IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.
DEWEY HOMER VARNER JR.,

Respondent.
_____/

Case No. SC06-1919

The Florida Bar File
No. 2005-51,022(15C)

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Dewey Homer Varner, Jr., 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

After first having filed a complaint against Patricia Thorne, Jerry Lee Lindale grieved the Respondent, Dewey Homer Varner, Jr., who was Thorne's former law partner. See TFB 2; TT444-455.[1] A year and a half after Lindale complained to the Bar, the Bar filed distinct formal complaints against both Thorne[2] and Varner. The final hearing in this case was held on four different days, spread out over three months, with the last day of the trial being held on September 10, 2007.[3] The Referee, the Honorable Peggy Tribbett Gehl, served her Report of Referee on September 19, 2007, wherein she has found the Respondent guilty of certain rule violations and is recommending a ninety one day suspension from the practice of law.

In February 2000, Lindale met with Thorne concerning a workers compensation claim and retained the law firm then known as Varner & Thorne, P.A. RR2. There were two name partners, the Respondent, Dewey Varner, and Patricia Thorne, Esquire. RR2; TT133-136. At the time of this retention there were no other partners, but the law firm had two different associates who worked

[1] Lindale filed his grievance against Thorne on or about January 20, 2005, and after having met with Thorne, filed the grievance against the Respondent that is dated February 24, 2005. TT114; TBB Ex. 2.

[2] The Thorne complaint and disciplinary file is designated as Supreme Court Case No. SC06-1982.

[3] Portions of the final hearing were held on June 20, 2007, June 21, 2007, August 15, 2007 and September 10, 2007.

at the firm during part of the time frame that the law firm represented Lindale. TT231-233, 244 & 542. The law firm also employed several nonlawyers in secretarial and paralegal capacities. The two partners had known each other for several years, prior to entering into their partnership.[4] Prior to the creation of Varner & Thorne, P.A., Varner practiced mainly in the personal injury field and Thorne practiced primarily in the workers compensation field.

While the focus of this case related to the prosecution of one distinct workers compensation case, Lindale had retained the law firm on more than one claim against the Palm Beach County School Board. RR2. The accident at issue arose on October 15, 1999, wherein Lindale claimed to have been injured while climbing a fence. TT18-19. The School Board's attorney, Amy Smith,[5] testified that her client did not believe the accident occurred and that therefore the case was fully controverted. TT33-24. Thorne was the attorney of record for the Lindale case. TT 19.

The case proceeded normally and by the summer of 2003 the case was set for mediation followed by a trial and several depositions were set before that time.

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[4] The testimony also revealed that the two partners knew each other prior to the time that Thorne became admitted to the Bar and that when she was a newly admitted attorney she worked as an associate for the Respondent. TT131-136.

[5] At the time of the operative events in this case, Smith was the defense attorney. However, prior to the ultimate settlement of Lindale's case, Smith was elected as a circuit court judge.

RR2-3. The trial, the mediation and one deposition were cancelled after the Respondent served, on August 14, 2003, a notice of voluntary dismissal without prejudice concerning the October 15, 1999 accident only. RR3-4. Also see TFB Ex. 1. Both parties agreed, and the Referee so found, that Lindale did not consent to the filing of the dismissal. However, it was the Respondent's position that his partner, Thorne, had advised him that she had secured Lindale's consent to take the dismissal. TT204. The Report of Referee declined to accept this explanation. RR4.

Several months after the dismissal and for reasons unrelated to the Lindale case, the law firm dissolved and Lindale's remaining claims and file were taken by Thorne to her new office. TT206-208. Ultimately, Lindale discharged Thorne when he claims to have discovered the dismissal and retains new counsel, who successfully settles all of Lindale's claims, inclusive of the case that was dismissed by the Respondent. TT97; Resp. Ex. 1.

The Referee, based on these facts has found the Respondent guilty of a variety of rule violations. In Count I, the Referee found that the Respondent violated R. Regulating Fla. Bar 4-1.1 [lack of competence]; 4-1.2(a) [failure to follow a clients instructions] and 4-3.2 [failing to expedite litigation].[6] As to Count II, the Respondent was found guilty of violating R. Regulating Fla. Bar 4-1.4(b)

[6] As to all Counts the Referee found certain catch-all and procedural rules. These were R. Regulating Fla. Bar 3-4.2, 3-4.3, 4-8.4(a) and 4-8.4(d).

[communication] and 4-1.6(d) [failing to protect a client upon withdrawal]. Lastly, in Count III the Referee found a violation of 4-8.4(c) [dishonesty]. As a sanction, the Referee, without much explanation or citation to specific precedent, is recommending a ninety one day suspension from the practice of law.

As the Respondent believes that the Referee's findings are not supported by the record, he has filed this appeal seeking review of the Referee's factual findings, her findings of guilt and her sanction recommendation.

