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 (17G);
2012-50,157 (17G)
2012-50,427 (17G)
2012-50,637 (17G)

RESPONDENT'S INITIAL BRIEF

KEVIN P. TYNAN, #710822
RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

TABLE OF CONTENTS

Page(s)

TABLE OF CASES AND CITATIONS

R. Regulating Fla. Bar

Fla. Standards for Imposing Lawyer Sanctions

STATEMENT OF CASE AND FACTS

Starting in the Spring of 2005 Respondent Petersen served as co-counsel in a case involving the failure of the underlying Defendant in the case in chief to honor a contract promise to pay Robert Gielchinsky (the complaining witness) monthly installment payments toward the purchase of a tobacco brand product (the "Bronco Brand"). ROR 2.[1] The case was hard fought, to such a degree that a discovery special master had to be appointed to oversee all depositions. TT 399.

Eventually, the case was set for trial in February 2011. Right before the process of jury selection was to start, the Bronco brand attorney asked for an opportunity to settle the case. It was settled there and then in front of Trial Judge Ellen Venzer, and she approved the Award. TT 180 & 497. Importantly, after the settlement, the griever Robert Gielchinsky sent Petersen an email thanking him for all the work he did on the case and standing by the Gielchinsky's until the end. Resp. Ex. 7. The Petersen-Gielchinsky fee agreement provided that Petersen was entitled to a charging lien in the event a trial or settlement was favorably decided in Gielchinsky's favor. TFB Ex. 10. A clarification was later signed making it

---

[1] The Florida Bar, Appellee, will be referred to as "The Bar" or "The Florida Bar." Byron Gregory Petersen, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the Report of Referee and the symbol "TT" with a page reference will be used to designate the transcript of the final hearing. Exhibits introduced by the parties will be designated as TFB Ex. ___ or Resp. Ex. ___.

abundantly clear that Petersen's fee percentage applied in and to the Bronco brand (i.e. in the Washington D.C. Trademark "Bronco" and the Washington D.C. Copyright of a "rearing horse"). TFB Ex. 11. This was **not** a new fee agreement, but a clarification triggered when Petersen amended Gielchinsky's complaint in the underlying Bronco case in order to obtain restoration, recession, foreclosure and other important grounds for recovery coupled with an order to the then owner of the Bronco brand to relinquish all rights in the brand and reassign those rights back to Robert Gielchinsky personally. TT 184. This document, to help Robert Gielchinsky due to severe financial difficulties, also created a twenty-thousand-dollar credit in favor of the Gielchinsky's. TFB Ex. 10 & 11.

Following the Settlement and the clients' "thank you" note, Petersen began a series of emails to Gielchinsky asking to discuss the logistics of liquidating the Brand rights component of the February 2011 settlement so that Petersen's 15% ownership in Broncos could be satisfied. Resp. Ex. 8. Gielchinsky refused to respond with the exception of one email from Gielchinsky where he noted that all the logistics questions posed by Petersen were legitimate and deserved discussion. See for example Resp. Ex. 8.

No such discussion was ever attempted by Gielchinsky and Mr. Petersen was forced to begin the rather arduous process of researching Florida charging liens with an eye to the probability one must be filed. TT 455-456.

Mr. Petersen prepared a draft of a Notice of Charging Lien. He asked Gielchinsky on more than one occasion whether Gielchinsky had any comments about the language of the Charging Lien. TT 502-503. Petersen thought that Gielchinsky might have changes which would not affect enforceability of a Notice of Charging Lien, but which Gielchinsky thought might lessen remarks about non-payment so as to help with Gielchinsky's financial reputation (which can be important as Gielchinsky planned to get investors for the Bronco brand). TT 455-456. Once again, Gielchinsky declined to respond. TT 455-456.

Given the settlement in the underlying case from which Petersen's right to fees and advances and lien were vested, dismissal was, logically, right around the corner. Had a dismissal been entered before a charging lien notice could be filed the court in the underlying case from which the right to fees was based would completely loose subject matter jurisdiction and Petersen would be forced to file a separate circuit court case on fees (with all attendant delays typical of any commercial civil case) that would have taken years to resolve. TT 455.

Now the emails really started flowing between the Respondent and his clients and they were rough and hateful, with the Gielchinskys makings all sorts of scurrilous ad hominin attacks that Petersen was "essentially" a crook because he did not trust the Gielchinskys to pay him his fees and he was going to secure his fees by following through with a Notice of Charging Lien. TT 503. And, after

Petersen's charging lien notice was filed, in similar respects co-counsel's charging lien was also filed. TT 502. It would seem that some of the Gielchinskys unjustified anger toward Mr. Petersen arose from the fact that with the entrance to the fray by co-counsel, the Gielchinskys faced two charging lien procedures - not just Petersen's.

Seemingly, out of nowhere, Petersen was copied on an email that said that the parties in the underlying case and their respective (and many) attorneys would be affixing e-signatures that afternoon to formally confirm the underlying settlement (though it had already been announced before the Court and approved). TFB Ex. 16. Petersen knew from his earlier research on charging liens that if the settlement *res* is transferred without Petersen's consent he could lose all lien rights. TT 455. He also discovered that any defense attorney permitting a settlement without satisfaction of opposing counsel's lien is liable under Florida Common Law for the full value in money or properties of the charging lienor's notice. TT 445; 499. Thus, to protect his rights, Petersen sent an email to all parties that the settlement papers must not be signed until Petersen's lien was satisfied. TFB Ex. 15. This was promptly followed by a phone call and a letter to Judge Venzer to advise her of the road-block. TFB Ex. 16.

During a telephonic hearing Judge Venzer asked Mr. Petersen to state his position in the matter. TT 504. Petersen responded by noting that Notices of

Charging Liens can at times involve some ethical issues and that he (Respondent) did not want to talk until he could hire compensated counsel to advise him as to each and every legal and all ethical aspect of Petersen's attorneys' fee agreement and step by step prosecution of the lien proper. TT 504-505. Petersen hired attorney Lawrence Livotti (followed by attorney Richard Baron) to advise him each step along the way. TT 505. Mr. Livotti appeared in Court with Mr. Petersen, serving as "ethics counsel" until he was replaced with attorney Richard Baron, who handled the charging lien evidentiary hearing that was held in September 2011.

