IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant, vs. GERALD JOHN D'AMBROSIO, Respondent. _____/	Supreme Court Case No. SC04-922 The Florida Bar File Nos. 2002-51,513(15A) 2002-51,610(15A) 2002-51,612(15A) 2003-50,817(15A)

RESPONDENT'S INITIAL BRIEF

KEVIN P. TYNAN, #710822
RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS i

TABLE OF CASES AND CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF CASE AND FACTS 2

SUMMARY OF THE ARGUMENT. 8

ARGUMENT 10

I. DISBARMENT IS NOT THE APPROPRIATE SANCTION FOR A LAWYER WHO ALLEGEDLY FAILS TO PROVIDE ONE CLIENT WITH COMPETENT REPRESENTATION, IS PRESENT IN COURT ON TWO OCCASSIONS POST HIS SUSPENSION FROM THE PRACTICE OF LAW (BUT DOES NOT PRACTICE LAW) AND FAILS TO SECURE TWO WRITTEN RETAINER AGREEMENTS WITH THE SAME CLIENT WHO CLAIMS THE FEE WAS CONTINGENT IN NATURE 10

A. The Referee's factual findings and recommendations as to guilt are clearly erroneous and lacking in evidentiary support 10

B. The proposed sanction is not supported by precedent and is unwarranted under the facts of this case 24

CONCLUSION 31

CERTIFICATE OF SERVICE 33

CERTIFICATION AS TO FONT SIZE AND STYLE 33

TABLE OF CASES AND CITATIONS

Cases Page(s)

1. Daniel Mones, P.A., v. Smith, 486 So. 2d 559 (Fla. 1986) 24
2. Rakusin v. Christianson & Jacknin, 863 So. 2d 442 (Fla. 4th DCA 2003) 16
3. The Florida Bar v. Barley, 831So. 2d 163 (Fla. 2002) 15,16
4. The Florida Bar v. Bauman, 558 So. 2d 994 (Fla. 1990) 28
5. The Florida Bar v.Brigman, 322 So. 2d 556 (Fla. 1975) 29
6. The Bar v.Canto, 668 So. 2d 583 (Fla. 1996) 10,11
7. The Bar v. Chosid, 500 So. 2d 150 (Fla. 1987) 28
8. The Bar v. Chosid, 869 So. 2d 541 (Fla. 2004) 28
9. The Florida Bar v. Davis, 379 So. 2d 942 (Fla. 1980) 10
10. The Florida Bar v.Gersten, 707 So. 2d 711 (Fla. 1998) 20, 21
11. The Florida Bar v. Golden, 563 So. 2d 81 (Fla. 1990) 17,18,19
12. The Florida Bar v. Greene, 589 So. 2d 281 (Fla. 1991) 28
13. The Bar v. Hollander, 594 So. 2d 307 (Fla. 1992) 30
14. The Bar v. Jones, 571 So. 2d 426 (Fla. 1990) 28,29
15. The Bar v. Maier, 784 So. 2d 411 (Fla. 2001) 27
16. The Bar v. Moore, 194 So. 2d 264 (Fla. 1967). 31
17. The Florida Bar v. Morrison, 669 So. 2d 1040 (Fla. 1996) 27

TABLE OF CASES AND CITATIONS (cont.)

Cases Page(s)

18. The Florida Bar v. Neckman, 616 So. 2d 31 (Fla. 1993) 29

19. The Florida Bar v.Nunes, 734 So. 2d 393 (Fla. 1999) 28

20. The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970). 25

21. The Bar v. Porter, 684 So. 2d 810 (Fla. 1996) 11

22. The Bar v. Rose, 823 So. 2d 727 (Fla. 2002). 14

23. The Bar v. Thomas, 698 So. 2d 530 (Fla. 1997) 25

24. The Florida Bar v.Turk, 202 So. 2d 848 (Fla. 1967) 31

25. Tutor Time Merger Corp. v. McCabe, 763 So. 2d 505 (Fla. 4th DCA 2000) 16

24. Wintter v. Fabber, 618 So. 2d 375 (Fla. 4th DCA 1993) 24

PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Gerald John D'Ambrosio, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

STATEMENT OF CASE AND FACTS

On May 27, 2004, The Florida Bar filed a five count complaint against the Respondent, Gerald John D'Ambrosio, which was assigned to the Honorable John Murphy on June 17, 2004, to act as referee and to render a report to this Court. A Final Hearing, as to guilt and innocence was held on May 23, 2005, and a Status Conference was held on June 3, 2005. No separate sanction hearing was held. The Referee served a five page Report of Referee on June 3, 2005.