SUMMARY OF THE ARGUMENT

At the heart of the Bar disciplinary process is the concept that this Court must protect the public from being harmed from unethical attorneys. The Respondent, Dewey Varner is not an unethical lawyer. It has been the Respondent's position throughout this case that he tried to be a good partner and friend to Patricia Thorne, who had serious mental health concerns that needed constant attention and treatment. In fact were in not for these health concerns the Respondent would not have been involved in the workers compensation case that forms the backdrop to this disciplinary action.

In the case at hand, the Court is going to be faced with making a decision on which partner to believe regarding a conversation(s) that they had regarding the need to take a voluntary dismissal of one of Mr. Lindale's workers compensation claims. It has been the Respondent's consistent position that he discussed with his partner the need to take a dismissal of Mr. Lindale's case as there was surveillance videotape showing Mr. Lindale engaging in physical activity that he claimed he could not do and also showed him working at a time he was claiming lost wages for not being able to work. This created a very real concern that continuing with this one particular claim could subject Mr. Lindale (and potentially his counsel) to insurance fraud allegations.

At the crucial time frame in this case, mid August 2003, Thorne was not in the office, but was still in control of her cases and Lindale was one of her cases. The documentary evidence, which comes from records produced by Thorne to the Bar, shows that she was trying to contact Lindale at the time frame where she informed the Respondent that the client had authorized a dismissal. The documentary evidence also shows that Lindale had received the videotapes and called back to comment on same. Nonetheless, the Referee chose to believe Thorne's version of events, but only after severely curtailing the cross examination of the Bar's key witness. The purpose of the examination was to point out the inconsistencies in her testimony verses the documents that she had produced to the Bar and the letters that she had written to the Bar at a time when she was being investigated for the same actions the Respondent stands accused of committing.

Even if the Referee's findings of fact and guilt are upheld, the recommended sanction of a ninety one day suspension is not warranted under existing case law. While the Respondent does have one prior disciplinary suspension it is seven years old and should not be given the weight that the Bar has convinced the Referee to ascribe to same.

The Bar seeks to suspend a lawyer for taking a voluntary dismissal of a case wherein the lawyer believed, based on a conversation with his partner, that the client had provided his consent to take the action. While the case was initially

dismissed, successor counsel, who took over the case after Thorne failed to prosecute his other claim or personally communicate with Lindale for more than a year, was able to reopen the case and secure a settlement of both of Mr. Lindale's workers compensation claims. Thus, there was ultimately no harm to Lindale.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND GUILT ARE NOT SUPPORTED BY THE RECORD.

The Florida Bar filed a three count complaint against the Respondent relative to the representation of Jerry Lee Lindale, who was represented by the Respondent's law firm concerning a workers compensation claim. In Count I of its complaint, the Bar alleges that the Respondent failed to provide competent representation, failed to inform the client that a dismissal was being taken as to one of his claims, and failed to make reasonable efforts to expedite litigation. In Count II, the Bar charges the Respondent with a lack of communication and failing to take adequate steps to protect the client upon the termination of representation. Lastly, in Count III the Bar asserts that the Respondent engaged in conduct involving dishonest, fraud, deceit and misrepresentation. In order to properly resolve these claims, one must not only analyze Mr. Lindale's workers compensation case, but one must also examine the inner workings of the Respondent's law firm and his relationship with his former law partner, who first consulted with Lindale and was the lawyer who signed Mr. Lindale to a retainer agreement with the law firm.

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). It is respectfully contended that a careful examination of the record will reveal that the referee in this case overlooked certain key evidence and ignored uncontroverted testimony that would have exonerated the Respondent in this case.

A. Lindale's retention of the law firm and processing of claims.

The Respondent has enjoyed a long and successful career as a personal injury attorney, working by himself or in various partnerships. In early 2000, the Respondent formed a partnership with Patricia Thorne. As Thorne primarily practiced in the workers compensation field and the Respondent in the personal injury field, the office was divided into two fields with staff primarily reporting to either Thorne or the Respondent, depending on the type of case. TT133-134. While the Respondent did not have experience in the workers compensation field, he was very competent on the medical issues that arose in both sides of the practice and as such assisted Thorne on her cases by conducting discovery depositions and when necessary hearings that did not involve the intricacies of the workers compensation statutes. TT144-146. During the majority of the time frame at issue in this case, the law firm employed two different associates, both of whom assisted in the prosecution of the firm's workers compensation claims, as well as a support staff or twelve to fourteen. TT231, 244 & 542.

In February 2000, Jerry Lee Lindale met with Thorne and discussed his claim that he was injured at his place of employment on October 15, 1999. TT18.[7] After meeting with Thorne the law firm was retained to prosecute this claim. RR2. Apparently the case proceeded normally until the summer of 2003. TT234.

