IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DAVID SAMUEL NICNICK

Respondent.
_____/

Case No. SC06-290

The Florida Bar File
No. 2004-50, 937(17J)

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." David Samuel Nicnick, 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

This Bar Grievance action arises from a dispute between a mother, seeking child support for her children, and the father of her children, who had successfully avoided paying such support for multiple years. The Respondent, David Samuel Nicnick, represented the mother, Susan Cerny.

The core facts of this case are not in dispute and can be found in the parties' Joint Pretrial Stipulation. The Referee, in his Report at pages 2 through 4, adopts the following facts found in that stipulation:

1. The Respondent, David S. Nicnick, represented Susan Cerny in the case styled Susan Carney v. Heinrich F. Buettner and Luise Buettner, designated as Case Number 99-08110 (08) (hereinafter referred to as "the litigation").

2. Prior to the aforementioned lawsuit, the Respondent had represented Cerny for several years concerning Heinrich Beuttner's failure to pay child support. In the Susan Cerny v. Heinrich F. Buettner and Luise Buettner litigation, it was alleged that Heinrich Buettner had fraudulently transferred stock to his mother to avoid a child support obligation.

3. Respondent, David S. Nicnick, was the attorney of record for Cerny in the above referenced litigation from the filing of the lawsuit on May 11, 1999 through January 27, 2003, when he was replaced by another lawyer.

4. Luise Buettner retained the services of E.E. Jordan, Esquire, to defend her in the above referenced litigation and he represented Luise Buettner in the litigation from June 1, 1999, through until May 2, 2001, when his Motion to Withdraw was granted by the trial judge.

5. Respondent knew that attorney Jordan was representing Luise Buettner during the dates described in paragraph 4, above.

6. Prior to Mr. Jordan's withdrawal from the litigation, the Respondent prepared two documents concerning a potential settlement of the litigation. These documents were drafted at different times. The Respondent gave both of these documents to his client, Cerny, shortly after he had drafted same.

7. On or about February 17, 2001, or shortly thereafter, one of these documents, styled Compromise and Settlement Agreement, was returned to the Respondent with a signature attached thereto purporting to be Luise Buettner's signature.

8. The Respondent did not inform Jordan that he had prepared either of the aforementioned documents or that it appeared that Luise Buettner had executed the document styled Compromise and Settlement Agreement. The parties agreed that if called to testify, Jordan would have stated that, prior to his withdrawal from the litigation he had no knowledge of either of the aforementioned documents or that

his client had allegedly executed the document styled Compromise and Settlement Agreement.

9. Luise Buettner is deceased and was unavailable to testify in this case.

10. E. Howard Seidin, a Criminalist employed by the Broward County Sheriff's Office, if called to testify would have stated that he analyzed the signature on the document styled Compromise and Settlement Agreement and that, in his expert opinion, Luise Buettner did not sign the document and that he had no expert opinions as to who affixed Ms. Buettner's signature to this document.

The final hearing focused on the drafting and use of a document entitled Compromise and Settlement Agreement. See TFB Ex. 1. However, the Referee only found the Respondent guilty of certain rule violations relative to the Respondent's decision not to immediately share a copy of the Settlement Agreement with opposing counsel.[1] In particular, the Referee found the Respondent violated R. Regulating Fla. Bar 4-3.3(a) and R. Regulating Fla. Bar 4-8.4(c) when he gave the proposed settlement agreement to his client, Cerney, "with the understanding that it would be delivered to Luise Buettner for her consideration." RR14. T

[1] As the Referee found the Respondent not guilty of the majority of the Bar's complaint and the Bar has not appealed such finding, the facts and potential rule violations relative to the not guilty findings will not be discussed herein.

The Respondent respectfully contends that these findings are clearly erroneous and lacking in evidentiary support. Further, the Respondent, in this appeal, will demonstrate that the Referee's recommendation of a 91 day suspension from the practice of law is excessive and fails to follow this Court's precedent.

