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 INITIAL BRIEF

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

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to herein as "The Bar" or "Complainant." Appellant, Richard Stuart Shankman will be referred to as "Respondent" or "Shankman." The symbol "RR" will be used to designate the Report of Referee. The symbol "T" will be used to designate the transcript of the Final Hearing held before the Referee. The symbol "App" will be used to designate the Appendix which is already part of this Court's file concerning the interlocutory appeal of the Referee's taking of Judicial Notice.

STATEMENT OF THE CASE AND FACTS

On June 11, 2008, Complainant, The Florida Bar, filed a complaint against Respondent, Richard Stuart Shankman, alleging four counts of misconduct relating to his representation of Plaintiff Monica Pippin in a federal civil lawsuit entitled Pippin v. Playboy Entertainment Group, Inc., et.al, Middle District Case No. 8:02-CV-2329-T-17EAJ. (Hereinafter referred to as Pippin).

In its Complaint, The Bar alleged the following violations: In Count I, the Bar alleged Respondent claimed entitlement to an excessive fee in violation of R. Regulating Fla. Bar 4-1.5(a) (an attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost).

In Count II, The Bar alleged Respondent wrongfully advised Pippin that attorneys fired for cause had no right to recover a fee and violated R. Regulating Fla. Bar 4-1.1 (A lawyer shall provide competent representation to a client. and/or 4-1.4(b) (A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

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. 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); 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).

In Count IV, The Bar alleged Respondent acted in a deceitful manner by intentionally withholding important information from Pippin, while pursuing his own agenda and increasing his fee percentage. (RR. 7). The Bar alleged Respondent violated R. Regulating Fla. Bar 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit

or misrepresentation). (See Complaint).

INTERLOCUTORY APPEAL OF REFEREE'S TAKING OF JUDICIAL NOTICE[1]

As part of its Complaint, The Florida Bar attached the Report and Recommendation of Magistrate Jenkins as well as an Order from Judge Kovachevich as operative documents. The Florida Bar's "Exhibit A" attached to its Complaint was an Order from United State's Magistrate Judge Elizabeth A. Jenkins, dated August 9, 2005, which found that Respondent was fired for cause, and the parties were instructed to focus on the quantum meruit value of Mr. Shankman's services. (See App, Exhibit No. 2: Court Order dated August 9, 2005). The Florida Bar's "Exhibit B" was a Report and Recommendation from Magistrate Jenkins dated January 27, 2006. (See App, Exhibit No. 3: Report and Recommendation, dated January 27, 2006). Part of this 51 page Report and Recommendation included the Magistrate's finding that Mr. Shankman's performance fell substantially below the standards expected of an attorney and officer of the court. (See App, Exhibit No. 3: p. 49). The Florida Bar's "Exhibit C" attached to the Complaint was an Order from Judge Elizabeth A. Kovachevich dated March 31, 2006, adopting the prior Report and Recommendation from Magistrate Jenkins. (See App, Exhibit No. 4: Judge Kovachevich's Order dated March 31, 2006).

[1] Respondent filed an interlocutory appeal to this Court on this Issue on October 31, 2008, and included an Index and Appendix as part of his response. His petition to review this issue was denied by this Court without prejudice.

On September 11, 2008, The Florida Bar filed a Request for Judicial Notice, requesting the Referee take Judicial Notice of the Report and Recommendation issued by United States Magistrate Judge Elizabeth A. Jenkins dated January 27, 2006. Respondent filed an objection to this Motion. On October 1, 2008, The Florida Bar filed a second Request for Judicial Notice requesting the Referee take Judicial Notice of the Order of United States District Judge Elizabeth Kovachevich, dated March 31, 2006, which adopted the Report and Recommendation of Magistrate Jenkins.

Respondent filed an objection to these motions. A hearing was held before the Referee on September 26, 2008 regarding the judicial notice motion. Respondent pointed out there were numerous findings contained in the report and recommendation that Mr. Shankman disputed, as well as questioning the credibility of the persons who testified at the fee dispute hearing. (App, Exhibit No. 7: p. 52). Respondent argued it would be improper for the referee to take judicial notice of the factual findings made in that report because the only facts that can be judicially noticed are those that are not subject to dispute because they are capable of accurate and ready determination. Section 90.202(12). (App, Exhibit No. 7: p. 54).

The Referee granted the Bar’s motion to take judicial notice, and clarified The Bar’s intention that the judicial

notice was not to constitute conclusive proof, and The Bar still had to prove its case. (App, Exhibit No. 8: p.8). The Referee then took judicial notice of the court order, as well as the report and recommendation. (App, Exhibit No. 8: p.9). Counsel for Respondent pointed out that the report and recommendation at the center of this motion contained "statements, innuendos, characterization and findings that are subject to dispute" and if the court took judicial notice, then The Bar had no need to put on a guilt phase. In the Report and Recommendation concerning the fee dispute, Magistrate Judge Jenkins made several factual findings in evaluating the justification of Mr. Shankman's fee. Many of these findings were disputed by Respondent and were not supported by the record in the federal case. The Federal Magistrate determined that "though Mr. Shankman's conduct in this case was unprofessional, bumbling and outrageous at times," it did not warrant a complete forfeiture of his attorney's fees. (See App, Exhibit No. 3: Report and Recommendation, p. 29). Respondent would ordinarily be able to put on evidence to rebut such findings. However, if judicial notice was taken of the contents of the report and recommendation, the Respondent would be unable to dispute and attack the accuracy of such findings. (Exhibit No. 8: p.12).

Respondent filed a Petition for Review of Non-Final Order on October 22, 2008. (See Exhibit No. 10: Petition for Review of

Non-final Order). On October 23, 2009, The Bar filed its Response and Motion to dismiss Respondents Petition for Review of Non-Final Order. On October 28, 2008, Respondent filed his Response in Opposition to the Bar's Motion to Dismiss. On October 31, 2008, Respondent filed a Supplemental Response (Petition for Review of Non-final Order and Memorandum of Law w/ appendix).

On January 22, 2009, this Court issued an order granting The Bar's motion to dismiss, without prejudice. Respondent's Petition for Review of Non-Final Order was dismissed without prejudice for Respondent to seek review of the order after the Referee's report is filed.

