IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BYRON GREGORY PETERSEN,

Respondent.

_____/

Supreme Court Case
No. SC14-1942

The Florida Bar File Nos.
2012-50,135(17J)
2012-50,157(17J)
2012-50,427(17J)
2012-50,637(17J)

THE FLORIDA BAR'S ANSWER BRIEF

Frances R. Brown-Lewis, Bar Counsel
The Florida Bar
Lake Shore Plaza II
1300 Concord Terrace, Suite 130
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 503452
fbrownle@flabar.org

Adria E. Quintela, Staff Counsel
The Florida Bar
Lakeshore Plaza II, Suite 130
1300 Concord Terrace
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 897000
aquintel@flabar.org

John F. Harkness, Jr., Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390
jharkness@flabar.org

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PRELIMINARY STATEMENT

The Respondent, Byron Gregory Petersen, is seeking review of a Report of Referee recommending a 91-day suspension from the practice of law and payment of The Florida Bar's costs in these proceedings totaling $7,513.25.

Complainant will be referred to as The Florida Bar, or as the Bar and Byron Gregory Petersen, Respondent, will be referred to as Respondent, or as Mr. Petersen throughout this brief.

Christine Broder will be referred to as Ms. Broder. Robert and Wendy Gielchinsky, if used collectively will be referred to as the Gielchinskys. Individually, Wendy Gielchinsky will be referred to as Mrs. Gielchinsky and Robert Gielchinsky will be referred to as Mr. Gielchinsky.

References to the Report of Referee shall be by the symbol ROR followed by the appropriate page number (e.g., ROR-12).

References to the transcript of the final hearing shall be by symbol TR, followed by the volume, followed by the appropriate page number (e.g., TR III, 289).

References to Bar exhibits shall be by the symbol TFB Ex. followed by the appropriate exhibit number (e.g., TFB Ex. 10).

References to Respondent's exhibits shall be by the symbol R-Ex. followed by the appropriate exhibit number (e.g., R-Ex. 1).

References to specific pleadings will be made by title.

STATEMENT OF THE CASE

On October 7, 2014, The Florida Bar filed a complaint against Respondent, which was subsequently assigned Supreme Court Case No. SC14-1942. On October 20, 2014, The Honorable Catherine M. W. Brunson was appointed as Referee. The Referee set a case management conference for November 12, 2014 and thereafter reset it for December 1, 2014. On December 30, 2014, the Respondent filed his Answer, Affirmative Defenses & Motion to Dismiss. On January 13, 2015, Judge Brunson entered an Order on Case Management Conference and Setting Final Hearing. The final hearing was set for April 14 and April 15, 2015. On March 2, 2015, The Florida Bar filed its Request for Production of Documents and on March 11, 2015, The Florida Bar propounded Interrogatories to Respondent.

On June 2, 2015, The Florida Bar filed a Notice of Final Hearing with the final hearing being reset to July 23 and July 24, 2015. Beginning in February 2015, The Florida Bar made numerous informal attempts to set a date for Respondent's deposition. On June 12, 2015, The Florida Bar filed its Notice of Taking Deposition of the Respondent. The Respondent's deposition was set to take place on June 18, 2015. On June 26, 2015, The Florida Bar filed a motion to compel answers to discovery and a Motion to Compel Respondent's Deposition

after numerous attempts as documented by the motion. On July 16, 2015, Judge Brunson entered an Order on The Florida Bar's Motion to Compel and The Florida Bar's Motion to Compel Respondent's Deposition. The Referee ordered Respondent to file answers to discovery by July 13, 2015 and to make himself available for deposition by August 7, 2015. Respondent's deposition was finally taken on April 12, 2016.

On October 29, 2015, The Florida Bar filed a Notice of Final Hearing indicating that the final hearing had been scheduled for February 16 and February 17, 2016. On January 27, 2016, the Referee entered her Order on The Florida Bar's Ore Tenus Motion for Continuance and Status Conference. The continuance was granted. Respondent had no objection.

On March 1, 2016, the parties were notified that the final hearing was rescheduled for May 5 and May 6, 2016. On March 9, 2016, The Florida Bar served its Second Request to Produce on Respondent's counsel. On April 8, 2016, The Florida Bar filed a second Notice of Taking Deposition of the Respondent setting Respondent's deposition for April 12, 2016. On April 28, 2016, The Florida Bar filed The Florida Bar's Motion to Compel answers to the Second Request to Produce. By order dated May 2, 2016, the Referee ordered Respondent to file his answers to the second request for production by May 3, 2016.

The Referee held the final hearing on May 5, 6, and 10 and June 8, 2016. She entered her Report of Referee on September 15, 2016 finding the Respondent guilty of violating the following Rules Regulating The Florida Bar: 3-4.2, for violation of the Rules of Professional Conduct; 3-4.3, for acts unlawful or contrary to honesty and justice; 4-1.1, for lack of competence; 4-1.3, for lack of diligence; 4-1.4, for failing to properly communicate with the client; 4-1.5(a), for charging a clearly excessive fee; 4-1.8(a), for knowingly acquiring an ownership, possessory, or other pecuniary interest adverse to a client and failing to advise his client in writing of the advisability of seeking the advice of independent counsel; 4-3.3(a)(1), for making a false statement of fact to a tribunal; 4-4.1(a), for making a false statement of material fact to a third person; 4-4.4(a), for using means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly using methods of obtaining evidence that violate the legal rights of a person; 4-8.4(a), for violating the Rules of Professional Conduct; 4-8.4(c), for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; 4-8.4(d), for engaging in conduct that is prejudicial to the administration of justice; and 4-8.4(g), for failing to respond in writing to an official inquiry by Bar Counsel within 15 days of the date of the initial written investigative inquiry.