However, in 2003 all is not well in the law firm. While Thorne suffered from a variety of mental health issues for a significant period of time,[8] she testified at trial that her condition was improving in 2003. TT233. However, by her own testimony Thorne during this time frame was "not generally meeting with clients" and not attending hearings but instead was just sitting in the office "cranking out pleadings" and only talking to clients when she had to do so. TT239. Yet, the other witnesses that testified at the trial stated that she remained in control of her files.[9] Further, Thorne admitted that even up to the crucial time frame in this case,

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[7] Testimony also revealed that Lindale claimed injuries from an incident on October 11, 1999 and January 27, 1997. TT18. The law firm was ultimately retained on both October 1999 incidents.

[8] Due to the sensitive nature of mental health concerns and the variety of confidentiality statutes, this brief will no go into detail on the extensive nature of Thorne's mental health illnesses and would ask the Court to refer to the record below for the exact nature and extent of these illnesses and to take judicial notice of any and all mental health records introduced in *The Florida Bar v. Thorne*, Sup. Ct. Case No. SC06-1982. In short, Thorne testified that she suffered from a bipolar (type II) personality, as well as ADHD and OCD. TT228.

[9] Norma Almazon, a firm secretary, testified that Thorne would come in after hours, leave instructions on the work that needed to be done and generally

August of 2003, she was in the office working on files. In particular her own billing statement reflects regular activity on the Lindale file all through 2003.[10] See Resp. Ex 3. In fact forty five of the fifty one entries on the billing statement for the period beginning January 1, 2003 and ending August 14, 2003, reflect the work being done and billed by Thorne. Other law firm records introduced at the final hearing indicate that Thorne was actively working on the Lindale trial and preparing the case for trial. See Resp. Ex. 4 (a Petition for Benefits), 5 (correspondence), 6 and 10 (printouts from the Messages section of the case management software). For example the Messages reflect that on August 5, 2003, Thorne was looking for the client's "journal" so she could prepare the case for mediation and trial which were scheduled for August 15, 2003 and August 25, 2003, respectively.

B. The notice of voluntary dismissal.

At the core of this case is a notice of voluntary dismissal executed and served by the Respondent on August 14, 2003. The testimony at trial adduced that

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supervised her files. TT295-297. Also see Respondent's testimony at TT155-160 and at 184 wherein he states that Thorne and he talked almost every day.

[10] These billing statements that show activity on the file by Thorne indicate that Amy Smith's testimony that the Respondent had taken the Lindale case over was not accurate in that Smith was not privy to the internal workings of the law firm. At most, Varner had taken over the depositions and was the attorney ordinarily discussing the case with Smith. However, this did not mean that Thorne was no longer working on the file, as she clearly was.

in late January of 2003, it was discovered by the Respondent in a conversation with defense counsel, that the defense had conducted some form of surveillance of Lindale and that it was not favorable. See Resp. Ex. 6 (January 29, 2003 entry). The Respondent and Thorne discussed this potential surveillance on several occasions. TT587. The Respondent testified that:

> Patricia and I had talked about it. And she said that it would absolutely kill us. That she didn't want to go forward with the trial on it, because of the surveillance tape. And she asked me to call (the defense counsel) and see if I could just buy some time to get the mediation and the trial put on. (sic)[11] TT608.

This conversation regarding a potential dismissal of the case was repeated on several occasions since the discovery of the potential surveillance and the actual surveillance tape being made available.[12] TT612-616. However, it is the Respondent's testimony that after taking Dr. Katzell's deposition on August 11, 2003, at which the surveillance tape was played for the doctor to review and make comment upon, he had the specific conversation referenced above. TT612. Further, the Respondent testified that Thorne said she would confer with Lindale to get his permission to take the dismissal and in a subsequent conversation informed

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[11] This should read "off."

[12] Thorne, on cross, admitted to at least one conversation with the Respondent about the surveillance and admitted to a separate call with defense counsel who "warned her" about the content of the tapes. TT471-472.

the Respondent that she had talked to Lindale and he had approved the dismissal. TT616-618.[13]

With this background in mind, the Respondent went on to testify that he tried to convince, Amy Smith, the opposing counsel, to continue the mediation and the trial but that he was unsuccessful in that regard. TT609. Smith confirmed that the Respondent first tried to continue both the mediation and the trial but she did not agree to same but instead insisted on a voluntary dismissal. TT27-28. During this phone call the Respondent advised Smith that a voluntary dismissal would be filed.[14] On August 14, 2003, the Respondent executed the notice of voluntary dismissal and caused it to be served thus concluding the litigation on the October 15, 1999 claim.