FINAL HEARING

Monica Pippin testified she hired Respondent to get the tapes of her wet t-shirt contest off television and stop the production of the videotapes. She signed a fee agreement with Shankman, along with the Trenam, Kemker law firm on July 16, 2002. (V. 1: T. 40, 42). She believed she was going to get 60% and the lawyers were going to get 40%. (V. 1: T. 44). Sometime soon after, Respondent told her Trenam had to be fired, so she signed a letter discharging Trenam, and retained the Willie Gary law firm, with Shankman as co-counsel. (V. 1: T. 49). Shankman told her Trenam wanted handle her case fast and get the money. He also told her if there were any fees to be paid, he would pay

it out of his fees. (V. 1: T. 50).

A few months later, she discharged the Gary law firm because Shankman told her they had to be fired, and she signed a retainer agreement with Litigation Concepts (Shankman's newly formed corporation) on August 21, 2003. (V. 1: T. 55, 57). Arthur Tifford was also listed on this fee agreement. (V. 1: T. 58). Several months later, Shankman told her that Tifford resigned from her case, and she was to "avoid him like the plague." If she contacted him, that would mean they did not accept his resignation, and would have to pay Tifford. (V. 1: T. 63). She eventually went back to Tifford for representation because she was unhappy with Shankman's handling of the case. (V. 1: T. 65). She wanted the case to settle quickly. Tifford eventually settled the case. (V. 1: T. 67, 68).

Pippin filed a complaint with The Florida Bar alleging Respondent misled her by bringing her to several law firms and telling her she would not have to pay them any money. (V. 1: T. 72). Tifford helped her prepare the Bar complaint. (V. 2: T. 138). On cross-examination, Pippin admitted her primary goal in this case was to stop production and distribution of the broadcast and video. She was not sure if Trenam ever filed a preliminary injunction to stop production or airing of the video. (V. 2: T. 89). Shankman never suggested to her that he handle the case himself, and encouraged retaining more

experienced lead counsel. (V. 2: T. 98). Shankman provided her with his cell number, office number, and home number so she could contact him any time. He always made himself available and kept her updated. Toward the end of the representation, there was no communication as nothing noteworthy was happening in her case. (V. 2: T. 128).

Pippin remembers reading the first page of The Bar Complaint form, and signing that page. Pippin does not remember if she ever saw the other pages 11 pages of the complaint form. She did not understand the portions of The Bar Complaint that were put before her at the hearing. (V. 2: T. 142). She claimed Shankman distracted the other attorneys and wasted their time, but she admitted she had no way of knowing if this was correct. (V. 2: T. 145, 146). Shankman never sent her any bill. (V. 2: T. 161).

Shelton Keely testified he is Pippin's step-father. The family wanted to stop the production of the tapes, and Keely was involved in meeting with attorneys. They contacted Shankman, who then introduced them to the Trenam Kemker law firm. He understood that the attorneys would receive 40% of the gross recovery, but costs came off the top of any settlement. (V. 2: T. 182, 184-185). They next switched to the Gary law firm and Shields McManus. However, there were disagreements between Shankman and McManus because the Gary firm was not doing enough

discovery. They decided to stay with Shankman because of his drive and determination. (V. 2: T. 188-190).

They next hired Arthur W. Tifford, who subsequently resigned through an email. Shankman told them they did not have to pay Tifford since he quit the case. (V. 2: T. 193). Two other girls with similar claims remained with Tifford for representation, but the Pippin's stayed with Shankman. Shankman "camped out" at Keely's office in Plant City for two days trying to reassure the Pippins to keep him. Keely gave Shankman 30 days to settle. Nothing happened, and 2-3 months later, Keely retained Tifford, and discharged Shankman. (V. 2: T. 196, 198).

Keely previously asked Shankman if firing the attorneys would affect the case, and Shankman said it would not hurt the case at all. Replacing this many attorneys concerned Keely. He was told when the case is over the lawyers will go before the judge to make a quantum meruit claim. (V. 2: T. 200).

Tifford was representing them at the time the decision to file a bar complaint was made. Tifford drafted the entire Bar complaint. (V. 2: T. 201). Keely was familiar with contracts having dealt with them in real estate, and he understood Pippin's percentage was to be 60%, and the costs would come off the top. (V. 2: T. 202). Shankman disclosed from the very beginning that he was relatively inexperienced, and would need assistance from more experienced co-counsel. (V. 2: T. 204).

The family's main goal was to stop the distribution of the tapes, and Shankman very much wanted to accomplish the same goal. (V. 2: T. 207). Trenam Kemker failed to pursue an injunction to stop distribution of the tape during their 6 month tenure. (V. 2: T. 210). When Trenam was fired, Shankman informed them of quantum meruit, that the Trenam firm would be entitled to some kind of fee for the work they had already done, and Shankman agreed that any such payment would come out of his fee. (V. 2: T. 212-213).

When the Gary firm was hired, the videos were still being distributed, and there were no offers of settlement. The Gary firm was then terminated because Mr. Willie Gary did not wish to include distributors Viacom or iN-DEMAND, as defendants in the lawsuit. The Gary firm did file a Motion For Preliminary Injunction to stop the distribution of the videos. Such motion was denied by the Federal Court. (V. 2: T. 215-216). Shankman further believed the Gary firm was more interested in pursuing a settlement offer, rather than stopping distribution. (V. 2: T. 217). Shankman further explained to them that if the Gary firm sought fees, there would be a quantum meruit hearing and Shankman would pay it out of his share of the proceeds. (V. 2: T. 222-223).

Shankman was always available to answer their questions. He provided his cell number and advised they could call him

anytime, anywhere to discuss anything about the case. (V. 2: T. 224). When the Gary firm was hired the fee arrangement changed from 60/40 split to a 55/45 split. (V. 2: T. 227). Keely understood this fee split was standard policy of the Gary firm. (V. 2: T. 228). Once the Gary firm was replaced, Shankman's Litigation Concepts firm was hired for the same 45% fee. Tifford's firm then split the fee 50/50 between Shankman and Tifford. (V. 2: T. 230, 231). Shankman attended and conducted depositions on the case, and drafted pleadings and discovery. He worked the case vigorously. (V. 2: T. 233).