The Referee recommended that Respondent be suspended from the practice of law for 91 days requiring proof of rehabilitation prior to reinstatement and that he pay the Bar's disciplinary costs [ROR-15].

Throughout the case, the Supreme Court of Florida entered orders on motions for extension of time to file the Report of Referee on February 12, 2015, June 9, 2015, September 9, 2015, February 16, 2016, June 2, 2016, and August 18, 2016.

STATEMENT OF THE FACTS

The Bar adopts the Referee's findings of fact as set forth in her report. The following facts are taken from the Report of Referee and as otherwise noted.

In 2005 the Gielchinskys hired Respondent to represent them in a matter regarding construction of their pool. The Respondent initiated work on this matter and let the case go stagnant for almost two years resulting in the trial court dismissing the case for lack of prosecution [ROR-6; TFB Ex. 5; TR III, 95; and TR III, 104]. After the pool case was reinstated, the Respondent took no action, failed to inform his clients that an expert was needed to prosecute the case, abandoned their cause and lost evidence vital to the case [ROR-6-8; TR I, 42, 110-112; and TR II, 251-253 and 259-260]. Respondent withdrew from the representation in June of 2011 [TFB Ex. 6]. On July 14, 2011 and October 31, 2011, respectively, Wendy and Robert Gielchinsky filed their grievances against Respondent. Christine Broder filed her grievance against the Respondent on September 12, 2011 [TFB Ex. 1].

During the representation on the pool case, the Gielchinskys hired Respondent as co-counsel on a matter involving their rights to payment from a defendant, hereinafter referred to as "Vibo", pursuant to a settlement agreement wherein Mr. Gielchinsky had assigned Vibo the intellectual property rights to the

Bronco cigarette brand. The Respondent persuaded the Gielchinskys to fire co-counsel Brian Hersh convincing them that Respondent was capable of taking the Vibo case to trial and that it would take no more than six to nine months to resolve [TR II, 265 and 274]. The Vibo case toiled on for over five years at which time, with the assistance of new co-counsel, the case was resolved.

The complaint in the Vibo case requested damages and was later amended to request, among other things, the return of the intellectual property rights to the Bronco cigarette brand [TFB Ex. 17]. Respondent's original fee agreement required the Gielchinskys to pay a $3,000.00 monthly retainer and entitled Respondent to a percentage of the recovered funds as fees. The Gielchinskys paid at least $24,000.00 [TFB Ex. 22] to Respondent who was with Petersen & Hawthorne, P.A., his former law firm. During the pendency of the Vibo case Respondent modified his fee agreement several times to his benefit [ROR-2]. In the final version of the fee agreement, Respondent agreed to work on the case on a contingency fee basis only, accepting a percentage of the "recovery" as his fee. Respondent testified that the recovery in the case always contemplated a nonmonetary recovery as well as a monetary recovery [ROR-3]. His testimony was contradicted by the Gielchinskys whom testified that they believed Respondent's fee would be based on a monetary recovery [ROR-3; TR II, 201,

205-206, and 288] as they, along with counsel, had contemplated during the course of the litigation a big monetary payout in the case [TR II, 201]. It was only in the final stages of the litigation that it became clear that Vibo had decimated the company and the best resolution would be the return of the intellectual property rights to the Bronco brand [TR II, 276].

Despite testifying that it was his intent from the onset of the Vibo case to take an interest in the Bronco brand, Respondent, at no time, advised his clients in writing to seek the advice of independent counsel prior to executing the various fee agreements wherein he would be taking a pecuniary or possessory interest in the Bronco brand [ROR-3-4; TR I, 119; TR II, 275, 283 and 287]. The only time Respondent advised the Gielchinskys to seek the advice of independent counsel prior to executing a fee agreement concerned the breakup of the Petersen & Hawthorne law firm [TR II, 270].

On the eve of trial in the Vibo case and thereafter, Respondent engaged in a series of unethical conduct designed to create a conflict with the Gielchinskys and their corporate entities. Respondent's plan would allow him to withdraw from all their cases and still allow him to collect his legal fees. [TFB Ex. 27; TFB Ex. 28; ROR-5; and ROR-8]. Respondent created a conflict so that he could withdraw from all the Gielchinskys' cases and still get paid [ROR-6 and TR I, 64]. Ms.

Broder was so concerned about Respondent's conduct that she contacted The Florida Bar Ethics Hotline [ROR-4]. Respondent consciously neglected cases, failed and refused to effectively communicate with the Gielchinskys. He lost and/or misplaced documents, failed to turn over documents the Gielchinskys were entitled to receive and made misrepresentations to the Gielchinskys regarding their cases [ROR-6-8; TR I, 42, 111-112; and TR II, 259-260].

In withdrawing from the pool case, Respondent mislead the court in his Motion to Withdraw. Respondent indicated opposing counsel interposed no objection to the Motion. Opposing counsel, Mr. Shalek, was never notified of the hearing nor was he provided with a copy of the Motion [ROR-7 and TFB Ex. 7]. Respondent also failed to coordinate the hearing date with the Gielchinskys and misinformed the court in his Motion that they had no objection to his withdrawal [TFB Ex. 6]. The Gielchinskys objected to Respondent withdrawing from the pool case. [TFB Ex. 9; TR I, 108-109; and TR II, 254-259].

