IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. SC11-1135

v. TFB File No. 2007-50,202(09C)

MAX RICARDO WHITNEY,

Respondent.

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REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

The Florida Bar filed its Complaint against respondent on or about June 8, 2011 and the parties commenced discovery. This matter was continued on several occasions, at the request of the Respondent, and the final hearing was held on June 12, 2012 through June 14, 2012. The respondent presented the testimony of character witnesses by telephone on June 20, 2012. All items properly filed including pleadings, recorded testimony, exhibits in evidence and the report of

referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - Frances R. Brown-Lewis and JoAnn Marie Stalcup

For the Respondent – Kevin P. Tynan

II. FINDINGS OF FACT

After considering all the pleadings and evidence, this Referee finds that, by clear and convincing evidence the Bar has proven the following facts:

A. Jurisdictional Statement: Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary:

1. At the outset of the representation at issue in this case, the respondent Maintained an office in Orange County, Florida, but later relocated to offices in Palm Beach and Broward Counties. He currently resides and practices in Broward County, Florida.

2. Prior to January 19, 2004, Leila de Oliveira entered this country. She is a native of Brazil and is not a citizen of this country.

3. On January 19, 2004, respondent, Ms. de Oliveira and Dr. Michael Hill met to discuss Ms. de Oliveira's immigration status and the intention of Ms. de Oliveira and Dr. Hill to be married.

4. On January 19, 2004, Dr. Hill, a neurosurgeon, and Ms. de Oliveira hired respondent to provide him and Ms. de Oliveira with immigration and legal advice.

5. During their initial meeting with respondent, they provided him with a letter Ms. de Oliveira had received from the U.S. Department of Justice banning her from the country for 20 years because of her previous illegal entries on two separate occasions into the States.

6. Ms. de Oliveira also advised respondent that she was in the United States illegally for the third time. Dr. Hill advised respondent that he intended to marry Ms. de Oliveira but they were not engaged at that time and he had known her only since November 2003 when she moved into his home with him in Lake County, Florida.

7. As a result of that meeting, a fee agreement was executed. The fee agreement provided for a flat fee of $ 15,000.00 plus a $5,000.00 deposit for costs. In the agreement Dr. Hill was referred to as the client. Ms. de Oliveira did not execute a fee contract with respondent. Respondent did not want any written proof

that Ms. de Oliveira was in the country. He, however, provided responses to discovery in these proceedings, that it was inadvertent that he left her name off the fee agreement.

8. During the course of the representation, Hill provided the following payments to the respondent; (a) Check number 006773 in the amount of $10,000.00 dated January 26, 2004 and (b) Check number 006824 in the amount of $9,365.00 dated February 6, 2004.

9. Respondent used cost money in the case for his personal benefit. Immediately upon receiving the costs monies herein, respondent deposited them in his personal account. He failed to provide an accounting for the costs expending in the representation despite Dr. Hill's request that he do so. Respondent during civil litigation provided documentation regarding some of his expenditures but was unable to account for $2,148.00 that he improperly kept and used because he needed money.

10. During the course of representing Dr. Hill and Ms. de Oliveira, respondent failed to keep his client(s) reasonably informed about the status of the immigration matter, and failed to explain sufficiently matters to permit the client(s) to make informed decisions regarding the representation.

Respondent knew or reasonably should have known that, Dr. Hill and Ms. de Oliveira would have to overcome the legal obstacles of her having twice been illegally in the States and either removed, deported or excluded. He knew that was a very difficult legal problem to overcome. The only chance the couple had in resolving the immigration matter was to marry in Brazil and to seek a waiver of the prior immigration ruling that barred Ms de Oliveira from the country for 20 years. The indication from the Respondent at the time he was retained was that he was going to research what could be done to resolve the dilemma with Ms de Oliveira remaining in this country. The evidence indicated clearly and convincingly that the Respondent failed to act diligently in his representation regarding the pursuit of a solution to the client's legal problem, and his duty owed to his client(s) to keep them informed of the progress of his representation.

12. The fee contract provided that respondent would represent Ms. de Oliveira "in regard to all matters pertaining to her immigration status...." The contract further provided that respondent's "obligations under this agreement terminate upon decision of the Office of the Attorney General granting or denying permission for Leila Mesquita de Oliveira to reenter the United States."

13. Dr. Hill paid respondent a total of $19,365.00 for fees and costs. He also paid directly for an airline ticket for respondent to travel to Brazil.

14. Respondent deposited the entire sum into his personal checking Account at Wachovia Bank. He did not deposit the funds intended for costs and Expenses into a trust account.

15. Respondent thereafter used Dr. Hill's funds, including the cost deposit, to pay his personal bills because respondent was experiencing financial problems at the time.

16. In September 2004, respondent took possession of Ms. de Oliveira's Brazilian passport, which she advised him was a falsified document, as well as other original Brazilian documents.

