommended disciplinary sanction against Abrams of rehabilitative suspension from the practice of law for one (1) year is also completely devoid of any legal or factual support. The legal precedent, even taking into account the mitigating and aggravating factors set forth in the Florida Standards For Imposing Lawyer Sanctions, evidence a disciplinary sanction of ten (10) days to ninety (90) days, however, not exceeding ninety (90) days.

Lastly, the taxation of costs imposed against Abrams in the Report of the Referee (A. 4) does not compute with the amount ordered at the disciplinary trial on December 13, 2004 (T. 220); the additional costs imposed in the Report of the Referee violating Abrams' right to due process of law inasmuch as notice was never provided on the issue, nor hearing had. Abrams' right to due process of law was also violated in connection with the $2,400.00 restitution amount imposed against him (T. 220) inasmuch as notice was never provided, nor hearing had on the issue.

ARGUMENT

I WHETHER THE FINDING OF THE REFEREE THAT RESPONDENT, ABRAMS, ENGAGED IN CONDUCT CONSTITUTING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION IS SUPPORTED BY THE RECORD EVIDENCE TO UPHOLD AN ADJUDICATION OF GUILT OF VIOLATING RULE 4-8.4(C), R. REGULATING FLA. BAR.

To succeed in challenging a Referee's finding of fact and recommendation of guilt, the findings must lack evidentiary support or, alternatively, be clearly erroneous. See, The Florida Bar v. Beach, 675 So.2d 106 (Fla. 1996); The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990). Moreover, as set forth in Beach, supra, relying upon The Florida Bar In re Inglis, 471 So.2d 38, 41 (Fla. 1985), "A referee's legal conclusions are subject to a broader review by this Court than are findings of fact."

The legal conclusion of the Referee herein is that Abrams is guilty of violating Rule 4-8.4 (c), R. Regulating Fla. Bar. Rule 4-8.4(c), R. Regulating Fla. Bar states "A lawyer shall not... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." And the only facts relied upon the by the Referee to support such a conclusion, as reflected in the ruling of the Referee, is:

> Allowing Miss - - Ms. Akbas to appear to - - to represent or to be a - - to have the benefit of Mr. Abrams as a managing lawyer is - -is, uh, conduct involving dishonesty and misrepresentation (T. 212).

The aforesaid finding is the only evidence relied upon by the Referee to support his conclusion that Abrams violated Rule 4-8.4(c), R. Regulating Fla. Bar. The aforesaid finding, however, is insufficient to uphold an adjudication of guilt that Abrams engaged in conduct involving fraud, dishonesty, deceit or misrepresentation.

As argued by Abrams in his motion for rehearing (A. 5), fraud, dishonesty, deceit, or misrepresentation all require an element of "intent." This Court defined the elements of fraud in Lance v. Wade, 457 So.2d 1008 (Fla. 1984) and it is clear that "intent" is required. Nothing in the Referee's Report establishes "intent" on the part of Respondent. In The Florida Bar v. Cueto, 834 So.2d 152 (Fla. 2002), this Court stated:

> Rule 4-8.4(c) states that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Although the rules do not define these four words, *Black's Law Dictionary* notes that "misrepresentation" includes "[c]oncealment or even non-disclosure." *Black's Law Dictionary* 1016 (7th ed.1999) (quoting Restatement (Second) of Contracts section 159 cmt. a (1981)). For the term "dishonest act," *Black's* refers to "fraudulent act," which is defined as "[c]onduct involving ... dishonesty, a lack of integrity, or moral turpitude." *Id.* at 672. Further, "moral turpitude" is defined as "[c]onduct that is contrary to justice, honesty, or morality," and "[i]n the area of legal ethics, offenses involving moral turpitude ... traditionally make a person unfit to practice law." *Id.* at 1026.

Abrams association with US Entry, Inc. appears to have resulted from his own misunderstanding of his inquiry with The Florida Bar prior to associating with US Entry, Inc. (T. 131-132). Abrams did make an effort to discuss his association with U.S. Entry, Inc. with The Florida Bar before executing on his decision to do so (T. 131-132); his understanding of the inquiry obviously incorrect. Because of his misunderstanding, Abrams accepts responsibility for his conduct in violating Rules 4-5.3; 4-5.4; and 4-5.5; R. Regulating Fla. Bar, and acknowledges same, however, his error is not tantamount to dishonesty, fraud, deceit, or misrepresentation.

The record supports, and Abrams does not dispute it, that he associated with U.S. Entry, Inc. (T. 87-88; 130-132), that his name appeared as Managing Attorney

on the letterhead of U.S. Entry, Inc. (T. 155-156), that he shared fees with US Entry, Inc. of no more than $5,000.00 or $6,000.00 (T. 107; 136-137) over an approximate two and one half year period of time (T. 87; 155), and that his New York law license was on the wall at the office of U.S. Entry, Inc. (T. 91), however, these facts by themselves or together fail to support any conclusion that Abrams engaged in dishonesty, fraud, deceit, or misrepresentation. In fact, Mr. Ziya and Ms. Ulershperger knew Ms. Akbas of US Entry, Inc., the paralegal with whom they dealt, was not an attorney and, moreover, did not even know an attorney, in this case Abrams, was even involved in their matter (T. 66; 72).