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[13] The documentary evidence in this case reveals that Thorne was trying to call Lindale several times on August 13, 2003 and that she was continuing to try and call him. See Resp. Ex. 6 and in particular the first 8/13/2003 notation in Messages. The Messages also reflect a call to Thorne on August 14, 2003 reflecting he had seen the videotapes. See Resp. Ex. 6.

[14] A significant amount of trial testimony was devoted to the actual timeline of activity in the case regarding depositions that were scheduled and then cancelled as well as when the law firm first drafted the notice of voluntary dismissal and all phone calls related to the dismissal. However, the documentary evidence contained within the Messages (Resp. Ex. 6) and the other documents introduced at trial (the actual notice – TFB Ex. 1) show that the Respondent's phone call with Smith had to be on August 13 or 14, 2003 and that the notice of voluntary dismissal was served via facsimile on August 14, 2003.

1. Count I

In Count I the Bar charged and the Referee found that the Respondent failed to provide competent representation to Lindale; that he failed to abide by his client's decisions regarding settlement or disposition of his case and that he failed to expedite litigation.

This Court has held that in order to find a violation of a lack of competence that lawyer's conduct "must be somewhat egregious to be considered incompetent" and a violation of the rule. *The Florida Bar v. Rose*, 823 So. 2d 727,730 (Fla. 2002). This Court has further noted that when the courts consider claims concerning a lack of competence the reviewing court should ". . . permit a certain amount of deference to an attorney's trial strategy or tactical decisions." *Id*. at 730. In applying this standard to the case at hand it is evident that the decision to take a voluntary dismissal under the facts of this case was not incompetent.

The only fact referenced in the Report of Referee that might support this finding is that the Respondent did not consider the statute of limitations at the time the dismissal was taken. RR5, para. 18. While the Respondent candidly admitted that he did not consider this fact, the overriding concern was that the surveillance tape indicated that Lindale was not injured in the manner that he claimed he was and that if the case was pursued through trial the client and the lawyers could have

been accused of insurance fraud.[15] Successor counsel, who was able to reopen and settle the claim, agreed that a dismissal would have been reasonable if there was a "fear that their client was nothing but a fraud." TT113.

It should also be noted that the Respondent testified that his partner, Thorne, believed that she could still recover significant damages on the other October 1999 claim and by dismissing the case with the surveillance video there would be no reason for the potentially fraudulent activities of the client to be introduced in this other case. TT187-189.

The Referee also found a violation of R. Regulating Fla. Bar 4-1.2(a) which requires a lawyer to abide by the client's decisions regarding the settlement or ultimate disposition of their case. In order to reach this violation, there needs to be a finding that the Respondent knew that Lindale had not approved the taking of a voluntary dismissal. The Referee does make such a finding. RR4, para. 12. However, the Referee makes no comment on the central theme of the Respondent's defense that his partner told him that she had talked to Lindale and that he had approved the dismissal. A lawyer should have the right to rely upon information provided by his partner and act upon that information.

[15] The videotapes showed Lindale conducting physical activities that he claimed he could not do, as well as showed that he was working two jobs which adversely impacted his claim to lost wages. TT35-36.

While it is true that Thorne denied that she made a phone call to Lindale and discussed the dismissal (a real possibility), she also claimed that she did not discover anything about the dismissal until Lindale filed his bar complaint against her. TT322. This position strains credulity! When the partnership dissolved, within months of the dismissal, Thorne took the file and continued to represent Lindale. TT206-207. She continued to represent Lindale from the date of the dismissal, August 14, 2003 through June 27, 2004 – almost a full year and she did not discover the dismissal. This is just not true and in fact is contradicted by her own letter to The Florida Bar. Resp. Ex. 2. In her March 22, 2005 response to the Lindale Bar grievance, Thorne writes:

> The first I learned of the dismissal was upon speaking with Mrs. Smith, as I was aware trial was approaching. She was the one who advised me that Mr. Varner had taken a dismissal.

Thorne creates a whole different story at trial when she testified as follows:

> Q. . . . When did you learn that Mr. Varner had taken a voluntary dismissal of Mr. Lindale's case?
>
> A. When I got the grievance.
>
> Q. When was that?
>
> A. I believe it was January 2005.
>
> Q. You never known (sic) that he had taken a voluntary dismissal before that?

> A. No. I had questioned the staff. I had questioned Norma. I said, hey what's happening on Lindale? We're supposed to go to trial this week. I told him we needed to get certain documents.
>
> Q. This was August of 2003 –
>
> A. Right.
>
> Q. - you asked Norma –
>
> A. When I came home from Boston. She said its taken care of, no problem. TT321, l. 25 – 322, l. 17.[16]

This is not the only time that Thorne's letter to the Bar was in stark contrast to her trial testimony. In trying to distance herself from the Lindale case in August of 2003, Thorne testified at trial that she was in Boston getting treatment at the time of the dismissal. TT476-477.[17] However, in the very same letter to The Florida Bar, Thorne states that: "When the grievance was initially received, I thought I was in Boston on that date but, upon reviewing my receipts, I was not." Resp. Ex. 2, page two, para. 7.

