IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant, v. RICHARD STUART SHANKMAN, Respondent.	Supreme Court Case No. SC08-1107 TFB No. 2007-51,241 (15G)

RESPONDENT'S REPLY BRIEF AND ANSWER BRIEF ON CROSS APPEAL

JOHN M. KLAWIKOFSKY
Florida Bar No. 930997
DAVID R. RISTOFF
Florida Bar No. 3585767
WILLIAMS, RISTOFF & PROPER, P.L.C.
Florida Bar No. 930997
4532 U.S. HIGHWAY 19
NEW PORT RICHEY, FL 34652
Telephone: (727)842-9758
Fax (727) 848-2494
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE NO.

Contents

TABLE OF CITATIONS

Cases

PRELIMINARY STATEMENT

Complainant, The Florida Bar(Appellee/Cross Appellant) has submitted an Answer Brief and Initial Brief on Cross Appeal. This brief contains five issues and does not follow the order of the Issues presented by Respondent (Appellant/Cross Appellee) as presented in his Initial Brief. Respondent's Reply Brief will address the Issues in the order as they were raised in his Initial Brief, and then address the Issues raised by Complainant in the Cross Appeal.

SUMMARY OF THE ARGUMENT

The Referee's determination that Respondent violated Counts I, II, and III is not supported by the record evidence or the existing case law. Respondent never charged an excessive fee to his client, as he merely made a quantum meruit claim toward the Pippin settlement after he was discharged by the client. Moreover, Respondent was not incompetent in the handling of this case. His representation and actions reflected the wishes of his client. He kept her and her family aware of the status of the case, and always made himself available to her. His conduct was not prejudicial to his client or the administration of justice.

The Referee did not err in finding Respondent not guilty of Count IV (dishonesty, fraud, deceit, or misrepresentation). The Referee properly found the Bar failed to establish intent on the part of Respondent.

Further, the 90 day sanction imposed by the Referee is not supported by the record before this court and is excessive in light of this Court's holdings and case law. Clearly the 6 month suspension The Bar seeks is not supported by the record or the case law of this Court.

ARGUMENT

ISSUE I

WHETHER THE BAR'S COMPLAINT IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE?

Complainant, The Florida Bar, failed to meet its burden of proving any misconduct on the part of Respondent by clear and convincing evidence. The Florida Bar v. Hopper, 509 So. 2d 289 (Fla. 1987). Many of the referee's findings are not supported by competent and substantial evidence. Although a Referee's findings of fact carry a presumption of correctness, findings that are clearly erroneous or unsupported by the competent and substantial record evidence are not entitled to such a presumption. Florida Bar. v. Vannier, 498 So.2d 896, 898 (Fla. 1986). Here the Record does not substantiate the Referee's finding Respondent guilty of Counts I, II, and III. These findings were not supported by competent, substantial evidence. Thus, this Court must reweigh the evidence and can substitute its judgment for that of the referee See Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992).

In **Count I**, **(Issue I. A. of Complainant's Answer Brief)** the Bar failed to prove Respondent charged a clearly excessive fee, and Respondent did not violate R. Regulating Fla. Bar 4-1.5(a). This violation is not supported by substantial competent evidence. The Referee found Respondent's fee claim was

excessive in light of his prior promises to Pippin that she would not be responsible for multiple fees to multiple law firms who were replaced during the proceedings. (RR. P. 5). The Bar claims the fee was excessive because of Respondent's representations to Ms. Pippin that she would never have to pay more than 40% of the gross recovery.

The Bar claims Respondent sought 45% of the total recovery on the federal case. Such is not the case. Respondent never submitted a bill to Ms. Pippin, and merely put forth expert testimony at the quantum meruit hearing seeking a reasonable fee amount. Pippin was seeking a complete forfeiture of Shankman's fees, and Shankman was seeking a judicial determination of the value of his services in a reasonable fee amount. Such specific amount was left to the federal court, which saw fit to award Respondent a fee of $29,560.00. (See Report and Recommendation p. 50). None of these actions violate Bar rules, nor do they constitute a violation of Count I. See Adams v. Fisher, 390 So. 2d 1248 (Fla. 1st DCA 1980)(client who discharges attorney without cause and then recovers through successor attorney is responsible to successor attorney for his full fee and to former attorney in quantum meruit).