Keely acknowledged receiving an email forwarded by Shankman in which Tifford indicated that they should consider this letter his resignation on the grounds of incompatibility among counsel. Tifford refused to continue handling the case unless Shankman apologized. (V. 2: T. 244,246). The family met with Shankman, and agreed Tifford was out of the case. (V. 2: T. 249). Shankman told them to avoid Tifford like the plague, and if they contacted him, it would hurt the case. (V. 2: T. 249). They then instructed Shankman to settle the case on his own, but Shankman brought in other counsel. (V. 2: T. 251). Pippin subsequently fired Shankman and rehired Tifford. There had been no activity on the case since Tifford was fired, because a defense motion for summary judgment was pending before the Federal Judge, who never ruled on the motion. (V. 2: T.

255,256). Once Shankman was fired, the case was not settled for another 8 months. (V. 2: T. 257). Tifford's new agreement provided for a 40% fee, and Tifford agreed to pay the liens from Trenam Kemker, Willie Gary and Tancredo. (V. 2: T. 257-258).

Keely testified there were four other Plaintiffs that had similar claims to Pippin. Three of the girls discharged Shankman, while the other two plaintiffs remained with Shankman. (V. 2: T. 261). Keely also was not aware that the two young ladies that remained with Shankman got a significantly greater settlement that Pippin. (V. 2: T. 263).

John Vento testified he is an attorney who works for Trenam Kemker.(V. 3: T. 284). Shankman discussed the Pippin case, and told him the family wanted to stop distribution of the tape and get a large money award. (V. 3: T. 290). They entered into a fee agreement with Pippin. (V. 3: T. 292). They determined that the case was best settled quickly. (V. 3: T. 293). An informal test review showed no sympathy for Pippin, especially because of the way she acted in the video. Also, Pippin knew she was being taped, and she reviewed the tape in the photographer's room that night. (V. 3: T. 316).

Vento disagreed with Shankman about pursuing an injunction and instead obtained voluntary agreements to pull the tapes. (V. 3: T. 297). Vento was retained in July, and by August Shankman threatened to have them fired because they had not yet filed a

complaint. (V. 3: T. 302). The Complaint was filed in December 2002.(V. 3: T. 302-303). They were trying to get dates for mediation with Playboy. (V. 3: T. 311). Vento believed Playboy would offer 1-1.5 million to settle the case, as well as an injunction. (V. 3: T. 312, 314). In January 2003, Trenam was fired. (V. 3: T. 322). Their fees were $169,795. (V. 3: T. 326). Later they received about $120,000 for fees. (V. 3: T. 326). The Trenam law firm had not previously handled any such cases involving videotaping young women. (V. 3: T. 332). The Pippin family also made it clear their primary goal was to stop distribution of the tape. (V. 3: T. 333).

Judge Shields McManus testified by video deposition that he had been an attorney with the Gary Law Firm, and was retained for Pippin's case on January 23, 2003. (V. 4: T. 392-393). Trenam's firm filed a lien on the file, and their lien was to be paid out of the fees between the Gary firm and Shankman. The Gary contingent fee was 45%. (V. 4: T. 398-399). Six months into the case, Shankman indicated he was not happy with the way the firm was handling the case. (V. 4: T. 403). Shankman wanted them to move for a preliminary injunction. McManus did not think the injunction would be granted. Shankman also signed up 6 or 7 other similarly situated young girls, and the Gary firm agreed to represent them as well. (V. 4: T. 404-405).

McManus acknowledged that Shankman probably spent almost

every working hour on the case, and Shankman was the greatest investigator McManus ever worked with. (V. 4: T. 409). Shankman also believed the Gary firm had a conflict of interest because Willie Gary had an interest in cable companies, was trying to do business with Time Warner, and thus they would not sue them. (V. 4: T. 411). The Gary firm was discharged and filed a lien against the case. (V. 4: T. 416).

The Gary firm filed a motion for an injunction which was denied and criticized by Judge Moody. (V. 4: T. 420). Pippin and her mother were made aware that the total attorney's contingency fee was 45%. (V. 4: T. 421-422). Shankman was very diligent in this case and attended numerous depositions. (V. 4: T. 425). Arthur Tifford replaced the Gary firm, and Tifford told the Gary firm they were not entitled to any fees because they were discharged. (V. 4: T. 426).

Respondent Richard Shankman testified he promised Pippin he would pay the quantum meruit fees awarded to prior counsel, and she would never have to pay them. (V. 4: T. 446). He thought the court would find Trenam was discharged for cause. (V. 4: T. 448). He also told Pippin that Tifford voluntarily withdrew from the case, and she would not owe him a fee. (V. 4: T. 449).

After Shankman was discharged, he filed a lien on the Pippin case, but was unable to settle with Tifford. (V. 4: T. 451). Tifford claimed Shankman was entitled to no compensation.

Tifford negotiated settlement of the fees of the other attorneys, but not Shankman. (V. 4: T. 452-453).

After the Bar rested its case, Respondent moved for directed verdict. The court took judicial notice of the federal order, but still claimed the bar had to prove each count. (V. 4: T. 487). The Settlement amount paid to Pippin was confidential. (V. 4: T. 490). The Bar attempted to prove Count I without expert testimony. The Bar submitted the Report and Recommendation of the federal order to prove the Counts. (V. 4: T. 491-492).

Respondent testified on his own behalf. Monica Pippin was related to his partner Chris Tancredo. He met Pippin and her mother after neighbors had seen her on Pay per view TV in a wet t-shirt contest. They discussed what could be done to stop the distribution of the program. (V. 6: T. 594). He approached John Vento of Trenam Kemker since Shankman needed experienced counsel and informed the Pippin family of such. (V. 6: T. 596). Shankman made it clear that the family wanted to stop the distribution of the tapes. They did not discuss monetary recovery. (V. 6: T. 601). Pippin signed the contract retaining Trenam, with Shankman as co-counsel. The family wanted Shankman to deal with the other attorneys on their behalf, and keep them apprised. (V. 6: T. 603). Lead counsel for Trenam was John Vento, and Shankman was co-counsel. Shankman explained the fee

agreement to the Pippins. No-one in the Pippin family expressed any reservations about the fee agreement. The agreement provided for 40% to the attorneys. This was further split 68% to Trenam and 32% to Shankman's firm. Pippin's mother wanted other families to know what happened, and Vento arranged for Monica to meet with a public relations firm which coached her on wardrobe, appearance, and answering media questions. (V. 6: T. 605-606). Shankman pushed for a preliminary injunction from the beginning. Trenam feared Playboy would demand a bond be filed before the injunction could issue, and that could cost $1 million. (V. 6: T. 609). Vento contacted various defendants through counsel, and counsel agreed to voluntarily pull the movies from the shelves and cease distribution. Shankman later confirmed distribution continued despite the voluntary agreement. Shankman found and purchased the tape in the Tampa Bay area, as well as around the country. (V. 6: T. 610-611).

