SUPREME COURT OF FLORIDA

CASE NO.: SC08-1786
Lower Tribunal Case No.: 2008-10,621(20D)

THE FLORIDA BAR,

Complainant,

vs.

MICHELLE BERTHIAUME,

Respondent.
_____/

RESPONDENT, MICHELLE BERTHIAUME'S ANSWER BRIEF AND BRIEF ON CROSS-PETITION

G. Michael Keenan, Esquire
Florida Bar No. 334839
G. MICHAEL KEENAN, P.A.
Attorneys for Respondent
1532 Old Okeechobee Road
Suite 103
West Palm Beach, Florida 33409
(561) 684-9601 Telephone
(561) 684-9602 Telefax

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

TABLE OF CITATIONS (contd.)

TABLE OF CITATIONS (contd.)

RULES OF DISCIPLINE

FLORIDA STANDARDS FOR IMPOSING SANCTIONS

TABLE OF CITATIONS (contd.)

SYMBOLS AND REFERENCES

In this Brief, the Complainant, THE FLORIDA BAR, will be referred to as "The Florida Bar" or "the Bar." The Respondent, MICHELE ERIN BERTHIAUME, will be referred to as "Respondent."

"TR" will refer to the transcript of the final hearing before the Referee in Supreme court Case No. SC08-1786 held on April 14, April 15, May 22 and July 9, 2009. "SH(March 19, 2010)" will refer to the transcript of the Sanctions Hearing held on March 19, 2010, and "SH(May 19, 2010)" will refer to the continued Sanctions Hearing held on May 19, 2010. "GC(April 24, 2008)" will refer to the Second Grievance Committee. "TFB Exh." will refer to exhibits presented by THE FLORIDA BAR and "R Exh." will refer to exhibits presented by Respondent at the final hearing before the Referee. The Final Report of Referee dated July 1, 2010 will be referred to as "RR."

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar,

"Standard" or :Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF FACTS AND THE CASE

The Florida Bar's Statement of the Facts and of the Case is incomplete and in one particular incident, grossly inaccurate. As a result, Respondent feels that it is necessary to offer a thorough recitation of the facts giving rise to this matter.

Respondent, who is fifty-five (55) years old, became a member of The Florida Bar on April 13, 2000. (RR, p.5). From the beginning of her legal career, Respondent has focused her career on providing legal services to those who could not otherwise receive them due to lack of funds (SH p.96, l.1 through p.98, l.14) and has championed unpopular positions. (TR p.371, l.18 through p.572, l.10) As Respondent's resume recites, "To serve the community is the greatest service an individual can aspire." (R.Exh.2). Since 2002, Respondent has dedicated herself to providing countless hours of work to the impoverished through the Florida Rural Legal Services Community Corporation. (SH, p.96, l.1 through p.98, l.14).

Much of what lead to Respondent finding herself before this Court emanated from her lack of experience both in the area of civil litigation and the private practice of law. (RR,p.5; R.Exh.2; TR,p.568, l.1 through p.569, l.13). After being admitted to The Florida Bar in April of 2000, Respondent

handled criminal cases in the office of the Public Defender through 2001.[1] (R.Exh.2) In 2001, Respondent commenced private practice handling predominantly criminal cases and did so through September of 2004 when Respondent improvidently mailed a letter to Pelican National Bank seeking documents of a client who had paid for legal fees with a check that was not honored by Pelican National Bank. (TR, p.568, l.1 through p.569, l.13).

Prior to September of 2004, Respondent had represented a client by the name of George Furlan and his companies in various legal matters. (TR, p.577, l.14 through p.578, l.1). As many attorneys experience, Mr. Furlan became delinquent in his financial obligations to Respondent for work she had performed for him. (TR, p.58, ll.2-3). In June of 2004, Mr. Furlan gave respondent four (4) checks for legal services performed and costs advanced by Respondent. (TFB Exh. 60; R.Exh. 54).

When Respondent deposited the checks, they were not honored by Pelican National Bank. To assist Mr. Furlan who was a customer of the bank and known to its Vice President, June Kossow, Pelican National Bank returned the check to Respondent stamped "Return to Maker" instead of "Non-sufficient Funds." (TR, p.181, l.20 through p.183, l.22; TR, p.24,

[1] Even before being admitted to the practice of law in Florida, Respondent was involved in the area of criminal law. Respondent worked in the office of the Public Defender in Rhode Island from 1998 through 1999. (R.Exh.2).

ll.11-17). It was this act by Pelican National Bank to cause the State Attorney's Office in Lee County not to prosecute worthless check charges against Mr. Furlan. (TFB Exh.9; TR, p.589, ll.11-23).

Respondent's conduct after receiving Mr. Furlan's checks from Pelican National Bank stamped "Refer to Maker" demonstrates her intent to follow proper procedures in pursuing Mr. Furlan for payment and that the mailing of the offending letter to Pelican National Bank was a mistake for which Respondent accepts full responsibility. Upon receiving the dishonored checks from Pelican National Bank, Respondent communicated with Mr. Furlan and offered him an opportunity to make good on the checks. (TR, p.586, l.9 through, p.587, l.5). When this proved unsuccessful, Respondent mailed Mr. Furlan notices as required by Florida Statute that his checks were returned and demanding payment within thirty (30) days. (TFB Exh. 6A-6D). Respondent then forwarded the matter to the State Attorney's Office so that worthless check charges could be prosecuted against Mr. Furlan as provided under Florida law. (TFB Exh. 8, 8A; TR, p.587, ll.18-22). Unfortunately, the State Attorney's Office advised Respondent that it could not pursue the worthless check charges because Pelican National Bank had returned Mr. Furlan's checks stamped "Return to Maker" as opposed to "Non-sufficient Funds." (TFB Exh.9). The State Attorney's Office further

advised Respondent that if she could obtain confirmation that insufficient funds existed in Mr. Furlan's account on the date the checks were presented for payment, it would pursue Respondent's complaint against her client. (TR, p.591, l.24 through p.592, l.7).