SUMMARY OF THE ARGUMENT

At issue in this case is whether a lawyer should be found guilty of unethical conduct when he drafts a proposed settlement agreement and shares same with his client, with the possibility that the proposed settlement agreement will be provided to the opposing client who is represented by legal counsel at that time. While the Respondent in this case could have been more careful in his handling of the situation, he did not intentionally engage in any dishonest or deceitful conduct. Nor did he actively conceal the existence of the proposed settlement agreement. It is the Respondent's position, and uncontroverted trial testimony, that he believed opposing counsel was fully aware that the respective parties were having settlement discussions amongst themselves and that he was truly surprised that the proposed agreement that he had drafted for his client's consideration came back signed by the other side.

A secondary but very significant issue is the sanction recommendation in this case. The Referee is recommending a ninety-one day suspension from the practice of law based upon his finding that the Respondent should have shared the proposed settlement agreement at the moment he gave same to his client. It is respectfully contended that the more appropriate sanction for what the Referee found is a public reprimand or at most a ten day suspension, based upon the lack of severity of the misconduct and the mitigation found in this case.

ARGUMENT

I. A LAWYER DOES NOT VIOLATE THE RULES REGULATING THE FLORIDA BAR BY WAITING TO SHARE A PUPORTED SETTLEMENT AGREEMENT WITH OPPOSING COUNSEL UNTIL THAT LAWYER IS CERTAIN THAT THE AGREEMENT WAS NOT FRAUDULENTY SECURED BY A THIRD PARTY.

At issue in this appeal is whether a lawyer, should be found guilty of violating R. Regulating Fla. Bar 4-3.4 (c) [altering, destroying or concealing evidence] and 4-8.4(c) [engaging in dishonest, fraudulent or deceitful conduct], when that lawyer does not immediately disclose to opposing counsel the existence of a purported settlement agreement, when that lawyer is concerned that the settlement may have been fraudulently procured by a third party and the lawyer desires to determine if a fraud had been committed prior to sharing such document with opposing counsel. It is the Respondent's position that his delay in notifying opposing counsel was reasonable under the unique circumstances of this case and that his actions were not intended to "conceal evidence" or to engage in some form of dishonest or deceitful conduct. Rather, the Respondent contends that a prudent and ethical attorney needed to ascertain the bonifides of the settlement agreement prior to its use.

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).

Only two witnesses testified at trial, but only one witness testified about the facts and circumstances related to the two rule violations found by the Referee and that witness was the Respondent.[2] A review of the relevant portions of the Respondent's testimony is therefore important for resolution of this case.

The Respondent testified that he began his representation of Susan Cerney sometime in 1996 to assist her in her efforts to collect on an outstanding judgment for child support. TT192. While there was a written retainer agreement, Ms. Cerney had not paid the Respondent any legal fees for three years of representation in the child support collection litigation.[3] TT192. Collection efforts were difficult because Heinrich Buettner ("Heinrich"), the father of the children, had purposefully made himself unavailable and was virtually hiding from the obligation to support his children. TT194-196.

There came a point in time that Cerney and the Respondent discovered that there may have been a fraudulent transfer of Heinrich's assets to his mother, Luise Buettner ("Luise"). Accordingly, a lawsuit was filed in May of 1999, against

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[2] The other witness was Detective Randall Pelham, who testified on the matters that did not result in any rule violations. It is also important to note that the detective's testimony was highly discounted by the Referee. See footnote 4 of the Report of Referee.

[3] Nor did the Respondent collect a legal fee for the fraudulent transfer action.

Luise and Heinrich alleging that Heinrich fraudulently transferred some of his assets into his mother's name to avoid paying his child support obligations. TT86. While Luise was served and appeared in the fraudulent transfer litigation, Heinrich avoided service and was not a participant in the litigation until well after the events at issue. TT194.

During the course of the litigation Cerny informed the Respondent that Luise had approached her through Luise's caretaker, Paul Edwards, seeking to settle the case. RR5. Cerney requested that the Respondent draft an outline of a settlement for her review. RR5. The Respondent drafted that document and gave it to Cerney. RR5. A little while later, Cerney told the Respondent that she had further discussions with Edwards and needed a new document with modifications to consider and the Respondent drafted this document also. RR5. As the Referee noted in his Report, the Respondent, at the time he gave the settlement agreement to his client, "had no expectation of this document ever being returned to him executed" by all parties. TT102-103; RR5.[4] However, the parties, through a pretrial stipulation, agreed that on or about February 17, 2001, the Respondent came into possession of an executed version of the settlement agreement that he drafted. TT209-210.