17. In fact, during the first consultation respondent knew, or reasonably should have known, that Ms. de Oliveira could not continue to remain in the United States, regardless of whether or not she married. This issue was resolved thru the civil malpractice action against the Respondent, and there was no clear and convincing evidence that Respondent's advice was not competent legal representation. I do find the failure of the Respondent in not seeking information from the Justice Department relative to Ms de Oliveira's prohibition from being in this country was a failure to diligently represent his client(s), notwithstanding the Respondent's position of being fearful that a records request would jeopardize Ms. de Oliveira.

18. In January/February 2004 and March 2004, respondent traveled to Brazil on two occasions to allegedly to research the requirements for Dr. Hill and Ms. de Oliveira to marry in Brazil. Respondent could have easily obtained this same information without leaving the country. Respondent also claimed that during one of his trips to Brazil he obtained information on rental properties for Ms. de Oliveira and English schools as well as to verify her Brazilian documents. The location Respondent indicated he found a residence for Ms. de Oliveira to reside was in an area other than where she lived in Brazil, which made absolutely no sense whatsoever, and gives rise to my belief that the Respondent's trip to Brazil was for a purpose other than for his client's case. Respondent was never able to provide any tangible documentation to support his position.

19. Beyond the two trips to Brazil, respondent took no further meaningful action with respect to Ms. de Oliveira's immigration matter.

20. After failing to receive any communication from respondent since hiring him in January 2004, Dr. Hill contacted respondent in late 2004 or early 2005 to inquire as to the status of Ms. de Oliveira's matter. Dr. Hill was becoming increasingly frustrated with the lack of any visible progress, and the failure of the Respondent of communicating any information relative to the task at hand.

21. Respondent advised Dr. Hill he had not initiated the process to have

Ms. de Oliveira remain in the United States or to re-enter legally so they could be married in the United States. Respondent advised Dr. Hill that Ms. de Oliveira needed to marry Dr. Hill in Brazil and that respondent had traveled to Brazil, twice, to research the matter, and to obtain the necessary documents. Respondent advised Dr. Hill he would proceed further only after Dr. Hill paid an additional fee of between $40,000.00 and $60,000.00.

22. Dr. Hill terminated respondent's services, demanded a full refund of his fees and costs, and the return of his and Ms. de Oliveira's original documents which were in respondent's possession.

23. Respondent advised Dr. Hill that he had earned the fees and costs paid. He did not make any refund. He failed to provide an accounting for the monies he had received and he failed to timely return to Ms. de Oliveira's original documents.

24. On or about February 16, 2005, Dr. Hill sent respondent information received from another law office. The email advised her that for fee and cost amount of $6,000.00 with a $2,000.00 deposit, the law firm would prepare a family petition to try and obtain a waiver of the existing ineligibility for her to re-enter the United States. The attorney further advised that Dr. Hill should not accompany Ms. de Oliveira her to Brazil and marry her in that country because it was possible

Dr. Hill could make "admissions" that could make Ms. de Oliveira's immigration matter significantly worse.

25. On February 22, 2005, Ms. de Oliveira executed a letter addressed to respondent demanding that he return her original documents in his possession. She and Dr. Hill had made previous request that the respondent had ignored. Respondent did not return her documents until after receiving this written request. He claimed he could not return her documents to Dr. Hill because of confidentiality concerns. The Respondent's email of February 7, 2005, makes no mention of such concerns. The delay in returning the documents to the client(s), although late, did not cause injury to the client(s) and I determine did not rise to the level of clear and convincing evidence that the Respondent violated an ethical obligation. The failure to account for funds advanced for costs was shown by clear and convincing evidence.

26. Ms. de Oliveira returned to Brazil in or around April 2005.

27. On or about July 18, 2005, Dr. Hill filed a civil suit against respondent in the circuit court of Orange County, Florida, alleging breach of contract, legal malpractice, and unjust enrichment. The case was styled *Hill v. Whitney,* Case No. 05-CA-5999. Dr. Hill was represented by Bonnie J. Jackson and respondent was *pro se.*

28. During the course of the civil litigation, respondent engaged in a course of conduct where he was uncooperative in coordinating the scheduling of hearings. For example, Ms. Jackson contacted respondent on November 30, 2005, to ascertain his availability for a hearing on her motions to compel discovery. Respondent refused to provide dates for his availability prior to February 2006. As a result, Ms. Jackson set a hearing for December 12, 2005, to address the matter with the presiding judge. Respondent served a motion to reschedule the hearing but did not appear on the hearing date, either in person or telephonically, nor did he send alternate counsel in his stead. Further, respondent did not produce documents pursuant to the request to produce nor did he provide supplemental answers to the interrogatories. The court ruled that respondent's unavailability for two months was unreasonable and compelled his compliance.

29. Respondent engaged in conduct during the litigation whereby he willfully failed to substantially comply with pretrial discovery and provided falsified documents in response to discovery requests.

30. Respondent failed to timely serve his response to the plaintiff's first request for production and, in his answer to the plaintiffs first set of interrogatories, respondent provided evasive answers.

31. As a result, Ms. Jackson served a motion to compel respondent's response to the request for production and more complete answers to the interrogatories. The court entered an order on December 12, 2005 granting the motion to compel, awarding fees and costs to the plaintiff, and directing respondent to produce responsive documents on or before December 19, 2005.