Consistent with the instructions received from the State Attorney's Office, Respondent then instructed her secretary to prepare a request to obtain records from Pelican National Bank establishing that Mr. Furlan had insufficient funds in his business accounts to cover the checks written to Respondent. (TR, p.594, ll.2-12). Respondent's secretary prepared a form subpoena that Respondent knew was improper because there was no action filed against Mr. Furlan. (TR, p.595, l.1 through p.596, l.20). Respondent instructed her secretary to change the document and send a letter to Pelican National Bank requesting Mr. Furlan's records. (TR, p.596, ll.12-18; TR, p.597, ll.9-24). Consistent with Respondent's instruction, Respondent's secretary placed the request for documents on Respondent's letterhead and mailed it to Pelican National Bank with the offending form subpoena language contained in the letter.

In its Statement of the Facts, The Florida Bar recites its mistaken belief that Respondent's statement of facts regarding the mailing of the offending document changed from GC (April 24, 2008) hearing in 2008 to

the final hearing before the Referee in 2010. The Florida Bar recites that Respondent did not testify during GC(April 24, 2008) that her secretary had prepared the offending document while doing so during the final hearing. However, as demonstrated later in this Brief under Argument II, Respondent's GC(April 24, 2008) and final hearing testimony were consistent on this point.

Respondent clearly made a mistake in mailing the offending document containing the form subpoena language to Pelican National Bank. (TR, p.609, ll.8-21). Respondent had no dishonest, fraudulent or deceitful intent. Respondent had no intent to mislead Pelican National Bank as was evidenced by the fact that the offending document was typed on Respondent's law firm's stationary, it did not have a case number, did not list any parties and did not state that it was issued by the Court. (TFB Exh.1).

After receiving the request for Mr. Furlan's records from Respondent, Pelican National Bank and its attorneys did not believe that the document was a valid subpoena and did not provide documents in response to it. Ms. Kossow, the bank's Vice President, testified that when she received the purported subpoena, she determined it was not a valid. (TR, p.244, ll. 20-28). Mr. Witt and Mr. Kushner, the bank's attorneys, testified that they

immediately knew that the document was not a valid subpoena. (TR, p.292, l.22 through p.295, l.1; TR, p.144, l.15 through p.146, l.19). Pelican National Bank and its attorneys' reaction upon receiving the offending document was consistent with the fact that the document sent by Respondent was mailed mistakenly and that Respondent did not mail it with the intent of having third parties rely upon it as legal process.

After receiving the document and immediately recognizing that it was not a valid subpoena, Michael Witt, the bank's attorney, filed a Complaint with The Florida Bar. The Complaint was referred to the Grievance Committee for investigation and Respondent was interviewed by Charles Green, Clerk of the Circuit Court for Lee County. After being interviewed by Mr. Green and after the Grievance Committee conducted its investigation, the Grievance Committee found that there was no probable cause that Respondent had violated the Rules Regulating The Florida Bar and issued Respondent a Letter of Advice which should have ended the matter. (TR, p.623, l.10 through p.627, l.9; R.Exh.4). However, it did not.

Instead, the reviewing member of the Grievance Committee, Christopher Lombardo, refused to approve the recommendation of the Grievance Committee. Mr. Lombardo had a conflict of interest and bias against Respondent. Mr. Lombardo was representing the other side of a

divorce case where Respondent had represented the other party and filed a charging lien. Despite this real and actual conflict of interest, Mr. Lombardo did not recuse himself as required by Rule 3-3.4(c)(3) and (4). Mr. Lombardo stated to Respondent that unless she removed the charging lien she had filed in the case, he would not approve the recommendation of the Grievance Committee. Respondent did not remove the charging lien and Mr. Lombardo, true to his word, refused to approve the finding of no probable cause. (Respondent's Motion to Dismiss dated Nov.24, 2008).

As a result, The Florida Bar served its first Complaint against Respondent on February 13, 2007, in Case No. SC07-274. In response thereto, Respondent sought dismissal based upon the improper conduct of The Florida Bar. At the hearing on Respondent's Motion to Dismiss, The Florida Bar agreed to dismiss the case against Respondent which should have caused the previous finding of no probable cause to be reinstated and resolve this matter. Instead, The Florida Bar pursued a second investigation of Respondent in 2008.

In addition to the issue of the document sent by Respondent to Pelican National Bank, The Florida Bar investigated a new allegation that Respondent, after sending the document to Pelican National Bank, spoke with a bank officer, June Kossow, and demanded that Pelican National Bank

honor the purported subpoena. The matter was referred to GC(April 24, 2008). During the course of the proceedings of GC(April 24, 2008), it became apparent that members of the Grievance Committee, including Andrew Epstein, had exhibited a prejudice and bias against Respondent so as to merit recusal. This biased and prejudiced manner manifested itself through Mr. Epstein improperly asking a witness, Respondent's Office Manager, if she was involved in a romantic relationship with Respondent. (Respondent's Verified Motion to Disqualify Grievance Committee 20A of the Twentieth Judicial Circuit and Respondent's Motion to Transfer Complaint to Grievance Committee of the Twelfth Judicial Circuit dated June 12, 2008). Respondent's request to recuse Mr. Epstein and the Grievance Committee was denied. The Grievance Committee issued a finding of probable cause.