Thereafter, in September 2011 Judge Venzer conducted an evidentiary hearing, on the merits of Petersen's and his co-counsel's charging liens. Resp. Ex. 13. As is noted above, Petersen was represented by attorney Richard Baron while co-counsel Ron Weil represented his Firm without separate counsel. Resp. Ex. 13.

Well known and respected attorney Robert G. Josefsberg was called to testify as an expert on the ethics of the language of fee agreements and the ethics of the Notice of Charging Lien. Resp. Ex. 13 (p.48-67). He testified, without any objection, as to his experience with contingency agreements and Notices of Charging Liens. Resp. Ex. 13.

It is also important to know that Petersen immediately filed a motion to withdraw after learning of the attempt to divert Petersen's funds and rights in the recovered Bronco IP rights and before any hearing after Petersen told everyone to

stand down to protect his Firm's fees. TT 505. Independent counsel for Gielchinsky, Louis Gigliottie, fully agreed to the withdrawal order as it was clear that Petersen could not represent Gielchinsky while at the same time prosecuting a Notice of Charging Lien against him (an irreconcilable conflict). Resp. Ex. 10; TT 506.

Subsequently, in January 2012 Judge Venzer rendered her written order awarding Mr. Petersen and co-counsel a 15% ownership interest in the recovered Bronco brand to be satisfied by 15% of income from the sale of the branded product not to exceed 5 million dollars. TFB Ex. 14. That award in favor of Petersen was affirmed on appeal by the Third DCA (PCA) on March 26, 2014. Resp. Ex. 15.

The Florida Bar was brought into the fray in the fall of 2011. Even before Judge Venzer's 5 million dollar capped fee award to Petersen and affirmance of that Award on charging lien by the Third District, Gielchinsky filed a complaint with the Florida Bar arguing that even though all of the ethical issues Gielchinsky was complaining about to the Bar had already been resolved in favor of Petersen by Judge Venzer based on her own understanding of the law (obviously) and on the expert testimony of trial expert Robert Josefsburg he (Gielchinsky) still wanted a second bite at the apple and he filed the instant grievance.

After the Gielchinsky filings with the Bar, the Gielchinsky grievances proceeded through an investigation, panel hearing, Bar Complaint, Bar Trial, and now on the Supreme Court level. The Honorable Catherine M. Brunson served as the Referee by Order of Judge Jeffrey Colbath in the 15th Florida Circuit.

The evidentiary portion of the final Bar hearing now before this Court was held on May 5, 6 and 10 and June 8, 2016. The Referee refused to hold a hearing on the issue of sanction or the related topics of significant mitigation and issued her Report of Referee on September 15, 2016, wherein she adopted The Florida Bar's proposed Report of Referee almost entirely verbatim, finding the Respondent guilty of **each** and **every** rule violation plead in its complaint and has recommended that Respondent be suspended from the practice of law for ninety-one days. There is nothing in the Recommendation that gives any reasoning at all to support a conclusion that there should be a penalty.

The Respondent filed a motion for rehearing specifically addressed to the lack of a sanction hearing and other evidentiary matters. The motion for rehearing was denied on November 14, 2016 and this timely appeal follows that denial.

SUMMARY OF THE ARGUMENT

In the summer of 2012, after almost six years of hard fought litigation, the Respondent, with the assistance of co-counsel, settled that litigation with a recovery to the client in excess of multi-million dollars. Shortly thereafter, a dispute arose between these clients and both lawyers that represented them on substantially similar fee agreements over the payment of legal fees causing both lawyers to withdraw and file charging liens. Both lawyers prevailed in this fee dispute after an evidentiary hearing[2] (a full transcript of which is in the record) and had that order affirmed on appeal. None of these exhibits are discussed in the Report of Referee that finds this Respondent guilty of certain acts of misconduct that are averse to the ruling by this trial court. This alone should be grounds for reversal of the Report of Referee.

The lawyer in this case put his heart and soul into representing his clients for multiple years with little or no compensation and when the fee dispute arose, he hired ethics counsel to assist him in navigating the ethical dilemmas that arose. At all times material, post initiation of the fee dispute, the Respondent was represented by ethics counsel, who attended all of the hearings in the *Vibo* matter through the appeal and into the defense of the Bar grievances filed by his former

---

[2] The full transcript of this hearing is in the record (Resp. Ex. 13), along with the trial judge's favorable ruling (TFB Ex. 14) and the Third District Court of Appeal's affirmance of the trial court (Resp. Ex. 15).

client and others that the clients convinced to file grievances. These facts, as well as other critical matters, are also not mentioned in the Report of Referee.

The Report of Referee fails to delineate how the factual findings that are being made are tied into any of the rule violations found in such Report, as the Referee, adopted the Bar's proposed Report of Referee, which failed to break the conduct down into the various counts of misconduct plead in the Bar's complaint or the rule violations plead by the Bar and as such this Court is left with having to make that evaluation themselves.

Lastly, the Referee failed to conduct a sanction hearing, violating the Respondent's due process rights, to present witnesses on mitigation and to personally testify regarding significant mitigation and the aggravating factors presented by the Bar. This alone requires the Referee's sanction recommendation to be rejected.

ARGUMENT

I. THE RESPONDENT DID NOT VIOLATE THE ETHICAL RULES RELATIVE TO HIS REPRESENTATION OF ROBERT AND WENDY GIELCHINSKY OR THEIR CORPORATE ENTITIES.