Finally, Respondent failed to timely file a written response to The Florida Bar as required by the Rules. Ms. Broder filed her grievance with The Florida Bar on September 12, 2011. After granting numerous extensions, the last of which was granted on February 2, 2012, the Respondent was given until February 15, 2012 to file a written response to Ms. Broder's grievance. Respondent did not file a

response to the grievance with The Florida Bar [TFB Ex. 1; TR I, 34 and 46] on or before February 15, 2012. It was not until November 11, 2012, that Respondent filed a written response to Ms. Broder's grievance [TFB Ex. 2]. Respondent filed his untimely response with the investigating member of the Grievance Committee in November 2012, but failed to provide a copy to the Bar or Ms. Broder [ROR-9 and TR I, 35].

During these disciplinary proceedings, the Respondent testified of his accomplishments as an attorney with forty (40) years of experience [TR III, 363] and his reputation in the legal community. He boasted of his law school accomplishments including, receiving the Gersten Award, and being number one overall at the University of Florida graduating class of 1976 [TR III, 370]. Respondent expounded on his volunteer activities which extended over many years. He provided tutoring during his law school years, served as a judge for the moot court team at Nova Southeastern University School of Law, and taught various seminars [R-Ex 2 and TR III, 368-372]. Respondent extensively testified about his legal career that took him from an associate at Greenberg & Traurig in 1976, to opening his solo firm [TR III, 364-368].

SUMMARY OF THE ARGUMENT

The record in this matter contains substantial, competent evidence that clearly and convincingly supports the Referee's findings of fact and recommendations of guilt. The Respondent seeks for this Court to disregard the testimony of any witness other than himself and to consider only his interpretation of the events and orders of the various courts. The Referee, who was in the best position to weigh the evidence and the credibility of witnesses, considered witness testimony, exhibits submitted by both parties, and the underlying federal case and civil case in this matter. The Respondent has failed to satisfy his burden that the record lacked supporting evidence of the Referee's findings. Therefore, consistent with its prior holdings, this Court should not reweigh the evidence or substitute its judgment for that of the Referee, but should approve the Referee's finding of fact and recommendations of guilt.

Further, Respondent was not denied due process as he had the opportunity to submit mitigating evidence prior to discipline being recommended. The record supports the Referee's findings on the appropriate aggravation and mitigation in this matter. The recommended discipline of a 91-day suspension is supported by the findings of fact, case law and the Standards for Imposing Lawyer Sanctions. A 91-day suspension would sufficiently address the Respondent's serious misconduct

and meet the purposes of discipline. A suspension of 91 days would also ensure that the Respondent cannot obtain reinstatement to practice law without proof of rehabilitation and thus should be upheld.

ISSUE I

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD BE UPHELD AS RESPONDENT HAS NOT MET HIS BURDEN ON REVIEW.

The Respondent's burden on review is to demonstrate that there is no evidence in the record to support the Referee's findings or that the record evidence clearly contradicts the conclusions. The Florida Bar v. Vining, 721 So. 2d 1164 (Fla. 1998). The Court's review of the factual findings is limited to determining whether the findings are supported by competent, substantial evidence. This court will not reweigh the evidence and substitute its judgment for that of the Referee. The Florida Bar v. Frederick, 756 So. 2d 79, 86 (Fla. 2000); see also The Florida Bar v. Jordan, 705 So. 2d 1387, 1390 (Fla. 1998). There is competent evidence to support the Referee's findings as cogently and extensively set forth in the Report of Referee filed in this cause.

A respondent contesting factual findings cannot simply point to contradictory evidence when competent, substantial evidence supports the findings. The Florida Bar v. Committe, 916 So. 2d 741 (Fla. 2005); The Florida Bar v. Nowacki, 697 So. 2d 828, 832 (Fla. 1997); and The Florida Bar v. Varner, 992 So. 2d 224 (Fla. 2008). Contrary to the standard of review, the Respondent simply points to contradictory evidence in the record as support of his position.

See Committe, at 746. He, however, disregards or discounts any testimony or documentary evidence in opposition to his own testimony or view of the documentary evidence.

The Referee herein did not merely rely on the magistrate's order in the Aldar case but considered the demeanor of the witnesses and the supporting exhibits to support her finding that Respondent had intentionally set about to create a conflict of interest between himself and the Gielchinskys in such a way as to withdraw from their cases and still claim fees. The Referee, who was in the best position to determine the credibility of the witnesses and weigh the evidence before her, found Ms. Broder and Mr. Gielchinsky to be credible witnesses [ROR-8]. After considering the testimony and the documentary evidence, the Referee found that, as part and parcel of his efforts to create a conflict, Respondent neglected cases and failed and refused to effectively communicate with the Gielchinskys. Further, Respondent lost and/or misplaced documents, failed to turn over documents to the Gielchinskys and made misrepresentations to the Gielchinskys [ROR 6-8; TR I, 42; TR I, 111-112; and TR II, 259-260]. The Respondent's actions were intentional and blatant. The fact that Respondent disagrees with the Referee's assessment of Ms. Broder and Mr. Gielchinsky's credibility is insufficient to overturn the Referee's findings of fact. The Respondent has failed to meet his

burden of establishing that the record is wholly lacking in evidentiary support for the Referee's findings.

Further, Respondent complains that the Referee failed to delineate how the factual findings are tied to the rule violations. This Court has found that such delineation is unnecessary. The only requirement is that a respondent be adequately informed as to the allegations against him and that he be given an opportunity to be heard. Respondent, throughout the trial and his brief, like Committe, "demonstrates that he was adequately informed and had an opportunity to be heard, given the strenuous arguments he presented to both the Referee and this Court as to why he believed his acts did not violate any ethical rules." Committe, at 745.