The Referee found that the fee was "clearly excessive in light of his prior promises to Ms. Pippin", and his fee claim was in direct contradiction to the promises he made to her that

she would not be responsible for multiple fees to multiple law firms. (RR. P. 5). This again misstates the testimony before the Referee. Here, the Pippins acknowledged being told about quantum meruit, and that such amounts would be determined by a judge. Also, implicit in Shankman's promise that Pippin would not be responsible for multiple fees, is the fact that such promise assumed that prior discharged counsel would be paid from Shankamn's portion of the recovery. Since Shankman was discharged and received no part of the recovery, any such promise by Shankman to cover the fees of prior counsel ended with his discharge.

The Bar claims Respondent never explained to the Pippins that their percentage of the settlement could be subject to discharged attorney's fees. Again, this misstates the record before the Referee. Pippin's step-father testified when Trenam was fired, Shankman informed them of quantum meruit, and Trenam would be entitled to some kind of fee for the work they had performed. (V. 2: T. 212-213). Shankman further explained to the Pippin family that the Gary firm could be entitled to a quantum meruit hearing to determine fees. (V. 2: T. 222-223).

In **Count II**, **(Issue I. B. of Complainant's Answer Brief),** The Bar alleged Respondent failed to provide competent representation in violation of R. Regulating Fla. Bar 4-1.1 by failing to follow the advice of more experienced counsel. An

attorney's conduct must be somewhat egregious to be considered incompetent. The Florida Bar vs. Rose, 823 So.2d 727 (Fla. 2002). No such evidence of egregious conduct on the part of Respondent has been put before the referee. Respondent's legal and strategic disagreements with "more experienced co-counsel" do not constitute incompetent representation, especially where co-counsel failed to aggressively pursue the client's primary goal of stopping distribution of the offending videos.

The instant record shows that Respondent represented his clients in a steadfast and thorough manner. The record evidence is uncontradicted as to the dedication and availability provided by Respondent on the Pippin case. The record further is uncontradicted as to the primary goal of the client from the beginning: enjoining the production and distribution of these subject video tapes. When co-counsel disagreed with pursuing injunctive relief, Respondent properly sought new counsel that would better honor the wishes of the client. Even Mr. Keely agreed that they remained with Shankman for so long because of his drive and determination. (V. 2: T. 188-190).

Disagreeing with co-counsel (even if they were more experienced) does not constitute incompetent representation, where co-counsel was failing to honor the client's primary goal of stopping distribution and production of the tape. Co-counsel failed to file a preliminary injunction (Trenam) or filed a

poorly drafted motion for preliminary injunction (Gary). Respondent further disagreed with co-counsel's failure to add certain parties as defendants. Respondent believed the Gary firm had a conflict as Gary was seeking to deal with certain cable companies, and did not want to add these as defendants to the action. Such does not constitute egregious representation of the client.

Count II further encompassed a violation of Rule 4-1.4(b) by failing to explain matters to his client **(Issue I. C. of Complainant's Answer Brief)**. These findings are not supported by the facts presented to the Referee at the Final Hearing. The Referee overlooked or ignored the testimony that was placed before him at the final hearing. Pippin's stepfather acknowledged being told repeatedly about quantum meruit. Such a quantum meruit determination is to be made by the Federal Judge and not the client or the lawyers. Although Ms. Pippin claimed to have not been told about the possibility of quantum meruit, her step father (Keely) acknowledged Shankman advised them of such procedure.(V. 2: T. 200, 212-213, 222-223). Keely did not think this would impact their recovery since Shankman promised that any monies would come from his portion of the recovery. Accordingly, the clients were sufficiently informed that such a fee determination was to be properly made by the court, not by the attorneys.

The Bar claims Respondent failed to inform Pippin as to the reasons the other firms had to be discharged. Such is not the case where the ultimate decision as to fire the attorneys was left to the Pippins, and the family stayed with Shankman, despite the firings because of his "drive and determination." (V. 2: T. 188-190).

In **Count III**, The Bar alleged Respondent engineered the hiring and firing of multiple law firms for Pippin, while continually increasing the percentage of his own recovery. The Bar alleged Respondent put his own interest above his clients interest and violated R. Regulating Fla. Bar 4-1.7(b) (A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest) **(Issue I. D. of Complainant's Answer Brief)**; and 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice) **(Issue I. E. of Complainant's Answer Brief)**. The Referee found by clear and convincing evidence that Respondent violated Rule 4-1.7(b) by hiring and firing a series of law firms, which delayed an opportunity for settlement. The Referee further found this delay also violated Rule 4-8.4(d) as prejudicial to the administration of justice. (RR. 7). The Referee found that the

hiring and firing of the firms "only moved Ms. Pippin further and further away from her goal of settling the case."