Based upon the probable cause recommendation of the second Grievance Committee, The Florida Bar filed a second Complaint against Respondent citing that she had violated Rule 4-4.1(in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 4-4.4(in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person and knowingly use methods of

obtaining evidence that violate the legal rights of such third person); Rule 4-8.4(c)(a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and rule 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). Respondent moved to dismiss the second Complaint based upon the failure of the GC(April 24, 2008) to recuse Mr. Epstein and itself due to the prejudice exhibited at the Grievance Committee hearing. Respondent further sought dismissal based upon the misconduct of The Florida Bar in connection with the original proceeding filed against her. The Referee denied Respondent's Motion. Respondent filed an Answer and Affirmative Defenses raising as a defense The Florida Bar's misconduct and its failure to follow its own Rules.

Respondent's Motion to Amend her Affirmative Defenses to assert as an additional defense the fact that Andrew Epstein, a member of GC(April 24, 2008) had failed to disclose that he represented a client in litigation adverse to Respondent's Office Manager who testified for the Respondent before GC(April 24, 2008). (Respondent's Motion to Amend Affirmative Defenses dated Mar.10, 2009). The Referee denied Respondent's Motion to Amend her Affirmative Defenses. (Order dated Apr. 2, 2009). Respondent then sought to depose Charles Green, Henry Paul, and Andrew Epstein to

elicit testimony concerning the defense raised in Respondent's Affirmative Defenses concerning The Florida Bar's initial finding of no probable cause and the Bar's misconduct in both the initial proceeding and second proceeding. The Referee refused to permit Respondent to conduct discovery on these issues and prevented Respondent from calling these individuals as witnesses at trial. (Order dated Apr. 2, 2009).

Prior to the final hearing commencing in this case, The Florida Bar recognizing that Respondent's conduct in sending the disputed request for documents was a mistake, agreed to abandon its claim that Respondent's conduct involved fraud. (Order on Respondent's Motion to Dismiss dated March 9, 2009). Thereafter, the Referee held a final hearing and sanctions hearing and found Respondent had violated Rule 4-8.4(d)(engaging in conduct that was prejudicial to the administration of justice). Finding that The Florida Bar failed to meets its burden of proof on the other issues, the Referee found that Respondent did not violate Rule 4-4.1; rule 4-4.4; and Rule 4-8.4(c). After considering the significant mitigation offered by Respondent which mitigation included, in large part, her extraordinary work in providing legal services to the poorest of the poor in Lee County through the Florida Rural Legal Services, the Referee recommended that Respondent be suspended for a period of ten (10) days.

Respondent submits that the Referee erred in refusing to permit Respondent to conduct discovery and pursue her Affirmative Defenses regarding the misconduct of The Florida Bar and its failure to follow its own Rules. Respondent further maintains that the Referee was correct in finding a single Rule violation of Rule 4-8.4(d) and that the evidence does not support a finding that Respondent violated Rule 4-8.4(c), Respondent further maintains that the Referee erred in failing to find that a public reprimand is the appropriate sanction in this matter.

SUMMARY OF ARGUMENT

The Referee erred in failing to permit Respondent to conduct discovery and to assert as a defense to The Florida Bar's Complaint, The Florida Bar's violation of its own Rules. The Referee was correct in finding that Respondent's conduct did not violate Rule 4-8.4(c). A suspension of ninety-one (91) days is not supported by either Rule or case law. The appropriate sanction in this case is a public reprimand.

ARGUMENT

I. THE REFEREE ERRED IN PROHIBITING RESPONDENT FROM DEFENDING AGAINST THE COMPLAINT FILED AGAINST HER BY TAKING DISCOVERY AND INTRODUCING EVIDENCE OF THE FLORIDA BAR'S FAILURE TO FOLLOW ITS RULES.

The Supreme Court has long recognized that The Florida Bar is required to follow its own Rules in prosecuting disciplinary matters and that The Florida Bar's failure to do so will result in dismissal. The Florida Bar v. Rubin, 362 So.2d 12, 15 (Fla. 1978). As this Court stated in Rubin;

> The Bar has consistently demanded that attorneys turn 'square corners' in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so.

The Florida Bar v. Rubin, supra, 362 So.2d at 16.

In the instant case, the multiple prosecutions of Respondent by The Florida Bar were the direct and proximate result of the Bar's failure to follow its own Rules and the Referee's refusal to permit Respondent to conduct discovery and consider this defense was error. There is no doubt that the original charges against Respondent resulted in a finding of no probable cause. There is no doubt that the reviewing member of the

Grievance Committee finding no probable cause had a conflict of interest with Respondent by virtue of his position representing a party in a domestic relations matter opposite to Respondent. This misconduct resulted in The Florida Bar dismissing its original Complaint against Respondent. At this point, The Florida Bar's finding of no probable cause was determinative as to Respondent's conduct.

When The Florida Bar re-filed its Complaint against Respondent, Respondent attempted to assert and prove as Affirmative Defenses The Florida Bar's failure to follow its own Rules in the disciplinary process. Respondent attempted to assert and prove that The Florida Bar violated its Rules when the reviewing member of the initial Grievance Committee, Mr. Lombardo, failed to recuse himself from considering Respondent's case because of his representation of a party in a case opposite to Respondent. Respondent also attempted to assert and prove that the finding of probable cause by GC(April 24, 2008) was invalid because of conflicts of interest possessed by Andrew Epstein, a member of the Committee. Respondent attempted to take the deposition of Mr. Charles Green, Clerk of the Court in Lee County, who originally investigated Respondent's conduct, Mr. Epstein and Mr. Paul to prove her defenses but was prohibited from doing so. Respondent intended to call Mr. Green, Mr. Epstein and Mr. Paul as

witnesses at the final hearing to prove her defense that the Bar violated its Rules, but was prohibited from doing so. Respondent's inability to pursue and prove her defenses against the Bar's Complaint resulted in substantial and incurable prejudice.