As to Count I of the Bar's Complaint, Respondent argues that he did not violate any rules of professional conduct in regards to his fee agreement with his clients, the Gielchinskys. While Respondent argues that he did not have a possessory interest that was adverse to his client and that he did not violate Rule 4-1.8(a), the evidence shows that the Respondent failed to advise the Gielchinskys, in writing, to seek the advice of independent legal counsel as required by Rule 4-1.8(a)(2) prior to the execution of the retainer agreement in the Vibo matter or its multitude of revisions. The one and only time Respondent advised the

Gielchinskys to seek the advice of independent legal counsel was when a revised agreement concerned protection of Respondent's own interest as it related to his separation from the law firm of Petersen and Hawthorne [TFB Ex. 18 and TR III, 404-405]. When it concerned protecting himself from possible malpractice, the Respondent was quick to follow the conflict rule.

The Referee stated that

> Whether with this addendum or whether with the initial fee agreement or its subsequent revisions, Respondent gained a pecuniary interest in the litigation which could be adverse to the Gielchinskys. Respondent failed to advise the Gielchinskys in writing that they could and/or should seek independent legal counsel to review the initial fee agreement or subsequent revisions (except for the agreement in which he sought to limit his liability for his former partner's alleged malpractice)…[ROR-3-4].

The Respondent claims that Rule 4-1.8 does not apply to contingency fee agreements. The Rule, however, sets forth no exception for contingency fee agreements. Further, the comment to the Rule specifically addresses the situation herein. The Rule's requirements "must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment for all or part of a fee." See Comment, Rule 4-1.8.

Respondent testified that it was his intention, from the very beginning of his involvement in the Vibo case, to obtain for the Gielchinskys the return of the

Bronco brand and as such this would be a part of the recovery subject to his contingency fee. He has maintained that the term "recovery" in his fee agreements always contemplated the return of the Bronco brand [TR I, 182; TR III, 420 and 438]. This view is further bolstered as Respondent claimed that the addendum [TFB Ex. 11] was merely a clarification that he was entitled to 15 percent of the Bronco brand up to $5 million as payment for his fee. That being the case, it was imperative that the clients have had an opportunity to obtain independent advice since Respondent would be entitled to be a co-owner of the brand. The Gielchinskys each testified that they thought the "recovery" related to monies recovered from the defendants in the Vibo case [TR II, 276-277]. This disciplinary matter clearly illustrates that the precautions set out in the Rule were not followed and that the Gielchinskys were broadsided by the Respondent.

Further, the Bar submits that the ambiguity of the term "recovery" in the various versions of Respondent's fee agreement in the Vibo case violated Rule 4-1.8(a)(1) which states that the transaction and terms are "fair and reasonable" and "transmitted in writing to the client in a manner that can be reasonably understood by the client." The Gielchinskys testified that Respondent made it clear that if they did not sign the Addendum he would withdraw from the case. He clearly pressured them to sign the document without ensuring that their interests were

adequately protected. In fact, the Respondent, without any consideration or loyalty to his clients, sought a big payout for his "life's work" without thought to his ethical obligation. He considered this case as his "ticket to retirement" [TR II, 46 and TR III, 441]. Respondent's actions were contrary to honesty and justice in contravention of Rule 3-4.3 and Rule 4-8.4(c). His actions were deliberate and knowing. The Florida Bar v. Russell-Love, 135 So. 3d 1034 (Fla. 2014).

The Respondent argues that Judge Venzer and the Third District Court of Appeal addressed the ethics of his retainer agreement and ultimately found it was ethical. The transcript of the September 13, 2011 hearing [R-Ex. 13] does not bear out his position. Judge Venzer does not address the ethical ramifications of Respondent's fee agreement. The only testimony regarding Rule 4-1.8 comes from a lay witness (never certified as an expert) as to his opinion. Judge Venzer's order did not address the Rules Regulating the Florida Bar or the ethicality of the fee amendment [R-Ex. 13], nor did the decision of the appellate court [R-Ex. 15]. The Referee herein, after considering all the evidence and testimony, determined that the Respondent violated Rule 4-1.8(a).

The record also clearly shows that the Respondent, in the Aldar case, disregarded his responsibility as an officer of the court to be truthful and the Referee's finding of guilt on Rule 3-4.3, Rule 4-8.4(c) and 4-8.4(d) should be

upheld. In a hearing in the Aldar case, Respondent claimed that his fee agreement (which had never been reduced to writing) with Mr. Gielchinsky was on an hourly basis. Ms. Broder and Mr. Gielchinsky, both of whom had knowledge of the Aldar case, testified that Respondent had taken the Aldar case on a contingency fee basis. [TFB Ex. 26].

Respondent acknowledged in documents in his own bankruptcy proceedings, that he had undertaken the Aldar case on a contingency fee basis. However, when he testified in the Aldar case, obviously understanding that he could not collect a contingency fee because he withdrew before settlement, Respondent recreated history and claimed that he had undertaken the case on an hourly basis. Magistrate Snow found that the Respondent had submitted no credible evidence to support an hourly fee [TFB Ex. 27] and the District Court upheld the magistrate's report [TFB Ex. 28]. Respondent's letter [TFB Ex. 12] in the bankruptcy case stated that the Aldar case had been undertaken on a contingency fee basis. The transcript of his testimony in the Aldar case [TFB Ex 26, page 27, line 12-25 and page 28, line 1] form the basis for the Referee's finding that Respondent made misrepresentations that violated Rule 4-8.4(c) and (d) when he claimed in a judicial proceeding that the Aldar case had been taken on an hourly basis. The testimony reflected that

Respondent had undertaken the Aldar case on a contingency basis rather than an hourly basis.