Count I of the Bar's complaint discussed the Respondent's representation of Karl R. Bachert ("Bachert") and his company, Reecie's Ristorante Italiano ("Reecies"). RR1. In the eleven sentences devoted in the Report of Referee to the representation of Bachert, the Referee noted that there was no written fee agreement between Bachert and the Respondent and that the Respondent was paid $1,450.00 for the representation and that the Respondent did not return any portion of such fee to Bachert. RR1-2. While there is some discussion in the Report of the potential sale of Reecies and related matters, there does not appear to be a rule violation that attaches to these comments. RR2. However, the Referee does state that the Respondent did not file a corporate bankruptcy for Reecies and that Bachert retained other counsel to perform this task. RR2. Again these facts are not in dispute. While the Report of Referee does set forth rule violations at page three of the Report, the reader is left with having to guess which rules the Referee

believed were violated in relation to Count I of the Bar's complaint. However, a reasonable deduction can be made by comparing the Bar's complaint with the Report of Referee and find that the Bar asserted violations of R. Regulating Fla. Bar 4-1.1, 4-1.5(a) and 4-8.4(a) and that these same violations are referenced in the Referee's Report at page 3. It appears that the Referee found the Respondent not guilty of any alleged conflicts of interest which was the major theme of the bar's complaint and presentation at trial.

Count II of the Bar's complaint concerns the Respondent's representation of Randy Dennis. RR2. It is agreed among the parties that the Respondent was retained by Randi Dennis prior to his 2002 suspension from the practice of law and that the Respondent agreed to represent Mr. Dennis concerning his arrest for domestic violence for a fee of $3,000.00, which was paid and that there was no written fee agreement between the parties. RR2. The Referee also finds that there came a point in time where the Respondent was replaced by other counsel and the Respondent does not dispute this fact. RR2. The Referee also recites that the Respondent was suspended from the practice of law by Court order dated January 17, 2002 (effective February 22, 2002) and that such suspension was for 90 days. RR2. The Referee finds that the Respondent "appeared on behalf" of Dennis on March 7, 2002, before Judge Richard J. Oftedal, in Palm Beach County, Florida. RR2. Unfortunately, there is no discussion of the nature of such "appearance" in

the Report. However, the testimony before the Referee was that (1) a day prior to the status conference in question, the Respondent had advised opposing counsel, an assistant state attorney, that he was suspended (TT240); (2) when the case was called the Respondent informed the judge that he was suspended (TT240) and the judge reset the matter for a week later (TT241). It was the Respondent's testimony that another lawyer, Jay Salyer, had been retained to take over the case but that Mr. Salyer did not appear on March 7, 2002 for the status conference and that the only reason he was present in the courtroom was to insure the orderly transition of the client to new counsel. (TT241-242) The Referee fails to set forth with any particularity which rules he believes were violated concerning Mr. Dennis' complaint. However, at page 3 of the Report, the Referee lists several rule violations and by comparing this list to the Bar's complaint one can assume that the Referee found violations of R. Regulating Fla. Bar 3-5.1(g) [Notice to clients regarding suspensions.]; 3-4.2 [Violation of the Rules of Professional conduct is cause for discipline.]; 4-3.4(c) [A lawyer shall not disobey an obligation under the rules of a tribunal.] and 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.].

Count III of the Bar's complaint focuses on the Representation of David Friedman. The Referee devoted five sentences to explain his ruling on this Count. RR2-3. Prior to the aforementioned January 17, 2002 suspension order, the

Respondent represented Friedman in a divorce proceeding. RR2. The Referee noted that after the effective date of the suspension, the Respondent "appeared" on behalf of Friedman on April 17, 2002 before Judge Carlisle in Palm Beach County. RR2. It is uncontroverted and established that the appearance was for a calendar call that had been previously scheduled for that date. TT245. The testimony adduced at trial was that prior to the calendar call, Friedman had retained new counsel, Jay Salyer, and that the Respondent had already informed opposing counsel and his client about his suspension well prior to the calendar call. TT244-245. At the calendar call, Sayler, who had already appeared in the case, was not present before the Court for the calendar call and the Respondent who went to the courtroom because his name still appeared as attorney of record, notwithstanding his withdrawal from the case and replacement by Sayler. TT244-245. The Judge picked a trial date and the matter was tried by Mr. Sayler. TT244. Notwithstanding, the Respondent's direct testimony that he provided a copy of his suspension order to Mr. Friedman and the lack of any testimony to the contrary, the Referee found that the Respondent did not provide a copy of the suspension order to Friedman. RR3

The last two counts of the Bar's complaint concerned the Respondent's representation of Richard Appelman on two distinct matters. In Count IV, the Bar charged that the Respondent agreed to defend a foreclosure action and file a

counterclaim for damages without a written contract to memorialize the party's fee agreement. The Referee found the Respondent guilty of R. Regulating Fla. Bar 4-1.5(f)(1) because he believed that there was a contingent fee agreement not reduced to a writing. RR3. Interestingly, the Referee after making such finding acknowledged that the Respondent received no funds from Appelman on either representation and in fact lost $10,000.00 to him. RR3. While the Referee did acknowledge that Appelman provided a $70,000.00 check to the Respondent and that the Respondent did advance $10,000.00 to him based upon the assurances that the funds were good, the Report fails to indicate the fraudulent and potentially criminal nature of Appelman's actions. RR3. In fact, the evidence adduced at trial was that the checks were drawn on an international bank that did not exist. TT275-276.

At the same time as the representation on the foreclosure the Respondent assisted Appleman with a personal injury claim. RR3. The Referee found that the Respondent did not have a written fee agreement on this matter in violation of R. Regulating Fla. Bar 4-1.5(f)(1). RR3. It also appears that the Referee found a violation of R. Regulating Fla. Bar 4-16(d) as the Report denotes a violation of same and Count V is the only count of the complaint that contains such a charge. RR3. Unfortunately, the Referee sets forth no facts to explain his reasoning for such a violation.