Despite Mr. Ziya testifying that "We didn't know she is lawyer (referring to Suzanne Akbas of US Entry, Inc.) or she is something else... We don't have any information about her" (T. 44), his wife, Ms. Ulershperger, was quite clear that she and her husband were well aware that Ms. Akbas was not an attorney and testified,

> Oh, well, the friend of ours, when he saw her card, he told us that she not lawyer. But since she agreed to help us, we didn't have any suspects - - just we trusted her, that she's -- we hoped that she's gonna help us." (T. 66).

Question: How did that make you feel when you found out that there was an attorney who was working with her?

> Well, really we didn't know anything about that. I mean, since she was taking care of our case, of our papers, she was meeting with us, we just - - we just didn't know that supposed to be some attorney was gonna' take care of us. (T. 72).

Mr. Ziya and Ms. Ulershperger were both well aware that Ms. Akbas was not an attorney and, moreover, did not even know an attorney, in this case Abrams, was even involved in their matter (T. 66; 72). Inasmuch as Mr. Ziya and Ms. Ulershperger were aware that Ms. Akbas was not an attorney and did not even

believe an attorney was involved in the handling of their matter, there can be no issue of any deception, dishonesty, fraud, deceit, or misrepresentation by Abrams.

And again, Abrams did inquire with The Florida Bar about whether his relationship with US Entry, Inc. was permissible (T. 88-89; 131-132) and, based upon the information received, believed his conduct was appropriate (T. 132). Whether he was directed to someone in the wrong department of The Florida Bar (T. 131), which likely caused Abrams to err, does not change the fact that Abrams did make inquiry. As testified to by Abrams,

> It was my intention to speak to somebody from The Florida Bar who could answer my question. I had other questions and [sic] transferred me to other departments in reference to advertising I was putting into the yellow pages. So I was always... very careful whatever I did, advertising, whatever the situation I was going to enter into to avoid what we're here for today." (T. 132).

The conduct of Abrams, who commenced his law practice in Florida by committing to public service by accepting court appointments (T. 127-128), was without malice or intent and resulted from his own misunderstanding. But again, it cannot be overlooked that Mr. Ziya and Ms. Ulershperger were well aware that in working with Ms. Akbas of US Entry, Inc. that Ms. Akbas was not an attorney and, moreover, did not even know an attorney was involved in their matter (T. 66; 72).

Based upon the principles of law set forth in forth in Lance v. Wade, supra, and The Florida Bar v. Cueto, supra, Abrams failed to act with any intent nor did he engage in concealment / non-disclosure, act with a lack of integrity or moral turpitude, or involve himself in any act of moral turpitude making him unfit to practice law. Imprudence and error is not tantamount to dishonesty, fraud deceit, or misrepresentation, especially in this circumstance where Mr. Ziya and Ms. Ulershperger were aware that Ms. Akbas, the paralegal for US Entry, Inc., was not

an attorney and did not even believe an attorney was involved in their matter (T. 66; 72) notwithstanding that Abram's New York law license hung on the wall of US Entry, Inc. and he appeared as managing attorney on its letterhead (T. 88-89; 91; 155). There is certainly no issue of any deception, dishonesty, fraud, deceit, or misrepresentation herein by Abrams.

For cases involving dishonesty, fraud, deceit, or misrepresentation, the following legal authority should be evaluated: In The Florida Bar v. Rotstein, 835 So.2d 241 (Fla. 2003), Rotstein not only backdated a letter to his client to hide a mistake, he repeatedly made misrepresentations to The Florida Bar and submitted four false documents to the grievance committee and The Florida Bar. In The Florida Bar v. Miller, 863 So.2d 231 (Fla. 2003), Miller concealed critical evidence, advanced spurious arguments, and submitted misleading affidavits and testimony in a federal proceeding. In The Florida Bar v. Kravitz, 694 So.2d 725 (Fla. 1997), Kravitz made intentional misleading representations and false misrepresentations. In The Florida Bar v. McLawhorn, 535 So.2d 602, (Fla. 1988), McLawhorn made false statements in a traverse. In The Florida Bar v. Sax 520 So.2d 269 (Fla. 1988), Sax submitted a notarized pleading to a court when "he knew or should have known" that it contained false information and, moreover, signed the document outside the presence of the notary. In The Florida Bar v. Wright, 520 So.2d 269 (Fla. 1988), Wright intentionally failed to disclose real property contracts in which he had an interest in connection with a discovery request. For other cases, See Also, The Florida Bar v. Haglund, 372 So.2d 76 (Fla. 1979); The Florida Bar v. Pearce, 356 So.2d 359 (Fla. 1976); The Florida Bar v. Brooks, 336 So.2d 359 (Fla. 1976).