Bar disciplinary proceedings are not civil or criminal in nature but *quasi* judicial. Therefore, the Rules of Evidence are not binding on the Referee. The Florida Bar v. Tobkin, 944 So.2d 219, 224 (Fla. 2006). A Referee's actions regarding the admissibility of evidence in disciplinary cases are viewed under an abuse of discretion standard. The Florida Bar v. Shankman, 41 So.3d 166 (Fla. 2010). This Court's holding in Rubin unequivocally supports Respondent's right to raise and prove as a defense The Florida Bar's failure to follow its own Rules and the Referee's failure to permit Respondent to do so was error.

II. THE REFEREE'S FINDING THAT RESPONDENT DID NOT VIOLATE RULE 4-8.4(c) IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE. MOREOVER, THE FLORIDA BAR ABANDONED ITS CLAIM THAT RESPONDENT ACTED WITH FRAUDULENT INTENT.

The Florida Bar seeks to overturn the Referee's finding that Respondent did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation and, thus, did not violate Rule 4-8.4(c). In so doing The Florida Bar has the burden of showing that the Referee's findings are clearly erroneous and not supported by the record. The Florida Bar v. Neu, 597 So.2d 266, 268 (Fla. 1992). In the instant case, substantive, competent evidence supports the Referee's finding that Respondent's conduct did not involve dishonesty, misrepresentation, deceit or fraud. In this case, The Florida Bar failed to prove by clear and convincing evidence that Respondent acted with the intent necessary to find a violation of Rule 4-8.4(c). As Judge Goldman ruled:

> The Court: …. So what the Court has found is a violation of Rule 4-8.4(d).
>
> Mr. Paul: - and not 4-4.4 and –
>
> The Court: And not 4-4.1.
>
> Mr. Paul: How about – and not 4-4.4 or 4-8.4(c).

> The Court: That's correct. I made only one finding the others are not proven and do not meet the burden of proof.

(TR, p.931, ll.5-8).

The record supports the Referee's finding that Respondent did not violate Rule 4-8.4(c). Initially, The Florida Bar, itself, recognized that Respondent's conduct did not violate Rule 4-8.4(c) when it voluntarily abandoned its claim that Respondent acted fraudulently. The Florida Bar's decision to abandon its claim that Respondent acted fraudulently in sending the offending document and the Referee's refusal to find a violation of Rule 4-8.4(c) is supported by the following facts:

a. that Respondent was inexperienced in the area of private practice and handling civil matters;

b. the confusion caused by Pelican National Bank stamping a check "Return to Maker" as opposed to "Non-sufficient Funds" which prevented the State Attorney's Office from pursuing worthless check charges;

c. Respondent's failure to review the offending document before it was mailed;

d. the offending document was written on Respondent's law firm's stationary did not recite that it was issued from a court, did not contain a case number, and did not list the names of parties;

e. the offending document was mailed and was not served by a process server;

f. Respondent initially referred the matter to the State Attorney's office for prosecution;

g. the initial Grievance Committee found no probable cause that Respondent's conduct violated the Rules; and

h. Respondent had instructed her secretary to send out the request for documents not as a subpoena but on her letterhead as a demand letter.

These facts support the Referee's finding that Respondent did not violate Rule 4-8.4(c).

As significantly, The Florida Bar, because it had acknowledged that Respondent's conduct was not fraudulent, presented no evidence to support its claim that Respondent's conduct involved fraud, deceit, misrepresentation or dishonesty. In fact, the Referee specifically refused to find dishonesty as an aggravating factor as requested by The Florida Bar.

The Florida Bar's reliance upon The Florida Bar v. Varner, 780 So.2d 1 (Fla. 2010), provides no support for its position that the Referee erred in finding that Respondent did not violate Rule 4-8.4(c). Unlike this case, Varner involved an attorney who, after making a mistake by representing to another attorney that a case had been filed when it was not, intentionally created a notice of voluntary dismissal which he sent to opposing counsel to cover up his mistake and to induce payment of settlement proceeds. Varner was a situation where a lawyer covered up a mistake and it was this lie that formed the basis for the finding that the attorney engaged in deceptive, fraudulent and dishonest conduct resulting in a finding of multiple rule violations. There is no evidence in this case that Respondent lied to cover up the mistake she had made in sending the offending request to Pelican National Bank.

Similarly, the holdings in The Florida Bar v. Riggs, 944 So.2d 167 (Fla. 2006) and The Florida Bar v. Shankman, 41 So.3d 166 (Fla. 2010), do not support The Florida Bar's claim that Respondent violated Rule 4-8.4(c). In Riggs, an attorney was unable to explain the absence of $118,000.00 from his trust account which was to be used to satisfy a client's mortgage. A review of Riggs' trust account revealed serious and extensive violations of trust accounting rules, including shortages, the payment of personal

expenses with trust account monies and the commingling of personal funds with trust monies. Unable to explain the loss of the $118,000.00 in trust account monies, Riggs blamed the trust account on the sloppiness of a secretary. The facts in Riggs demonstrated conduct where Riggs was knowingly and intentionally stealing from his trust account thus, supported a finding that he acted dishonestly, fraudulently, and deceitfully. In the instant case, Respondent did not engage in any such conduct and, in fact, there is an absence of evidence in the record of Respondent improperly receiving any monies or property from third parties.

In Shankman, an attorney lied to his client to increase the amount of his fee and covered up his scheme by telling the client not to talk with more experienced counsel with whom he had associated and fired. Because Shankman had lied to his client on numerous occasions to increase his fees, the court found that Shankman had violated Rule 4-8.4(c). Again, Respondent did not engage in any conduct in which she lied or attempted to cover up her mistake after sending the offending document.