Page four of the Report contains the Referee's sanction recommendation. Without reference to any precedent or any of the Florida Standards for Imposing Lawyer Sanctions and without any explanation whatsoever the Referee recommends that the Respondent be disbarred. RR4. This appeal now follows. It is the Respondent's position that the Court should reverse the Referee's findings of fact and guilt as to many of the alleged rule violations and to reverse the Referee's sanction recommendation as it is not in compliance with this Court's precedent.

SUMMARY OF THE ARGUMENT

In this case a Referee has recommended that a lawyer be disbarred, but never gave that lawyer an opportunity to be heard on the proposed sanction or present any evidence in mitigation. If this was not troubling enough the Report of Referee is devoid of any explanation why the Referee is recommending the most serious punishment available in a disciplinary action and the factual findings in the Report are conclussory and short on any real detail.

The Referee has found the Respondent guilty of lacking competence and taking an excessive fee of $1,450.00 notwithstanding that substantial (and competent) services were provided to the client. In a second client transaction, the Referee has found the Respondent guilty of failing to secure written contingent fee agreements on two cases for that client, but acknowledges that no fees were ultimately paid and the record in this case clearly shows the client admitting that one of the two cases was an hourly fee case. In the potentially most serious charge, the Referee has found that the Respondent violated a prior suspension order by being present in the court room on two occasions when the judges, the clients and opposing counsel all knew of his suspension. However, the record is clear that in both instances, the Respondent did not practice law or give the appearance that he was engaging in the practice of law. Rather, the first matter was reset by the judge without any comment on the client's case and the second

matter (a calendar call) was concluded by the setting of a trial date for the case wherein the case was being tried by the lawyer who had already appeared in the case to replace the Respondent, but for reasons unknown did not appear at the calendar call. While the Court may be troubled by a suspended lawyer putting himself in a situation where he could be accused of practicing law while suspended, this lawyer did not practice law in violation of the Court's suspension order.

The well established precedent of this Court is that in order for disbarment to be the appropriate sanction there must be a finding that the lawyer should never have been admitted to the Bar and that there is no chance for rehabilitation. The record in this case does not support such a finding, especially when many of the charges found by the Referee ought to be reversed.

ARGUMENT

I. DISBARMENT IS NOT THE APPROPRIATE SANCTION FOR A LAWYER WHO ALLEGEDLY FAILS TO PROVIDE ONE CLIENT WITH COMPETENT REPRESENTATION, IS PRESENT IN COURT ON TWO OCCASSIONS POST HIS SUSPENSION FROM THE PRACTICE OF LAW (BUT DOES NOT PRACTICE LAW) AND FAILS TO SECURE TWO WRITTEN RETAINER AGREEMENTS WITH THE SAME CLIENT WHO CLAIMS THE FEE WAS CONTINGENT IN NATURE.

At issue in this appeal is whether a lawyer, who allegedly fails to provide competent representation to one client, who is present in court on two occasions where he does not practice law and with all parties knowing his suspended status, and who allegedly fails to secure written contingent fee agreements on two cases in which the client claims the fee was contingent warrants the ultimate sanction of disbarment. It is the Respondent's position that disbarment is too draconian a sanction under the facts of this case and that, at most, a public reprimand is appropriate. See for example The Florida Bar v. Davis, 379 So. 2d 942 (Fla. 1980) [Disbarment is an extreme penalty and should be imposed only in cases where rehabilitation is improbable.].

A. The Referee's factual findings and recommendations as to guilt are clearly erroneous and lacking in evidentiary support.

It is well settled that a referee's findings of fact and guilt are presumed to be correct and the appealing party has the burden to demonstrate that these findings are "clearly erroneous and lacking in evidentiary support." The Florida Bar v.

Canto, 668 So.2d 583 (Fla. 1996); The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996).

The Referee without much comment has found the Respondent guilty of a great majority of the Bar's complaint. The Report of Referee is devoid of any real discussion of the facts of the case and instead makes brief conclussorry statements and then lists several rule violations in one paragraph without explaining which violation goes with each distinct count of the Bar's complaint. In short, the Report of Referee is deficient and should not be upheld.

1. THE BACHERT REPRESENTATION

Count I of the Bar's complaint concerns the Respondent's representation of Karl R. Bachert's company, Reecie's Ristorante Italiano ("Reecies"). The Referee presumably has found that the failure to file a corporate bankruptcy equated to a lack of competence in violation of R. Regulating Fla. Bar 4-1.1. However, the true facts of this case reveal that to have filed the requested corporate bankruptcy under the circumstances found in this case would have subjected the Respondent to Bar prosecution for making a bad faith filing or worse.