The Respondent represented Robert and Wendy Gielchinsky, and their corporate entities, on a daily all-consuming basis for more than six years and when it came time to pay their lawyer, the Gielchinskys took affirmative steps to avoid such payment, inclusive of attempting to transfer the recovery to avoid payment legal fees, litigating with the Respondent and the filing of a variety of Bar grievances by themselves and/or through others to force the Respondent not to seek his fees relative to a multimillion dollar recovery on the Gielchinskys' behalf.

The Florida Bar carries a heavy burden in this prosecution, as it should when it seeks to discipline a lawyer for alleged acts of unethical conduct. In this case, they must be able to prove by clear and convincing evidence that a lawyer engaged in a variety of ethical misdeeds while he represented a client. While the Referee listened to multiple witnesses over a four-day trial and received more than fifty exhibits into evidence, her conclusions in her Report of Referee, adopted verbatim from the Bar's proposed Report, are "clearly erroneous and lacking in evidentiary support" and must therefore be overturned. *The Florida Bar v. Canto*, 668 So.2d 583 (Fla. 1996); *The Florida Bar v. Porter*, 684 So.2d 810 (Fla. 1996). Further, there is no clear and convincing evidence of a rule violation. Perhaps the most

compelling argument for a reversal is the fact that the Report of Referee is devoid of any mention of the most compelling evidence presented on the key facts of this case, a ruling by Judge Venzer in the *Vibo* case wherein the Respondent prevailed on his charging lien and which order was upheld on appeal, notwithstanding the exact same arguments advanced by the Bar herein. See TFB Ex. 14; Resp. Ex. 13 & 15.

A. The Respondent.

The Respondent, Byron Gregory Petersen, is 65 years old and was admitted to The Florida Bar in December of 1976. TT363-363.The Respondent introduced a copy of his *Curriculum Vitae* as Resp. Ex. 2. His background included 18 years as a trial attorney with Greenberg Traurig, and 20 years as an adjunct law school professor. TT 364,371. Also of note was that he was recognized, based on grades and extracurricular activities, as the outstanding graduate, when he graduated from the University of Florida law school.

B. Overview.

The Respondent started representing Robert and Wendy Gielchinsky (sometimes collectively referred to as the Gielchinskys) and their various corporate entities in 2005, almost eleven years ago, and ceased representing the Gielchinskys, either individually or corporately, in 2011, approximately five years ago. ROR 2; TT 379. The uncontroverted testimony at trial was that the

Respondent represented the Gielchinskys on twelve different litigation matters and that these matters took most of the Respondent's time wherein the Gielchinskys became his primary clients. TT 171. Three of those matters will be discussed in some detail below. At the core of this case, however, is a dispute over the legal fees earned and awarded by court order, affirmed on appeal, but not fully paid.[3]

C. The Respondent is not guilty of the conduct plead in Count I.[4]

At the core of Count I of the Bar's complaint is the allegation that the Respondent's fee agreement in *Gielchinsky v. Vibo* (hereinafter *Vibo*) was improper and that when he and the client amended the agreement he allegedly engaged in a conflict of interest because he did not advise his client that he needed to seek independent counsel prior to executing the amended fee agreement.[5] The Bar further alleges that the Respondent engaged in other unethical acts when he tried to enforce a charging lien in *Aldar Tobacco Group, LLC, et. al., v. American Cigarette Company, et. al.* (hereinafter *Aldar*). For the reasons set forth below this Court should reject out of hand the allegations advanced by the Bar.

---

[3] The Trial Court capped these fees at five million dollars and the Respondent has only been paid approximately $33,000.00 through the date of the trial. See TFB Ex. 14.

[4] The Report of Referee does not provide a breakdown of what rule violations are allegedly associated with the factual matters at issue leaving this Court to determine what rule violations could or should follow from these factual findings.

[5] Judge Venzer, in her ultimate ruling in *Vibo,* fully disagreed with these claims after a full evidentiary hearing. See TFB Ex. 14.

In the *Vibo* case Gielchinsky was initially represented by Brian Hersh, Esquire. TT 410. The Respondent was brought in as a co-counsel to Hersh and was able to amend the complaint to include a claim for Gielchinsky to recover the intellectual property rights to a brand of cigarettes called Bronco.[6] After the two lawyers did not get along, Hersh was discharged and the Respondent was the only counsel in the matter through a several day nonbinding formal arbitration proceeding. TT 430, 433-436. After the arbitration proceeding concluded with both sides not accepting the decision, Ronald Weil, Esquire, was retained as co-counsel as the case approached trial. TT 419. The *Vibo* case settled on February 7, 2011, which was the day trial was to commence.

The Respondent's first retainer agreement on *Vibo* was not introduced by either party, but the testimony indicated that this first agreement was a split contingency fee wherein Gielchinsky was obligated to pay a reduced fee of $3,000.00 per month to be credited against a twelve percent contingent fee. TT 391,400. This first agreement was changed in February of 2008 when the Respondent dissolved his partnership with Kim Hawthorne, Esquire. TT 380. The second retainer agreement was introduced as TFB Ex. 10 and required a ten (10) percent contingency fee on "any recovery resulting from a claim, law suit, award, mediation, or settlement." The testimony at trial was that the Respondent did

---

6 The third Amended Complaint was introduced as TFB 17.

suggest that the Gielchinskys seek independent counsel on this revised retainer agreement as there were potential issues of malpractice relative to services performed by the Respondent's now prior law partner.[7] TT 404. The prior requirement of a monthly $3,000.00 payment was removed from the second retainer agreement as a further concession to the Gielchinskys. See TFB Ex. 10.

When Hersh was discharged as counsel and the Respondent assumed sole responsibility for the case, a new fee agreement was signed to provide an increased percentage for the Respondent. TT 410. The third fee agreement dated in September of 2008, introduced as TFB Ex. 19, and labeled as an Amendment to the February 2008 retainer agreement, provided that the Respondent would receive fifteen percent "of any recovery from any source in connection with (the *Vibo* case) including from any claim, law suit, award, mediation, or settlement."[8]

The trial testimony indicated that the Respondent and the Gielchinskys continued to discuss the fees to be paid and on or about April 9, 2010 (10 months prior to the settlement of *Vibo*) the Gielchinskys executed what was labeled as a

---

[7] This issue was specifically addressed in the retainer on page two under the heading "Novation." Also of note was that Hawthorne worked on the *Pool People* case and is not subject to a grievance. TT 380.