After abandoning its claim that Respondent acted fraudulently, The Florida Bar, during the final hearing, for the first time created a myth that Respondent's testimony at the final hearing was inconsistent with the testimony before the GC(April 24, 2008). The Florida Bar maintains that

Respondent's testimony at the final hearing in which she stated that she instructed her secretary to change the document originally drafted as a subpoena to a demand letter was different than Respondent's testimony before GC(April 24, 2008). However, a simple comparison of Respondent's GC(April 24, 2008) testimony demonstrates that her final hearing testimony was, indeed, consistent on this point. At GC(April 24, 2008), at p.16, l.17 through p.17, l.11, Respondent testified just as she did in the final hearing by stating:

> Originally we had written this up as an actual subpoena and it was supposed to be sent – it was all documented in the court name it was pretty much under the Twentieth Judicial Circuit.
>
> And then my assistant said to me, what's the case number. And I said, wait a minute. There is no case open. I cannot send this document like that because it might indicate to them that it's coming from the court, not from an attorney.
>
> So I said, put my letterhead on this document, and basically – we also eliminated some of the other language in there. For example, some of them would have – on the subpoenas they have State of Florida, County of Lee. We took that off there as well, and the remaining part of it basically was supposed to look like a letter of demand.
>
> I never intended for it to go out in a manner that would be a legal process document. That's why it has my letterhead on it.

At trial, Respondent testified consistently that her secretary prepared the document as a subpoena, Respondent changed it so that it would go out on her letterhead as a demand for documents, and it was mistakenly sent out in its offending form. See, TR 594-598. Most telling, however, is that the Referee made no finding that Respondent testified differently at the final hearing than at the Grievance Committee. The Referee only noted that any changes in Respondent's explanation as to how and why the subpoena was sent was attributable to the length of the case. Certainly, this conduct is insufficient to support a Rule 4-8.4(c) violation.

This Court has long recognized that there is a difference between conduct emanating from an honest mistake and conduct where an attorney is involved in stealing, lying, cheating or other morally reprehensible conduct. See, The Florida Bar v. Weiss, 586 So.2d 1015 (Fla. 1991); The Florida Bar v. Neu, 587 So.2d 266 (Fla. 1992). To eliminate this distinction as The Florida Bar argues would be to make all conduct found to violate the Rules automatically a violation of rule 4-8.4(c) without regard to the facts, circumstances or character of the conduct. Such an interpretation is not provided for in the Rules nor has this Court ever enunciated such a Rule. In the instant case, Respondent's conduct was borne out of inexperience and neglect, not dishonesty, fraud or deceit, which The Florida Bar recognized.

For these reasons, the Referee's finding that Respondent did not violate Rule 4-8.4(c) must be sustained.

III. A PUBLIC REPRIMAND IS THE APPROPRIATE SANCTION IN THIS CASE. THERE IS NO BASIS IN THE STANDARDS OR CASE LAW FOR A NINETY-ONE (91) DAY SUSPENSION.

The Referee's recommendation of a ten (10) day suspension for violation of Rule 4-8.4(d) was erroneous in light of the substantial mitigation found to exist by the Referee and the absence of any aggravating factors.[2] In her report, the Referee found the following mitigating factors applied to this case:

A. Respondent's absence of a prior disciplinary record;

B. Respondent's lack of experience in civil matters;

C. Respondent's substantial and extraordinary efforts in providing *pro bono* services to the neediest residents through the Florida Rural Legal Services program which commenced long before the conduct complained of in this case; and

D. Interim rehabilitation, including voluntarily taking two (2) LOMAS classes and voluntarily enrolling The Florida Bar's Professional Workshop and Ethics School.

---

[2] The Florida Bar disingenuously and erroneously argues that comments made by the Referee in explaining her decision to suspend Respondent as opposed to ordering a public reprimand are "aggravating factors." However, a review of the Referee's report confirms that she clearly found that no aggravating factors had been proven by The Florida Bar.

These substantial mitigating factors when compared with the existing case law demonstrate that a public reprimand is the appropriate sanction for Respondent's conduct.

In the instant case, the evidence clearly established that Respondent was negligent in failing to review the offending document requesting records from Pelican National Bank to assure that the offending language was removed. Respondent's testimony was clear that it was never her intent to have the document sent with the offending subpoena contained therein. As Respondent testified, and her testimony is uncontroverted on this point, Respondent saw the document with the Court name and case style, instructed that the document be changed to make the document a letter requesting information from Pelican National Bank, and that she was negligent in failing to properly read the document before it was mailed. Respondent has never blamed her secretary or anyone else for the offending document being sent and has accepted full responsibility for her conduct. As a result, Standards 6.23 and 7.2 which provide for a public reprimand when a lawyer negligently fails to comply with a rule or causes injury or potential injury to a client or other party or negligently engages in conduct in violation of the duty owed as a professional and causes injury or potential injury to a client, the public or legal system, are applicable to this case.

In its Initial Brief, The Florida Bar erroneously argues that the offending document invoked the Court's power of contempt and violated the Florida Rules of Civil Procedure. Again, the evidence presented in the record in this case is undisputed in that the offending document was not a subpoena, was not issued from a court, was not served in accordance with the Florida Rules of Civil Procedure and, perhaps most importantly, was never viewed by Pelican National Bank, its Vice President, June Kossow, or its attorneys as a valid subpoena. Contrary to the argument of The Florida Bar, there was no competent evidence that Respondent had put the bank and its employees at risk of violating federal or state law if they had produced the requested documents. Respondent's client, George Furlan, did not testify that any privacy rights would have been violated if his banking records were produced. The Florida Bar's arguments on these issues are unsupported by the record and designed merely to focus attention away from the substantial mitigation found to exist by the Referee.