There is no evidence that Respondent was retained in November of 2000 for any purpose. However, what occurred in November of that year was a discussion between the Respondent and Bachert concerning the sale of the restaurant. Bachert's testimony that the parties discussed bankruptcy is not supported by the

documentary evidence in this case. The defense submitted letters to Bachert regarding a sale of the restaurant which never materialized. There was no testimony that Bachert or his wife Reecie ever conferred with the Respondent between November 2000 and March 30, 2001. The record is clear that the Respondent had written Bachert's New York Counsel, provided him with documentary evidence regarding UCC filings in Florida, wrote counsel representing Luna's advising that Luna was not a creditor and had no claim and also communicated with Bachert. Although it is true that no bankruptcy was ultimately filed by the Respondent, the reasons and rationale for this was fully explained to Bachert.

Bachert testified that at the time that he retained the Respondent to file a corporate bankruptcy in Florida for Reecies, he also had retained New York counsel to file a personal bankruptcy in New York. TT99-101. It is clear from the record that this fact was not timely disclosed to the Respondent. Bachert testified that the Respondent wanted to file both the corporate and personal bankruptcies in Florida, but that Bachert did not want to file both in Florida.

The Respondent testified that he prepared the initial paperwork for the corporate bankruptcy, but that he did not file same.[1] TT256-257. The reason he did not file the bankruptcy is key to the resolution of the claim of failing to provide

[1] Bachert even admits that he signed the initial corporate bankruptcy petitions. TT199-200.

competent legal services to Bachert. The Respondent testified that there were several very important issues that had to be resolved prior to the actual filing of the bankruptcy. First and foremost among them was the need to review the New York personal bankruptcy filing so that the pleadings he prepared "matched, both in creditors, in debtors, (and) in financial affairs." TT257, l.12-14. He went on to state that this was especially important because the bankruptcy petitions are filed under penalty of perjury, so absolute accuracy is a fundamental element of the services that need to be provided to a client. TT257.

It came to pass during the Respondent's work up of the file and attempts to secure further information from Bachert and his New York counsel that the list of creditors was wrong and that he created a bankruptcy preference[2] in that he was personally paying one creditor, Antonio Galante, who was a friend, and that this could have been interpreted as a bankruptcy fraud issue. TT 26. There was no evidence adduced at trial to controvert this testimony in any way.

Further, the unsecured creditor schedules on Bachert's New York Bankruptcy petition contained several falsehoods. First, Bachert listed a debt owed to his landlord for issuing a bad check as a "loan." Worthless checks are clearly not loans and are not dischargeable in bankruptcy. Further, Bachert, listed a

[2] See 11 USC §547(b). Galante was not a creditor. Payments to him were more than a preference. They were fraudulent. It should be noted that all of the Respondent's concerns regarding the schedules and listing of creditors were ultimately followed.

secured debt to Luna's which Bachert knew to be assigned to a different party. It was these concerns, and others that caused the Respondent to insist upon accurate filings in Florida.

The Supreme Court of Florida has held that ". . . an attorney's conduct must be somewhat egregious to be considered incompetent and therefore, a violation of rule 4-1.1." The Florida Bar v. Rose, 823 So. 2d 727 (Fla. 2002). In Rose, the lawyer was found not guilty of failing to provide competent legal representation for a variety of tactical decisions that he made during the representation of criminal defendant. In the case at hand, the Bar seeks to discipline the Respondent for his tactical decision not to file a corporate bankruptcy until such time as he was certain that the information he was including in the petition was accurate and would not subject his client to claims of a fraudulent preference. Rose; Also see R. Regulating Fla. Bar 4-1.2 and the comments thereto which state that while a client is the final arbiter on the objectives of litigation (the need for a bankruptcy), the lawyer is final arbiter of the means (timing and drafting of pleadings) used to secure these objectives. On the record presented below the Respondent should be found not guilty of a violation of R. Regulating Fla. Bar 4-1.1.

The Referee's Report may also have found the Respondent guilty of having collected an excessive fee in violation of R. Regulating Fla. Bar 4-1.5(a). It is presumed that the thrust of the Bar's argument on this point will be that the

Respondent received a fee of $1,450.00 and that this fee was unreasonable under the circumstances. However, it is unchallenged by the Bar and by Bachert that the Respondent met with him, communicated with him, communicated with Bachert's New York lawyer, drafted the initial corporate bankruptcy petition and performed other services for Bachert. While there is no testimony as to a reasonable hourly rate or hours expended, one could analyze the $1,450.00 fee as encompassing approximately seven (7) hours of time at a reasonable hourly rate of $200.00 per hour for a lawyer who has practiced law for more than forty years.[3] In this case the Bar has the burden of proof to demonstrate by clear and convincing evidence that this fee was excessive. The Bar has completely failed to meet this burden. They have presented no direct testimony on the unreasonableness of the fee collected and produced no expert testimony to support their position.

One could argue that there are similarities to The Florida Bar v. Barley, 831 So. 2d 163 (Fla. 2002). The lawyer, in Barley, was found guilty of serious misconduct unrelated to the issues before the Court at this time. However, he was found not guilty of charging and collecting an excessive fee. Id., at 170. In fact, the Court in commenting on the evidence noted that: "In the instant case, the Bar presented no expert testimony or any evidence other than Mr. Emo's testimony, challenging the legality or the reasonableness of the fees Barley charged." Id. The

[3] Admitted in Florida in 1987 and in Ohio in 1965.