It is also interesting to note that the documentary evidence indicates that Thorne was attempting to contact Lindale on August 13, 2003 and left a message at the law firm that she was trying to get in touch with Lindale. See Resp. Ex. 6.

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[16] Of course this testimony also belies the claim that Thorne was not working on this file during August of 2003.

[17] In fact she went into an elaborate description of standing in a field making phone calls because the cell phone reception was difficult indoors.

Interestingly, Lindale's June 27, 2004 letter discharging Thorne as his lawyer, decries a total lack of communication and that the last time he had talked to Thorne was in August of 2003. Resp. Ex. 1, para. 1.

Thorne has presented two completely different stories as to when she found out about the dismissal, has lied about her whereabouts in August of 2003 and has either lied about a conversation she had with Lindale or more likely lied to her partner that she had in fact talked to Lindale and he had approved the dismissal. [18]

The last rule violation found by the Referee regarding Count I was the claim that the Respondent violated R. Regulating Fla. Bar 4-3.2 which requires a lawyer to make reasonable efforts to expedite litigation. The Referee does not set forth any comment regarding the factual underpinnings of this violation. However, one can surmise that the filing of the voluntary dismissal somehow delayed the ultimate disposition of the client's case. However, by the very nature of the action of taking a dismissal the litigation was concluded and as is explained above the Respondent believed that Lindale was in agreement with the dismissal.

2. Count II

In Count II the Referee has found the Respondent guilty of failing to adequately communicate with his client and in failing to provide Lindale's new

[18] It should be noted that part of her mental health issues revolved around a failure to be able to confront difficult situations. Thus, the Respondent's constant desire to push off trials, not go to court, not attend depositions or not meet with clients in the office.

counsel, Williams, with a copy of his file. Unlike some of the findings for Count II, the Referee makes some specific findings of fact that she believed supported these findings. However, a close examination of the trial testimony and evidence introduced at trial clearly show these findings are not supported by the record.

The Referee found (1) that the Respondent never told Lindale that his case had been dismissed; (2) that Lindale had been calling the Varner and Thorne Law firm to ascertain the status of his case; (3) that no one at the firm had told Lindale that they had stopped working on the case and (4) that the Respondent did not "return Lindale's file" or take any steps to protect his interest. While the Respondent has consistently admitted that he never personally spoke to Lindale about the dismissal, he was told by his partner that she had done so negating any further obligation to convey the information a second time. However, the rest of these findings are not supported by the evidence due to one crucial fact which is that shortly after the dismissal was taken the law firm dissolved and Thorne took the Lindale case with her to her new law firm. TT 206-207.

The testimony at trial was clear, the law firm dissolved in the fall of 2003. Since Lindale's case(s) was a workers compensation matter, this file was transferred to Thorne and she took the file to her new office. TT206-207. Accordingly, the Respondent had no file to give to anyone. In any event, Thorne's successor counsel, Mr. Williams testified that he was retained in late June 2004

and received a copy of the file in November of that year.[19] TT69 & TT70. Further, while Lindale did not testify in this case, his letter of discharge was directed personally to Thorne at her new law firm and not to Varner & Thorne, P.A. See Resp. Ex. 1. In his discharge letter, Lindale makes specific reference to multiple calls placed to Thorne at her new office (not the Respondent) and that these calls were not returned. Resp. Ex. 1. Therefore, if there were unreturned phone calls they were made to Thorne, who was the attorney of record, and she should be the only lawyer held responsible for failing to return Lindale's phone calls which were made after the Varner and Thorne law firm had already dissolved.

There is some discussion in the Report of Referee that it was difficult for Lindale to reopen his case. However, Mr. Williams testified that he was in fact able to reopen the case and secure a good and valuable settlement of all then pending claims. TT 86-87.

3. Count III.

In Count III, the Referee has found the Respondent guilty of having violated R. Regulating Fla. Bar 4-8.4(c) which states in pertinent part "that a lawyer shall not engage in conduct involving dishonest, fraud, deceit or misrepresentation."

[19] The Respondent testified that Williams never called requesting the file. TT206. Further, there is no testimony from Williams that he ever called the Respondent or his office to request the file. Instead Williams' testimony was that his office called Thorne's office looking for the file. TT79-80.

This rule violation requires a specific finding of intent. *The Florida Bar v. Nue,* 597 So. 2d 17 (Fla. 1992).

The theory advanced by the Bar to support this rule violation was that the very language of the notice of voluntary dismissal and the implied consent to the action of taking of the dismissal by Lindale was false or fraudulent. The Notice of Voluntary Dismissal (TFB Ex. 1) reads in toto:[20] "Claimant, Jerry L. Lindale, through his undersigned counsel, dismisses without prejudice any and all pending claims filed in the above matter."