[4] In fact, the Respondent's actions in pushing the case along, inclusive of noticing the case for trial on February 5, 2001 support this finding. See RR 5-6.

On or about February 17, 2001, the Respondent traveled to his client's home, along with his partner, Gordon Schnap, Esquire, to meet with Paul Edwards, who by that time had been arrested and charged with allegedly stealing Luise Buettner's automobile. The purpose of such meeting was for Mr. Schnap[5] to discuss potential representation of Edwards in the defense of this criminal charge. TT 198-200. Mr. Edwards decided not to retain Mr. Schnap, but did deliver to the Respondent the original executed version of the Settlement Agreement. TT209-210. The Referee found that the "uncontroverted testimony at trial was that the Respondent accepted possession of the agreement but made no inquiry of Edwards concerning the document or how it was executed." RR6.

The Referee in this case takes issue with the fact that the Respondent did not immediately share with opposing counsel the fact that he had given a proposed settlement agreement to his client "with the understanding that it would be delivered to Luise." RR13-14. It was the Referee's position that this failure coupled with a portion of the Respondent's testimony that "he did not want opposing counsel involved at that time" was a violation of R. Regulating Fla. Bar

[5] The Respondent needed to drive Mr. Schnap to this meeting as Mr. Schnap is legally blind and unable to drive. TT200.

4-3.4(a)[6] and 4-8.4(c). It is the Respondent's position that his testimony on this point was misunderstood and that he did not violate either rule.

Regulating Fla. Bar 4-3.4(a) states that a lawyer shall not "unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy or conceal a document" that is relevant to a pending proceeding. The second rule violation, R. Regulating Fla. Bar 4-8.4(c) mandates that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. This rule requires a finding of intent. *The Florida Bar v. Nue,* 597 S0. 2d 17 (Fla. 1992). Both alleged violations are not well founded on the facts of this case or existing precedent relied upon by the Bar.

The Bar in urging the Referee to find a violation of R. Regulating Fla. Bar 4-3.4(a) and 4-8.4(c) advanced several cases that are inapposite to the facts of this case. For example, the lawyer in *The Florida Bar v. Miller*, 863 So. 2d 231 (Fla. 2003), was found guilty of these same two rules for hiding the fact that he had received a Right to Sue Notice earlier than he had disclosed. A similar result can be found in *The Florida Bar v. Hmielewski,* 702 So. 2d 218 (Fla. 1997), wherein the lawyer failed to disclose that his client had the "missing" medical records. Lastly, in *The Florida Bar v. Myers,* 581 So. 2d 128 (Fla. 1991), the lawyer was

[6] The Referee in cites to R. Regulating Fla. Bar 4-3.4(a) in his ultimate recommendations on guilt, but incorrectly cites to R. Regulating Fla. Bar 4-3.3(a) in his discussion. See RR14.

found guilty of these same rule violations for setting a final hearing without notice to opposing counsel and then submitting a settlement agreement to the Court that was executed prior to that counsel being retained and which settlement had been disavowed by the other party.

In the first two cases the lawyer hid documents that were harmful to the lawyer's position in the case and in the last case the lawyer used a document that no longer had any viability without notifying opposing counsel. In the case at hand the alleged offending document helped the Respondent's position in the case and when he did use the document it was with full knowledge of the opposition.

It was the Respondent's uncontroverted testimony that he believed that opposing counsel knew of the settlement overtures and that Luise would have shared the settlement agreement, as well as the third party settlement discussions, with her counsel. TT206. In fact the Respondent's testimony was that he "expected Luise Buettner would be at least touching base with (her counsel) and let him know what was going on, as (his) client had done." TT206, l.21-23.[7] This is especially true when the settlement overtures between the clients had come from Luise and not the Respondent or his client, Cerny.

[7] The Respondent also testified that it was not unusual in his line of work (family law) for the clients to work out some of the issues between them without counsel. TT202.