Although the aforementioned legal authority fails to mirror the facts and circumstances of Abrams' conduct, the point is nevertheless self-evident. Nothing in the Referee's Report sub judice, nor the record, supports the finding that Abrams

is guilty of violating Rule 4-8.4(c), R. Regulating Fla. Bar. The case most mirroring the facts sub judice is The Florida Bar v. Beach, 675 So.2d 106 (Fla. 1996) and in that case absent therefrom is any allegation based upon Rule 4-8.4(c), R. Regulating Fla. Bar.

In Beach, supra, Beach was the managing attorney for a paralegal service; Beach allowed a paralegal service to act as his conduit for providing legal advice by obtaining and relaying, without supervision, case-specific information to persons whom he never met or consulted with; Beach shared fees with a non-lawyer; and Beach assisted a non-member of the Florida Bar to practice law within the State of Florida. The facts in Beach are identical to the facts sub judice; the allegations in the formal complaint filed by The Florida Bar against Abrams mirroring Beach, however, absent from Beach is any allegation related to Rule 4-8.4(c) R. Regulating Fla. Bar. In fact, in Beach, this Court found **"There is no evidence in the record that his violations of the rules was willful or deliberate; nor is there any evidence that he intends to disregard the authority of this Court."**

To uphold the Referee's findings and adjudication of guilt that Abrams engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, consistent with the foregoing legal precedent, there needs to be "intent" ; concealment / non-disclosure; acts lacking of integrity or moral turpitude; or involvement in an act of moral turpitude making him unfit to practice law; factors all of which are absent from the record evidence. Abrams said it best in his concluding statement to the Referee,

> I never did anything malicious or anything of that nature, just tried to do the best that I could do (T. 203). I did not become an attorney to hurt people... (T. 204).

Completely absent from the record is any evidence supporting the Referee's findings of fact and conclusion of law that Abrams engaged in dishonesty, fraud, deceit, or misrepresentation and that he violated Rule 4-8.4(c), R. Regulating Fla. Bar. As in Beach, supra, **there is no evidence in the record that Abrams' violations of the rules was willful or deliberate; nor is there any evidence that Abrams intends to disregard the authority of this Court.**

II WHETHER THE FINDING OF THE REFEREE THAT RESPONDENT, ABRAMS, FAILED TO ACT COMPETENTLY IS SUPPORTED BY THE RECORD EVIDENCE TO UPHOLD AN ADJUDICATION OF GUILT OF VIOLATING RULE 4-1.1, R. REGULATING FLA. BAR.

To succeed in challenging a Referee's finding of fact and recommendation of guilt, the findings must lack evidentiary support or, alternatively, be clearly erroneous. See, The Florida Bar v. Beach, 675 So.2d 106 (Fla. 1996); The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990). Moreover, as set forth in Beach, supra, relying upon The Florida Bar In re Inglis, 471 So.2d 38, 41 (Fla. 1985), "A referee's legal conclusions are subject to a broader review by this Court than are findings of fact."

Despite the forum being one of a disciplinary proceeding, the Referee found Abrams to have acted in a grossly negligent manner (A. 4; T. 214). If Abrams would have known that he was on trial for professional malpractice, a week long jury trial would have been requested and the appropriate expert witnesses called to attest. The only finding that the Referee relied upon to support his finding of gross negligence is the testimony of attorney Elisa Brasil discussing intake procedure (T. 215-216). There is no doubt that intake during an initial consultation is extremely important in setting the tone of the representation, however, intake does not end at the initial consultation. Intake is continuous throughout a given representation and the record herein evidences that Mr. Ziya and Ms. Ulershperger never informed Abrams or anyone from US Entry, Inc. of persecution giving rise to an asylum claim (T. 76; 120-121).

Moreover, just because attorney's elect different paths to obtain a result, electing one path over the other is not tantamount to incompetence (T. 104-105; 140-141; 192). Ms. Brasil's testimony relied upon by the Referee reflects nothing more than an opinion that all requests for relief should be pursued and whichever

proves itself by the facts over time should be the one ultimately elected (T. 215). **The record is clear that in the event an asylum claim presented itself to either US Entry, Inc. or Abrams it would have been immediately referred to an attorney who handles such matters** (T. 121; 134-135), however, at the time Mr. Ziya and Ms. Ulershperger retained U.S. Entry, Inc. there was never any claim for asylum presented (T. 76; 120-121). Pursuant to Rule 4-3.1, R. Regulating Fla. Bar, only claims with merit should be pursued, however, if discovery reveals facts subsequently, applications could be withdrawn and new ones submitted (T. 148).