These violations are wholly unsupported by the record. Repeated testimony during the Final Hearing unequivocally established the goal of Ms. Pippin and her family was not to settle the case, but to "**stop the distribution of the tape**." (V. 1: T. 40, V. 2: T. 89,182). Respondent's fee percentage gradually increased as the percentage of his co-counsel went up. Trenam was originally retained for 40%. Trenam was then replaced by the Gary firm, whose standard fees are 45%. Such small fee increments do not indicate a compromise of Shankman's representation of Ms. Pippin. Similarly, when Tifford was retained, Shankman's percentage was determined solely by Tifford. This belies the Bar's unsubstantiated accusations that Shankman was "engineering" attorney discharges to increase his fees. Tifford was to receive 45% like the Gary firm, and Shankman was to receive half of Tifford's share of the recovery. Shankman agreed to have Tifford determine their fee split. (V. 6: T. 669). Shankman's fee percentage actually decreased when the Solomon firm was brought on toward the end of his representation. (V. 6: T. 708).

All of the fee agreements were made with full disclosure to the Pippin family, and their full agreement to continue the representation. None of the discharged firms were replaced in

order for Shankman to obtain a higher fee. Rather these firms were discharged for failing to act efficiently and effectively. Dissatisfaction and replacing of co-counsel in this matter does not rise to the level of being prejudicial to the administration of justice. Respondent discussed changing attorneys with Pippin in order to get representation that better honored her wishes and sought her goals on this case, namely the stopping of distribution of the tapes. The final decision was always made by Pippin and her family, not by Richard Shankman.

Respondent further cannot be held responsible for such delay in handling this case where prior co-counsel had failed to timely file a complaint, or seek an injunction (Trenam), or failed to file a legally sufficient temporary injunction, or bring in proper defendants (Gary). Respondent further cannot be held responsible when co-counsel, Tifford removed himself from the case because of professional disagreements with Shankman.

The Bar failed to put on competent evidence showing Respondent's professional judgment was compromised. Shankman was always steadfast in this representation, and in honoring the client's primary goal of stopping distribution of the tape. The mere fact that he disagreed with co-counsel's attempts to settle the matter quickly, does not constitute violations of this rule. Moreover, Respondent's actions were not prejudicial to the administration of justice. Co-Counsel was never given a

settlement offer during the period of Shankman's representation. Instead, Shankman was honoring what his client repeatedly claimed was her goal of stopping distribution. The fact that she now claims she wanted to settle the case is contradicted by her own testimony and that of her step-father.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN TAKING JUDICIAL NOTICE? (ISSUE III OF ANSWER BRIEF).

Respondent was unduly prejudiced by the Refereee's taking of judicial notice of the federal magistrate's report and recommendation. Although the Referee declared he was taking judicial notice, but would still require The Bar to prove there case, such judicial notice prevented Respondent from challenging the findings in the federal fee proceeding.

The Bar relied on the Magistrate's findings of fact in the fee proceeding. However, such proceeding did not involve a determination as to the competence of Respondent's representation. Rather, the Magistrate still awarded Shankman a significant fee for his representation.

The Bar claims it did not offer the report of the Magistrate as conclusive proof of misconduct. However, this conflicts with the ultimate purpose of judicial notice. The Referee could have admitted the report of Magistrate into evidence and weighed it as any other evidence. But, that is not what occurred. The Bar insisted that the Referee's taking of judicial notice was mandatory since the Federal proceeding was decisional law. (See Section 90.203). Such was error, and irreparably hampered Respondent's ability to defend the

accusations levied against him. Although the Referee may look at any evidence which is relevant, his improper taking of judicial notice prevented Respondent from effectively defending such findings that took place in the federal proceeding.

Judicial notice establishes the existence of a particular fact, and precludes the adverse party from introducing evidence to rebut it. Cordova v. State, 675 So. 2d 632 (Fla. 3d DCA 1996). Here, the Referee's taking of judicial notice of only portions of the federal file impermissibly shifted the burden of proof to Respondent, without providing him an opportunity to effectively rebut such claims.