Respondent again asserts on appeal that he violated no Rules of Professional Conduct in his representation of the Gielchinskys in the pool case. Respondent attempts to argue that the defendant's failure to move the case forward somehow relieved him of his duty to timely, competently and diligently represent his clients. Respondent admitted that there was no record activity in the case for a period of two years, causing the case to be dismissed by the Court for lack of prosecution [TFB Ex. 5]. Respondent appealed the dismissal based on improper notice by the trial court not because the case had been actively prosecuted. Mr. Gielchinsky testified that Respondent never told him the case had the potential to be dismissed for lack of activity. Nor had he been informed that the court had sought to dismiss the case for lack of prosecution prior to it being dismissed in 2008 [ROR-6]. The appeals court reinstated the pool case in February 2011 and again Respondent failed to take any significant action until he filed a Motion to Withdraw in June 2011 [TFB Ex. 5]. Respondent attempted to blame his clients for the lack of activity in the case. He claimed that the clients had instructed him not to move the case along and that the clients had failed to hire an expert to support the case [TR IV, 568-569]. His testimony was contradicted by the Gielchinskys. The Referee

heard testimony of Ms. Gielchinsky wherein she stated that Respondent failed to properly communicate with them regarding the pool case. She maintained that Respondent never told them of the need to hire an expert [TR I, 110] and both she and Mr. Gielchinsky testified that Respondent was never informed not to proceed with the case [TR II, 253-254]. Ms. Gielchinsky was very specific in her testimony [TR I, 110]. Ms. Gielchinsky further testified that Respondent made it difficult for them to proceed with the case after he withdrew as he lost essential evidence supportive of the case [TR I, 110-113]. The record supports the Referee's finding that Respondent violated Rules 4-1.1, 4-1.3, 4-1.4, 4-8.4(a), and 4-8.4(d).

Respondent contends that he did not make misrepresentations to the court in his proposed order and his Motion to Withdraw in the pool case but rather that there were scrivener's errors. In said motion, Respondent stated that "Defendant's counsel, Mr. Shalek, has interposed no objection to the motion" [TFB Ex. 6]. The Referee found that the reason Mr. Shalek had interposed no objection was that "Respondent had failed to give notice of the hearing to opposing counsel" [ROR-7]. Such finding is supported by an e-mail exchange between Respondent and Mr. Shalek wherein Mr. Shalek states, "It would have been proper to serve me with a copy of the notice and the motion. This is the first I ever heard of this" [TFB Ex.

7]. Respondent's blatant misrepresentation to the court that Mr. Shalek had no objection to the Motion to Withdraw violated Rules 3-4.3, 4-3.3(a)(1), 4-4.1(a), 4-8.4(c), and 4-8.4(d).

In Respondent's Initial Brief on page 29, Respondent states, "One could contend that the statement that Mr. Shalek did not interpose an objection is a true statement, but the Respondent understands that if he had no notice of the motion he would be unable to interpose an objection." Respondent makes no attempt to accept responsibility nor does it appear that he appreciates that a court should be able to rely on the representations made by an attorney. Respondent's continued attempt to somehow justify his misrepresentation to the court shows that Respondent still fails to understand the gravity of his misconduct and the impact it has on the administration of justice.

The Bar submits that the record supports the Referee's finding that Respondent violated Rule 4-1.4. Admittedly there was a plethora of e-mails sent between the Respondent and the Gielchinskys. The issue goes beyond quantity but rather quality, that is whether Respondent communicated substantive information to the Gielchinskys such as to allow them to make informed decisions regarding the pool case. Respondent's Exhibit 18 included various e-mails, but a careful review of same fails to show that Respondent communicated substantive

information on this case to his clients nor do the e-mails show what efforts Respondent made to move the case forward in any meaningful way. None of the e-mails gave any explanation on the current status of the case nor did he indicate the next steps that should be taken in the case. The Gielchinskys testified that Respondent's communications lacked substantive information such as the need for an expert or that they were facing dismissal of their case for lack of prosecution. Respondent's testimony contradicted the Gielchinskys' testimony. After considering all the testimony and the evidence, the Referee found that Respondent violated Rule 4-1.4. The Respondent is unable to show that there was no evidence in the record to support the Referee's findings on this issue.

The Bar alleged in Count 6 of the Bar's Complaint that the Respondent violated Rule 4-8.4(a) and 4-8.4(g) by failing to respond in writing in a timely manner to the Christina Broder grievance, The Florida Bar's file number 2012-50,427(17J). The Bar's record custodian stated that the file showed that the Respondent was given numerous extensions to respond in writing [TR I, 32-34; and TFB Ex.1]. The last of those extensions was granted on February 2, 2012 and the Respondent was given until February 15, 2012 to respond. The Bar's file reflected that no response was provided to The Florida Bar within that time period. The Bar's records reflected that a written response to the grievance was submitted

by Respondent on November 11, 2012, some nine (9) months after the final extension. Respondent admitted in his testimony that he filed his response with the Investigating Member of the Grievance Committee months after the February 15, 2012 deadline [R-Ex. 22, 23, and 24; and TR IV, 582].

During the proceeding before this Referee, Respondent for the first time indicated that he had written a response to Ms. Broder's grievance prior to the November 11, 2012 letter [TR IV, 583]. Respondent testified that he provided a response to his attorney [R-Ex. 21 and TR IV, 583] but provided no evidence to show that he or his counsel forwarded the response to the Bar. In addition, Respondent's November 11, 2012 response contained no statement to indicate that a prior response existed and that it had somehow failed to have been forwarded to the Bar. Respondent, a seasoned attorney who should have knowledge of the Rules regulating this profession, submits that under these facts he has not violated Rules 4-8.4(a) and 4-8.4(g). Respondent attempted to abdicate his responsibility to comply with the Rules to his counsel. The Referee rejected this position and found the Respondent guilty as he had failed to file a timely response to the grievance, despite being granted several extensions.