Initial intake by US Entry, Inc. evidenced that at no given time did Mr. Ziya and Ms. Ulershperger ever disclose an issue of persecution warranting a claim for asylum (T. 120-121). Mr. Ziya and Ms. Ulershperger had no preference on the method used to provide them lawful status within the United States (T. 56-60; 78). In fact, Mr. Ziya nor Ms. Ulershperger, when entering the United States, never even mentioned anything relating to persecution or asylum to any immigration officials at airport customs (T. 76). Although suggesting they were scared as their reason for not mentioning to any U.S. immigration official upon entering the United States their alleged claim of persecution and request for asylum (T. 76), it cannot be overlooked that Mr. Ziya and Ms. Ulershperger were both educated and held university degrees (T. 35) thereby calling into question their veracity regarding the mention of any persecution to Ms. Akbas and U.S. Entry, Inc.

Again, the testimony of Ms. Brasil is reduced to nothing more than intake inquiry, however, **Ms. Brasil herself was not present during any meeting between Mr. Ziya and Ms. Ulershperger and that of Ms. Akbas and/or Abrams** (T. 48) and, accordingly, does not know what was or was not discussed. ***The testimony of Ms. Brasil regarding anything discussed between Mr. Ziya, Ms. Ulershperger, and Ms. Akbas of U.S. Entry, Inc. is all based upon hearsay and***

after the fact statements made by Mr. Ziya and Ms. Ulershperger without any other corroborating evidence (T. 40; 48). Other than the statements made by Mr. Ziya and Ms. Ulershperger well after the fact, Ms. Brasil's testimony is nothing more than a generalization of how an intake of an immigration consultation should be performed. Certainly, since Mr. Ziya and Ms. Ulershperger needed to initiate a Florida Bar proceeding to substantiate their claim of incapacity or ineffective assistance of counsel, a condition precedent to overcome the expired asylum claim deadline in order to receive an extension of time to proceed with an asylum claim (T. 148-149), See, Matter of Lozada, 19 I. & N. Dec. 637 (1988), it cannot be overlooked that the testimony of both Mr. Ziya and Ms. Ulershperger is suspect.

As set forth above, despite the forum being one of a disciplinary proceeding, the Referee found Abrams to have acted in a grossly negligent manner. As set forth in The Florida Bar v. Neale, 384 So.2d 1264 (Fla. 1980), "There is a fine line between simple negligence by an attorney and violation of Canon 6 that should lead to discipline." The purpose of the proceeding against Abrams was to determine if he engaged in misconduct, not determine if he committed legal malpractice.

As found by the referee in Neale, supra, the attorney failed to adequately prepare; failed to properly interrogate his client or make an independent investigation (a/k/a intake); and overlooked or otherwise misconstrued a statute of limitations in dismissing a lawsuit thereby preventing its re-filing. Notwithstanding the facts, this Honorable Court in Neale determined that the attorney was not subject to any disciplinary action. The issue of of intake protocol relied upon by the Referee herein does not rise to the level of misconduct.

Other than the pasta approach to the practice of law, of throwing all claims against the wall and seeing which sticks, a violation of Rule 4-3.1, R. Regulating

Fla. Bar, and the practice apparently followed by Ms. Brasil, the Referee completely ignored whether the path traveled by US Entry, Inc. and Abrams in seeking employment based visas for Mr. Ziya and Ms. Ulershperger was appropriate and with merit. The failure to bring a claim may result in a professional malpractice lawsuit should remedies elected ultimately fail to provide relief, however, there is not one scintilla of evidence in the record establishing that the petition pursued by US Entry, Inc. and Abrams on behalf of Mr. Ziya and Ms. Ulershperger was improper or otherwise incompetent. In fact, but for Ms. Ulershperger failing to respond to a request for further information from the U.S. Immigration and Naturalization Service (T. 105), Mr. Ziya and Ms. Ulershperger would have likely received their employment based (O or H) immigration visas providing them with lawful status to remain in the United States.

As set forth in The Florida Bar v. Penn, 351 So.2d 979 (Fla. 1977), in addressing the issue of competence, this Honorable Court held that a person who is trained in the field of civil litigation and inexpertly handles a matter in another field of law "does not necessarily subject such attorney to disciplinary proceeding." The Penn holding is consistent with this Court's holding in Neale, supra. As opposed to a civil attorney taking on a matter in criminal law, as in Penn, Abrams herein, a civil attorney, bridged out into the area of immigration law (T. 128). But again, potential claims for malpractice do not automatically subject an attorney to disciplinary proceedings based upon a lack of competence.

To uphold the Referee's findings and adjudication of guilt that Abrams failed to act competently, a violation of Rile 4-1.1, R. Regulating Fla. Bar, more than an alleged lack of intake protocol and an alleged lack of experience in a particular area of the law is required. In the case sub judice, there may be conjecture that Abrams may have committed errors and omissions, however, the

existing record evidence does not support the Referee's findings of fact and conclusion of law that Abrams acted without competence in violation of Rule 4-1.1, R. Regulating Fla. Bar.