32. Respondent failed to comply with the court's December 12, 2005 order and failed to appear for his duly noticed deposition on December 21, 2005. At no time did respondent file a notice of unavailability for his deposition nor did he contact opposing counsel. As a result, Ms. Jackson served a second motion to compel compliance with discovery and a motion for sanctions.

33. At the hearing on January 18, 2006, on Ms. Jackson's second motion to compel, the court admonished respondent and advised him to fully cooperate with discovery. The court reserved ruling on Ms. Jackson's motion for sanctions.

34. Despite the court's warning, respondent remained uncooperative and continued to frustrate the plaintiff's discovery efforts.

35. Respondent did not produce the required documents sought by the request for production dated September 20, 2005, until January 4, 2006, despite the fact that the production originally was required by October 20, 2005, and the court had ordered respondent to comply with the production request on or before December 19, 2005. Further, respondent failed to produce all the requested documents, a fact that Ms. Jackson discovered during respondent's deposition on January 27, 2006, when respondent arrived with a client file containing documents that he had not previously produced pursuant to the request for production.

36. Respondent produced documents that were redacted without asserting an objection or otherwise indicating that a redaction had been made. For example, respondent produced to Ms. Jackson in response to the request for production a United States Citizenship and Immigration Services Checklist that contained no substantive information. During his deposition, while respondent was paging through his client file, Ms. Jackson inadvertently saw a document nearly identical To the one respondent had produced on January 4, 2006, but that contained substantive information. Respondent had no adequate explanation for his having redacted this document or for his failure to disclose the redaction to Ms. Jackson in

His response to the request for production or to identify any privilege that applied to the redaction.

37. During her pre suit investigation of Dr. Hill's case against respondent, respondent had repeatedly advised Ms. Jackson that he no longer had a client file for either Dr. Hill or Ms. de Oliveira or any documents pertaining to them because he had returned everything to Ms. de Oliveira. Yet respondent brought with him on January 27, 2006, a client file containing documents he previously assured Ms. Jackson he no longer had in his possession.

38. Respondent failed to produce his Visa credit card account statements and/or receipts that were responsive to the plaintiffs first set of interrogatories and That the court had ordered him to produce. Such Visa credit card account statements were requested in order to document the expenditures respondent made In Brazil that he allocated to Dr. Hill's cost deposit.

39. Respondent falsely answered plaintiff's request for production for documents reflecting promotions, advertising, announcements, websites, banners, flyers, brochures, business cards and the like in connection with the practice of law in any jurisdiction. Respondent merely responded that he did not advertise. In fact, respondent had a current website on the Internet. Ms. Jackson discovered the website through her own efforts.

40. Additionally, respondent testified at his deposition that the name of his law firm was Max R. Whitney, P. A. but failed to disclose that his Internet website used the name Max Whitney & Willie Jones Advogados Associados. The business card respondent provided to Dr. Hill and Ms. de Oliveira reflected another law firm name of Carvalhosa & Whitney Direito Internacional. The Florida Secretary of State, Division of Corporations, also indicated that respondent's law firm was registered with yet another name, The Law Offices of Max R. Whitney, P. A., and cited a different address than the one respondent testified to during his deposition. In fact, each law firm name respondent used reflected a different address including, but not limited to, Delray Beach, Lakeworth, Orlando, Palm Beach, and Wellington, Florida, and Sao Paulo, Brazil.

41. During his deposition on January 27, 2006, respondent testified that he opened his law office in or around 2001 when in fact the Secretary of State, Division of Corporations, indicated he opened his law office on April 24, 2003. I find no significance in this fact, as it is conceivable that the date Respondent opened his practice and the date he filed for his status as a professional association, could be two different dates.

42. Respondent testified during his January 27, 2006 deposition regarding

Various employers he worked for prior to engaging in the practice of law. When Ms. Jackson sought non-party subpoenas duces tecum from the former employers Respondent had identified during his deposition and that he listed on his web site, Respondent filed a motion to quash with the court.

43. In the motion to quash, respondent represented to the court that all the non-parties to whom the subpoenas were to be issued were former employers. After the court denied respondent's motion and the subpoenas were issued, one of Respondent's alleged former employers, Magnetic Inspection Laboratories, provided sworn testimony that it had never employed respondent. It was apparent that the subpoena issued to Magnetic Inspection Laboratories, Inc., was not the company the Respondent claimed that he had previously worked for, which was Magnetic Laboratories. I find no evidence that the Respondent misrepresented Magnetic Laboratories as a prior employer.

44. Respondent made misrepresentations to Ms. Jackson while testifying under oath during his deposition on January 27, 2006, in response to her questions intended to discover whether respondent was experiencing financial problems during the time period he was hired by Dr. Hill and Ms. de Oliveira. Respondent falsely testified that the only pending litigation in which he was involved was a suit against him by U. B. Vehicle Leasing, Inc. relating to a dispute as to the mileage of

A car. No evidence was received that rebutted the Respondent's explanation of the basis of the complaint.