The Florida Bar attempts to justify an increased sanction by using the Referee's explanations as to why she refused to find certain mitigating factors. Illustratively, The Florida Bar points that the Referee's finding that Respondent, while seeking to collect a just debt, utilized an improper self-help procedure in refusing to find the mitigating factor of remorse. This is

not an aggravating factor under the Standards. Similarly, the Referee pointed to a confrontational telephone call that was made to Respondent's office and the fact that Respondent did not take remedial action after she became aware of it. Again, this is not an aggravating factor under the Standards. It is improper for The Florida Bar to attempt to utilize the Referee's refusal to find a mitigating factor as a basis for seeking an increase in the discipline recommended in this case.

Moreover, a long history of decisions from this Court supports the imposition of a public reprimand in this case.

In The Florida Bar v. Buckle, 771 So.2d 1131, (Fla. 2000), the Florida Supreme Court ordered a public reprimand for an attorney who was found to have violated Rule 4-8.4(d) – conduct prejudicial to the administration of justice – based upon the lawyer's communications with the victim of a crime to intimidate and threaten him to abandon his claim against the attorney's client.

In The Florida Bar v. Martocci, 791 So.2d 1074 (Fla. 2001), the Florida Supreme Court approved a public reprimand for conduct prejudicial to the administration of justice for an attorney who physically threatened the father of an opposing party in Court.

In The Florida Bar v. Carson, 737 So.2d 1069 (Fla. 1999), the Florida Supreme Court approved a public reprimand for an attorney who improperly accepted a referral fee.

In The Florida Bar v. Cocalis, 959 So.2d 163 (Fla. 2007), the Florida Supreme Court ordered a public reprimand for a defense attorney who communicated with the Plaintiff's treating physician and failed to advise Plaintiff that he had received medical records prior to trial.

In The Florida Bar v. Day, 520 So.2d 581 (Fla. 1988), the Florida Supreme Court ordered a public reprimand for an attorney who notarized numerous affidavits without requiring the affiants to personally appear. In this instance, the Florida Supreme Court ordered a public reprimand notwithstanding the fact that respondent had been found guilty of conduct involving dishonesty, fraud, deception, and misrepresentation along with conduct adversely affecting his fitness to practice law and conduct prejudicial to the administration of justice. In the instant case, Respondent was found to only have engaged in conduct prejudicial to the administration of justice.

In The Florida Bar v. Orr, 504 So.2d 753 (Fla. 1987), the Florida Supreme Court ordered again a public reprimand for an attorney found guilty of multiple rule violations arising from his representation of criminal

defendants including conduct reflecting adversely on his fitness to practice law, knowingly advancing a defense that was not supported by the law or facts, neglect of a legal matter and conduct prejudicial to the administration of justice. The Florida Supreme Court pronounced the standard for imposing a public reprimand and it held that a public reprimand is appropriate discipline for isolated instances of neglect or lapse in judgment. In the instant case, Respondent's conduct was indeed isolated and constituted a lapse of judgment.

In The Florida Bar v. McKenzie, 432 So.2d 566 (Fla. 1983), the Florida Supreme Court again ordered a public reprimand for an attorney found guilty of three (3) rule violations: neglecting a legal matter, failing to return funds to a client, and engaging in conduct prejudicial to the administration of justice for obtaining a Default Judgment despite knowing the other party was represented by counsel.

In The Florida Bar v. Seidel, 510 So.2d 871 (Fla. 1987), the Florida Supreme Court ordered a public reprimand for an attorney found guilty of driving while intoxicated resulting in three (3) rule violations involving conduct adversely reflecting on his fitness to practice law, committing acts contrary to honesty, justice and good morals and conduct prejudicial to the

administration of justice. Again, Respondent in this case was found to have one (1) rule violation.

In The Florida Bar v. Von Zamft, 814 So.2d 38 (Fla. 2002), the Florida Supreme Court ordered public reprimand for a state attorney who engaged in ex parte communication with a Judge to obtain a continuance in violation of Rule 4-8.4(d) – conduct prejudicial to the administration of justice.

In The Florida Bar v. Feinberg, 760 So.2d 933 (Fla. 2000), a state attorney was found guilty of multiple rule violations – Rule 4-4.1(a); Rule 4-4.2; Rule 4-8.4(a); Rule 4-8.4(c) – conduct involving fraud, deceit and dishonesty; and Rule 4-8.4(d), received a public reprimand for communicating with a defendant despite the defendant being represented by counsel and lying about the communication.

In The Florida Bar v. McLawhorn, 535 So.2d 602 (Fla. 1988), a lawyer was publicly reprimanded for, among other things, misstating the true owner of certain real property in post dissolution proceedings.

In The Florida Bar v. Fatolitis, 546 So.2d 1054 (Fla. 1989), an attorney was publicly reprimanded for signing his wife's name as a witness to a Will where his wife was present at the signing but was physically unable to sign due to having burned her hand.

In The Florida Bar v. Anderson, 538 So.2d 582 (Fla. 1989), two (2) attorneys were disciplined for making factual misrepresentations in an Appellate Brief, with the less culpable attorney receiving a public reprimand and lead counsel being suspended for thirty (30) days.

In The Florida Bar v. Hagglund 372 So.2d 76 (Fla. 1979), a public reprimand was imposed where an attorney filed an affidavit that the attorney knew or should have known was false in a law suit against a former client and over a business in which the attorney was invested.

In The Florida Bar v. Sax, 530 So.2d 284 (Fla. 1988), an attorney was publicly reprimanded for submitting a notarized pleading containing a statement the attorney "knew or should have known" was not true.

In The Florida Bar v. Pearce, 356 So.2d 317 (Fla. 1978), an attorney publicly for participating in plans to have witnesses testify falsely.