Once the executed settlement agreement came into his possession, the Respondent had a secondary issue that caused him not to immediately share this document with opposing counsel.[8] The issue that caused the Respondent to not immediately share the agreement was his concern about Edwards' character and a desire to make sure that Luise had in fact signed the document.[9] TT110; TT216. This concern was two fold but clearly based upon the warning signs about the honesty and veracity of Mr. Edwards. The first warning sign was that Edwards only produced the executed settlement agreement after he had been charged with stealing Luise's automobile. Further, after having personally met Edwards, the Respondent was not sure about his personal credibility. The Respondent testified that:

> . . . what was troubling me was that up until he got arrested, I was only hearing good things about him. About how he took care of Luise, got her to the doctors and went grocery shopping for her, took her where she needed to go. Took care of, you know, her personal needs.
>
> It was just difficult for me to understand how that person was the same person that supposedly stole her car and later I found out the allegations of credit card fraud. TT217, l. 13-23.

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[8] After Luise's lawyer withdrew, the Respondent did attempt to discuss the settlement agreement directly with Luise but Luise failed to attend mediation or the calendar call. Further, she failed to properly respond to a request for admissions that was directed to this agreement. RR7.

[9] If Luise did not sign the document there was no settlement and the concern was that Edwards, if he was dishonest may have signed the document to exact some form of revenge on Luise for her filing the criminal complaint against him.

Shortly after the first meeting with Edwards another issue arose between Cerny and Edwards. The information that was relayed to the Respondent, through Cerny, was that Cerny had allowed Edwards to stay at her home after he had bailed out of jail as he had no place to stay, but that the same week that he had met Edwards at Cerny's home the police needed to be called to remove him from the home. TT218. This incident increased the Respondent's concern about Edwards' character. As such the Respondent wanted to see what developed with the criminal case prior to doing anything with the settlement document. Unfortunately, prior to there being any significant developments in the criminal case, Luise's lawyer filed a motion to withdraw from the litigation and that motion was granted on May 2, 2001.

It was the Respondent's testimony at trial that the litigation at issue was cordial between the respective attorneys but without much contact between counsel. TT235. Just prior to the Respondent's receipt of the settlement agreement, he had noticed the case for trial and the trial court's pretrial was executed on February 27, 2001. See TFB Ex. 2 & 3. Somewhere after the matter was set for trial Luise's counsel filed his motion to withdraw. Between the time the motion to withdraw was filed and granted, there was no communication between counsel and it is the Respondent's testimony that he did not discuss the settlement agreement with Luise's lawyer in this time frame, or at any time after he

had received the settlement agreement from Edwards.[10] The Referee does not make a specific finding that the failure to share the settlement agreement in executed form pending the outcome of the Respondent's investigation of Edwards' character and investigation into whether or not Luise had in fact signed the agreement was violative of the two rules set forth in his Report. Instead the Referee focused on the fact that the Respondent, upon giving a draft settlement agreement to his client with an "understanding" that it would be shared with Luise violated R. Regulating Fla. Bar 4-3.4(a) and R. Regulating Fla. Bar 4-8.4(c).[11] However, in order for there to be a finding of violation on R. Regulating Fla. Bar 4-3.4(a) there must be a finding that a lawyer unlawfully obstructed another party's access to evidence or otherwise unlawfully altered, destroyed or concealed a document that was relevant to a pending proceeding.[12] There are no issues of alteration or destruction and therefore the only issue is one of potential

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[10] The Respondent testified that had Jordan stayed in the case he would have ultimately shared the agreement with him prior to its use. TT106-108

[11] One could argue that the more appropriate finding would have been a violation of R. Regulating Fla. Bar 4-4.2 (communication with a represented party) but the Bar did not charge Respondent with this potential rule violation and the Referee specifically noted that he was not considering same. RR14. However, it could also be argued that there could not be a violation of this rule if Luise claimed she did not sign it and may never have seen it prior to it being attached to a request for admission. See TFB 7 & 8.

[12] The Rules of Civil Procedure govern the sharing of evidence and the Respondent in this case did make disclosure of the document in question, prior to trial via a request for admissions.

concealment.[13] However, there is no active concealment in that the Respondent's testimony was that (1) he believed Luise was having the same conversations with her lawyer that Cerny was having with him and (2) that the document he gave to his client would not come back signed but instead the lawyers would draw up a complete formal agreement if the respective parties were able to agree on the general terms.