45. During his January 27, 2006 deposition, respondent falsely testified that the mortgage on his home had not been in foreclosure. However, a mortgage foreclosure action had been filed against respondent on November 1, 2004, in Palm Beach County, Florida and said action was pending at the time of respondent's deposition. Respondent's failure to reveal the existence of this action was particularly relevant to Dr. Hill's lawsuit given respondent's sworn deposition testimony on January 27, 2006, that he deposited the fees and costs Dr. Hill paid him into his personal checking account and used the funds to pay, among other things, the mortgage on his home.

46. Respondent asserted frivolous objections to discovery requests on the basis of attorney-client privilege and withheld documents despite the fact the documents had originated from Dr. Hill and/or were public record. He also failed to provide a privilege log or otherwise comply with the discovery rules.

47. On March 31, 2006, Ms. Jackson served a motion for sanctions and motion for entry of default judgment against respondent due to his ongoing refusal to substantially comply with discovery.

48. The court entered an order on May 30, 2006 granting the motion for sanctions and entry of default striking respondent's defenses and awarding reasonable attorney's fees and costs to Dr. Hill, reserving ruling to determine the amount of such fees and costs. The court find that respondent had "willfully failed and refused to comply with previous order of this Court, failed and refused to participate in pretrial discovery and provided falsified documents" in the case.

49. On October 4, 2007, the court entered a final judgment in favor of Dr. Hill in the amount of $62,321.00 consisting of $20,000.00 on principal, $35,050.00 for attorney's fees, $1,000.00 for expert fees and costs of $5,371.00. Respondent remitted the sum of $20,000.00 to Dr. Hill through his legal counsel.

50. Respondent filed an appeal on or about November 5, 2007. The Fifth District Court of Appeals upheld the lower court's final judgment against respondent on January 23, 2009. The matter was remanded for the determination of the correct amount of attorney's fees.

51. The Second Amended Final Judgment was entered on June 15, 2011. The respondent has paid nothing towards the attorney's fees, expert fees and taxable costs totaling $24,246.00 awarded to Dr. Hill.

C. Witnesses: The following witnesses testified in this proceeding: Bonnie Jackson, attorney and former counsel for the Dr. Michael Hill in the

underlying civil suit, *Hill v. Whitney*, Case No. 05-CA-5999-40, Dr. Michael Hill, the complaining witness, Sasha Watson, the bar's expert witness regarding immigration matters, and respondent. In addition, I heard the testimony of respondent's character witnesses, long time friend, Samuel Wasserman, who has known respondent for approximately 40 years as well as that of two attorneys, Joel Stewart and Walter Strauss, both of whom have known the respondent approximately 5 to 7 years.

I found Ms. Jackson's testimony to be forthright. While she clearly expressed great frustration and questioned respondent's ethical conduct based upon the manner in which respondent conducted himself during the civil suit she brought on behalf of her client, Dr. Hill, I did not find that she engaged in a "witch hunt", nor did I find that her testimony to be anything but credible. The evidence presented in the underlying suit as well as Ms. Jackson's testimony during the instant proceeding was consistent in regard to the lack of cooperation she was received from respondent and in regard to the deceptive practices engaged in by respondent.

Likewise, I found Dr. Hill's testimony to be credible. Dr. Hill explained why he brought the civil suit against respondent and he explained why he filed a complaint with The Florida Bar. While Dr. Hill clearly has an interest in this

matter, I did not find that his testimony was self-serving or disingenuous. While there were some inconsistencies in his testimony, I found them to be few and of relative unimportance to the issues before me.

I found the testimony of the bar's expert witness, Sasha Watson, to be helpful in regard to understanding the complex nature of immigration law especially as it related to the particular issues involved in the bar proceeding. I further found her testimony to be credible. Based upon her testimony, it was apparent that the Respondent should have made a request to the Department of Justice for records on Ms. de Oliveira to discover the exact nature of her immigration problem, in order to properly advise his client(s), of the best avenue to take to approach the immigration problem. I find also, that the Respondent's decision to travel to Brazil to conduct his investigation of the immigration problem was unnecessary and did not have results that could not have been obtained while remaining in Florida and using his phone and/or internet research.

I found the respondent's testimony to be self-serving and, at times, contrary to previous testimony and/or statements. Further, I found much of his testimony regarding the actions he took on behalf of Dr. Hill and Ms. de Oliveira as well as his testimony regarding his conduct during the civil litigation was not credible. Respondent failed to accept any responsibility for his actions, but rather

placed blame on Dr. Hill, Ms. de Oliveira, the Brazilian bureaucracy, misunderstandings, or the "sharp" practices engaged in by Ms. Jackson on behalf of Dr. Hill.

I found all of respondent's character/reputation witnesses to be sincere. Mr. Wasserman, who had known respondent since he was a teenager working as a bus boy at the Stevensville Resort, thought highly of respondent. He indicated their relationship was more personal than professional; however, he indicated respondent had prepared a Will and a Living Trust for him and that he had from time to time referred others to respondent. He indicated he had not heard anything bad about respondent from those individuals. While Mr. Wasserman and the respondent had shared many things over the years, such as the births of children and graduations, respondent had not shared with Mr. Wasserman the fact he had been sued by Dr. Hill nor had respondent shared the fact that he had a pending bar matter until respondent needed Mr. Wasserman to testify in the bar proceeding.