III WHETHER THE DISCIPLINARY SANCTION OF A ONE YEAR SUSPENSION IMPOSED UPON THE RESPONDENT, ABRAMS, IS SUPPORTED BY THE RECORD AND IN LAW.

"A bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must severe enough to deter other attorneys from similar misconduct." The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994). See Also, The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970). In determining whether the disciplinary action has served its three purposes, the Florida Supreme Court's "review is broader than that afforded to the referee's findings of act because it is ultimately our responsibility to order the appropriate sanction." The Florida Bar v. Batista, 846 So.2d 479 (Fla. 2003). See Also, The Florida Bar v. Rotstein, 835 So.2d 241 (Fla. 2003); The Florida Bar v. Kravitz, 694 So.2d 725 (Fla. 1997).

The disciplinary sanction imposed upon Abrams is arguably fair to society and certainly severe enough to deter other attorneys from similar misconduct, however, by no means is it fair to the attorney, Abrams. As already pointed out in the discussion above, in The Florida Bar v. Beach, 675 So.2d 106 (Fla. 1996), Beach was the managing attorney for a paralegal service; Beach allowed a paralegal service to act as his conduit for providing legal advice by obtaining and relaying, without supervision, case-specific information to persons whom he never met or consulted with; Beach shared fees with a non-lawyer; and Beach assisted a non-member of the Florida Bar to practice law within the State of Florida. The facts in Beach are identical to the facts sub judice; the allegations in the formal complaint filed by The Florida Bar against Abrams (A. 2) coming directly from Beach, however, in Beach the attorney was only subject to a **ninety (90) day**

suspension *notwithstanding having a prior disciplinary sanction imposed against him*.

In Beach there was no allegation pursued, or finding made, that Beach violated Rule 4-8.4(c), R. Regulating Fla. Bar, however, as already discussed above, and equally true herein, **"There is no evidence in the record that his violations of the rules was willful or deliberate; nor is there any evidence that he intends to disregard the authority of this Court."** Beach, supra. Arguably herein there is the finding and conclusion that Abrams violated Rule 4-1.1, R. Regulating Fla. Bar, however, when compared to The Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997) whereby Glick was found to have violated Rules 3-4.3 (conduct contrary to honesty); 4-1.1 (failing to provide competent representation); 4-1.2 (failing to abide by client's decision regarding settlement); 4-1.3 (failing to act with reasonable promptness and diligence in representing a client); 4-1.4 (failing to explain matters to extent reasonably necessary to assist a client in making an informed decision); 4-1.8 (in connection with a disciplinary matter, failing to disclose a fact necessary to correct a misapprehension known by the lawyer to have arisen in the matter); and 4-8.4 (c) (engaging in conduct constituting dishonesty, fraud, deceit, or misrepresentation), R. Regulating Fla. Bar, **Glick only received a ten (10) day suspension.**

In view of the discipline imposed upon the attorneys in Beach and Glick, supra, assuming arguendo all those violations were applicable to Abrams herein, there is no doubt that the one (1) year suspension imposed by the Referee herein falls outside the scope of any guideline and is no doubt unfair to Abrams. In considering any sanction to be imposed upon Abrams the Referee acted appropriately in considering the aggravating and mitigating factors set forth in 9.22 and 9.23, Fla. Stds. Imposing Law Sancs.,

however, the factors considered by the Referee still do not give support to the one (1) year suspension from the practice of law imposed upon Abrams.

The Referee, in imposing his sanction upon Abrams, considered the following aggravating and mitigating factors, Fla. Stds. Imposing Law Sancs.:

9.22(b) dishonest or selfish motive;

9.22 (c) pattern of misconduct;

9.22 (h) vulnerability of victim;

9.22 (i) substantial experience in the practice of law; and

9.32(a) absence of prior discipline.

The issue of dishonest and selfish motive was also discussed in Argument I above. To the extent dishonest and self-motive is used by the Referee as an aggravating factor for purposes of determining punishment, the dishonest or selfish motive of Abrams was to "obtain money and not comport with the - - with the Code of Conduct or even his oath that he took as a member of The Bar" (T. 218). The finding of the Referee, however, is contrary to Abrams' testimony that he did inquire with The Florida Bar prior to associating with US Entry, Inc. (T. 131-132), and contrary to Beach, supra. **There is no evidence in the record that Abrams' violations of the rules was willful or deliberate; nor is there any evidence that Abrams intends to disregard the authority of this Court.** Additionally, not that sharing fees with a non-lawyer is acceptable conduct and Abrams already concedes and accepts the consequences of violating Rule, 4-5.4(a), R. Regulating Fla. Bar, however, the sum of $5,000.00 or $6,000.00 over a two and one-half year period of time can hardly be considered to be a hunger and drive to obtain money (T. 107; 136-137); especially in view of the way in which Abrams was compensated; to wit: a flat fee of One Hundred

($100.00) Dollars per case irrespective of the amount of work required (T. 90).