In, The Florida Bar v. re: Brooks, 336 So.2d 359 (Fla. 1976), an attorney was publicly reprimanded for testifying falsely at an inquest.

The long history of disciplinary cases cited above, all of which involved more serious conduct and multiple rule violations not present in this action, make it clear that a public reprimand is the appropriate discipline to be imposed in this case. Certainly, none of these cases support a suspension of ninety-one (91) days as is sought by The Florida Bar.

The cases relied upon by The Florida Bar in support of its claim for an increased sanction of ninety-one (91) days are distinguishable from the instant case because they involve multiple rule violations and the added element that the attorney attempted to cover up his error or presented false testimony during the disciplinary proceedings. In The Florida Bar v. Varner, 780 So.2d 1 (Fla. 2001), an attorney was suspended for ninety (90) days for multiple rule violations, including violation of Rule 4-4.1(a) making a false statement of material fact; Rule 4-8.4(b) engaging in conduct reflecting adversely on the attorney's honesty, trustworthiness and fitness, and Rule 4-8.4(d) conduct prejudicial to the administration of justice, emanating from the attorney's preparation and filing of a false voluntary dismissal in a personal injury case that had not been filed to effect a settlement of his client's personal injury claim. In Varner, the Court ordered a ninety (90) day suspension based upon a factor that does not exist in this case. As the Court noted:

> We find the most troubling aspect of Morse present here: an error is made in the representation of a client, but instead of the error being admitted, an attorney develops a deception to cover up the error so it will not be detected.

The Florida Bar v. Varner, supra, 780 So.2d at 5-6.

As the Florida Supreme Court noted, the attorney's original error in representing that a personal injury suit had been filed when it had not was pardonable and correctable. So too, Respondent's error, in this case, was pardonable and correctable. Unlike the attorney in Varner, Respondent did not lie about or create a deceptive scheme to cover up her error. Thus, the Varner case is inapplicable.

Finally, The Florida Bar's reliance upon The Florida Bar v Steinberg, 977 So.2d 579 (Fla. 2008) is misplaced because Steinberg involved aggravating factual issues and multiple rule violations not present in this case. In Steinberg, a former assistant State Attorney knowingly created a subpoena in an actual criminal case to induce a telephone company to send him telephone records of this wife's paramour. Mr. Steinberg admitted he created the subpoena using a case number of an existing criminal case in an existing criminal division in St. John's County, Florida. Mr. Steinberg inserted the name of a fictitious defendant that he took from a television show he viewed, had the subpoena served on the telephone company in accordance with the Florida Rules of Criminal Procedure and obtained the telephone records. In suspending Mr. Steinberg for 91 days, the Referee found that Mr. Steinberg engaged in a criminal act and that Mr. Steinberg engaged in a series of calculated actions consistent with a history of

manipulative conduct. As a result, the Referee found that Mr. Steinberg violated multiple Bar rules: Rule 3-4.3 –committing acts unlawful and contrary to justice (Respondent was not charged with violating this rule); Rule 4-8.4(b)-committing a criminal act (Respondent was not charged with violating this rule); Rule 4-8.4(c)-engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (Respondent was found not to have violated this rule); and Rule 4-8.4(d)(conduct adverse to the administration of justice).

In the instant case, Respondent's conduct that supported a single rule violation was devoid of any intentional, calculating and manipulative behavior. Respondent did not create a scheme to have a subpoena issued containing a real case number in an existing case that she served in accordance with the Florida Rules of Civil Procedure. Instead, it was Respondent's intent that the offending document, after she initially reviewed it, changed to a letter of demand and sent to Pelican National Bank. In fact, the offending document was partially changed to eliminate the name of the court, case number and case style and was placed on Respondent's law firm's stationary. Respondent mistakenly failed to review the document before it was mailed and, for this, she is responsible. There is simply no

evidence of intentional, willful, calculating or manipulative conduct by Respondent.

This Court has long espoused the three (3) goals to be achieved in imposing discipline in Bar matters:

> First, the judgment must be fair to society both in terms of protecting the public from unethical conduct and at the same time not denying the services of a qualified lawyer as a result of the harshness in imposing penalty.
>
> Second, the judgment must be fair to the respondent being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation.
>
> Third, the judgment must be severe enough to deter others who might be prone or attempt to become involved in the like violations.

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

In accordance with the substantial mitigation the Referee found in this case, Respondent has made a compelling case for a public reprimand by the way she has conducted herself both before and after the conduct complained of in this matter which occurred in September of 2004. Most significantly, Respondent has dedicated her professional career to providing legal services to the poor since her admission to The Florida Bar. As Ethel Wells, Pro Bono Coordinator for Florida Rural Legal Services, testified in this matter:

Question: [Mr. Keenan] And you have had an opportunity as the pro bono coordinator, to refer her cases?

Answer: [Ms. Wells] I have been referring cases to her [Ms. Berthiaume] the eight years I have been working for Florida rural Legal Services.

Question: And that was all the way back to the beginning then?

Answer: Yes.

Question: All right. And the types of cases you refer to her, are those the types of cases you have described for us?

Answer: Yes, sir.

Question: And can you tell us, do you recall or can you tell us approximately how many cases, how involved Ms. Berthiaume is in the Florida Rural Legal Services?

Answer: Well, if my memory serves me correct right now, I think she has over six cases with me open right now.

Question: Right now? Is that typical for the number of cases that she would handled on a yearly basis or bi-annual basis over the eight years that you have been involved with her?

Answer: Yes, sir. It's very typical. She's one of the persons I have been honoring at my annual awards program since I have been working for Florida Rural Legal Services.

Question: So that would be an honor for her pro bono work from 2002 up through the present?

Answer: Yes, sir.