ISSUE II

THE REFEREE APPLIED THE APPROPRIATE AGGRAVATION AND MITIGATION IN THIS CASE AND RESPONDENT WAS AFFORDED AN OPPORTUNITY TO PRESENT MITIGATING EVIDENCE PRIOR TO DISCIPLINE BEING IMPOSED.

The final hearing in this matter spanned a total of four days. The Referee heard the testimony of eight witnesses and reviewed exhibits from both the Respondent and the Bar. After the conclusion of the case, it was determined between counsel for the parties and the Court that closing arguments would be made in writing. Further, both sides were requested to provide a proposed Report of Referee. The Florida Bar submitted a proposed Report of Referee setting forth proposed findings of fact, findings of guilt, aggravating circumstances and mitigating circumstances, references to the discipline suggested by the Standards for Imposing Lawyer Sanctions and case law in support of the proposed sanctions.

The Respondent submitted a proposed Report of Referee as his closing argument. Through counsel, Respondent indicated the proposed report contained the same analysis and precedent that would have been included in a closing argument and provided to the Referee copies of the case law referenced in his proposed report. In his proposed Report of Referee, the Respondent made the strategic decision not to set forth any evidence in mitigation or refer to the Florida

Standards for Imposing Lawyer Sanctions. In his proposed Report of Referee, as well as during the disciplinary proceeding, the Respondent took the position that he did nothing wrong.

In Respondent's Initial Brief, at page 41, he contends that all the testimony in this case demonstrates that he had no dishonest or selfish motive and that Standard 9.32(b) was applicable as a mitigating factor. He placed blame on the Gielchinskys and others (through the Gielchinskys) as the source of the grievances pending before this Court. (See Respondent's Initial Brief, at page 10). He claimed that these grievances were a way of forcing him to not seek his fees for work he had undertaken on a daily basis for more than six years. Respondent testified in these proceedings and indicated in his brief that the Gielchinskys tried to avoid paying his legal fee by transferring the recovery, that is the Bronco brand. He takes this position despite testimony from two of Mr. Gielchinsky's other attorneys that Mr. Gielchinsky always paid his attorneys and that the reason for the brand transfer was to avoid the government tariff and to effectuate the settlement agreement with Vibo [TR II, 208 and 232]. Moreover, the Respondent acknowledged, in his letter to co-counsel in Vibo, that at no time had Robert Gielchinsky said or even hinted that he was not going to honor the fee agreement in the Vibo matter [TFB Ex. 15]. The Bar submits that the evidence and testimony

show that Respondent, impatient for his big payday, orchestrated steps to create a conflict with his clients. His selfish desire for what he believed would be a $5 million fee prompted his refusal to sign the settlement papers and send a letter to opposing counsel showing discord with his clients [TFB Ex. 16]. His conduct had the propensity and potential to undermine the settlement. Respondent was so entrenched in owning a part of the Bronco brand that he had no reservations about bragging to others that he would be a tobacco baron and have Mr. Gielchinsky work for him [TR II, 203-204]. Indeed, Respondent refused to sign the settlement agreement in Vibo until the judge threatened to hold him in contempt if he did not execute the settlement agreement and dismiss the related civil suit [TFB Ex. 25].

In addition, in the Aldar case, Respondent conveniently tried to recreate history by claiming he had agreed to handle the Aldar case on an hourly basis. It is clear that he took the position that it was an hourly fee case so that he would not be forestalled in perfecting his charging lien while withdrawing from the case prior to its conclusion. Respondent, however, failed to appreciate that he had taken a contrary position in his personal bankruptcy wherein he had indicated that he had undertaken the Aldar representation on a contingency fee basis [TFB Ex. 12]. The evidence clearly and convincingly show that Respondent had a selfish and dishonest motive for his actions in these matters.

On September 7, 2016, the Court held a telephonic status conference during which the Referee announced her findings of guilt. After the Referee made it clear that she believed that Respondent was guilty as charged in the Formal Complaint of The Florida Bar, Respondent submitted a second proposed Report of Referee. In the second report, Respondent argued that his misconduct in the case warranted only a public reprimand. Respondent set forth detailed arguments, cited to case law and argued the mitigating factors he believed were relevant in this matter. In addition, during the trial, Respondent testified to his character and reputation [TR IV, 362-375] and the Bar stipulated to Standard 9.32(g) - character or reputation. For Respondent to now argue that he was not given the opportunity to present mitigation is disingenuous at best.

As the Court has noted, there is no requirement that a respondent be given a separate sanctions hearing. As stated in The Florida Bar v. Baker, 810 So. 2d 876 (Fla. 2002), "Due process in Bar disciplinary proceedings requires that an accused attorney be given a full opportunity to explain the circumstances of an alleged offense and to offer testimony in mitigation regarding any possible sanction." See The Florida Bar v. Carricarte, 733 So. 2d 975, 979 (Fla.1999); The Florida Bar v. Pavlick, 504 So. 2d 1231, 1234 (Fla.1987). As set forth above, Respondent had

numerous opportunities to fully explain the circumstances of the alleged offenses and to offer testimony in mitigation.

ISSUE III

RESPONDENT HAS FAILED TO SHOW THAT THERE WAS UNREASONABLE DELAY IN THE PROCEEDING FOR WHICH HE DID NOT SUBSTANTIALLY CONTRIBUTE OR TO SHOW ANY SPECIFIC PREJUDICE RESULTING FROM ANY DELAY IN THE DISCIPLINARY PROCEEDING.