Abrams commenced practicing law in Florida in 1997 by committing to public service and accepting court appointments as he did when he commenced practicing law in New Jersey in 1988 (T. 126-127). For his conduct herein, Abrams was apologetic (T. 203). The Referee may have been disappointed in what he wished to hear (T. 219), however, Abrams was clear that he never intended anyone to get hurt; that he did the best he could; and that he did not become an attorney to hurt people (T. 203). Certainly, once this disciplinary matter became adversarial (T. 204), it cannot be overlooked that Abrams was represented by counsel and acting upon his advice (T. 145-146).

The finding of the Referee of pattern of misconduct is equally contrary to the record evidence. The Referee's finding is also based upon conjecture and speculation and in violation of the law. According to the Referee, "There's a pattern of misconduct in as much as the only - - that it's not just the only, that is Mr. Ziya and Miss Ulershperger being the - - being the only people who were, uh - - who - - who were the, uh, clients of US Entry, Inc..." (T. 218).

First, The Florida Bar proceeding against Abrams only pertains to and includes Mr. Ziya and Ms. Ulershperger. The record and evidence herein reflect no other claimants and for the Referee to have gone outside the proceeding and based his finding on nothing more than mere conjecture and speculation has no place in this proceeding and, in fact, violates Abrams' right to due process of law. Just as "a finding of an uncharged rule violation based on conduct that is not within the scope of the specific allegations of the complaint is a violation of due process", as set forth in The Florida Bar

v. Fredericks, 731 So.2d 1249 (Fla. 1999), so too is going outside the record to suggest other potential clients of US Entry, Inc. were equally harmed without any specific allegation in The Florida Bar complaint filed against Abrams (A. 2) nor any evidence in the record establishing same. The Referee's conclusion is nothing more than mere conjecture and speculation and violated Abrams' fundamental right to due process of law. See Also, The Florida Bar v. Vernell, 721 So.2d 705 (1988).

Secondly, the conduct of Abrams arises from one, and only one act. See, The Florida Bar v.McLawhorn, 535 So.2d 602 (Fla. 1988), (asserted two remaining violations arising from a single set of circumstances). The case of McLawhorn, supra, speaks in terms of violation arising from a single set of circumstances.

The issues associated with Mr. Ziya and Ms. Ulershperger do arise from a single set of circumstances and it would be fundamentally unfair and prejudicial to Abrams to equate a series of violations of the Rules of Professional Conduct as a pattern of misconduct. For cases involving a pattern of misconduct, or cumulative misconduct, this Honorable Court is directed to The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994) (two separate complaints were consolidated..."in light of multiple misconduct involved and the nature of the misconduct"... resulting in a 91 day suspension); The Florida Bar v. Inglis, 660 So.2d 697 (Fla. 1995) (cumulative misconduct of three separate complaints resulting in 30 day disbarment).

All of Abrams activity herein arise out of a single set of circumstances, to wit, his association with US Entry, Inc. and, moreover, only involve one complaint and one set of complainants (husband and wife). Abrams association with U.S. Entry, Inc. was inappropriate, but to assert that each and every act of Abrams' conduct is separate unto itself reflecting

a pattern of misconduct is contrary to the facts and the precedent set forth in McLawhorn. There was no pattern of misconduct herein; Abrams' conduct arising "from a single set of circumstances." McLawhorn, supra.

As to the vulnerability of the victims herein, per the Referee's finding (T. 217-218), however, again, it important to highlight that Mr. Ziya and Ms. Ulershperger never mentioned any persecution or asylum claim upon entering the United States (T. 76). Additionally, Mr. Ziya and Ms. Ulershperger were certainly aware prior to any meeting with US Entry, Inc. that Ms. Akbas herself was not an attorney and, moreover, were never aware an attorney, in this case Abrams, was even involved in their matter (T. 66; 72) notwithstanding that Abram's New York law license hung on the wall of US Entry, Inc. and he appeared as managing attorney on its letterhead (T. 88-89; 91; 155). Furthermore, Mr. Ziya and Ms. Ulershperger, both educated individuals, did not even care what method was used to obtain their lawful status in the United States so long as it was obtained (T. 56-60; 78), again noting it was Ms. Ulershperger who failed to respond to a request for further information from the U.S Immigration and Naturalization Service (T. 105). And again, one cannot help but question the asylum claim as it appeared to be Mr. Ziya's and Ms. Ulershperger's last resort to remain in the United States. Since The Florida Bar complaint herein against Abrams was a condition precedent to extend the deadline to file the asylum claim (T. 148-149), See, Matter of Lozada, supra, the testimony of Mr. Ziya and Ms. Ulershperger that they made US Entry, Inc. and Ms. Akbas aware of their persecution is certainly suspect.