Question: And the cases that you assign to pro bono attorneys, do they – do sometimes attorneys not take cases?

Answer: Yes. I have been denied service by attorneys before; yes, sir.

Question: Has Ms Berthiaume ever denied or said she wouldn't handle a case that you have referred to her?

Answer: No, she does not. And I really appreciate that because our resources are very limited in terms of the demand that we get for our services.

Question: The work – do you get feedback as to whether work has been completed timely?

Answer: Yes. What I do is request an annual report from the attorneys as to the status of the case, and I do that in writing or I might do that by phone.

And I've never had a problem with her responding to that and getting me some feedback regarding the status of the case.

Question: Is Ms. Berthiaume a valuable asset to the Florida Rural Legal Services, Inc., in its mission to provide legal service for the poor?

> Answer: Very, very valuable to me in our program. I just wished I had more attorneys like her.
>
> Question: Do you have anything else you would like to say?
>
> Answer: I just wanted to say that she [Ms. Berthiaume] has been really helpful to the program and I have not had any problems with her. I know that I have overwhelmed her with cases, but she doesn't refuse so I'm going to try to let up a little bit.

SH, p.96, l.1 through SH p. 98, l.14. In acknowledging Respondent's contribution to providing legal services to the poor, the Referee stated:

> The Court: No, not in any way, but it is quite remarkable in this case, and I think that I owe it to make a comment for the record how substantial this is and how it is to the poorest of the poor and the lowest on the totem pole as far as legal services. To qualify for legal aid is below poverty level. To qualify for legal aid in this world in a five-County area, well that encompasses so many migrant families – I mean, it's just significant amount of poverty we are talking about, and I think that one is on one hand, one is on the other, does not excuse the other, but I think it has to be acknowledged for the value that it has, which is a very high value.
>
> And you [Mr. Paul] made the point itself, it was not done to mitigate the penalty. Thus was ongoing before this ever happened.

SH, p.240, l.20 through SH p.241, l.12.

While Respondent recognizes that her contribution to representing and helping the poorest of the poor does not excuse her actions in this case, it is nonetheless, the truest indicator of her character, her motives, and what is in her heart. As Ms. Wells testified, Respondent is representing approximately six (6) clients through Florida Rural Legal Services, Inc., who because of their poverty and social status would never otherwise receive legal representation. Suspending Respondent for her conduct in this matter, will deprive these clients of legal representations they would not otherwise receive thus, causing them to suffer by being unable to receive the services of an otherwise qualified attorney. As this Court has noted in the Official Comment to Rule 4-6.1:

> Pro bono legal service to the poor in an integral and particular part of a lawyer's pro bono public service responsibility. As our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of crucial importance. This is true for all people, be they rich, poor, or of moderate means. However, because the legal problems of the poor often involve areas of basic need, their inability to obtain legal services can have dire consequences. The base unmet legal needs of the poor in Florida have been recognized by the supreme Court of Florida and by several studies undertaken in Florida over the past two decades. The Supreme Court of Florida has further recognized the necessity of finding a solution to the problem of providing the poor greater access to legal service and the unique role

> of lawyers in our adversarial system of representing and defending persons against the actions and conduct of governmental entities, individuals and nongovernmental entities.

Rule 4-6.1, Official Comment, Rules of Professional Conduct. Respondent has demonstrated through her actions that she recognizes the critical importance of providing legal services to the poor and has acted to lessen this crisis.

Respondent's conduct since the date of the mailing of the offending document in September of 2004 also demonstrates that she recognizes the seriousness of her actions and the need to take action to assure that it will not occur again. Thus, Respondent objectively demonstrated her understanding by completing two (2) LOMAS programs and the Bar's Professional Workshop and Ethics School. Respondent was and is determined to take that action necessary to continue providing legal representation to the poor and to assure that the conduct which occurred in this instant remains isolated and not repeated.

For these reasons, a public reprimand will accomplish the three (3) purposes to be achieved in disciplinary matters. A public reprimand will be fair to society, both in terms of protecting the public from unethical conduct and at the same time will not deny the services of Respondent to those legal aid clients who have come to rely upon her. Second, a public reprimand will

be fair to Respondent being sufficient to punish her for her breach of ethics and, at the same time encourage reformation and rehabilitation. Third, the judgment is severe enough to deter others who might be prone or attempt to become involved in like violations. For these reasons, Respondent submits that a public reprimand is the appropriate sanction in this matter.

CONCLUSION

The record in this matter establishes that The Florida Bar repeatedly violated its own Rules in the prosecution of this matter meriting dismissal of this case. The record evidence and the Referee's factual findings further support the Referee's finding that Respondent was not guilty of violating Rule 4-8.4(c). The record and case law further support the conclusion that a public reprimand is the appropriate sanction to be assessed in this case.

Respectfully submitted,

G. MICHAEL KEENAN, P.A.
Attorneys for Respondent
1532 Old Okeechobee Road
Suite 103
West Palm Beach, Florida 33409
(561) 684-9601 Telephone
(561) 684-9602 Telefax

By: _____
G. Michael Keenan
Florida Bar No. 334839

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original and seven (7) copies of his Answer Brief have been provided by Federal Express Air Bill No. _____ to The Honorable Thomas D. Hall, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1900; and a true and correct copy by Federal Express to Henry Lee Paul, Esquire, The Florida Bar, 5521 West Spruce Street, Suite C-49, Tampa, Florida 33607-5958; and Kenneth Lawrence Marvin, Esquire, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this _____ day of October, 2010.

G. MICHAEL KEENAN, P.A.

By: _____
G. Michael Keenan

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

The undersigned counsel does hereby certify that this Answer Brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer generated briefs.

G. MICHAEL KEENAN, P.A.

By: _____
G. Michael Keenan