This rule violation also turns on the fact that the Respondent, when he took the actions that he did regarding the voluntary dismissal, relied upon information imparted by his law partner and believed that the action he was taking was authorized by the client. The prior arguments that are advanced above which show that there was a conversation between the Respondent and Thorne wherein she advised the Respondent that she had the client's permission will not be set forth again. However, it is important to note that at all times the Respondent believed that he was assisting his partner in resolving a case that needed to be resolved and that he had no motivation to take the action as he was not going to try the case.[21]

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[20] Other than the case style and certificate of service.

[21] Prior to the Lindale dismissal, as well as after it, the Respondent has never tried a workers compensation case. At all times he believed that Thorne would be trying same.

C. The Referee improperly limited cross examination.

The most important fact in this case was whether or not a certain conversation was held between the Respondent and his law partner, Patricia Thorne. As such Thorne's credibility or lack thereof, was a crucial portion of the presentation from both parties. Unfortunately, the Referee unfairly placed serious limits upon the Respondent's ability to fully and completely cross examine this witness as to her veracity, her bias and her mental state at the time of the events in question. This included restricting the Respondent's cross examination on some of the same subject matters that were inquired of by the Bar. In fact, the Referee made the comment that: "We're going to reinvent the wheel on when she met him," after Respondent's counsel asked his first question of Thorne. TT327, l. 6-7.

For example, Bar Counsel inquired about Thorne's treatment for a series of mental health issues. TT226-231 and TT244-249. However, when Respondent's counsel asked his first questions of Thorne regarding mental health, the Referee, without any objection being raised by the Bar, stated: "This is all asked and answered, Mr. Tynan." TT339, l. 16-17. The record will reflect an exchange between the Referee and Respondent's counsel, wherein Respondent's counsel noted that he had not yet asked anything about Thorne's "health care or mental health care at all." TT339. The Referee went on and described what she understood Thorne's testimony was in this regards and even allowed Thorne to add

comments, without allowing Respondent's counsel to continue with this line of questioning by suggesting that she fully understood the issue and intimated that Respondent's counsel should move on to other areas.

Not more than a few pages later in the record, the Referee chided Respondent's counsel by asking: "Any new material you think you could ask her about?" when Respondent's counsel was trying to establish that Thorne was in the office on a consistent basis as opposed to her earlier testimony on direct that she was not. RR 343-344.

During the course of cross examination Respondent's counsel wanted to inquire of Thorne regarding the grievance that had been filed against her by Lindale. However, the Referee declined to admit the Bar complaint that Lindale had filed against Thorne (Resp. #11 for identification). TT445-452. This was despite the fact that the Referee admitted Lindale's grievance against the Respondent. TFB Ex. 2. Further, the Referee limited any questioning on the settlement of Lindale's grievance against Thorne. TT452-454.[22]

By limiting the cross examination of the Bar's key witness, the Referee could not accurately gage the veracity of this witness. As is pointed out above, Thorne made radically different statements during the final hearing as compared to letters that she wrote to The Florida Bar when she was trying to extract herself

[22] The Referee did allow proffers on both issues and those are contained in the transcript as referenced above.

from Lindale's grievance. Accordingly, it was essential for the Respondent to be able to cross examine Thorne on her mental health, the grievance that was filed against her by Lindale and the result of that grievance. To do otherwise was error.

II. A NINETY ONE DAY SUSPENSION IS AN EXCESSIVE SANCTION.

This Court has consistently held that it has a broader discretion when reviewing a sanction recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997). The Court should exercise its discretion in finding that the ninety one day suspension being recommended by the Referee is too harsh a sanction under the circumstances.

The Supreme Court in *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), stated that in selecting an appropriate discipline certain fundamental issues must be addressed. They are: (1) Fairness to both the public and the accused; (2) sufficient harshness in the sanction to punish the violation and encourage reformation; and (3) the severity must be appropriate to function as deterrent to others who might be tempted to engage in similar misconduct. Also see The Standards for Imposing Lawyer Sanctions, Standard 1.1. The sanction proposed by the Referee does not meet these criteria.