Court went on and stated that "(a)lthough we find Mr. Emo's testimony reliable, in and of itself, his testimony does not constitute competent, substantial evidence that Barley's fees were clearly excessive." Id.

While the Referee in this case may have found Bachert's "testimony reliable in and of itself, his testimony does not constitute competent, substantial evidence" that the Respondent's fees were excessive.[4] The Bar only presented Bachert's testimony and failed to present any expert testimony. The lack of an expert in Barley established a failure of the Bar to meet its burden of proof on the excessive fee claim and the lack of an expert in this case should result in the same finding by this Court. This finding would be consistent with general law when a trial court is considering a fee award. See for example Rakusin v. Christiansen & Jacknin, 863 So. 2d 442 (Fla. 4th DCA 2003); Tutor Time Merger Corp. v. McCabe, 763 So. 2d 505 (Fla. 4th DCA 2000).

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

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[4] However, the evidence is clear that Bachert was not a truthful person. All one needed to do was examine his personal bankruptcy filing wherein Bachert and his wife filed a false petition under oath; claimed the restaurant's debt was a consumer/nonbusiness debt. Further at Question 18 on the Statement of Affairs: Nature, Location, and name of Business, they answered "NONE".

2. THE DENNIS AND FRIEDMAN REPRESENTATIONS.

The Bar charged that the Respondent practiced law on two distinct occasions, post his suspension from the practice of law. While the evidence indicates that the Respondent was present in a courtroom post his suspension, the Bar has failed to prove by clear and convincing evidence that he practiced law on those two occasions.

In the Florida Bar v. Golden, 563 So. 2d 81, 82 (Fla. 1990) a lawyer was disciplined for practicing law post a suspension wherein the Court found that "counseling and attempting to assist his client in requesting two continuances constituted the unauthorized practice of law." It appears that it was not the mere presence of Golden in the courtroom that triggered the violation. Rather, it was the action taken to advance the client's cause or position.

Of necessity we must discuss both claims of practice by the Respondent. All parties agree that the Respondent's representation of Randy Dennis commenced prior to the suspension order at issue. RR2. The Referee correctly found that the Respondent was replaced as counsel in Dennis criminal case. RR2. The uncontroverted testimony in this case was that prior to the "appearance" at issue, the Respondent personally advised the state attorney that he was suspended from the practice of law and that he was being replaced as counsel. TT240. It was the Respondent's testimony that he believed that Jay Salyer, Esquire, had been

retained to take over the Dennis representation and that for reason's unknown to the Respondent, Sayler did not attend the March 7, 2002 status conference.[5] Seeing that Sayler was not present, the Respondent approached the bench, advised the judge that he was suspended and unable to represent Dennis and that Mr. Sayler had been retained to represent him. TT240. The judge, upon being advised of the suspension, just reset the hearing for a week later, when new counsel needed to be present on behalf of Dennis. The Respondent sought no relief from the Court and only spoke up to assist in the orderly transition of his former client's case. Thus, there is significant difference between this case and that found in Golden.

The second "appearance" is equally innocuous and not the practice of law. At the final hearing of this case, the only testimony on the Friedman matter came from the Respondent and it was his testimony that prior to the calendar call at issue, new counsel had appeared in the case for Friedman, Jay Sayler, and that the Respondent had already informed opposing counsel and his client about the suspension well prior to the calendar call. TT244-245. Notwithstanding that he had been replaced as counsel, the Respondent was aware that his name still appeared as counsel of record for Friedman and in an abundance of caution he attended the calendar call expecting Mr. Sayler to be present. Mr. Sayler was once again not present putting the Respondent in a dilemma as to what his most prudent

[5] Unfortunately, Mr. Sayler passed away prior to the trial of this case and there is no testimony from him on the Dennis matter or the Friedman case.

course of action should be. The Respondent testified that opposing counsel requested an early trial date and the court accommodated him. TT244. Nothing else occurred at the calendar call and the Respondent sought no affirmative relief for his former client, other than to inform the judge that Mr. Sayler had taken over the case from him. TT244. It was undisputed that Sayler tried the case and there was no testimony that the Respondent took any other action on behalf of Friedman post his suspension from the practice of law. Typically, clients do not attend calendar calls and there is no trial testimony to indicate that Friedman attended this one or that he had any interaction with the Respondent, post his replacement in the case. It is therefore evident that the actions taken by the Respondent in being present in the courtroom for calendar call on April 17, 2002 do not run afoul of the standard established in Golden and were not violative of R. Regulating Fla. Bar 4-3.4(c).

The Report of Referee asserts that the Respondent failed to inform Dennis and Friedman, in writing with a copy of the actual order, of his suspension from the practice of law in violation of R. Regulating Fla. Bar 3-5.1(g). The Respondent was asked at trial whether he provided Freidman with a letter and a copy of the order and his response was in the affirmative. TT244, l. 12-16. There is no contrary evidence in the record to rebut this point. Accordingly, the Respondent should be found not guilty as to the Friedman matter.