The next question that must be asked was the decision not to share with opposing counsel a copy of the document the Respondent had given to his client is somehow dishonest, fraudulent or deceitful in violation of R. Regulating Fla. Bar 4-8.4(c). As is noted above this is an intent rule and the Bar must prove by clear and convincing evidence that the Respondent, when he gave the settlement agreement to his client for her use, knowingly and intentionally gave the document to her in an effort to be dishonest with opposing counsel or his client, Luise. At most the Respondent was reckless in assuming that if Cerny gave the settlement agreement to Luise that Luise would share it with her legal counsel.

It is respectfully contended that the Bar failed to meet its burden of proof on either rule violation and that the Respondent should be found not guilty.

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[13] The Referee makes a finding that the Respondent did not want Jordan involved in the settlement process. RR14. This point is refuted by the Respondent's testimony that he believed Jordan already knew about Luise's settlement overtures through his own client and his direct testimony that he did expect Jordan to be involved with the settlement. See TT107-108.

II. A NINETY-ONE DAY SUSPENSION IS NOT WARRANTED WHEN A LAWYER DECIDES TO WAIT TO SHARE A PURPORTED SETTLEMENT AGREEMENT WITH OPPOSING COUNSEL IN ORDER TO ASCERTAIN WHETHER THE AGREEMENT WAS TAINTED BY FRAUDULENT CONDUCT BY A THIRD PARTY.

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 recommended by the Referee is to harsh a sanction for a lawyer faced with an ethical dilemma and who chooses a course of conduct that he believed to be a prudent and ethical resolution of that dilemma, but which course of conduct has now been found to be the wrong resolution of that ethical dilemma.[14]

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

[14] If the Court affirms the Referee on one or both potential rule violations and believes a disciplinary sanction is warranted, the Respondent takes no issue with the Referee's recommendation of ten hours of CLER ethics courses.

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. The Referee found two aggravating factors and five mitigating factors. RR15. In particular the Referee found the following mitigating factors:

1. Standard 9.32(b) – absence of a dishonest or selfish motive;
2. Standard 9.32(e) – full cooperation with The Florida Bar;
3. Standard 9.32(g) – otherwise good character and reputation;
4. Standard 9.32(l) – remorse;
5. Standard 9.32(m) – remoteness of prior offense (2001).

In terms of aggravation the Referee found Standards 9.22(i) [substantial experience in the practice of law] and 9.22(a) [a prior disciplinary sanction].[15] While the Respondent has been disciplined previously (once), this five year old sanction must be considered in aggravation, the enhancement should not be unduly significant. This Court has reserved significant enhancement when the lawyer has multiple prior sanctions and/or when that lawyer has repeatedly engaged in the same types of misconduct. For example in *The Florida Bar v. Maier*, 784 So. 2d 411 (Fla. 2001), the Court suspended a lawyer for sixty days when that lawyer neglected a client matter, failed to properly communicate with the client and also

[15] The Respondent received a ten day suspension in 2001, for conduct different than that charged in this case.

failed to respond to the Bar notwithstanding a more extensive disciplinary record than that found in this case. The lawyer in *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." This Court has consistently noted 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) (emphasis supplied). A corollary to this tenet is that the Court also tries to place the right emphasis on the value of the prior sanction as it relates to the current disciplinary event. 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 than seven years not considered as aggravating under certain circumstances.]. While the Respondent acknowledges that the Court must give some consideration to the 2001 ten day suspension, it is respectfully contended that Respondent has learned from his one and only disciplinary order and has had no disciplinary action initiated against him since that time (other than the instant case).

Unfortunately the Referee does not cite to any precedent to support his recommendation of a rehabilitative suspension. However, during the course of this

case the Bar has relied upon certain precedent and it is believed that the Bar will cite to this same case law in its Answer Brief. Therefore, comment needs to be made on each of these cases.

The case with the most significant misconduct cited by the Bar was *Hmielewski*. The lawyer in this case was suspended for three years. The Court found that this lawyer made multiple misrepresentations to a trial court and opposing counsel about some medical records that he claimed were missing, possibly hidden by the hospital as part of a cover up, when he clearly knew that his client had removed the records from the hospital. The Court found that the misconduct "made a mockery of the justice system." Factually, this case is not even close to the one at hand in that the Respondent herein at most failed to disclose a fact but never created the 'straw man" argument that was used in *Hmielewski*.