Trenam filed the Complaint in December 2002. (V. 6: T. 613). In January 2003, Vento wanted to hire Harvey Moore as a trial consultant. Moore was not an attorney and wanted 3 ½ % contingent fee. (V. 6: T. 616-617). Vento refused to contact The Bar about this, so Shankman contacted The Bar and was told it was improper to share percentage fees with non-attorneys. (V. 6: T. 618).

The Pippins decided to fire Trenam. (V. 6: T. 625).

Shankman informed them about quantum meruit determinations, and that recovery would come from Shankman's portion. He further advised the Pippins that no judge in their right mind was going to award quantum meruit to this firm because they were fired for cause. (V. 6: T. 626-627). He told them Vento was going to have to convince a Federal Judge that Trenam was entitled to its fees despite insisting on illegal fee splitting with Harvey Moore, as well as failing to move for a preliminary injunction. Trenam filed a charging lien. (V. 6: T. 628-629).

Shankman next recommended the Gary firm (McManus). (V. 6: T. 635). The fee agreement with Gary was for 45%. (V. 6: T. 636). Shankman discussed the fee with the Pippins and it was agreed it was worth paying the higher fee to this firm because they would actually litigate the case. Shankman was to get 33% of the attorney's fee. The Pippins did not object in any way. (V. 6: T. 637-638). Shankman explained to the Gary firm that in order for them to be hired, they had to go to trial because the family wants to make new law, and Gary had to stop distribution. (V. 6: T. 639). McManus and Shankman worked the case together, sharing depositions. (V. 6: T. 641). The Gary firm did not want to bring in broadcast networks as defendants since Gary was negotiating with those networks. (V. 6: T. 643). Shankman was able to identify and be retained by seven other potential victims from the videotapes. (V. 6: T. 645-646).

The Gary firm filed a motion for preliminary injunction which was denied and criticized by the Federal Judge for the delay in bringing the motion. (V. 6: T. 635, 646). The Pippins and Shankman decided to discharge the Gary firm. (V. 6: T. 653). Gary filed a charging lien. (V. 6: T. 654). When the Gary firm was fired, Shankman told the Pippins he doubted any judge was going to award a sizable fee amount to lawyers that failed to timely file a preliminary injunction, and the motion that was filed was poorly done. (V. 6: T. 657).

Respondent next recommended retaining Arthur Tifford. (V. 6: T. 659). Shankman advised Pippin not to contact prior counsel since there was no confidentiality and any conversations were discoverable. (V. 6: T. 663). Selena Keely even suggested Shankman handle the entire case himself. (V. 6: T. 665-666). The Tifford retainer was a 50/50 split of the 45% retainer. (V. 6: T. 667). Shankman wanted Tifford to be lead counsel, and agreed to let Tifford determine what the fee split would be between the lawyers. (V. 6: T. 669).

The Pippins agreed to retain Tifford. However Tifford did not do discovery. (V. 6: T. 676). During his representation, Shankman never received an offer of settlement on the case. (V. 6: T. 677). Tifford neglected to name Playboy as a defendant in the amended complaint involving the other four claimants. (V. 6: T. 681). Tifford accused Shankman of failing to develop proper

evidence linking Playboy to the case. (V. 6: T. 683). Tifford resigned and requested an apology from Shankman as follows:

> If you don't send the email I requested above, come get your files and consider this paragraph of this letter my resignation from the case on the grounds of incompatibility of counsel.

(V. 6: T. 688-689). Shankman forwarded the email to Keely. (V. 6: T. 691). Keely was nervous, and told Shankman, "this is now 3 law firms that had to be fired, the next one that gets fired is going to be you." (V. 6: T. 696).

Shankman next arranged co-counsel with Kevin O'Connor, and he instructed the family to treat Tifford like he has the plague.(V. 6: T. 699). Shankman assured the Pippins that any fees to Tifford would be paid by Shankman. (V. 6: T. 704). Shankman also brought in the other Plaintiffs to O'Connor. (V. 6: T. 707). O'Connor's firm then had to resign because he lost a partner, and O'Connor could not handle the case himself. Shankman next went to the Solomon Tropp Law group, and Shankman's fee went down. When Shankman was discharged, he filed a charging lien. (V. 6: T. 708). The case had not yet been settled when he filed his charging lien. (V. 6: T. 709).

Pippin's case eventually settled with Tifford. Two other clients that stayed with Shankman settled for significantly higher settlements than Pippin. (V. 6: T. 727). Shankman never asked for a specific fee amount after he was discharged.

Instead there was a quantum meruit hearing before Magistrate Jenkins. At the hearing, Tifford and Shankman both put on expert testimony as to the appropriate fee. Shankman's expert, Michael Addison, put his fee at $350,000, based on the hours he worked on the case. (V. 7: T. 711, 784).

The Pippin case settlement amount was sealed, and the Referee, as well as the Bar, was not aware of the amount. Evidence did come before the Referee that other victim's that stayed with Shankman received higher settlement amounts. (V 8: T. 935).

The Video Deposition testimony of Thomas E. Deberg was put before the Referee. Mr. Deberg testified he had worked for The Florida Bar as Assistant Staff Counsel for 19 years before joining the Solomon Law Group. Deberg worked with Shankman on Pippin and other similar cases while with the Solomon Law Group. (Deposition of Thomas Deberg: p. 5, 8). The other cases settled for substantially greater amounts than Pippin. (Deposition of Thomas Deberg: p. 19). Deberg disagreed with the magistrate's assessment that Shankman's conduct fell substantially below the standards of an attorney. Shankman associated himself with counsel that had a good reputation, and then disagreed with co-counsel's attempts to quickly reach a settlement. (Deposition of Thomas Deberg: p. 29-30).