ISSUE III

WHETHER THE REFEREE'S RECOMMENDED SANCTION IS EXCESSIVE AND IMPROPER? (ANSWER BRIEF ISSUE IV AND V)

This Court's scope of review on recommendations for discipline is broader than that afforded to a Referee's findings of fact. Florida Bar v. Langston, 540 So.2d 118, 120-21 (Fla. 1989). Although a Referee's recommended discipline is persuasive, this Court does not pay the same deference to this recommendation as it does to the guilt recommendation because this Court has the ultimate responsibility to determine the appropriate sanction. Florida Bar v. Temmer, 753 So.2d 555, 558 (Fla. 1999). However, this Court will generally not second-guess the Referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Herman, 8 So. 3d 1100 (Fla. 2009); The Florida Bar v. Fredericks, 731 So. 2d 1249, 1254 (Fla. 1999). Here, the Referee's recommended discipline of a 90 day suspension lacks a reasonable basis, and should not be followed. The Bar Cross Appeals, claiming a six month suspension is proper. (See **Issue V of Complainant's Answer Brief and Initial Brief on Cross Appeal**).

A Referee's findings of mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record. A referee's failure

to find that an aggravating factor or mitigating factor applies is due the same deference. Florida Bar v. Germain, 957 So.2d 613, 621 (Fla. 2007). Here, the Referee found no aggravating factors, and held that Respondent's lack of a prior disciplinary history, his legal inexperience, and remorse were mitigating factors to consider. The Bar Cross Appeals, claiming the Referee erred in finding no aggravating factors. (See **Issue IV of Complainant's Answer Brief and Initial Brief on Cross Appeal**).

The Bar asserts that Respondent acted with a selfish motive, and claims the Referee should have found this as an aggravating factor. **(Issue IV. A. of Answer Brief and Cross Appeal)**. The Bar claims Respondent put his own interest before that of the client by insisting on going to trial, by firing co-counsel, and increasing his fee percentage. Such assertion ignores the undisputed primary goal of the litigation: to stop distribution. Moreover, the Defendants never made a settlement offer to Respondent. His fee percentage increased as co-counsel's percentage increased, and this was all disclosed to the client.

The Bar asserts that Respondent engaged in a pattern of misconduct by hiring and firing successive law firms, and telling the client she would not have to pay the fees of discharged counsel. The Bar claims the Referee should have

found this as an aggravating factor. **(Issue IV. B. of Answer Brief and Cross Appeal)**. Such is not the case where Shankman explained quantum meruit to the Pippins, but assured them he would pay the fees out of his portion, should any be awarded. Again, this encompasses the fact that Shankman would be receiving a percentage of any recovery. Such understanding ended when Shankman's representation ended.

Respondent's percentage increased minimally as the percentage of his co-counsel increased. The Gary firm's standard percentage is 45%, and the client was made aware of, and agreed to all increases in fees. Tifford decided what percentage to give to Shankman when he was brought on. Shankman's percentage decreased when the Solomon Group was retained.

The Bar asserts that Respondent took advantage of a vulnerable client, and claims the Referee should have found this as an aggravating factor. **(Issue IV. C. of Answer Brief and Cross Appeal)**. Although Ms. Pippin was young and inexperienced in the law, Respondent always made himself available to the entire family. Respondent also saw fit to involve Mr. Keely (Pippin's step-father), in every critical meeting.

The Bar asserts that Respondent consistently refused to acknowledge the wrongful nature of his conduct, and claims the Referee should have found this as an aggravating factor. **(Issue**

IV. D. of Answer Brief and Cross Appeal). Respondent consistently asserts that while representing Ms. Pippin, he was acting at her direction to accomplish her primary goal of stopping distribution. Any monetary settlement was secondary to the client, and there were no offers of settlement presented during this period. When Respondent was discharged, quantum meruit was his only option in order to be compensated for the significant time he had invested in this case.

The Bar asserts that Respondent caused actual harm to his clients and third parties. **(Issue IV. E. of Answer Brief and Cross Appeal)**. The Referee found that Respondent caused a delay in the litigation and increased the cost to the client. This is not supported by the record. Respondent should not be held wholly accountable for the failure of co-counsel to follow the client's directives and for failing to file legally sufficient pleadings. Respondent's obligation to his client was honored when they hired more experienced co-counsel. This obligation extended to replacing co-counsel when they did not honor the client's ultimate wishes. Although the Referee believed the case could have been settled much earlier, the Defendants never made a legitimate offer to settle this matter, and no such offer was rejected by the client or Respondent during the term of his representation.

The Bar claims Respondent's actions warrant s suspension of

six months, rather than the ninety day suspension recommended by the Referee. **(See ISSUE V of Answer Brief and Cross Appeal).** The Bar argues that a substantial suspension is appropriate because of Respondent's lack of competence. However, Respondent acknowledged this by insisting on including more experienced co-counsel. Respondent insisted on retaining co-counsel despite the Pippin family's repeated insistence that he handle the case himself.