On the Dennis matter, the Bar failed to present any testimony from Mr. Dennis, and in particular presented no testimony about whether or not he received a copy of the order from the Respondent. However, when questioned by the Referee, the Respondent admitted that he had not provided an actual copy of the suspension order to Dennis. TT311. However, it has been and continues to be the Respondent's position that Dennis was informed of the suspension order by the Respondent, especially in regards to the discussions that caused Mr. Sayler to take the case over from him. The Respondent, while failing to live up to perfect compliance with his suspension order, honored the spirit of this order by notifying each and every client of his suspension and assisting each of them in their transition to new counsel. The only issue presented by the Bar is the failure to send one client a copy of the actual suspension order, when that client had already been personally informed of same and had retained new counsel as a result of being so informed.

The Referee found a violation of R. Regulating Fla. Bar 4-3.4(c) which reads in pertinent part that "a lawyer shall not knowingly disobey an obligation under the rules of a tribunal." "Knowingly disobeying an obligation" requires intent and the Bar has failed to provide any evidence of an intentional refusal to obey a court ordered obligation. See for example The Florida Bar v. Gersten, 707 So. 2d 711

(Fla. 1998) [Attorney sanctioned for knowingly disobeying a subpoena to testify in a proceeding.].

3. THE APPELMAN REPRESENTATION.

The last matter referenced in the Report of Referee was the Respondent's representation of Richard Appelman. The record below indicates that both the Respondent and Appelman considered each other friends and that the Respondent had represented Appleman on a variety of matters over the years.[6] Notwithstanding this longstanding relationship and friendship, Appleman defrauded the Respondent out of $10,000.00, tried to pay the money back with yet another fraudulent check (with the same number as the previous check) and still filed a Bar complaint, possibly in an effort to forestall collection or secure some other benefit. While the Referee acknowledged the $10,000.00 debt occasioned by Appleman's misdeeds, the Referee fails to discredit Appleman in any way. This is even more astonishing when you consider the evasive nature of Appelman's testimony at trial.[7]

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[6] In fact, Appelman testified that: "We did things for each other, quote, unquote, with no agreement on dollars or anything else." TT75, l. 1-3. Please note that R. Regulating Fla. Bar 4-1.5(b)(1)(F) states that the nature and length of the professional relationship is a factor when considering fee agreements.

[7] See for example the following remarks: "The Court: Mr. Appelman, excuse me, I'm not going to allow you to just read from whatever you're reading from, sir. The Witness: See how nuts I am? TT60, l14-17.

In any event, the Bar's charges, as accepted by the Referee, are that in two cases the Respondent failed to have a written fee agreement for a contingent fee and also failed to furnish his client with "his" file upon termination of representation, when the client needed it to personally settle the personal injury action that the Respondent had been representing him on. While it is agreed that there was no written contingency fee agreement on the personal injury matter, the Respondent explained that based upon their course of conduct and friendship,[8] he and Appleman personally discussed an agreed upon fee but it was never reduced to writing because of their personal relationship. TT271. The Respondent also testified that his decision to not immediately reduce the fee agreement to writing was ". . . a lesson that everybody should understand" and that even your friends must be treated differently when they are your clients. TT271, l. 11-12.

It is the Respondent's position that he did not enter into a contingency fee agreement on the mortgage foreclosure action, but he does admit that there was no written agreement to document the nature of the fee in this case. However, an affidavit was introduced during the hearing (Respondent's Exhibit 4) which evidenced a $200 hourly fee and Appelman acknowledged his signature on that affidavit. TT74. Further, the Respondent testified that there was an hourly agreement for fees at the rate of $200.00 an hour. TT284. If there was any

[8] The testimony was that Appelman would call the Respondent and his wife on a daily basis. TT271

confusion over the nature of the fee in this case it was that the Respondent testified that he had not billed Appelman and may only have billed him if they were successful on a counterclaim in the foreclosure case. TT285.

The Respondent's testimony is clear – the mortgage foreclosure case was an hourly fee. Apellman admitted to this fact on cross examination and Respondent's Exhibit 4, an affidavit evidencing this hourly fee, was signed by Appelman. On these facts, the Bar can not show that the fee for the foreclosure case defense was contingent in nature and the Respondent should be found not guilty of this violation.

The last matter that needs to be addressed is the claim to a violation of R. Regulating Fla. Bar 4-1.16(d) which requires a lawyer, upon termination of representation, to take steps reasonably necessary to protect the client's interests. In the case at hand the Bar has charged a violation of this rule alleging that the Respondent's decision not to provide Appelman with a copy of "his" file was a violation of that portion of R. Regulating Fla. Bar 4-1.16(d) that one means of protecting the client's interests was to "surrender papers or property" in the lawyers possession. It is agreed that the Respondent informed Appelman that he was not going to "surrender" the papers in his possession that related to the personal injury case. However, the Respondent's defense to this charge is contained in the last sentence of the rule, which sentence the Referee and the Bar

have seemed to ignore. This sentence reads as follows: "The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law." R. Regulating Fla. Bar 4-1.16(d). It is the Respondent's position that since Appelman stole $10,000.00 from him (and the Referee acknowledged this debt at page 3 of his Report) that he could exercise a retaining lien over the client file.[9]

It is well settled law in Florida that if a lawyer is owed monies by a client, that lawyer may exercise a retaining lien over the papers and property in his possession until such time that lawyer is paid. Daniel Mones, P.A., v. Smith, 486 So. 2d 559 Fla. 1986); Wintter v. Fabber, 618 So. 2d 375 (Fla. 4th DCA 1993). Therefore, as a matter of law, the Referee is incorrect to find a violation of R. Regulating Fla. Bar 4-16(d) under the facts of this case.