FINDINGS OF FACT CONTAINED IN THE REPORT OF REFEREE

In 2001, when she was 16 years old, Ms. Pippin participated in a "wet t-shirt contest" during spring break in Daytona Beach, Florida. The contest, including Ms. Pippin's participation was videotaped. Friends later informed her they had seen a video of her on cable television. Ms. Pippin contacted the law firm Shankman, Tancredo & Co. L.C. regarding potential claims arising out of the videotaping and subsequent distribution of the videotapes. (RR. P. 2).

At that point, Respondent Richard Shankman had been practicing law for less than three years and had no experience litigating in federal court. Respondent associated with Trenam Kemker, a Tampa law firm with trial and federal court experience. Ms. Pippin entered into a contingency fee agreement with the Trenam Kemker firm, with Shankman as co-counsel. The attorneys were to receive 40 percent of her gross recovery. Under this agreement, Respondent was to receive 9.6 percent of the gross recovery (32 percent of the fee, less 25 percent to his partner Tancredo). Respondent disagreed with the manner in which the Trenam firm was handling the case and convinced Ms. Pippin to fire Trenam. He promised her she would not owe the law firm any fees. (RR. P. 2).

Respondent then advised his client to hire a second law firm, the Gary Law Firm. Ms. Pippin entered into a contingency

fee agreement with the Gary firm and Respondent as co-counsel, which provided for a 45 percent contingency fee to the attorneys. Under this agreement, Respondent's share of the fees increased to about 11.25 percent of Ms. Pippin's gross recovery (one-third of the fee, less 25 percent to Tancredo). Respondent disagreed with the way the Gary firm was handling the case and convinced Ms. Pippin to replace the Gary firm. He promised Ms. Pippin she would not have to pay the Gary firm any fees and instructed her not to talk to the Gary firm attorneys, or she would owe fees. (RR. P. 3).

Ms. Pippin signed a contingency fee agreement with Respondent's newly formed law firm, Litigation Concepts. L.C. Respondent then advised his client to hire a third law firm, Arthur W. Tifford, P.A. Ms. Pippin signed a fee agreement addendum, providing for a 45 percent contingency fee to be split equally between the Tifford firm and Litigation Concepts. Under this agreement, Respondent's fee again increased (50 percent of the fee, less 25 percent to Tancredo). Respondent disagreed with Mr. Tifford's handling of the case and told Ms. Pippin that Mr. Tifford had resigned from her case. He told Ms. Pippin not to talk to Mr. Tifford, or she would owe fees. (Vol. I, P-63, L-20). (RR. P. 3).

Respondent then hired a fourth and then a fifth law firm. On August 30, 2004, Ms. Pippin fired Respondent and returned to

the Tifford firm. Mr. Tifford negotiated a confidential settlement on behalf of Ms. Pippin. All the prior firms except Shankman filed charging liens and settled their charging liens. (RR. 3).

Respondent then pursued his lien in federal court under quantum meruit, claiming through expert testimony he was entitled to up to 45 percent of Ms. Pippin's gross settlement recovery. The Federal District Court Magistrate awarded Respondent $29,560. (RR. 4).

The Referee found Shankman guilty on Counts I, II, and III. He found him not guilty of Count IV.

DISCIPLINARY RECOMMENDATION

A hearing was held on the disciplinary recommendation. The Florida Bar sought a six month suspension, and Respondent sought no punishment. The Referee recommended a 90 day suspension, and Ethics School. (V. 9: T. 995). The Referee found no aggravating factors. However, the Referee found three mitigating factors: the absence of a prior disciplinary record, inexperience in the practice of law, and remorse.

On July 24, 2009, Respondent filed his Petition for Review of Report of Referee. On August 3, 2009, the Florida Bar filed its Cross-Petition for Review of Report of Referee.

SUMMARY OF THE ARGUMENT

Respondent asserts that the Referee's findings are not supported by the record evidence or the existing case law. Respondent did not charge an excessive fee, as he merely made a quantum meruit claim toward the Pippin settlement. He **never** sent a bill to the client, and only sought a fair determination of his fee from the Federal Court. Moreover, Respondent was not incompetent in the handling of this case. His perceived aggressive actions reflected the wishes of his client's primary goal of stopping distribution of the tape. Respondent sufficiently kept his client aware of the status of the case, and always made himself available to her. Respondent cannot be held responsible for the delay in settling this case when the client's ultimate wishes were not being honored by co-counsel. Co-counsel was responsible for significant delays, and the Federal Court's failure to rule on the Motion For Summary Judgment further contributed to the delay.

The Referee's taking of judicial notice of the Federal Magistrate's Report and Recommendation was erroneous. This tainted the entirety of the proceedings by compromising the impartiality of the referee and unduly prejudiced Respondent.

Further, the 90 day sanction imposed is not supported by the record before this court and is excessive in light of this Court's holdings and case law.

ARGUMENT

ISSUE I

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

The Bar must present the Referee with clear and convincing evidence of a rule violation in order to make a finding of misconduct. Such a finding will be sustained only if it is supported by competent and substantial evidence. The Florida Bar v. Hopper, 509 So. 2d 289 (Fla. 1987). A Referee's findings of fact carries a presumption of correctness and should be upheld unless they are clearly erroneous or there is no evidence in the record to support them. See Florida Bar. v. Vannier, 498 So.2d 896, 898 (Fla. 1986). If a Referee's findings are not supported by competent, substantial evidence, 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). Here, the Bar has failed to shoulder its burden of proving a violation by clear and convincing evidence, and many of the referee's findings are not supported by competent and substantial evidence.

A party challenging the Referee's findings carries the burden of demonstrating that the record clearly contradicts those conclusions. See The Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996). Here, the record evidence does not

support a violation of any of the counts alleged by the Bar, and the Bar failed to provide competent substantial evidence to prove its case against Respondent.