The attorneys that testified, Joel Stewart and Walter Strauss, indicated their knowledge of respondent was based on a professional relationship rather than a personal one. Mr. Stewart testified that he had a positive opinion of respondent and believes respondent has a good reputation in the community. He explained that his position in this regard is based upon his work at the Brazilian Consulate

and the fact he often hears things about attorneys but he had not heard anything bad about respondent. He further testified that he would consider respondent to be a litigator rather than an immigration attorney.

Mr. Strauss testified that he has covered some proceedings for respondent over the years. He indicated most of the matters he covered were civil in nature, but he thought he might have covered one immigration matter. Mr. Strauss testified he believed respondent had a good character because respondent was always clear with him that he just "needed to do the right thing that he just needed to be straight." Mr. Strauss testified that, in his experience as an attorney, he had not always found attorneys willing to do the right thing and be straight. He further testified that while he had not discussed respondent with other lawyers, he knew that respondent had a good reputation in the Brazilian community.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found guilty of violating the following Rules Regulating the Florida Bar:

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4-1.3 A lawyer shall act with reasonable diligence and promptness in

representing a client.

4-1.4(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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.

4-1.16(d) upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

4-3.3(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter

comes to know of its falsity, the lawyer shall take reasonable remedial measures.

4-3.4(a) A lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.

4-3.4(b) A lawyer shall not fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

4-3.4(c) A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

4-3.4(d) a lawyer shall not in pretrial procedure make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an

opposing party.

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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, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

IV. MATTERS CONSIDERED PRIOR TO MAKING A RECOMMENDATION AS TO DISCIPLINE:

Prior to making a disciplinary recommendation in this matter, I considered the testimony of all the witnesses and the evidence presented by the parties, the applicable standards for recommending discipline, the case law, and argument presented by counsel on behalf of their respective clients.

Prior to the final hearing, the bar and respondent stipulated to most of the 64 exhibits presented by the bar. Pursuant to respondent's objection to the bar's inclusion in Exhibit 39, of an incomplete copy of Defendant's Response and

Motion in Opposition to Plaintiff's Motion for Sanctions and Motion for Entry of Default Judgment filed April 24, 2006, in *Hill v. Whitney*, because it did not contain a copy of the attached exhibits, the bar removed the incomplete exhibit from its exhibit notebook. Thereafter, respondent entered a complete copy of the exhibit as Respondent's Exhibit 1. The only other exhibit presented by respondent during the case was his Exhibit 2, which was a Notice of Filing of the wire transfer made by respondent on or about October 4, 2007. Finally, while Dr. Hill was queried at some length during cross examination regarding his testimony during depositions taken on February 20, 2006 and April 4, 2012, Dr. Hill's depositions were filed with this referee but were not entered into evidence.

STANDARDS FOR IMPOSING LAWYER SANCTIONS:

I considered the following prior to recommending discipline:

a) the duties violated;

b) the lawyer's mental state;

c) the potential or actual injury caused by the lawyer's misconduct;

d) The existence of aggravating and/or mitigating circumstances.

I further considered the purpose of disciplinary proceedings as outlined by the Standards for Imposing Lawyer Sanctions, "[t]he purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers

who have not discharged, will not discharge, or unlikely to discharged their professional duties to client, the public, the legal system, and the legal profession properly."

Finally, I considered the criteria enunciated by the Court that "the sanction must be (1) fair to the disciplined attorney, being sufficient to punish while at the same time encouraging rehabilitation; (2) fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public service of a qualified lawyer as a result of undue harshness; and (3) severe enough to deter others who might be tempted to engage in like violations. *The Florida Bar v. Liberman*, 43 So. 3d 36, 39 (Fla. 2010).

I reviewed the following Standards in determining which Standards were appropriate under the facts proven by clear and convincing evidence in this matter:

4.4 Lack of Diligence

4.43 Public reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

4.5 Lack of Competence

4.54(a) Public reprimand is appropriate when a lawyer demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client.

4.6 Lack of Candor

4.62 Suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

4.63 Public reprimand is appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

6.1 False Statements, Fraud, and Misrepresentation

6.11(a) Disbarment is appropriate when a lawyer with the intent to deceive the court, knowingly makes a false statement or submits a false document; or

6.11(b) Disbarment is appropriate when a lawyer improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

6.12 Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action.

6.2 Abuse of the Legal Process

6.21 Disbarment is appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

6.22 Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

6.23 Public reprimand if appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

7.0 Violations of Other Duties Owed as a Professional

7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain

a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

I additionally considered the Standards 9.2 Aggravating Factors; 9.3 Mitigating Factors; and 9.4 Factors that are Neither Aggravating or mitigating prior to making a decision in the matter.