[8] The uncontroverted testimony at trial was that Weil had the exact same provision in his fee agreement with Gielchinsky and that his fee was ultimately negotiated down and paid without a Bar grievance being filed against him. TT 419. Also see Resp. Ex. 13, p.8.

Clarification of the September 2008 retainer. See TFB Ex. 11. This Clarification read as follows:

> In the Vibo case I think that my firm's fee agreement with you and Wendy not only covers a percentage "recovery" against a money judgment but also would cover a percentage "recovery" from any assets transferred to you in settlement or through trial (such as a transfer of the Bronco brand to you) or a hybrid of the two. The total recovery for the aforementioned representation is not to exceed $5,000,000.00 (five million dollars). Please print this out, sign below, scan this, and email the scan PDF to me letting me know that you agree with this clarification.

The Gielchinskys executed the Clarification and returned same to the Respondent.

The Bar has asserted that the Respondent violated R. Regulating Fla. Bar 4-1.8(a) because the September 2008 fee agreement as clarified gave the Respondent a "possessory interest" in the *res* of the litigation and therefore the Respondent needed to follow all of the requirements of a business transaction with a client inclusive of telling the client to secure independent counsel before signing the agreement. The Bar has provided no precedent on point for this claim. Nor does the Report of Referee.

R. Regulating Fla. Bar 4-1.8(a) reads as follows:

> **(a) Business Transactions With or Acquiring Interest Adverse to Client.** A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary

> interest adverse to a client, ***except a lien granted by law to secure a lawyer's fee or expenses***, unless:
>
> > (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
> >
> > (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> >
> > (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. (***emphasis added***)

The real issue herein is whether the fact that a legal fee to be paid gets calculated by the value of the intellectual property rights that were recovered in the *Vibo* settlement created a "possessory interest" in the case that triggered the requirement of R. Regulating Fla. Bar 4-1.8(a). While the exception to this rule (except a lien granted by law to secure a lawyer's fee or expenses) is the simple answer to this essential question, it is evident that at the time of execution of these agreements that it is the value of the recovery of the intellectual property rights and not the actual intellectual property rights that were referenced in the retainer and clarification and therefore the predicate to R. Regulating Fla. Bar 4-1.8(a) (a possessory interest) is not found and therefore there can be no violation of the rule.

The facts of this case are different than that found in this Court's prior precedent. For example, in *The Florida Bar v. Abagis*, 318 So. 2d 395 (Fla. 1975), a lawyer was found to have secured a pecuniary interest in his client's litigation by purchasing, from his clients, the home that was the subject of the litigation while the litigation was pending. Another example of a violation is where a lawyer purchased the company that was the subject of the litigation. *The Florida Bar v. Norvell*, 685 So. 2d 1296 (Fla. 1996). See also *The Florida Bar v. Perry*, 377 So. 2d 712 (Fla. 1979). Each of these examples are violations of the rule but in the facts found herein the Respondent did not violate the rule.[9] It is important to note that any possessory interest (no matter how transitory) came by court order (which should exonerate the Respondent by itself) and well after the Respondent was no longer representing the Gielchinskys.[10] Further, it should be noted that the Bar's argument taken to an extreme would require every lawyer who seeks a contingency fee against nonmonetary claims would be required to have their clients seek independent counsel just to sign a fee agreement. Lastly, as the exception to the

---

[9] Judge Venzer's resolution of the Respondent's and Weil's charging liens, awarded both lawyers a percentage of the intellectual property rights as security for the fees to be paid them, which ownership interest was to revert to the Gielchinskys after the lawyer was paid in full. See paragraph 5 of the January 26, 2012 Order introduced as TFB Ex. 14. TT

[10] The Referee completely misstates the nature of the settlement in that Gielshincky received intellectual property rights and a monetary amount, rather than he gave the intellectual property rights (that he did not own at that time) to Bronco in exchange for a monetary amount. See ROR 2; TFB Ex. 14.

rule states an attorney can have an interest if it is a "a lien granted by law to secure a lawyer's fee or expenses", which is exactly the way Judge Venzer resolved the *Vibo* case. The Report of Referee is devoid of any reference to Judge Venzer's findings or that Judge Venzer was affirmed on appeal and instead the Bar took the Referee down a rabbit trail to a different dispute between the parties.

The Bar introduced exhibits related to the *Aldar* matter (a completely different case and different lien) in an attempt to support its claim of a violation of R. Regulating Fla. Bar 4-1.8(a). After *Vibo* settled and the Respondent had not been paid and as litigation over his fee continued in the *Vibo* case, the Respondent, filed a different charging lien in *Aldar* for services he had rendered in that case, where there was a substantial recovery after he had withdrawn from that case. The Respondent was assisted by counsel, but who did not appear, in the *Aldar* proceeding. A hearing was held on January 12, 2012 (two weeks before Judge Venzer issued her written Order on *Vibo*) and ultimately Magistrate Snow issued a Report. See TFB Ex. 26, 27, 28 & 29. In *Aldar* the Respondent's charging lien was stricken as he had withdrawn from this case prior to the contingency having been met. See TFB Ex. 26.