Moreover, the Bar's prosecution of the instant case went beyond the mere allegations in the complaint, and thus should not have been entertained by the Referee or this Court. A rule violation cannot be prosecuted during a trial unless it is within the allegations of the Bar's complaint against the attorney. The Florida Bar vs. Batista, 846 So.2d 479(Fla. 2003). See also The Florida Bar v. Rose, 823 So. 2d 727 (Fla. 2002). The Bar failed to prove its case as so instructed by the Referee. The majority of the Bar's case hinged on the Report and Recommendation from the federal quantum meruit proceeding. Respondent's competence was not an issue before the federal court. The Bar failed to put on any substantial evidence establishing any rule violations committed by Respondent.

In **Count I**, the Bar alleged Respondent claimed entitlement to an excessive fee where he sought 45% of the client's recovery, after she had already paid out 40% to the other attorneys. The Bar alleged this violated R. Regulating Fla. Bar 4-1.5(a) (an attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost). The referee found by clear and convincing evidence that Respondent violated Rule 4-1.5(a). "Respondent

claimed a maximum of 45 percent contingency fee after Ms. Pippin had already paid 40 percent to other attorneys." (RR. p. 5). The Referee further found it significant that the federal district court did not award him the full amount of his quantum meruit claim. 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).

This finding is not supported by the facts presented to the Referee. The Bar failed to put on any expert testimony establishing the reasonableness (or unreasonableness) of Respondent's fee. The Referee has ignored the fact that Respondent never submitted a bill to Ms. Pippin. Rather he put forth expert testimony in a quantum meruit hearing while attempting to establish and collect a reasonable fee. This entire issue was not properly presented before the Referee, and was established solely by the tainted findings included in the judicial notice of the federal order. The Bar never met its burden of establishing by clear and convincing evidence that Respondent's fee was excessive. The only expert testimony put before the Referee was that of Respondent's expert, Tom Deberg, who believed the fee was reasonable. The Bar failed to contradict this testimony, and instead relied on the findings of the federal magistrate.

Of greater significance is the fact that no such fee of 45% was sought by Respondent. Pippin was seeking a complete forfeiture of Shankman's fees, and Shankman was seeking a reasonable fee, through the testimony from his own expert. (See Report and Recommendation: P. 1). Such a determination 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 finding that any fees Respondent charged Pippin were excessive is reversible error and must be set aside. Additionally, the Bar presented no expert testimony or any evidence challenging the legality or the reasonableness of the fees Respondent charged. The Florida Bar vs. Barley, 831 So.2d 163 (Fla. 2003). 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 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.

In **Count II**, The Bar alleged each time a new contingency agreement was presented to the client, Respondent wrongfully advised Pippin and her parents that attorneys fired for cause had no right to recover a fee, when in truth attorneys fired for cause may still have a claim for quantum meruit. By failing to timely determine Florida law regarding the right to quantum meruit and by wrongly advising Pippin, The Bar alleged Respondent violated R. Regulating Fla. Bar 4-1.1 (A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation); and/or 4-1.4(b) (A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). The referee found by clear and convincing evidence that Respondent violated Rule 4-1.1 by failing to take the advice of co-counsel

to settle the case. The referee also found Respondent violated Rule 4-1.4(b) by failing to fully explain important matters to his client, which led to protracted litigation.(RR. P. 6).

Again, these findings are not supported by the facts presented to the Referee at the Final Hearing, and the law on quantum meruit. See Adams, supra. The Bar again relied on the Federal Magistrate's Report and Recommendation, and the Referee overlooked or ignored the testimony that was placed before him at the final hearing. Mr. Shankman testified he explained quantum meruit to the Pippins, and Pippin's stepfather Keely 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 advising 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 properly made by the court, not by the attorneys.

In Faro v. Romani, 641 So. 2d 69 (Fla. 1994), this Court held that when an attorney withdraws from representation of his own volition, and the contingency has not occurred, the attorney

forfeits all rights to compensation. However, if the client's conduct makes the attorney's continued performance legally impossible, the attorney may be entitled to a quantum meruit fee when the contingency is awarded. Here, Respondent advised the Pippins of the possibility of a quantum meruit fee award by the Federal Court. Such determination was not up to Respondent, and was that of the Federal Court which subsequently approved a privately mediated settlement with prior counsel. Such does not constitute a Bar violation. Shankman was correct in informing the clients that an attorney discharged for cause may not receive a fee, but still informed them of the possible quantum meruit determination by the federal court.

The Bar attempts to confuse this issue by pointing out that Shankman violated Bar Rules by not honoring his pledge to pay the other attorneys out of his own portion of the recovery, and not have it come from Pippins recovery. Respondent acknowledged such promise, but should not be expected to pay the fees of the prior attorneys when he himself had been discharged, and received no part of the recovery. Once Shankman was discharged, Tifford claimed Shankman was not entitled to any fees. Tifford also claimed the Gary firm was not entitled to any fees because of their discharge. (V. 4: T. 426). Therefore when Shankman advised that a court would be crazy to award fees to Trenam or Gary, there was a reasonable basis for such a determination. It

would be a reasonable for Shankman to believe there was a possibility that the attorneys fired for cause might not receive any fees. Also, it would not be reasonable to assume that Shankman was going to pay the fees of discharged counsel when he himself had been discharged and received no portion of the recovery. Further, Tifford's privately mediated payments to previous co-counsel were not a court awarded quantum meruit fee as contemplated and agreed to be paid by Shankman out of his fees.

The Bar claimed, and the Referee agreed that Respondent failed to provide competent representation in this matter. This Court has held that 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 disagreements with "more experienced co-counsel" does not constitute incompetent representation, especially where co-counsel failed to aggressively pursue the client's primary goal of stopping distribution of the offending videos.

Rather, the record contains ample evidence of Respondent's tenacious representation of Pippin. The record establishes Respondent's representation as co-counsel was competent, and he allowed experienced co-counsel to file the Complaint and

injunctions. Respondent performed more of an investigative and legal research role on this case, as well as handling depositions and attempting to honor the wishes and goals of the young client and her family. Mr. Keely agreed that Shankman worked the case vigorously. (V. 2: T. 233). The Bar presented no expert testimony that Respondent's representation of Pippin was incompetent. It is significant that Respondent always sought out and hired co-counsel to assist in this case. He acknowledged being unable to handle the case himself, and even resisted pleas from the Pippin family to handle the case himself. Respondent should not be held solely and wholly responsible for the tardiness or ineffectiveness of co-counsel, all of whom were eventually paid substantial fees by private mediated settlement with Arthur W. Tifford.