B. The proposed sanction is not supported by precedent and is unwarranted under the facts of this case.

The Referee in this case is recommending that a lawyer be disbarred but has not taken the time to explain how or why he is making this recommendation.

[9] There are two interesting facts not set forth in the Report of Referee. The first is that Appelman, notwithstanding he did not have "his file" was still able to settle his personal injury case (and avoid paying any fee to the Respondent or restitution for his theft). Further, the Respondent was prevented from calling Donald Dowling, Esquire as a witness through a subpoena technicality occasioned by the R. Regulating Fla. Bar, and Dowling was the lawyer who was supposedly retained by Appelman to replace the Respondent. Also of interest was the party's factual stipulation that Dowling never asked for the Respondent's file. TT319.

Further, no precedent is reviewed or cited to support this sanction recommendation. However, what is most troubling about this disbarment recommendation was that the Referee never allowed the Respondent an opportunity to present mitigating testimony.[10]

In reaching a proper disciplinary sanction the Supreme Court of Florida, has been consistently guided by the following precepts set forth in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970) which include the judgment must being fair to society, to the Respondent and "be severe enough to deter others who might be prone or tempted to become involved in like violations." In applying these standards to the case at hand it is evident that the recommended sanction is too harsh of a sanction under the circumstances.

This Court has consistently held that it has a broader discretion when reviewing a sanction recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. The Florida Bar v. Thomas, 698 So. 2d 530 (Fla. 1997).

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[10] At the conclusion of the case in chief there was a discussion of setting a hearing to consider an appropriate sanction. (TT327). However, the next and last hearing was scheduled as a status conference and during the status conference the Referee noted that he had basically finished writing his report. TT vol. 3. A review of the record in this case will not indicate that the Respondent was ever allowed to make a presentation on the proposed sanction or present any mitigating evidence.

While the Respondent has urged this Court to find him not guilty of a great majority of the matters referenced in the Report of Referee, for purposes of this section of the brief, we will assume that the Court has affirmed the Referee on most if not all of the contested factual matters. Even when taking this position, disbarment is not warranted under the circumstances.

The Bar's case can be broken down into several areas for a discussion of an appropriate sanction. First there must be an analysis of the mitigation and aggravation present in the case and then there must be an evaluation of the existing precedent or applicable Standard from the Florida Standards for Imposing Lawyer Sanctions (hereinafter "Standard __") for the individual types of misconduct that is present in a case. The Court must then balance the mitigation, the aggravation and the potential sanctions to be imposed for particular violation to reach a just result.

The Referee in this case has found several aggravating factors.[11] Many of them relate to his view of the case and are supported in the record only if the Court finds the Respondent guilty of all charges. Thus, the Referee's findings of a pattern of misconduct, multiple offenses and refusal to acknowledge wrongful nature of misconduct would not be applicable if the Court finds the Respondent not guilty of those matters requested by the Respondent. However, the fact that the Respondent has previously been disciplined will remain as an aggravating factor.

[11] As is explained above, the Respondent was not offered an opportunity to present mitigating factors to the Court, so there are none in this record.

As the Referee notes at page 4 of his Report, the Respondent has been disciplined three times by this Court. He has a 1994 admonishment for minor misconduct, a 1999 public reprimand and a 2002 suspension form the practice of law for ninety days.

The difficulty in this case is the value to assign this prior disciplinary record. This appears to be similar to the situation faced by the Court in imposing a proper sanction on a different lawyer. The Florida Bar v. Maier, 784 So. 2d 411 (Fla. 2001). In Maier, the Court suspended the lawyer for sixty days when that lawyer neglected a client matter, failed to properly communicate with the client and also failed to respond to the Bar notwithstanding a more extensive disciplinary record. Maier had a thirty-day suspension and two admonishments for similar misconduct. The Court in Maier stated that: ". . . we do not believe that a public reprimand is sufficient in light of the fact that Maier's violations in the instant case involve the same type of misconduct that were the subject of her three previous disciplinary actions." The operative term from the Morrison decision, as discussed in Maier, is that the "Court considers the respondent's previous history and increases the discipline where appropriate." Florida Bar v. Morrison, 669 So.2d 1040, 1042 (Fla.1996)

The Court has not always increased a disciplinary sanction when there is a prior record. For example an attorney has received a three year suspension and

then after being reinstated received a public reprimand. The Florida Bar v. Chosid 500 So. 2d 150 (Fla. 1987); The Florida Bar v. Chosid, 869 So. 2d 541 (Fla. 2004) [table opinion]. It is also important to note that this Court has also given lesser value to older disciplinary orders. See for example The Florida Bar v. Nunes, 734 So. 2d 393 (Fla. 1999); Fla. Standard for Imposing Lawyer Sanctions, Standard 9.22 [Minor misconducts older that seven years not considered as aggravating under certain circumstances.]. Accordingly the Referee's enhancement to disbarment is not warranted due to the age of the first two minor disciplinary sanctions in this case, which are now six and 11 years ago.