The *Aldar* charging lien issue was also litigated in *Vibo*. Judge Venzer conducted a hearing on September 13, 2011 (well prior to the *Aldar* hearing). See Resp. Ex. 13. Counsel for the Gielchinskys made the same arguments advanced by

the Bar herein. See for example p. 17-23 of Resp. Ex. 13. Weil also presented expert testimony from a well-respected expert, Robert Josephsberg, Esquire, who was a 49-year member of the Bar at the time of his testimony. Resp. Ex 13, p.48-51. Josephsberg opined that he did not see an ethical violation regarding the fee agreement and that it was the value of the brand or intellectual property rights and not an ownership interest that was involved in the retainer agreement. See Resp. Ex. 13, p. 55-67. After also hearing testimony from Robert Gielchinsky, Judge Venzer found in favor of both the Respondent and Weil, made an oral ruling as to her decision and that is found at pages 114 through 121 of Resp. Ex. 13. This oral ruling was reduced to writing on January 26, 2012 and was introduced as TFB 14. The Gielchinskys appealed said order and the testimony at the final hearing was that the record on appeal was supplemented by the *Aldar* rulings referenced above but that the Third District Court of Appeals affirmed Judge Venzer's ruling on March 26, 2014. See Resp. Ex. 14 and 15; TT 519-520.

A careful consideration of both the *Aldar* and *Vibo* hearings and the rulings made after those hearings and the testimony presented in this case leads to the inescapable conclusion that the Respondent did not violate any of the rules referenced in Count I of the Bar's compliant.[11]

---

[11] It has been the Respondent's position that he had a good faith position in *Aldar* and was assisted by non-appearing counsel who likewise held a good faith belief in the charging lien for that case. The fact that the Respondent did not

D. The Respondent is not guilty of the conduct plead in Count II.

Count II, III, and IV concerns the Respondent's representation of the Gielchinskys in a matter styled *Gielchinsky v. The Pool People Construction Company* (hereinafter "*Pool People*"). This was the first case wherein the Respondent represented the Gielchinskys and this case commenced in March of 2005. See TFB Ex. 5. The Respondent's prior law firm was paid $6,500.00 for said representation on this case which included an appeal (over a two year perioid, and the Respondent was told not to actively pursue the case. TT 526-527.

At issue in the case was a dispute over the construction of a pool. Opposing counsel in *Pool People*, Jeffrey Shalek, Esquire, was called as a witness by the Bar. TT 81-98. He valued his client's case (a construction lien foreclosure) as very minimal on the damages (TT 85-86) and agreed that at the outset of litigation the matter was hotly contested with motion practice and discovery. TT 86. He further agreed that there was a significant period of inactivity where ***both sides*** did not produce record activity in the file. TT 96-97. Mr. Shalek has not been prosecuted by the Bar.

---

prevail in the *Aldar* litigation (on a different charging lien) does not present clear and convincing evidence of conduct prejudicial to the administration of justice in violation of R. Regulating Fla. Bar 4-8.4(d). As the Respondent is not guilty of both Rule 4-1.8(a) and 4-8.4(d) there can be no violation of R. Regulating Fla. Bar 4-8.4(a) in that no other Rules of Professional Conduct were violated as to Count I.

The Bar has asserted a variety of rule violations claiming that the Respondent provided incompetent representation, that he failed to act with reasonable diligence, and that he received an excessive fee. The major argument advanced by the Bar is that they should prevail on Count II because the case was dismissed for a lack of prosecution. This argument completely misses the mark.

The *Pool People* docket was introduced as TFB Ex. 5 and it shows that the case was filed on March 9, 2005 and indicates that there was record activity through October of 2007.[12] The trial judge, on August 4, 2009, dismissed the case alleging a lack of prosecution by ***either*** party. The Respondent filed Motions for Rehearing of said dismissal which motions were denied on October 1, 2009. The Respondent promptly filed a notice of appeal, prosecuted the appeal with the Fourth District Court of Appeals entering an Order of reversal on February 9, 2011. See Resp. Ex. 3. The docket reflects that the mandate issued February 28, 2011, said reversal and the return of jurisdiction to the trial count occurred just as the *Vibo* case was settling (February 24, 2011). No record activity occurred in the case until the Respondent filed his motion to withdraw and a hearing was

---

[12] This is the approximate time frame that the Respondent began working on the Vibo case which was of significantly higher value to the Gielchinskys, a fact admitted to by Robert Gielchinsky on cross examination. The Respondent testified that he was directed by Robert Gielchinsky to focus his attention on the *Vibo* case, as well as the other more important matters that were pending. TT 387. While the Gielchinskys testified that they did not instruct the Respondent to cease work on *Pool People*, Robert Gielchinsky admitted on cross examination that his priority was the *Vibo* case. TT 323.

conducted on said motion on June 28, 2011. TFB Ex. 5. After this withdrawal, the Geilchinskys took no action to pursue same.

Based on these facts the Bar asserts that the Respondent failed to provide competent representation to his clients in violation of R. Regulating Fla. Bar 4-1.1 which reads as follows:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The Bar's basic argument is that the Respondent allowed the case to be dismissed for a lack of prosecution and therefore he must have provided incompetent representation. However, this argument clearly fails as the Fourth District Court of Appeals found that the case should not have been dismissed by the trial judge. See Resp. Ex. 3. The Bar presented no expert testimony on this point or other detail on the *Pool People* case and advanced no other argument other than the dismissal as grounds for this asserted rule violation. As such this Court should find the Respondent not guilty of having violated R. Regulating Fla. Bar 4-1.1. See for example, *The Florida Bar v. Neale*, 384 So. 2d 1264 (Fla. 1980) [simple malpractice does not warrant a disciplinary sanction]; *The Florida Bar v. Rose*, 823 So. 2d 727 (Fla. 2002) [in order to establish a lack of competence, the conduct must be somewhat egregious].