A Referee's findings as to aggravation and mitigation carry a presumption of correctness and are to be upheld absent a showing that the findings are clearly erroneous or without support on the record. The Florida Bar v. Doherty, 94 So. 3d 445, 451 (Fla. 2012). The Respondent, in his revised proposed Report of Referee, submitted as mitigation delay in the proceeding under factor 9.32(i). Prior to her issuing the Report of Referee with her disciplinary recommendation, this argument was reviewed, considered and given its appropriate weight and thereafter rejected by the Referee.

While unreasonable delay in the Bar's prosecution of a disciplinary proceeding may be considered as a mitigating factor in determining the appropriate level of discipline to recommend [Florida Standard for Imposing Lawyer Sanction 9.32(i)], the accused attorney must demonstrate specific prejudice resulted from the delay and the accused must not have substantially contributed to the delay. The

Florida Bar v. Wolf, 930 So. 2d 574, 578 (Fla. 2006). Respondent argues that a "significant" mitigating factor in the case is the unreasonable delay in disciplinary proceedings. The Respondent submits on appeal that 9.32(i) was a significant mitigating factor because it took the Bar two years to investigate four grievances against the Respondent and another year to file its Complaint after the findings of probable cause. The record indicates that the Respondent appealed the federal court's decision in the Aldar case and said appeal was concluded on August 14, 2014 by the United States District Court for the Southern District of Florida order upholding the trial court's decision [TFB Ex. 29]. Two months later, the Bar filed its Complaint. The evidence in this matter clearly demonstrates that much of the delay was the result of the processing of the civil litigation itself and Respondent's seeking and availing himself of appropriate appellate review. The Florida Bar would argue that under the circumstances herein there was no unreasonable delay.

Further, with respect to this "alleged" delay and any other delay, Respondent has failed to demonstrate any "specific prejudice" in the Bar's prosecution of these four grievances. The case cited by Respondent, The Florida Bar v. Wolf, supra, found "in light of Wolf's cooperation and his efforts to timely resolve the instant matters, the Bar's unexplained delay in pursuing this case is a significant fact that affects the disciplinary sanction." These facts are not present in the instant case.

Respondent has indicated no evidence to show any diminished memory on behalf of witnesses or that anyone indicated an inability to remember events due to the passage of time. Respondent has failed to meet his burden.

The Bar submits that Respondent was partly responsible for any delay in the case once the Complaint was filed. Respondent failed to timely make himself available for his deposition and his actions necessitated the Bar filing its Motion to Compel. Further, the Bar filed several motions to compel responses to discovery from the Respondent. Respondent's actions, arguably dilatory, necessitated the need for several continuances. Respondent candidly admits in his brief that continuances were sought due to discovery issues, but fails to admit it was because of his failure to submit to having his deposition taken or because of his failure to respond to discovery in a timely manner.

Even should this Court conclude that there was some "unreasonable delay" and that Respondent has provided evidence of specific prejudice to his case because of said delay, the seriousness of the misconduct as well as the Standards for Lawyer Sanction and the case law, indicate that a public reprimand would not be warranted but rather a rehabilitative suspension. The practice of law is a privilege, not a right, [See Wolf , at 548] and as lawyers are officers of the Court, they are in a unique position. With this unique and enviable position comes

commensurate responsibilities which Respondent has breached. His conduct should not be taken lightly.

ISSUE IV

A 91-DAY SUSPENSION IS THE APPROPRIATE DISCIPLINE IN THIS MATTER GIVEN THE REFEREE'S FINDINGS OF FACT, CASE LAW AND THE STANDARDS FOR IMPOSING LAWYER SANCTIONS.

The Bar submits that based on the available case law and the Florida Standards for Imposing Lawyer Sanctions, the Referee's recommended discipline of a 91-day suspension is appropriate. Prior to making her recommendation, the Referee considered cases that ranged in discipline from a public reprimand, to a 10-day suspension and other non-rehabilitative suspensions, and rehabilitative suspensions up to 3 years [ROR 13-15 and Respondent's proposed Report of Referee]. The Referee also considered aggravating and mitigating factors, including the ones submitted by both parties. As a general rule, the Court will not second guess a Referee's recommendation of discipline as long as the discipline is authorized under the Florida Standards for Imposing Lawyer Sanctions and has a reasonable basis in existing case law. The Florida Bar v. Spear, 887 So. 2d 1242, 1246 (Fla. 2004)

The Respondent's serious misconduct justifies the serious sanction recommended by the Referee. The Supreme Court of Florida has long held that

"[i]t is essential to the well-being of the profession that every attorney square his personal and professional conduct by the precepts of the Code of Ethics." Dodd v. The Florida Bar, 118 So. 2d 17, 21 (Fla. 1960). Respondent failed to uphold such standards during his representation of the Gielchinskys. He was more concerned with the big "payout" for his life's work without regards to his ethical responsibilities to his client or the legal profession.

A judgment must be fair to society, fair to the attorney, and severe enough to deter others who may be tempted to become involved in like violations. See Spear, at 1246, citing The Florida Bar v. Lord, 433 So. 2d 983 (Fla.1983). The Respondent's serious misconduct which included neglecting his clients, making misrepresentations to the court, and manufacturing a conflict of interest, should not be taken lightly. A 91-day suspension, requiring proof of rehabilitation prior to reinstatement, would adequately protect the public and would appropriately address Respondent's misconduct. It would act as an effective deterrent to other attorneys who might be tempted to engage in similar misconduct.

The Referee's disciplinary recommendation is supported in the Florida Standards for Imposing Lawyer Sanctions, as outlined in the Referee's report. Suspension is appropriate pursuant to Standard 4.42 when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or a

lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Further, suspension is appropriate pursuant to Standard 6.12 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. Suspension is also appropriate under Standard 7.2 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.