The Bar relies on The Florida Bar v. Mastrilli, 614 So. 2d 1081 (Fla. 1993) in seeking a six month suspension. Mastrilli involved clear conflict of interest where Mastrilli represented both the passenger and the driver in a lawsuit, then filed suit on behalf of the passenger against the driver. Such clear conflict of interest is not present in this case. Respondent's strategic disagreements with co-counsel do not constitute a conflict of interest. Respondent continued to represent the interest of Ms. Pippin, despite the desire of co-counsel to settle the matter quickly. The Pippin family continued to allow Respondent to represent them, despite opportunities to discharge him earlier. They finally discharged Respondent after they demanded he settle the matter within 30 days, and he was unable to quickly settle the matter.

Similarly, The Florida Bar v. Herman, 8 So. 3d 1100 (Fla. 2009) involved a conflict of interest where Herman represented a

corporation, then Herman opened his own company which competed directly with the client, and solicited the client's customers. This conflict was not disclosed, and the Referee found a dishonest motive in suspending Herman for 18 months. No such conflict or dishonest motive was present here.

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following (a) the duty violated; (b) the lawyers's mental state (c) potential or actual injury caused by the lawyer's misconduct and (d) the existence of aggravating or mitigating factors. See Florida Standards For Imposing Lawyer Sanctions.

The purpose of attorney discipline is to be fair to society, to be fair to the attorney, and to serve as a deterrent to other attorneys. Florida Bar v. Wasserman, 654 So.2d 905, 907 (Fla. 1995). Fairness to society entails protecting the public from unethical conduct, while simultaneously ensuring that a qualified lawyer not be taken away from the public because of "undue harshness in imposing a penalty" The Florida Bar v. Stein, 916 So.2d 774, 777 (Fla. 2005).

The Referee's recommendation of 90 day suspension in the instant case is inappropriate. Respondent was always acting as an advocate for Pippin, and this led to disagreements with co-counsel. Pippin always maintained that her main goal was to stop the distribution of the tape. Respondent had worked

closely with the Pippin family and wanted to ensure that co-counsel honored such ultimate goal. Much of the delay in settling the case can be attributed to co-counsel not following the client's wishes. The ultimate decision to replace counsel was always made by Pippin. Moreover, the extent of Pippin's injury is unknown because the settlement was sealed.

Accordingly, Respondent's actions do not warrant any discipline, and certainly do not warrant a 90 day suspension. In The Florida Bar v. Riskin, 594 So. 2d 178 (Fla. 1989), Respondent received a public reprimand for neglect of a legal matter and incompetence in allowing the statute of limitations to expire. Riskin had prior discipline, and still only received a public reprimand. Clearly here, a 90 day suspension is excessive and unwarranted where Respondent has no disciplinary history and was acting as an advocate for his client's ultimate wishes. Pippin always maintained that her primary goal was to stop distribution of the tape. When co-counsel failed to honor these goals, Pippin and Shankman retained different co-counsel that they hoped would be more effective and pro-active. The final determination was always made by the Pippins, and Respondent honored those wishes until his discharge.

Here, the Bar seeks a 6 month suspension. The Bar alleges suspension is appropriate since Respondent lacked experience in this area of law. However, Respondent acknowledged such

inexperience and attempted to associate with more experienced co-counsel. His dissatisfaction with co-counsel arose when they failed to timely and properly seek remedies to honor the client's primary purpose for the litigation: ending the production and distribution of the broadcasts and tapes.

Every decision to replace co-counsel was made with full disclosure and knowledge from Ms. Pippin and her family. There were several opportunities for the Pippin family to discharge Respondent, yet they continued to trust in his passion and dedication, until much later in the litigation when they decided to return to be represented by Tifford. It was only at that point that the Pippin family demonstrated a willingness to settle the case, and discharged Respondent.

CROSS APPEAL ISSUE I

WHETHER THE REFEREE ERRED IN FINDING RESPONDENT NOT GUILTY OF VIOLATING RULE 4-8.4 (C) (DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION). (ISSUE II of Answer Brief)

In **Count IV**, The Bar alleged Respondent engineered the firing of various law firms, did not provide complete information to Pippin, and Respondent's fee percentage continually increased. The Bar alleged this violated R. Regulating Fla. Bar 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation). The Referee found no evidence Respondent intended to deceive his client. Therefore, he was found not guilty of violating Rule 4-8.4 (c) because intent had not been proven. (RR. p. 7).