Concluding with the issue of substantial experience in the practice of law as an aggravating factor, the Referee does not go beyond the fact that Abrams has been an attorney since 1988 (T. 218). The Referee failed to take

into consideration that at the time of trial Abrams had only been a Florida attorney since September of 1997, a period of just under eight (8) years, and moreover, commenced his practice in Florida, the same as he did in New Jersey, by committing to public service and handling court appointments (T. 127-128). In Beach, supra, Beach was admitted to The Florida Bar in 1980 and was practicing for 13 years when his misconduct was called into question in 1993, **and even with a prior disciplinary sanction, Beach only received a 90 day suspension**. Again, Abrams had no prior disciplinary history prior to this action (T. 218).

Despite the aggravating factors in Beach, which included a prior disciplinary sanction which is absent with Abrams, Beach received a ninety (90) day suspension from the practice of law. Despite the aggravating factors in Glick of multiple offenses; submission of false statements; and substantial experience in the practice of law (noting there were mitigating factors of absence of prior disciplinary record; good character; and interim rehabilitation and remorse), **Glick only received a ten (10) day suspension** from the practice of law.

There is no doubt that the sanction imposed by the Referee of a one (1) year suspension of law is fundamentally unfair and not supported by the record or law.

Beach, supra, is the most similar case to the Abrams matter herein and the imposed sanction for the attorney, who had a prior disciplinary sanction, was only ninety (90) days. In McLawhorn, supra, albeit a factually different scenario, the misconduct nevertheless being substantial, **only received a ten (10) day suspension**; violations arising from a single set of circumstances. In Glick, supra, much of the misconduct overlapping with this matter, Glick received a ten (10) day suspension. In Kravitz, supra, the attorney's

suspension was **reduced to thirty (30) days notwithstanding presenting false statements and making misrepresentations**.

In connection with other cases, in The Florida Bar v. Roberts, 689 So.2d 1049 (Fla. 1997), where there were aggravating factors of failure to comply with rules or orders in proceedings; victims vulnerability; and indifference towards restitution, the only mitigating factor being a lack of prior disciplinary sanction, the attorney **received only a ninety (90) day suspension** from the practice of law for violating Rule 4-1.1 (competence); 4-1.3 (diligence); 4-1.4 (communication); 4-3.2 (failure to expedite litigation); and 4-8.4 (a) (violation of disciplinary rules), R. Regulating Fla. Bar. And in The Florida Bar v. Nunes, 679 So.2d 744 (Fla. 1996), Nunes representing a client in an immigration matter, **with two prior disciplinary sanctions imposed against him**, violates Rules 4-1.1 (competence); Rule 4-1.4(b) (reasonable explanation to assist client in making informed decisions); Rule 4-1.5(a) (entering into agreement providing for, charging, or collecting an illegal, prohibited, or clearly excessive fee), R. Regulating Fla. Bar, and receives only a **ninety (90) day suspension** from the practice of law.

There is no bright-line rule set forth in any legal precedent issued by this Honorable Court for imposing sanctions against an attorney. Inasmuch as this matter is most similar to the Beach matter, at maximum, Abrams should have received no more than a ninety (90) day suspension from the practice of law. Given the other legal precedent with similar aggravating and mitigating circumstances, and equally, if not greater, egregious misconduct, suspensions range as low as ten (10) days. Accordingly, the sanction imposed by the Referee herein is not supported by the record or law and, that at minimum, any imposed sanction should be ten (10) days and, at

maximum, not exceeding ninety (90) days. Again, the sanction imposed by the Referee, although arguably being fair to society and, certainly, severe enough to deter other attorneys from similar misconduct, it is fundamentally unfair to attorney Abrams.

The record before this Honorable Court does not evidence an attorney who intentionally violated the Florida Rules Regulating The Florida Bar. Abrams, a married man with a baby (T. 128), concedes violating Rules 4-5.3(a); 4-5.3(b); 4-5.3(c) 4-5.4(a); 4-5.4(d); 4-5.5(b), R. Regulating Fla. Bar, however, there is nothing in the record that evidences Abrams would jeopardize his law license and ability to support his family by acting in a willful manner with the intent "not to comport with - - with the Code of Conduct or even his oath that he took as a member of The Bar" as determined by the Referee (T. 218). While every attorney strives to do better, Abrams said it best in his concluding statement to the Referee,

> I never did anything malicious or anything of that nature, just tried to do the best that I could do (T. 203). I did not become an attorney to hurt people... (T. 204).

Although Abrams could have and should have done better, there is no doubt that the one (1) year rehabilitative suspension imposed by the Referee herein falls outside the scope of any guideline and must be reduced to a sanction ranging between ten (10) days to ninety (90) days, however, not exceeding same.