The Referee found as mitigation Respondent's character or reputation under Standard 9.32(g) [ROR-17]. Respondent argues that his misconduct should be discounted because it occurred several years ago. He also indicated that the discipline should be less severe because of the loss of his close personal friendship with Mr. Gielchinsky due to the misconduct set forth herein. The Bar would submit that it is this type of logic which justifies the Referee not finding the absence of a dishonest or selfish motive under Standard 9.32(a) as a mitigating factor. Respondent has had time to reflect upon his actions and accept responsibility but continues to refuse to do so. He instead focuses on a "woe is me" attitude and his losses instead of focusing on the impact his conduct had on his clients, the legal profession and the public as a whole. The limited mitigation

offered by the Respondent is insufficient to overcome the presumption that suspension is appropriate under the facts set forth in the Report of Referee.

In aggravation, the Referee considered Respondent's prior discipline, his dishonest or selfish motive, the pattern of misconduct, the multiple offenses and his substantial experience in the practice of law [See Fla. Stds. Imposing Law. Sancs. 9.22(a), 9.22(b), 9.22(c), 9.22(d) and 9.22(i), respectively and ROR 16-17]. The Referee found that as part of Respondent's efforts to create a conflict, he neglected cases, he failed and refused to effectively communicate with the Gielchinskys, he lost and/or misplaced documents, he failed to turn over documents to the Gielchinskys, and he made misrepresentations to the Gielchinskys regarding their cases [ROR 8].

The Respondent has failed to present any case law supporting a sanction less than the 91-day suspension recommended by the Referee but argues that the case law presented involved facts different from those set out herein and that the misconduct in those cases was more serious. Further, he argued that the violations found herein, standing alone, would warrant a public reprimand or perhaps an admonishment for minor misconduct. The Respondent neglects to appreciate that his misconduct was not isolated or random, but rather his actions were a systematic pattern of serious misconduct.

To support the recommendation of a 91-day suspension, the Bar submits this Court consider the serious nature of the Respondent's misconduct in this matter and the following cases: The Florida Bar v. Brown, 905 So. 2d 76,82 (Fla. 2005) and the The Florida Bar v. Valentine-Miller, 974 So. 2d 333, 338 (Fla. 2008), which uphold the proposition that attorneys are held to the highest ethical standards because the Rules of Professional Conduct mandate such a level of conduct and, more importantly, so as not to damage the public's trust in the legal profession. The Respondent, in an effort to protect a charging lien, made misrepresentations before the federal court regarding the fee structure [TFB Ex. 26].

In addition, Respondent made misrepresentations to the trial court in the pool case. He claimed that the Gielchinskys had no objection to his withdrawing from the case and thereafter that opposing counsel had "interposed no objection to the motion" to withdraw. Respondent failed to coordinate the hearing with his clients and he failed to provide notice of the hearing to opposing counsel. Respondent also failed to provide opposing counsel with a copy of said motion [ROR 7]. Respondent's conduct was not merely a scrivener's error but rather his modus operandi of doing or saying whatever was expedient to support his cause or position. The Referee found Respondent violated Rule 3-4.3 and Rule 4-8.4(c).

Veracity should be the hallmark of an attorney and officer of the Court. It is the foundation of the trust and confidence that must vest in a lawyer. Petition of Steele, 283 So. 2d 350, 351(Fla. 1973). This Court has stated that it "find[s] it troubling when a member of the Bar is guilty of misrepresentation or dishonesty, both of which are synonymous for lying. Honesty and candor in dealing with others is part of the foundation upon which respect for the profession is based." The Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992).

"[D]ishonest conduct by a lawyer results in 'an erosion of confidence on the part of the judiciary and the public in lawyers' honesty. There is no more serious impact upon the integrity of our judicial system.'" The Florida Bar v. Russell-Love, 135 So. 3d 1034, 1039 (Fla. 2014), quoting The Florida Bar v. Corbin, 701 So. 2d 334, 336 (Fla. 1997). Dishonesty and lack of candor cannot be tolerated in a profession that relies on the truthfulness of its members. See The Florida Bar v. Rotstein, 835 So. 2d 241, 246 (Fla. 2002); The Florida Bar v. Korones, 752 So. 2d 586, 591 (Fla. 2000). The 91-day suspension recommended by the Referee measures up to the gravity of the offenses and makes it clear that such conduct will not be tolerated by the attorneys who want the privilege of practicing law in the State of Florida.

CONCLUSION

A Referee's findings should not be disturbed unless they are clearly erroneous. This Referee's findings of serious misconduct and recommendations of a ninety-one (91) day suspension are clearly supported by the record, the case law and the Standards for Imposing Lawyer Sanctions. The Florida Bar respectfully submits that the Court should approve the Report of Referee in its entirety and suspend the Respondent for at least ninety-one (91) days and pay the costs incurred by The Florida Bar.

Respectfully Submitted,

Frances R. Brown-Lewis, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal and that a copy has been furnished by First-Class U.S. Mail to Kevin P. Tynan, Richardson & Tynan, P.L.C., 8142 N. University Drive, Tamarac, FL 33321-1708 and via E-Mail to ktynan@rtlawoffice.com; and to Staff Counsel, The Florida Bar at aquintel@flabar.org on this 2nd day of March, 2017.

Frances R. Brown-Lewis, Bar Counsel
The Florida Bar
Fort Lauderdale Branch Office
Lake Shore Plaza II
1300 Concord Terrace, Suite 130
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 503452
fbrownle@flabar.org

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

Frances R. Brown-Lewis, Bar Counsel