It is anticipated that the Bar will point to multiple cases were a lawyer with a prior disciplinary record has continued to practice law while disbarred or suspended. These cases are all distinguishable. In the great majority of these cases the lawyer engaged in much more significant practice of law or had a much more extensive disciplinary record and in some cases the lawyer never appeared in the proceeding to defend his actions. For example in The Florida Bar v. Bauman, 558 So. 2d 994 (Fla. 1990), the lawyer engaged in five distinct practice issues and one of those occasions was even held in contempt by a trial judge for having done so. Nonetheless he continued to practice law. Id. In The Florida Bar v. Greene, 589 So. 2d 281 (Fla. 1991), the lawyer had previously been disciplined 6 times. This case is also unlike Jones in that the lawyer in Jones "did not make a good faith

effort to comply" with his suspension order and "knowingly made untrue representations to the court with respect to his efforts to comply." The Florida Bar v. Jones 571 So. 2d 426 (Fla. 1990). Even the facts of The Florida Bar v. Brigman, 322 So. 2d 556 (Fla. 1975) are more serious. In Brigman, the lawyer held himself out as a lawyer while serving a six month suspension and violated other provisions of his suspension order. The Court extended Mr. Brigman's suspension by another six months.

In the case at hand, we have a lawyer who went to the courthouse on two occasions, was present in the courtroom with all parties and judges armed with full knowledge of his suspension and that lawyer did not seek any relief for himself or his clients. While not completely on point, The Florida Bar v. Neckman, 616 So. 2d 31 (Fla. 1993) is worthy of review. In Neckman, the lawyer held himself out as an attorney after he had resigned from the Bar. The Court noted that: "Disbarment would be appropriate where the violation results in injury or is an intentional repetition of prior misconduct for which discipline has been imposed." Id., at 32. The Respondent has not been previously disciplined for engaging in the practice of law while suspended from the practice. Further, the Respondent's actions did not result in any harm to his clients or to the orderly processing of the two cases at issue.

The case at hand is different from that found in The Florida Bar v. Hollander, 594 So. 2d 307 (Fla. 1992). In Hollander the lawyer was found guilty of taking an excessive contingent fee in that he kept all of the settlement monies. The lawyer in Hollander received a public reprimand. If the Report of Referee is accepted as to the excessive fee charge, the Respondent only gained $1,450.00 in fees and completed significant services.

A comment should be made concerning the Florida Standards for Imposing Lawyer Sanctions all of which appear to point to a public reprimand and not to disbarment. For example Standard 6.23 states that a public reprimand would be warranted when the attorney negligently fails to comply with a court order" and causes injury to a client or a legal proceeding.

The Bar's lack of competence charge also requires a public reprimand. See Standard 4-5.3. The Standards go on to state that a suspension would only be warranted if the lawyer "knowingly lacks competence" and there is injury to the client. Standard 4-5.2.

Of real interest however is the Standard that applies to the violation of prior disciplinary orders. Standard 8.0. According to Standard 8.1, disbarment would only be warranted if there was (a) an intentional violation of the disciplinary order and the violation causes injury to the client, the public or the court or (b) the

lawyer had previously been suspended for the same or similar charges. Neither section fits the facts of this case. At most there is a lawyer who negligently violated the Court's suspension order by failing to send one client a copy of the suspension order and by being present in a courtroom on two occasions without practicing law. Standard 7.3 appears to meet these criteria and this Standard states that a public reprimand would be an appropriate sanction for this type of violation.

While it is the Respondent's position that a public reprimand is warranted under the facts of this case, it is understood that the Court may still desire to enhance the sanction due to the prior discipline in this case. It is respectfully submitted that such an enhancement would be appropriate at a thirty day suspension.

CONCLUSION

The Supreme Court of Florida has consistently held that disbarment is an extreme measure of discipline that should be used only when that lawyer "has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards" and therefore there must be a showing that this person "should never be at the bar." The Florida Bar v. Moore, 194 So. 2d 264, 271 (Fla. 1967). In fact, this Court has even stated that disbarment is reserved for those individuals who are "beyond redemption." The Florida Bar v. Turk, 202 So.

2d 848 (Fla. 1967). In applying all of these standards to the case at bar, the Court is faced with disciplining a lawyer who has been a valued member of the Bar for forty years (including admission in other jurisdictions), who may have transgressed the rules of this profession, unwittingly in most circumstances. It is respectfully contended that the Bar and the Referee have not set forth a sound basis for disbarment and that the proposed sanction is not warranted under the facts of this case.

WHEREFORE the Respondent, Gerald John D'Ambrosio, respectfully requests that the Court find him not guilty of the Bar's complaint, and if the Court sustains some of the Referee's findings of guilt impose no more than a public reprimand or a thirty day suspension from the practice of law as a sanction therefore and grant any other relief that this Court deems reasonable and just.

Respectfully submitted,

RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

By: _____
KEVIN P. TYNAN, ESQ.
TFB No. 710822

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail on this ____ day of October, 2005 to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief or the e-mail forwarded to the Court has been scanned and found to be free of viruses, by McAfee.

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KEVIN P. TYNAN