CASE LAW:

Further, the following cases were carefully considered prior to making my recommendation as to the appropriate discipline in this matter:

The Florida Bar v. Herman, 8 So. 3d 1100 (Fla. 2009); *the Florida Bar v. Heptner*, 887 So. 2d 1036 (Fla. 2004); *the Florida Bar v. Miller*, 863 So. 2d 231 (Fla. 2003); *The Florida Bar v. Batista*, 846 So. 2d 479 (Fla. 2003); *The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002); *The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997); *The Florida Bar v. Kaufman*, 684 So. 2d 806 (Fla. 1996); *The Florida Bar v. Nunes*; 679 So. 2d 744 (Fla. 1996); *The Florida Bar v. Bloom*, 632 So. 2d 1016 (Fla. 1994); *The Florida Bar v. Anderson*, 515 So. 2d 224 (Fla.

1987) ; *The Florida Bar v. Abrams*, 402 So. 2d 1150 (Fla. 1981) and *The Florida Bar v Nunes* 679 So.2d 744 (1996).

STANDARDS AND CASE LAW APPLICABLE TO THE INSTANT MATTER:

After careful consideration of the foregoing as applied to the facts as clearly and convincingly proven in this matter as well as the mitigation testimony received in this case, I find the following Standards applicable:

4.43 (Lack of Diligence [public reprimand]);

4.62 (Lack of Candor [Suspension]);

6.12 (False Statements, Fraud, and Misrepresentation [Suspension]);

6.22 (Abuse of the Legal Process [Suspension]); and

7.2 (Other Duties Owed as a Professional [Suspension]).

9.22 Aggravating Factors:

(b) dishonest or selfish motive;

(c) pattern of misconduct;

(d) multiple offenses;

(h) vulnerability of the victim(s);

(i) substantial experience in the practice of law.

9.32 Mitigating Factors:

(a) absence of prior disciplinary record; and

(g) character or reputation.

(k) imposition of other penalties and sanctions

length of time elapsing between civil suit proceeding, and

Respondent's ability to avoid disciplinary action

9.4 Factors that are Neither Aggravating nor Mitigating:

(a) forced or compelled restitution.

I further find that *The Florida Bar v Nunes 679 So2d 744 (1996); The Florida Bar v. Batista*, 846 So. 2d 479 (Fla. 2003); and *The Florida Bar v. Bloom*, 632 So. 2d 1016 (Fla. 1994) are more analogous to the conduct engaged in by

respondent in the instant bar proceeding than that of the conduct engaged in by the attorneys in *Hmielewski* and *Kaufman*.

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In *Bloom*, the attorney received a 91 day suspension for failing to comply with discovery requests and for engaging in conduct prejudicial to the administration of justice in connection with a civil suit filed against him. The attorney represented himself. He failed to timely answer interrogatories, even after being ordered by the court to do so. He failed to attend hearings, failed to pay sanctions imposed against him for his discovery violations, failed to respond to the court's order to show cause which resulted in the court striking his responsive pleadings and entering a judgment against him. Thereafter, the attorney failed to answer interrogatories or attend his deposition set in aid of execution. He was eventually found in indirect criminal contempt and the court issued a writ of attachment against his property. Even after the bar commenced disciplinary proceedings against him, the attorney did not satisfy the judgment. The Court found that the attorney's flagrant disregard of the judicial process warranted a suspension requiring proof of rehabilitation. Proof that the attorney had satisfied the civil judgment was required as proof of rehabilitation.

The conduct engaged in by respondent in the civil suit brought against him is similar to that engaged in by *Bloom*. Dr. Hill hired attorney Bonnie Jackson to bring suit against the respondent after respondent failed to perform any meaningful services and failed to refund the $15,000.00 fee and $5,000.00 cost deposit paid by the doctor. Like *Bloom*, respondent failed to comply with discovery requests to the point that Dr. Hill's counsel filed "Plaintiff's Motion for Sanctions and Motion for Entry of Default Judgment." This motion outlined the respondent's egregious conduct and provided supporting exhibits. The trial court held a hearing in regard to Dr. Hill's motion and ***"[found] that [respondent] [had] willfully failed and refused to comply with previous order of this Court, failed and refused to participate in pretrial discovery and provided falsified documents. . . ."*** (Emphasis added). The trial court sanctioned respondent for his misconduct in the underlying civil suit by striking respondent's defenses and thereafter, awarding attorneys' fees to Ms. Jackson.

Respondent's failure to timely and properly respond to discovery and then to compound his failure to do so by providing deceptive, misleading, and/or false documents and/or testimony is inexcusable. Respondent is an officer of the court and as such, the obvious stall tactics he engaged in during discovery and his

pervasive and flagrant disregard for the judicial process represents serious attorney misconduct.

Again, like *Bloom*, respondent's misconduct resulted in a judgment being entered against him. On or about October 4, 2007, a Final Judgment was entered against the respondent for the principal sum of $20,000.00 plus attorney and expert fees and costs. Respondent timely paid the judgment of $20,000.00 in the underlying civil suit and appealed the issue of attorneys' fees and the trial court's order striking his defenses and entering a default judgment against him. The appellate court found no abuse of discretion on the part of the trial court, but did find that the attorney's fees assessed against respondent were improper and that the only attorney's fees that should be assessed against respondent were those reasonably occasioned by respondent's misconduct.