The Bar next contends that the Respondent violated R. Regulating Fla. Bar

4-1.3 which is the diligence rule and it simply requires that: "A lawyer shall act with reasonable diligence and promptness in representing a client." Again the Bar presented no expert testimony and its only argument was that the case was dismissed for a lack of prosecution and perhaps lasted too long without resolution. As to the later charge, the case was filed in March of 2005 and shows record activity through October of 2007 and then a period of record inactivity for almost two years except for two hearings initiated by the trial judge. See TFB Ex. 5. With the dismissal, the case went on appeal and the Fourth District Court of Appeals maintained jurisdiction of the case from October 29, 2009 through February 25, 2011 or roughly 16 months. As the case was on appeal for 16 months there was nothing that could be done to advance the trial level aspects of the case. Further, the fact that there is no record activity from late February of 2011 through late June of 2011 (four months), as the Respondent and the Gielchinskys developed a conflict of interest due to the *Vibo* fee dispute does not clearly and convincingly demonstrate a lack of diligence. Therefore, the only arguable period of time that this claim would attach to is from approximately October of 2007 through August of 2009. The Respondent's defense to this time frame was that the Gielchinskys wanted him to focus on *Vibo* and other higher value matters. TT 387. This defense is fully substantiated by all of the circumstances in the relationship between the

Respondent and his clients.[13] Further, if the Fourth District Court of Appeals found that the case should not have been dismissed for a lack of prosecution, a finding of a lack of diligence is contrary to a reasoned appellate opinion. It is respectfully contended that the Bar has not proven a clear and convincing violation of R. Regulating Fla. Bar 4-1.3.

Next the Bar contends that the Respondent violated R. Regulating Fla. Bar 4-1.5(a) and the prohibition in that rule for a lawyer charging or collecting an excessive fee. The Bar presented no expert testimony on this charge. The Respondent testified that the legal services furnished in prosecuting a successful appeal far exceeded the fees that had been paid to his predecessor firm (his prior partnership with Hawthorne who also worked on this file prior to the dissolution of the firm). TT 569-570. While the bar failed to present any testimony on the Respondent's reasonable hourly rate or the number of hours actually expended in the case if we divided the fee "allegedly" paid ($6,500.00) by a very reasonable rate for a 30-year lawyer, who had been a partner in a major South Florida law firm, ($350.00 an hour) the Respondent needed to work just 18 hours to have earned that fee. On the record before the Court, the Bar has failed to prove that the

---

[13] The Respondent also testified that an expert needed to be retained and the Gielchinskys did not have the funds to retain such expert. TT 569. The Gielchinskys also testified about their financial struggles during this time frame and that they had to downsize and moved back to New Jersey to save money. TT 385-386.

Respondent collected a clearly excessive fee in violation of R. Regulating Fla. Bar 4-1.5(a).

The remaining alleged rule violations for Count II are likewise not established by clear and convincing evidence in that the Respondent did not engage in conduct prejudicial to the administration of justice or violate a Rule of Professional Conduct. See R. Regulating Fla. Bar 4-8.4(a) and (d).

E. The Respondent is not guilty of the conduct plead in Count III.

In Count III the Bar contends that the Respondent failed to adequately communicate with his clients in regards to the *Pool People* case in violation of R. Regulating Fla. Bar 4-1.4(a) which reads as follows:

> **(a) Informing Client of Status of Representation.** A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance

not permitted by the Rules of Professional Conduct or other law.

While the Gielchinskys did testify that they believed that the Respondent failed to adequately communicate with them on the *Pool People* case, they admitted to personal meetings, telephone calls, emails and other correspondence between them during the time frame of the Respondent's representation.[14] TT 321-321. Further the Respondent introduced as Resp. Ex 18 just a small portion of the e-mail exchanges between the Respondent and his clients on the *Pool People* case, inclusive of sharing drafts of briefs and other important matters. Some of the e-mails introduced by the Bar also referenced the *Pool People* case. On balance there is no clear and convincing evidence of a violation of R. Regulating Fla. Bar 4-1.4(a).[15]

The remaining alleged rule violations for Count III are likewise not established by clear and convincing evidence. See R. Regulating Fla. Bar 4-8.4(a) and (d).

---

[14] The Respondent testified that Robert Gielchinsky was a very involved client, he went to hearings and depositions, reviewed all pleadings and correspondence (many times before they were sent) and maintained a constant flow of communication and direction via e-mail and phone calls.

[15] If the Gielchinskys were truly upset about the communication (or other aspects of the representation), why would they continue to hire the Respondent on new matters?

F. The Respondent is not guilty of the conduct plead in Count IV.

The Bar next takes issue with the Respondent's withdrawal from the *Pool People* case. Much of the Bar's claims are clearly factually inaccurate as proven by the exhibits and testimony on Count IV. The Bar first claimed that the Gielchinskys only received notice of the Respondent's motion to withdraw the day before the hearing. See paragraph 48 of the complaint. However, as TFB Ex. 8 clearly shows the Respondent sent the Gielchinskys an email on June 18, 2011, copied to one of their lawyers, Lou Giggliotti, which included as an attachment his motion to withdraw and confirmation of the hearing date of June 28, 2011. The testimony at trial from the Gielchinskys was that they did in fact receive said e-mail but that they allegedly did not open it as the Respondent was sending them a significant amount of e-mail regarding his withdrawal from all matters. TT 141-142; 324-235. The Gielchinskys clearly had notice and it was timely.

Notwithstanding their failure to timely open their e-mail the Gielchinskys did appear telephonically for the hearing and objected to the Respondent's withdrawal from the case. TT 326. Opposing counsel, Shalek did not attend the hearing. The trial judge considered the argument advanced by the Respondent and the Gielchinskys and agreed to allow the Respondent to withdraw. TFB Ex. 6. The Respondent had prepared a typed order granting his motion prior to the hearing and presented same to the trial judge. See TFB Ex. 6. TT 537. The trial

judge made some handwritten additions to the order setting forth a time frame to retain new counsel and allowing for no discovery during the referenced 30-day time frame. That said there were two provisions in the order that should have been modified. The Bar took issue with the following passage in the order:

> The Court finds that the Plaintiffs received timely notice of the hearing and they were also provided with copies of the withdrawal motion. There have been no objections to withdrawal interposed by either Plaintiff.

The Plaintiffs, the Gielchinskys, clearly received timely notice, as is explained above, however they did object to the withdrawal and this fact should have been corrected by the Respondent and/or the trial judge who had clearly listened to said objection and made the same scriveners error as the Respondent.