Intent is a necessary element in order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud. The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999). (RR. P. 7). Even the Magistrate in her Report and Recommendation, held that the evidence in the quantum meruit hearing was insufficient to support a finding that Shankman fraudulently induced Pippin to sign the Gary agreement. Pippin testified she willingly signed the agreement despite the increase in the attorney's percentage. The Federal Magistrate further held that the elements of fraud in the inducement, under

Florida law were not met. These elements are: 1)a party's misrepresentation of a material fact; 2)the party knew or should have known the representation was false; 3) the party intended for the misrepresentation to induce another party into an agreement; and 4) the induced party was injured by acting in justifiable reliance on the misrepresentation. Jankovich v. Bowen, 844 F. Supp. 743, 747 (S.D. 1994). (Report and Recommentation of Magistrate: p. 31).

The Bar asserts that the Referee's interpretation of the intent requirement was read too narrowly. The Bar claims it only had to show Respondent intended to do the act, and that Respondent deliberately and knowingly asserted a fee claim against Pippin, despite repeatedly promising her she would not have to pay attorney's fees over 40%. The Bar relies on Fredericks, supra, for the proposition that "the motive behind the attorney's action was not the determinative factor. The Bar claims the issue was whether the attorney deliberately or knowingly engaged in the activity in question.

However, to satisfy the intent requirement, the attorney must knowingly and deliberately have made a **misrepresentation**. A misrepresentation is an untrue statement of fact. No such material untrue statement of fact was made by Shankman to the Pippins. At the time Shankman promised the Pippins that any attorney's fees would come out of his portion, he was still

representing the Pippins, and would have received a percentage of any recovery. No such settlement offer or recovery occurred during this time period. Shankman was then discharged and replaced by Arthur Tifford. Shankman did not receive any percentage of the settlement, and was not part of the settlement of attorneys fees in a privately mediated settlement. His only recourse was to then file a quantum meruit claim for the substantial amount of work he had already performed for Pippin over a period of several years.

The Bar's reliance on The Florida Bar v. Riggs, 944 So. 2d 167 (Fla. 2006) is misplaced. In Riggs, this Court found that the attorney failed to pay off a mortgage with funds entrusted to him. The attorney claimed there was no intent, because the shortage in his trust account was due to an employee's mishandling of the account. This Court found that the attorney deliberately engaged in the activity, and could not hide behind the impropriety of an employee who the attorney failed to properly manage. Such is not the case here, where there was no delegation of duty or responsibility to other parties on the part of Respondent.

In The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992), the Bar challenged the Referee's finding that Neu did not engage in conduct that involved dishonesty, fraud, deceit, or misrepresentation. The Bar claimed the record showed Neu

intentionally converted his client's trust funds for his own purposes. This Court disagreed with The Bar and upheld the Referee's finding. The Bar failed to show the Referee's findings were clearly erroneous. The Bar failed to show intent. In Neu, as in the instant case, the attorney's lack of intent to deprive, defraud, or misappropriate a client's funds supported a finding that the attorney's conduct did not constitute dishonesty, misrepresentation, deceit or fraud. Similarly here, The Bar has failed to show that Shankman intended to deceive or misrepresent the client.

Respondent's filing of a quantum meruit claim is no different, or unethical than the similar claims filed by Trenam/Kemper, the Gary firm, and Tancredo. These claims were settled as part of a private mediation. Respondent was not provided such a settlement, and his quantum meruit claim was his only recourse against his prior client.

CONCLUSION

Respondent respectfully requests that this Court find him not guilty of the Bar's complaints.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief of Respondent has been furnished to the Supreme Court of Florida, Attention: Honorable Thomas D. Hall, Clerk of Court, 500 South Duval Street, Tallahassee, Florida 32399-1927 by e-file transmission and federal express; and by regular mail to Karen B. Lopez, Esq., Assistant Staff Counsel for the Florida Bar, 4200 George Bean Pkwy, Suite 2580, Tampa, Florida 33607-1496; and Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, this 2nd day of October 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

JOHN M. KLAWIKOFSKY
WILLIAMS,RISTOFF & PROPER,PLC
Florida Bar No. 930997
4532 U.S. HIGHWAY 19
NEW PORT RICHEY, FL 34652
Telephone: (727)842-9758
Fax (727) 848-2494
COUNSEL FOR RESPONDENT

DAVID R. RISTOFF
WILLIAMS,RISTOFF & PROPER,PLC
Florida Bar No. 358576
CO-COUNSEL FOR RESPONDENT