In all cases it is important to discuss the mitigation and aggravation that is present in a case. In terms of aggravation the Referee found the following from the Florida Standards for Imposing Lawyer Sanctions (hereinafter Standard __.):

1. Standard 9.22(a) – prior disciplinary offense:[23]

2. Standard 9.22(b) – a dishonest or selfish motive;

3. Standard 9.22 (c) – a pattern of misconduct;

4. Standard 9.22(d) – multiple offenses;

5. Standard 9.22(i) – substantial experience in the practice of law.

The Respondent takes no issue as to Standards 9.22(a) and 9.22(i) being found by the Referee. However, the Respondent does take issue to the weight being given to a seven year old disciplinary case, wherein the conduct was well before the resolution of that disciplinary matter. The remaining aggravation all flows from the mistaken belief that the Respondent had some great motive in taking a dismissal of Lindale's case. However, the record is very clear; the Respondent was not going to try the case, so taking the case off the trial docket did not affect him one bit. Yes, he did get out of covering a doctor's deposition, but

[23] See *The Florida Bar v. Varner*, 780 So. 2d 1 (Fla. 2001) which documents that the Respondent was suspended for ninety days for providing an adjuster with a fictitious notice of voluntary dismissal. The testimony at trial was that the Respondent fully accepted responsibility for his actions and even wrote letters of apology to the local judiciary and other members of the Bar, even though same was not ordered by the Court. The record will also reflect that the Respondent immediately began his suspension, rather than wait thirty days to close his office.

that certainly is not motive to dismiss a client's case. The evidence in this case shows that the Respondent acted upon information that he received from his partner and he should be able to rely upon same.

On the other side of the scale the Referee found two mitigating factors. They are Standard 9.32(c) [personal or emotional problems][24] and Standard 9.32(g) [good character and reputation].[25] The testimony at trial also established several other mitigating factors that were not referenced in the Referee's Report. The Respondent testified that he fully cooperated with The Florida Bar during all aspects of the Bar's investigation and prosecution of the case, which established Standard 9.32(e).

Two other mitigating factors are clearly established by the documentary evidence that was introduced at trial. Standard 9.32(m) states that the remoteness of a prior disciplinary matter should be accepted as mitigation. As one can see from the prior disciplinary case, it was resolved in February of 2001, approximately seven years ago, and that the conduct in question happened

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[24] This issue was not argued by the Respondent and quite frankly, we are uncertain why this reference was made. Perhaps it had to do with the fact that the Respondent took significant time and effort to assist Thorne as she dealt with her mental health issues, inclusive of personally attending counseling sessions to make sure Thorne sought treatment. TT148-150.

[25] Character testimony was presented by John Ramano, Esquire, Patrick Sean Spellacy, Esquire and Dr. Lesley Cohen. Each witness expressed an admiration for the Respondent and Ramano, discussed the true remorse that the Respondent felt for the conduct that led up to his prior disciplinary matter.

significantly prior to that time. See *The Florida Bar v. Varner*. Lastly, Standard 9.32(i) was established by the introduction of TFB Ex. 2, which was a copy of Lindale's Bar grievance which is dated February 24, 2005. The record in this case reflects that the Bar's formal complaint was not filed until a year and eight months after the grievance was filed. Further this case languished before the Referee for almost a year, as the Bar took several continuances.[26] In total this case took almost two and a half years to get to trial establishing this mitigating factor also.[27]

Mitigation and aggravation are just one part of the analysis. The Court must also establish the baseline for the conduct under review. In the Respondent's view the baseline is clearly no more than a public reprimand.[28]

In a case strikingly similar to the fact pattern found by the Referee a lawyer received a public reprimand. *The Florida Bar v. Price*, 569 So. 2d 1261 (Fla. 1990). In *Price* the lawyer failed to consult with his client concerning a dismissal of that client's case and filed a dismissal without the client's knowledge or consent and was found guilty of the same types of rule violations that are found in this

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[26] The Respondent did request a continuance of the sanction hearing due to witness unavailability and that added some time on the end of the case.

[27] It took two years and seven months to get to the execution of Report of Referee.

[28] The remaining portion of this argument assumes that the Court has accepted the Referee's findings of guilt and will therefore provide relevant authority to provide an appropriate sanction based on those findings.

case. This is one significant difference and that regards the harm to the client. In *Price* successor counsel was unable to undo the damage done by the taking of a dismissal and in the case currently before the Court, successor counsel was able to reopen the case and secure a settlement of the action. *Id.* at 1262.

A similar sanction was handed down in *The Florida Bar v. Weidenbenner*, 630 So. 2d 534 (Fla. 1993). This case was resolved as a misrepresentation case rather than a failure to secure client approval, but the facts are somewhat analogous. The lawyer in *Weidenbenner* failed to notify a co-trustee that the letters of administration had been revoked at the time that the lawyer wrote a letter to that co-trustee authorizing final disbursement. *Id.* at 536. The Court noted that the lawyer did not receive any financial gain as a result of his actions and therefore he received a public reprimand.[29] Likewise a lawyer received a public reprimand for among other things, filing a notice of appeal with the client's consent for the sole purpose of delaying a foreclosure. *The Florida Bar v. Barcus*, 697 So. 2d 71 (Fla. 1997).