Rather, the instant record shows that Respondent represented his clients in a steadfast and aggressive 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). Judge McManus agreed that Shankman spent almost every working hour on this case, and he was the greatest investigator he ever worked with. (V. 4: T. 409).

It is also important to note that the evidence showed that Pippin's case ended up settling for significantly less than the other similarly situated clients that remained with Shankman and resisted Tifford's overtures. (V. 6: T. 727; Deposition of Thomas Deberg p. 19-20)). There is no evidence of incompetent representation in this matter. Such testimony establishes Shankman's dedication and effectiveness on this case. Moreover, the Pippins agreed that Shankman communicated with them on a regular basis, and this communication only came to an end when the Pippins terminated his representation and returned to Arthur W. Tifford.[2]

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

[2] Tifford drafted the Bar grievance complaint form for Pippin. (V. 2: T. 201).

the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest); 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). 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. 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%. Next they were 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. (V. 6: T. 708). Had he been merely attempting to gain money, Shankman could have settled this matter quickly with the Trenam firm. Such changes in attorneys also do 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 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. Again, he 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.

In **Count IV**, The Bar alleged Respondent engineered the firing of various law firms, and did not provide complete information to Pippin, and Respondent's fee percentage continually increased. The Bar alleged Respondent 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). Similarly, in the other counts, Respondent Richard Shankman was attempting to achieve the main goal of his client: stopping distribution of the tape. When more experienced co-counsel sought a quick settlement, he quite reasonably sought to replace them with the consent of his client, and retain co-counsel to better address the client's interests.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN TAKING JUDICIAL NOTICE?

The Referee's Report and findings are legally inconsistent and should be overturned upon review by this Court. The Referee improperly took judicial notice of the federal magistrate's report and recommendation, thereby tainting the proceedings, and compromising the Referee's impartiality after having been exposed to erroneous and improperly admitted prior findings and proceedings from the federal quantum meruit hearing.

Here, the Referee took judicial notice of the Report and Recommendation of Magistrate Jenkins, as well as the Order of Judge Kovachevich, adopting said Report and Recommendation. The Referee misapplied the doctrine of judicial notice, and such constitutes reversible error. (V. 9: T. 980). In making these findings and decision, the Referee did not hear testimony from the Federal District Court Judges or Magistrate involved in the underlying litigation, nor did he look at the entire Pippin federal file.

A court may take judicial notice under Section 90.202, Fla. Stat. (2008) as follows:

(1) Special, local, and private acts and resolutions of the Congress of the United States and of the Florida Legislature.
(2) Decisional, constitutional, and public statutory law of every other state, territory, and jurisdiction of the United States...
(6) Records of any court of this state or of any court of record

of the United States or of any state, territory, or jurisdiction of the United States ...
(11) Facts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court.
(12) Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned...

At the proceedings below, The Bar argued for the taking of judicial notice, claiming that the federal order constitutes decisional law under subsection (2). The Bar next argued The Florida Bar v. Tobkin, 944 So. 2d 219 (Fla. 2006) for the proposition that the Referee can rely upon the facts of a prior proceeding and take judicial notice of such facts. However, Tobkin does not stand for such broad proposition. This Court in Tobkin found the Referee could properly consider facts from a Fourth District opinion involving Tobkin's representation. However, the Referee in Tobkin did not take judicial notice of such prior opinion from the Fourth District Court of Appeal. Rather, the Referee merely considered such opinion and facts in making its determination. This is far different from taking judicial notice of the facts and opinion from a prior federal order on disputed attorney's fee. Such holding by the Referee in the instant case resulted in irreparable harm to Respondent by compromising the proceedings and the impartiality of the Referee. Rather than putting forth a prosecution of the counts alleged in its complaint, The Bar

merely relied on the findings of the Federal Magistrate in this fee dispute, and provided little else of substance to support its case.

The Bar's invitation for the Referee to take judicial notice of the contents of said Report and Recommendation are contrary to the rulings of this Court, and contrary to the due process requirements in Bar proceedings. See The Florida Bar v. Calvo, 601 So. 2d 1194 (Fla. 1992)(order of suspension issued by the SEC is not a final adjudication of discipline by a foreign jurisdiction under rule 3-4.6); see also, The Florida Bar v. Tepps, 601 So. 2d 1174 (Fla. 1992). The Report and Recommendation in Pippin does not constitute decisional law, where such report concerned the propriety of Mr. Shankman's quantum meruit claim. The Report and Recommendation did not concern itself with the merits of the Pippin case, nor with Shankman's competence.

Although the Referee took judicial notice of the Report and Recommendation prior to the Final Hearing, he further instructed the Bar must still prove its case. The Bar failed to do that, and instead relied upon the factual allegations contained in the Federal Report. The instant proceeding involves a determination of Respondent's level of competent representation and whether his fee was excessive. Therefore taking judicial notice of the Magistrate's finding of incompetent representation goes far

beyond the bounds of relevancy for the instant proceeding. The Referee's taking of judicial notice permitted the Bar to have a presumption that Respondent's representation was incompetent, and misinterprets the Magistrate's actual findings. This created undue and irreparable damage to Respondent's defense in the Bar proceedings since such findings were not relevant to the Federal proceeding.

The only issue in dispute in the Federal Court was the value of Respondent's legal service. Such evidence was presented by expert witnesses who established the value of Respondent's representation. Pippin put on Robert V. Williams, Esq., who testified that Shankman's fee far exceeded the value of his services. (See App, Exhibit No. 3: P. 26-27). Respondent put on Michael Addison, Esq., as an expert on attorney's fees. Mr. Addison testified Respondent's fee was justified, and he was acting at the direction of his client. (See App, Exhibit No. 3: P. 27-28). Even the Magistrate's findings indicate Mr. Shankman associated himself with more experienced counsel due to his lack of experience in federal court. (See App, Exhibit No. 3: P. 31). The Magistrate further agreed that a complete forfeiture of attorney's fees was not appropriate. (See App, Exhibit No. 3: P. 32). The Magistrate made a quantum meruit determination and still determined Mr. Shankman was entitled to a significant fee. (See App, Exhibit No. 3: P. 50).