It is anticipated that the Bar will also rely upon *The Florida Bar v. Miller*, 863 So. 2d 231 (Fla. 2003). In *Miller* a lawyer was suspended for one year when he knowingly and deliberately hid the fact that he had received a Right to Sue Letter in a discrimination matter. This was significant as acknowledgement of his receipt of same would have made the case outside of the statute of limitations. The Respondent went even further in his unethical activity by hiding the first Right to Sue Letter, and having several individuals present fraudulent affidavits to support a

knowingly false position. In the case at hand, there was full disclosure of the potential signature issue and no presentation of knowingly false affidavits to a court.

The Bar may also rely upon *The Florida Bar v. Shapiro*, 413 So. 2d 1184 (Fla. 1982). There was significant misconduct in *Shapiro*. In fact the lawyer was found guilty of five distinct counts, inclusive of trust fund violations, assisting in the unlicensed practice of law and having severe psychiatric issues. Of interest is the fact that the lawyer was also found guilty of communicating an offer of settlement directly to a represented adverse party. The ninety one day suspension is significant as there was no automatic reinstatement and a need to prove rehabilitation. It appears that the mental health concerns properly triggered the rehabilitative suspension and these issues are not present here.

The Florida Bar v. Meyer resulted in a 90 day suspension, with automatic reinstatement. Meyer engaged in a very deliberate fraud upon the court. This case arose in a divorce action. In the early stages the wife was unrepresented and Meyer's represented the husband. While the wife was unrepresented, the parties executed a settlement agreement. However, the wife shortly thereafter retained counsel and continued negotiations ensued with no resulting settlement. Notwithstanding this fact, Meyer set the case for hearing (without notice to the new lawyer or the wife), secured the divorce and approval of the prior settlement,

all without notifying opposing counsel or informing the court that the wife had a lawyer and that this was an "old" settlement. In the case at hand, the Respondent, at most failed to reveal a settlement agreement to opposing counsel when he was in the case. However, when the settlement agreement was used, it was with the full knowledge of the adverse party and with full explanation of the potential signature issue.

The Bar may also reference a thirty day suspension case. *The Florida Bar v. Kravitz*, 694 So. 2d 725 (Fla. 1997). In *Kravitz* the lawyer presented false evidence to a trial judge concerning the identity of a witness, making a misrepresentation to opposing counsel that he was holding certain monies in trust and misleading the court into entering an order because he had told the court that opposing counsel had agreed to same. The Court considered a stronger sanction but found that this misconduct is less egregious than *Meyers*. The case at hand is even less egregious that *Kravitz*.

Two public reprimand cases should also be discussed. In the first case, *The Florida Bar v. Feinberg*, 760 So. 2d 933 (Fla. 2000), an assistant state attorney met with a represented party, without his counsel being present, discussed a plea agreement and then lied on multiple times that he had done so. The second case concerned a lawyer who secured a divorce for a client and in the final decree provided that custody of the couple's children would be handled in a certain

fashion, when in reality there was a second "secret" agreement that the attorney was going to enforce that would change the court approved custody arrangements. *The Florida Bar v. Wendel*, 254 So. 2d 199 (Fla. 1971).

As the Court can see the discipline range reviewed above is wide. However, a review of these cases shows that the suspension cases are for very serious conduct and that even the public reprimand cases seem to be more serious than the conduct in this case. On balance, when one considers the mitigation present in this case, adds some consideration for the prior sanction and sets an appropriate disciplinary recommendation, the Court will find that a public reprimand is the baseline sanction and that no more than a ten (10) day suspension is needed in this case.

Conclusion

The Respondent should be found not guilty of the remaining rule violations in this case as he did not intentionally conceal from opposing counsel a proposed settlement agreement or act in dishonest manner to opposing counsel relative to this proposed settlement agreement. Further, if the Court finds the Bar met its burden on these rule violations, the Referee's proposed sanction recommendation of a ninety-one day suspension is too excessive under the circumstances in this case.

WHEREFORE the Respondent, David Samuel Nicnick, 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 ten day suspension from the practice of law 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 December, 2006 to Juan Carlos Arias, 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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