In an extremely egregious case the Court still imposed a public reprimand. *The Florida Bar v. Glant*, 645 So. 2d 962 (Fla. 1994). *Glant* arose from a child custody case wherein custody of four children was at issue. *Id.* at 963.

[29] Williams testified that the Respondent waived all fees and costs that he potentially could have collected once the case had settled and Thorne waived her fees but was reimbursed costs. TT99.

Notwithstanding the lawyers full knowledge that her client only wanted custody of two of the four children, the lawyer sent a letter to HRS asking that her client receive custody of all four children. *Id.* at 963. In fact while responding to the Referee's question at trial, the lawyer responded that her client's opinion "meant nothing" to her and that she did not care if the client "said yes or no . . . (she) would have sent the letter anyway." *Id.* at 964. In the case at hand you have a lawyer that cared what his client desired and only when he knew, through his partner, that the client had approved the dismissal did he act.

The Report of Referee does not provide any case law to support the suspension that is being recommended. However, it is anticipated that the Bar will rely upon several cases that were cited during closing argument. Each is factually distinguishable. First the Bar cited to two cases that discussed misrepresentations made to a court. *The Florida Bar v. Corbin*, 701 So. 2d 334 (Fla. 1997); *The Florida Bar v. Oxner*, 431 So. 2d 983 (Fla. 1983). In *Oxner* the lawyer made multiple misrepresentations to the trial judge in order to secure a continuance. *Id.* at 984-985. The Court went on to note that these were "deliberate lies" and that there was no justification for same and as such the Court imposed a sixty day suspension. *Id.* at 985-986. The conduct in *Corbin* is even more serious. Not only did the lawyer make multiple material misrepresentation to the court by submitting an affidavit that he knew to contain false information but later lied to the Bar in his

response to the Bar complaint. *Id*. at 334-335. For this conduct the Court imposed a 90 day suspension. *Id*. at 337. One reason for the 90 day suspension was the fact that the lawyer had been disciplined on three prior occasions (all private reprimands) and had not established any real mitigation. This case is in stark contrast to both referenced opinions in that the Respondent herein drafted a document that he believed was based upon client consent and therefore would have been completely accurate had the client provided the consent. Further, there is significant differences in the mitigation and aggravation present in the referenced cases and in particular in *Corbin* the lawyer had three prior disciplinary sanctions and the enhancement was only to a 90 day suspension.

The Florida Bar also made reference to two enhancement cases during closing argument. In the first case, *The Florida Bar v. King,* 664 So. 2d 925 (Fla. 1995), the lawyer had three prior sanctions. They were a 1990 public reprimand, a 1991 admonishment and a 90 day suspension in 1994 that resolved multiple grievances. *Id.* at 927. As all of the sanctions were close in time, with a significant case only a year prior to the one being resolved by the Court and while still being on probation for that case, the lawyer received a three year suspension. In the case at hand the Respondent's one disciplinary sanction is more than seven years old.

The second enhancement case referenced by the Bar was *The Florida Bar v. Daniels*, 641 So. 2d 1331 (Fla. 1994), which was resolved upon default and without either party seeking an appeal. The Court noted that the lawyer had two 30 day suspensions in 1993 (a year prior to the decision) and that this factor warranted the step up to a 91 day suspension. *Id.* However, once again it should be noted that the Respondent's prior suspension, while a significant event, is remote in time and should not be given the weight that the Bar and the Referee would like to give it. That is especially true when taken in light of the other mitigating factors that are present in this case.

The last area that must be mentioned is the lack of harm to the client. In the only Standard cited by the Referee in her Report as to the appropriate level of sanction, one of the key elements is whether the client had been injured or harmed. See Standard 4.42(a). In looking at the evidence in this case it is clear that the dismissal was taken in August 2003 and upon the dissolution of the law firm, Lindale's case (and his file) remained with Thorne, who did not reveal the dismissal to Lindale or even talk to him for more than a year resulting in her discharge. Successor counsel was able to reopen the case and secure a settlement, not only of the dismissed case, but also the second claim that was apparently being neglected by Thorne.

Conclusion

In this case, the Respondent urges the Court to take a hard look at the evidence presented, as it is his belief that the Bar has failed to meet its burden of proof on the charges raised by the Bar. Further, the Respondent respectfully takes issue with the harsh sanction being recommended by the Referee where the Court's precedent indicates a lesser punishment. It is respectfully contended that the Bar seeks to discipline the wrong partner for causing a notice of voluntary dismissal to be filed in that the only person who stood to gain anything (not having to attend a trial where the client was going to be accused of insurance fraud) was Patricia Thorne and not Dewey Varner.

WHEREFORE the Respondent, Dewey Homer Varner, Jr., 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 as a sanction therefore and grant any other relief that this Court deems reasonable and just.

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 January, 2008 to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale,

FL 33309 and to Kenneth Marvin, 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.

Respectfully submitted,

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