Respondent disputes the Referee's taking judicial notice of the Federal Order, as well as the facts and inferences contained therein. This resulted in a shifting of the burden of proof, and thereby created an irrebuttable presumption which hampered Respondent's defense, and prevented a fair determination by an impartial arbiter. See Burgess v. State, 831 So. 2d 137, 141 (Fla. 2002)(although a trial court may take judicial notice of court records, see § 90.202(6), Fla. Stat. (1997), it does not follow that this permits the wholesale admission of hearsay statements contained within those court records. Such otherwise inadmissible documents are not automatically admissible just because they were included in a judicially noticed court file, and are still subject to the same rules of evidence).

Here, The Bar agreed that the Federal Report did not constitute conclusive evidence. However, The Bar failed to put on any expert testimony indicating Respondent's conduct was improper or incompetent or that his fee request was improper. Therefore the Referee's taking judicial notice of such inconclusive evidence is improper, since such report constitutes inadmissible hearsay. See Burgess, supra. Since the findings contained in the Federal Report are not conclusive, they cannot be offered for the truth of the matter asserted, are inadmissible hearsay, and the taking of judicial notice of such should be stricken.

"Judicial notice should be exercised with great caution because not every fact is the subject of proof by judicial notice -- only those matters of common and general knowledge." Nielsen v. Carney Groves, Incorporated, 159 So. 2d 489 (Fla. 2d DCA 1964). The Referee may take judicial notice of the existence of the Federal proceeding. However, if the Court proposes to take judicial notice of documentary evidence, such as pleadings in another case, copies of said documents judicially noticed must be brought into the record of the case under consideration. § 90.204(3), Fla. Stat. (1985). National Union Fire Ins. Co. v. Underwood, 502 So. 2d 1325, 1328 (Fla. 4th DCA 1987). Here, the Bar improperly attached the Federal Report to its Complaint, and failed to prove its case with any other competent evidence to establish a rule violation.

A matter judicially noticed must be of common and general knowledge. Moreover, it must be "authoritatively settled and free from doubt or uncertainty." Amos v. Moseley, 74 Fla. 555, 77 So. 619, (Fla. 1917). A Florida Court complies with § 90.202 by taking judicial notice in a manner similar to that made under the federal rules. A Court's determination of foreign law shall be treated as a ruling on a question of law. Moreover, in reviewing de novo the trial court's determination, the appellate courts are not limited to matters raised by the parties, but are encouraged to take an active role in ascertaining foreign law.

Transportes Aereos Nacionales, S.A. v. De Brenes, 625 So. 2d 4 (Fla. 3d DCA 1993). Here, upon de novo review, this Court should determine the Referee abused its discretion in accepting the Florida Bar's invitation to take judicial notice of such Federal proceeding. Further, The Florida Bar's suggestion that taking of such judicial notice was mandatory was improper.

In Cordova v. State, 675 So. 2d 632 (Fla. 3d DCA 1996), the court held that conclusive judicial notice not only establishes the existence of a particular fact, it precludes the adverse party from introducing evidence to rebut it. Such mandatory presumptions would violate due process rights in the instant proceedings. "Even in the case of a bench trial, judicial notice must not undermine the factfinder's responsibility at trial, based on evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt. County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777 (1979).

Here, taking judicial notice of any of the facts and conclusions contained in the magistrate's report and recommendation is improper, and Complainant has not met the standards required under §90.202(12). To fulfill the requirements of this provision, the facts sought to be noticed must not be subject to dispute because they are capable of accurate and ready determination by resort to sources whose

accuracy cannot be questioned. To fit within Section 90.202(12), accurate records or other sources must exist which establish the judicially-noticed fact. Maradie v. Maradie, 680 So. 2d 538 (Fla. 1st DCA 1996). Milton v. State, 429 So. 2d 804, 805 (Fla. 4th DCA 1983)(the fact that such statement was set forth in a document of which the court could take judicial notice, does not render it admissible; trial court may properly take judicial notice of the records of any court of record of any state of the United States, but cannot take judicial notice of hearsay allegations as being true, just because they are part of a court record or file).

Moreover, The Bar has not followed proper procedure in seeking to admit and have judicial notice taken of such Federal proceeding. Complainant merely attached the Report and Recommendation of the Magistrate and the subsequent order adopting said report to the Complaint. To have such proceeding properly admitted and be judicially noticed, Complainant should have sought to admit the entire federal file. No such record evidence, including depositions, and transcripts from expert witnesses, was presented before the referee. See Pan American Stone Co. v. Meister, 527 So. 2d 275 (Fla. 4th DCA 1988)(if a court proposes to take judicial notice of evidence in another case, that evidence must be brought into the record of the case under consideration). Therefore, Complainant has failed to

follow the proper procedures in seeking to have the Referee take judicial notice, pursuant to Sections 90.203 and 90.204, Fla. Stat. (2008), and as such, the taking of judicial notice was improper.

The Bar attempted to take a short-cut to making its case, and still insisted upon asserting its judicial notice before the Referee. The Referee's taking judicial notice of inadmissible findings and conclusions has instead improperly shifted the burden of proof on Respondent, and hampered his ability to defend his case.

Here, Respondent was unable to dispute the findings and conclusions reached by the Federal Magistrate in her Report and Recommendation. Respondent asserts that such findings and conclusions do not constitute sufficient, indisputable evidence of any misconduct on his part. Taking judicial notice of such Report and Recommendation was improper and resulted in a legally inconsistent ruling. By taking judicial notice, the Referee has shifted the burden of proof in the attorney disciplinary proceeding from Complainant to Respondent. Pursuant to the long established case law of this Court and due process requirements, this Court should require The Florida Bar to present its case against Respondent, and meet its burden of proof by clear and convincing evidence. The Bar failed to meet this burden of proof at the final hearing on this matter.

ISSUE III

WHETHER THE REFEREE'S RECOMMENDED SANCTION IS EXCESSIVE AND IMPROPER?

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 recommended discipline of 90 day suspension lacks a reasonable basis, and should not be followed.

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.

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 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.

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 ___ day of August 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,

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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