The other passage in the order that is questioned by the Bar is as follows: "The Defendant's counsel, Mr. Shalek, has interposed no objection to the motion." Shalek testified at trial that he did not receive actual notice of the hearing and the Respondent testified that he believed that he had served the motion and a notice of hearing at the same time as the e-mail that was sent to his client. Both parties are testifying truthfully on this point. TT 537-542.

Post the hearing, the Gielchinskys mailed a letter/motion to attempt to rehear the order of withdrawal and further complained about both passages in the order. The Respondent testified that he offered on several occasions to submit a revised

order to the court if the Gielchinskys would specifically request how they would like the order amended but they never made such a request. TT 540-541.

The Bar claims that both passages reflect that the Respondent made a material misrepresentation to the trial judge and otherwise engaged in dishonest or deceitful conduct in violation of several of the dishonesty rules. Each of the dishonesty rules, R. Regulating Fla. Bar 4-3.3(a)(1), 4-4.1(a) and 4-8.4(c) require intent to secure a violation of said rule. See for example, *The Florida Bar v. Neu*, 597 So. 2d 266 (Fla. 1992). While it is clear that as to the first passage there was an objection interposed by the clients, it is evident that a simple scriveners error was made by both the trial court and the Respondent in not correctly reflecting an objection that was overruled by the court. There is no clear and convincing evidence that the second passage drafted prior to the hearing is a knowing and intentional misrepresentation or dishonest act. One could contend the statement that 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.

The Bar has asserted a violation of R. Regulating Fla. Bar 3-4.3 which states in pertinent part that:

> The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or

> outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.

It is evident that this rule, found in Chapter 3 of the R. Regulating Fla. Bar and described as the Rules of Discipline, is more of a jurisdictional rule (a lawyer may be disciplined if) and is clearly a general catch all rather than a substantive rule. This rule has been used on several distinct occasions when the facts of a case did not fit one of the rules found in Chapter 4 of the R. Regulating Fla. Bar. See for example *The Florida Bar v. Draughon*, 94 So. 3d 566 (Fla. 2012). However, in this case the Bar has set forth multiple claims related to Chapter 4 and as such there is no need to discuss R. Regulating Fla. Bar 3-4.3. Further, the Respondent has not engaged in an act contrary to honesty and justice.

It is respectfully submitted that the remaining alleged rule violations for Count IV are likewise not established by clear and convincing evidence in that the Respondent did not engage in conduct prejudicial to the administration of justice or violate a Rule of Professional Conduct. See R. Regulating Fla. Bar 3-4.2, 4-8.4(a) and (d).

G. The Respondent is not guilty of the conduct plead in Count V.

Count V of the Bar's complaint discusses the grievance filed by the Respondent's former legal assistant, Tina Broder. To some extent this grievance tracks the dispute between the Gielchinskys and the Respondent over his charging

lien in *Vibo*. The Respondent therefore readopts his previous arguments set forth above as if set forth fully herein.

Prior to addressing the claims made in Count V, it is important to address Broder's credibility. While she presented well at trial and appeared reasonable, the Respondent was able to document that at the time when she was directly employed by the Respondent and supposed to be assisting the Respondent on the Respondent's defense of claims being made by the Gielchinskys she was providing advice and information to the Gielchinskys about the Respondent's defenses and even asserting the legal opinion that the Respondent could not assert his lien right. TT547-548. On the eve of the final hearing in this case, the Respondent discovered that at this same time frame Broder had been named, by Robert Gielchinsky as an officer in one of his new companies and this fact was never disclosed to the Respondent. TT 548. See TFB Ex. 4.

The Bar in Count V makes a multitude of generalized claims of unethical conduct and at trial failed to provide the specifics that could have supported these generalized claims. The Report of Referee suffers from this very same infirmity. For example, Count V claims that the Respondent purposefully neglected the Gielchinsky client matters and failed to communicate with them. As no specific fact or facts were set forth regarding this neglect allegation there is no support in the record for this claim. The Bar also advanced a generalized claim of a lack of

communication regarding the Gielchinskys. However, as the testimony at trial proved, there were multiple in person meetings, telephone calls and a plethora of e-mails between the Respondent and his clients.[16] TT 320-321. There was significant attorney-client communication. As is noted above, the Gielchinskys admitted as much at trial.

The Bar also claims, In Count V, that the Respondent "made a purposeful effort to create a conflict" between himself and the Gielchinskys so he could withdraw from their cases and still collect on his contingency fee in *Vibo*. While Broder certainly testified that this was her belief, it is clearly and convincingly evident that a true conflict arose between the Respondent and his clients when it appeared that they would not protect his legal fees in *Vibo* and were in the process of completing a transfer of the one asset that would have provided the security for the Respondent (and his co-counsel to be paid) – the intellectual property rights.

The evidence at trial demonstrated the following timeline:

> February 7. 2011: The case settled and Robert Gielchinsky sends the following e-mail: "Byron – Just a quick note to thank you for all the hard work and sticking by Wendy and I through this miserable time. Talk to you tomorrow." See Resp. Ex. 7.
>
> February 24, 2011: The Respondent sends Robert Gielchinsky a detailed e-mail discussing the legal fees that

[16] The Respondent testified that in preparation for the trial he did a search of his e-mails and had over 13,000 hits for e-mails related to the Gielchinsky and their various cases. TT 580.

should be paid to him by virtue of the settlement and raises several topics that he believes need to be discussed. Robert Gielchinsky responds that all of the topics were "fair and reasonable" and agreed that the two of them should sit down and discuss of the issues raised (but Gielschinsky never did so.)) See Resp. Ex. 8

May 31, 2011: No resolution on how the fees are to be paid is made and the parties are still discussing the need to resolve this issue, but the legal work continues to consummate all aspects of the settlement. See TFB Ex. 15 and Resp. Ex. 9.