IV WHETHER THE COSTS TAXED AGAINST THE RESPONDENT, ABRAMS, AS WELL AS THE RESTITUTION IMPOSED, IS SUPPORTED BY THE RECORD

Abrams acknowledges that the issues presented in this specific argument were not stated in his petition for review (A. 7). At the time Abrams' petition for review was filed, the actual transcript of the disciplinary trial proceedings had not yet been prepared and, thus, the issues addressed herein not then revealed. In The Florida Bar v. Cueto, supra, this Honorable Court made it clear that Rule 3-7.7, R. Regulating Fla. Bar, is more restrictive than Rule 9.110, Florida Rules of Appellate Procedure, however, it has

> the discretion under rule 3-7.7(c)(1) to consider a late-filed petition or cross-petition for review and, therefore, we treat the (Bar's) challenge as

> if it had been raised in a late filed petition. Further, we have the authority
> to review the record to determine if competent substantial evidence supports the referee's findings of fact and conclusions concerning guilt. The Florida Bar v. Jordan, 705 So.2d 1387, 1390 (Fla. 1998). Therefore, the rules and case law demonstrate that this Court has the ultimate discretion to review
> and consider all aspects of a referee's report.

The record is clear that Abrams was not in possession of the disciplinary trial transcript at the time his petition for review was filed. The Report of the Referee was entered on January 5, 2005 (A. 4) requiring the petition for review to be filed within sixty (60) days thereafter pursuant to Rule 3-7.7(c)(1), R. Regulating Fla. Bar, the deadline being March 7, 2005. Abrams needed to move for an extension of time to serve his initial brief because he was not in possession of the disciplinary trial transcript until well after March 7, 2006 (A. 8), this Honorable Court granting same (A. 9). Accordingly, Abrams would request that this Honorable Court entertain the argument presented below.

The Report of the Referee imposed costs against Abrams in the sum of $2,618.40 (A. 4), however, the verbal ruling of the Referee upon conclusion of the disciplinary trial required Abrams to pay "the amount of $1,663.70" (T. 220). Inasmuch as the costs inserted into the Report of the Referee is in fact not the amount verbally ordered by the Referee upon conclusion of the disciplinary trial, Abrams should only be required to pay those costs ruled on at the time of the disciplinary trial. Any other effort by The Florida Bar to tax costs would require an evidentiary hearing, with proper notice, so as not to violate Abrams' right to due process of law.

Abrams does not dispute certain costs are taxable pursuant to Rule 3-7.6(q), R. Regulating Fla. Bar, however, only those costs ruled upon at the disciplinary trial should have been included in the Report of the Referee; any other entitlement to costs requiring an evidentiary hearing, with proper notice, to avoid violating Abrams' right to due process of law. Additionally, should Abrams be successful in this petition for review, the assessment of said costs against Abrams would warrant a reduction.

In connection with the restitution that Abrams was ordered to pay Mr. Ziya and Ms. Ulershperger, although same is authorized by Rule 3-5.1(i), R. Regulating Fla. Bar, such relief was not specifically requested by The Florida Bar in the complaint filed against Abrams (A. 2). In accordance with the same due process of law principles set forth in the above paragraph, also addressed in Argument III above with citations to The Florida Bar v. Fredericks, supra, and The Florida Bar v. Vernell, supra, the restitution Abrams has been ordered to pay must be reversed.

CONCLUSION

The merits of this petition for review are set forth above. While Abrams does concede misconduct arising from violations of Rules 4-5.3; 4-5.4; and 4-5.5, R. Regulating Fla. Bar, the violations in dispute are not supported by the record facts or law, nor is the one (1) year rehabilitative suspension from the practice of law. Additionally, the assessment of costs and restitution imposed against Abrams warrant reduction and/or reversal.

Based upon the above and foregoing, attorney Abrams requests that this Honorable Court:

1. Reverse and disapprove the Referee's finding that he engaged in in dishonesty, fraud, deceit, or misrepresentation, a violation of Rule 4-8.4 (c),R. Regulating Fla. Bar;

2. Reverse and disapprove the Referee's finding that he failed to act with competence, a violation of Rule 4-1.1, R. Regulating Fla. Bar; and

3. Reverse and disapprove the imposed sanction of a one (1) year suspension from the practice of law and reduce same to a minimum of ten (10) days and a maximum of ninety (90) days.

4. Reverse and disapprove the Referee's taxation of costs against Abrams in the amount of $2,618.10 and reduce same to $1,663.70; further reducing the amount should Abrams prevail on his petition for review.

5. Reverse and disapprove the Referee's imposition of restitution against Abrams in the amount of $2,400.00.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondent's Initial Brief, pursuant to Rule 9.210(a)(2), Fla. R. App. P., complies with the font requirement of said rule and is submitted in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the Initial Brief of Respondent was overnighted, by U.S. Express Overnight Mail, to THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy was forwarded, by U.S. Mail, to LILLIAN ARCHBOLD, ESQUIRE, The Florida Bar, 5900 North Andrews Avenue, Suite 900, Fort Lauderdale, Florida 33309, as well as to JOHN A. BOGGS, ESQUIRE, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this ___ day of April, 2005.

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