Thereafter an Amended Final Judgment was issued on January 4, 2010. Respondent again appealed and the appellate court found respondent's claims of error were without merit and affirmed the judgment. However, a mathematical error was made; consequently, the appellate court remanded the matter to the trial court once again for a correction. On June 13, 2011, the trial court issued a Second Amended Final Judgment. As of the date of the final hearing in this matter, respondent had not paid the attorney's and expert's fees and/or the taxable costs in

the matter. Furthermore, there was no evidence presented that respondent has made any substantial efforts to address this portion of the judgment against him.

Similarly, the attorney in *Batista* also received a 91 day suspension. The attorney failed to provide several different clients with competent and diligent representation and failed to maintain adequate communication with them. In the first case, the attorney represented a client in a claim for social security benefits for her minor child. The attorney was paid a substantial fee and he did nothing more than meet with the client two times and speaks with her 6 times on the telephone. The attorney failed to obtain the results for which he had been retained although the client was partly at fault because she failed to obtain some of the proof necessary to support her claim. In the second case, the attorney was hired by a father and daughter to obtain permanent residency and a work permit for the daughter and to have the father's driver's license restored. The attorney failed to take any significant action in the daughter's case. While the referee found the daughter was partly at fault for failing to execute the required documents, the referee found that did not excuse the attorney's neglect because the subsequent attorney hired by the daughter was able to secure the work permit. In the father's case, the attorney let the father to believe his driver's license could easily be reinstated even though it had been permanently revoked. The attorney eventually

learned the revoked license could not be reinstated. The father eventually sued the attorney for the fee paid and received a default judgment against the attorney. The attorney failed to satisfy the judgment.

In the instant case, similar to *Batista*, the respondent failed to diligently represent his clients, Dr. Hill and Lelia Mesquita de Oliveira. The evidence did not support a finding that respondent adequately addressed the substantial hurdles his clients would have to overcome in order to obtain their stated goals of being married and having Ms. de Oliveira in the United States legally. Respondent had little contact with Dr. Hill either verbally or in writing. Respondent testified that he had substantially more contact with Ms. de Oliveira, which was not rebutted by the Bar.

Respondent indicated he did not correspond with Ms. de Oliveira via written communication because he did not want there to be any evidence she was in the country illegally. While respondent's testimony regarding why he did not communicate in writing with Ms. de Oliveira may be true, respondent failed to explain why he failed to keep any notes of his conversations with her or any other records which would have established that he had adequate and meaningful communication with his clients. In that regard, the only documents respondent was able to provide to support his claims of adequate and meaningful

communication with his clients during the approximate year of representation was a couple of e-mails and letters, which were initiated by his clients, seeking the return of their original documents. This correspondence occurred approximately 1 year after respondent had been retained. Other than those few documents, respondent produced no evidence that would indicate a diligent effort had been made on behalf of Respondent's client(s).

Respondent took two trips to Brazil, based upon his testimony, to determine what was necessary for Dr. Hill and Ms. de Oliveira to marry, to verify Ms. de Oliveira's documents, to determine what was necessary for her to establish residency in Sao Paulo, finding an English speaking school for her, and/or to obtain the services of an official translator. Yet, all respondent had to show for these two trips was a two page document from the Clerk's office in Sao Paulo regarding the requirements for marriage. Respondent provided no other information and/or documents to his clients, opposing counsel in this civil suit, or this referee with any other documents or information he obtained while in Brazil to represent his clients. In fact, respondent testified that he did not provide it to his client, rather, he threw away any information he had obtained because Ms. de Oliveira continued to reside in the United States and he determined the information had become stale.

Like *Batista*, Respondent at best, did not comprehend himself, or at worst, misled his clients in regard to the likelihood that Ms. de Oliveira would be able to lawfully reside in the United States. Respondent sought a large retainer from his clients due to the complexity of the case, but the objective evidence does not support a finding that he actually did anything to ensure that his clients actually understood how complex the situation was or how unlikely it was that he could actually do anything for them given the state of the immigration laws at the time and the warning letter issued to Ms. de Oliveira by the Department of Justice in May 2002. Respondent testified that there was really not much that could be done for his clients because of Ms. de Oliveira's status. However, there was no credible evidence presented that respondent actually told his clients this fact. Likewise there was no credible evidence presented to support a finding that respondent actually performed meaningful services for his clients; he failed to obtain even the most basic information from his clients regarding their background or perform even the most rudimentary investigation on behalf of his clients.

However, of even greater concern to this referee than respondent's lack of diligence and communication, was his obvious failure to abide by the black letter and spirit of the discovery rules, his misrepresentations and his failure to abide by the trial court's orders and respondent's clear, purposeful misuse of the cost

deposit provided by Dr. Hill. The testimony and evidence clearly and convincingly supports a finding that respondent's conduct in regard to the handling of the cost money was intentional and an improper use of trust monies. Respondent placed his client's funds in his personal account and used those funds for an improper purpose. Namely, for respondent's own benefit. Respondent was clear in his deposition testimony that he deposited all funds, including the cost deposit, because "he needed money." Moreover, when requested to do so, respondent failed to provide his client, Dr. Hill, with an accounting, asserting that Ms. de Oliveira told him not to discuss anything with Dr. Hill, including the expenditures made against the cost deposit. Respondent's position is nonsensical, and not credible.

The testimony and evidence supports a finding that respondent made two trips to Brazil. The first trip was made between January 31, 2003 and February 8, 2004. The second trip was made between March 19, 2004 and March 26, 2004. The testimony also supports a finding that Dr. Hill paid for one of the round trip plane tickets used by respondent to go to Brazil. In all likelihood, based upon the evidence presented, Dr. Hill paid for the first trip taken by respondent. The testimony and evidence supports a finding that Dr. Hill paid respondent a cost deposit of $4,365.00 ($5,000.00 less the price of one round trip ticket to Brazil), by

at least no later than February 6, 2004. The testimony presented also makes it clear that respondent placed the cost funds in his personal bank account prior to expending costs associated with Dr. Hill's and Ms. de Oliveira's matter.

The evidence shows that respondent had little in the way of receipts for his expenditures while in Brazil. Pursuant to the supplemental documents respondent produced to Dr. Hill's Request to Produce, respondent did not show that he expended all of the cost funds provided by Dr. Hill prior to his return from Brazil on February 8, 2004. Specifically, respondent was only able to account for $510.00 of costs (for hotel charges) for the first trip. Thus, respondent failed to show that he was entitled to the remaining $3,855.00 paid by Dr. Hill that respondent had immediately placed in his personal account prior to incurring additional expenses on behalf of his clients when he made the second trip to Brazil in March 2004.

Further, the evidence shows that respondent failed to prove that he was entitled to most of the remaining cost funds after his second trip to Brazil. The receipts provided support the following expenditures: air fare - $1,251.00, which includes $27.40 in airport taxes; hotel charges - $377.00; taxi charges - $36.00; and restaurant charges - $37.00; totaling $1701.00. In all, respondent was only able to

establish that he was entitled to $2,211.00 of the $4,365.00 Dr. Hill had provided respondent as a cost deposit.

While it is reasonable to believe respondent may have expended additional funds on behalf of his clients while on his trips to Brazil, respondent failed to provide the appropriate documentation to Dr. Hill at the time of representation, to Dr. Hill's counsel during the underlying civil suit, or to this referee during the bar proceeding. Consequently, this referee has grave concerns regarding respondent's conduct. At the time respondent undertook the representation of Dr. Hill and Ms. de Oliveira, respondent had been practicing law for approximately 7 years. Respondent indicated he had a trust account. Thus, respondent should have been familiar with the rules regarding receipt of cost deposits. Respondent knew, or certainly should have known, that he was not entitled to the funds when he placed them in his personal account. Respondent's position that he believed he had incurred expenses during the two trips sufficient to use all the cost deposit provided by Dr. Hill making it appropriate for him to place those funds in his personal account at the time they were paid is untenable.

In this matter, the bar proved clearly and convincingly that respondent engaged in numerous acts of ethical misconduct during his representation of Dr. Hill and Ms. de Oliveira and during the civil litigation. Respondent's misconduct

not only caused injury to his clients but also to the judicial system and to the profession as a whole. Respondent not only failed to diligently represent his clients, he also engaged in dishonest and deceitful conduct during his defense of the civil suit, to opposing counsel and the court. This referee finds the respondent's misconduct, when looked at in the aggregate, very serious.

In reaching a determination as to an appropriate sanction recommendation, this referee carefully considered the evidence presented by respondent's character witnesses in light of the conduct engaged in by respondent. Despite the evidence of good character presented on behalf of respondent, it is insufficient to overcome the significant cumulative misconduct engaged in by respondent. I have considered the record contained in the civil action brought against the Respondent, including the procedural sanctions imposed and the resulting judgment entered against the Respondent, and further considered the lapse of time between the last order entered in the civil action and the instant action, before determining my recommendation. Thus, it is the Referee's determination that the Respondent's misconduct warrants a sanction consistent with the discipline imposed in *Nunes, Bloom* and *Batista.*

V. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following:

Personal History of Respondent:

Age: 56

Date admitted to the Bar: February 8, 1996

Prior Discipline: None

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. A 90 day suspension; and

B. Payment of the bar's costs in this proceeding.

VII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

It is recommended that such costs be charged to respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Administrative Costs		$1,250.00
Expert's Fees		6,180.00
Witness Costs		99.62
Court Reporter Costs		5,359.10
Bar Counsel Costs		1,014.83
Copy Costs		984.07
	TOTAL:	$14,887.62

Dated this _____ day of _____, 2012.

_____
The Honorable William Bruce Smith
Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and that copies were mailed by regular U.S. Mail to Respondent's Counsel, Kevin P. Tynan, at Richardson & Tynan P. L. C., 8142 North University Drive, Tamarac, Florida 33321-1708, Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; Frances R Brown-Lewis, Bar Counsel, The Florida Bar, Orlando Branch Office, The Gateway Center1000 Legion Place, Suite 1625 Orlando, Florida 32801-1050; on this _____ day of _____, 2012.

_____
Judicial Assistant