June 8, 2011: The Respondent receives an e-mail that Vibo and the Gielchinskys are about to sign all of the settlement paperwork, which will include the assignment of the intellectual property rights to another entity. The Respondent is immediately concerned and sends an e-mail to all counsel, as well as his clients, reminding everyone of his charging lien rights and expressed his concern about the consummation of the settlement paperwork and the transfer of all intellectual property rights that very same day. See Resp. Ex. 4. That same day opposing counsel advised Judge Venzer of a possible problem with finishing the settlement. See TFB 16. The Respondent's e-mail also resulted in a very strident e-mail from his client and the attorney client relationship quickly deteriorated.

June 9, 2011: Judge Venzer holds a quick telephonic hearing on opposing counsel's letter and the Respondent's e-mail. The Respondent asks to be able to secure his own ethics counsel so he could proceed properly regarding the dispute with his clients. The judge agrees and orders that the settlement documents not be executed until the lien issue could be addressed.

June 15, 2011: A hearing is held before Judge Venzer, and the Respondent is represented by Lawrence Livoti, Esquire. A copy of the hearing transcript is admitted as TFB Ex. 25. The Respondent secures an Order, ***by agreement with counsel for Gielchinsky***, allowing him to withdraw as counsel

> for Gielchinsky. See Resp. Ex. 10. The Respondent is ordered to post haste file a dismissal of the related *Denman* case and he does so that day. See Resp. Ex. 11.

On the date that he withdrew in the *Vibo* case, the Respondent had an actual conflict between himself and his now former clients over the payment of his legal fees. It was not an imagined conflict or one that he "created" to protect his legal fees. After his withdrawal in *Vibo*, the Respondent withdrew from all of the active Gielchinsky matters. If he had a conflict with the client in one matter he needed to withdraw on all other matters. It should be noted that at the time of the first withdrawal he was represented by a lawyer who he hired just to provide ethics advice and ultimately hired a different lawyer, who Respondent believed a more specialized practice in the legal ethics field.

The last claim that needs to be addressed is the assertion that the Respondent "lost and/or misplaced numerous documents, failed to turn over documents the Gielchinskys were entitled to receive and made misrepresentations to the Gielchinskys regarding their cases." See Bar complaint para. 61. The testimony at trial only focused on the *Pool People* case. Introduced as Resp. Ex. 20 is the cover letter for a Federal Express package wherein the Respondent forwarded three binders of materials to the Gielchinskys. These materials were forwarded to his now former clients even though he could have exercised a retaining lien due to the ongoing dispute over unpaid legal fees. There was a generalized discussion about

what the Gielchinskys believed they were "missing" but the Respondent testified that he provided everything in his possession and that if the Gielchinskys were truly missing something it could have been recreated from the court file or the building department. TT 544-545. The Bar failed to present any evidence that a specific record or item was entrusted to the Respondent or that the Respondent failed to return that specific item.

The alleged rule violations for Count V are primarily identical to that found in Counts I through III and there is significant factual overlap between Count V and these other Counts. Therefore, the Respondent, based on the arguments raised above, respectfully submits that the Respondent did not violate R. Regulating Fla. Bar 4-1.1, 4-1.3, 4-1.4(a), 4-4.1(a), 4-8.4(a), (c) and (d).

There is one additional potential rule violation that has not previously been addressed and that is a claim of a violation of R. Regulating Fla. Bar 4-4.4(a). This rule states in relevant part that: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." The allegations of the Bar's complaint do not specifically set forth facts that could be a violation of this rule and the Report of Referee fails to delineate any such claim. See for example *The Florida Bar v. Sayler*, 721 So. 2d 1152 (Fla. 1998) (lawyer reprimanded for sending threatening letter to opposing counsel.) It appears that the Bar is contending that the "created conflict" issue

should be considered a violation of Rule 4-4.4(a). However, as is explained above the evidence in this case established that there was a real conflict of interest that caused the Respondent to withdraw. Therefore, there is no clear and convincing evidence of a violation of R. Regulating Fla. Bar 4-4.4(a).

H. The Respondent is not guilty of the conduct plead in Count VI.

In Count VI, the Bar charges that the Respondent failed to respond in writing to the Bar grievance filed by Broder. At all times material to this Count, the Respondent was represented by counsel (not his trial attorney in the instant case).

It was uncontroverted that Broder's complaint was received by The Florida Bar on September 14, 2011 and that the initial request for a response to same was mailed on or about September 27, 2011. See TRB composite Ex. 1. On October 17, 2011, Respondent's counsel sent a letter to the Bar requesting (1) a 45-day extension to respond and (2) further requesting the documents that were referenced in the grievance but had not been forwarded.[17] TFB Composite Ex. 1.

On or about the date that the response was due, Broder filed another grievance and the Bar requested a response to these new matters and extended the deadline for a response until the end of December of 2011. TFB Composite Ex. 1. On December 31, 2011 and on January 4, 2012, Respondent's counsel made a

[17] Respondent's counsel also forwarded the required certificate of disclosure on October 17, 2011.

second request for the documents referenced above and also asked for a further extension of time until they were produced. TFB Composite Ex. 1. The Respondent was advised that the complainant decided not to provide the e-mails referenced in her complaint and therefore the Bar requested that a response be submitted no later than February 15, 2012. TFB Composite Ex. 1. The Bar's complaint at paragraph 23, incorrectly alleges that no response was ever received.

The Bar introduced as TFB Ex. 2 the document that they claim was the response to the Broder complaint, which was a November 11, 2012 lengthy letter to Brian Lerner, who was the grievance committee member assigned to investigate the various grievances that were filed by the Gielchinskys and/or related to the Gielchinskys.

The Respondent introduced several documents in defense of the claim that he had not submitted a response to the Broder grievance. First, as Resp. Ex. 21, he submitted an e-mail to his prior counsel dated January 8, 2012, which contained a substantive response to the Broder grievance. The Respondent confirmed that he sent said e-mail to his lawyer and believed a response had been submitted at or about that time frame. TT 549-550. The Respondent also testified that he personally met with Mr. Lerner, a member of the grievance committee, and provided substantial documentation and responses to him relative to the Broder and other grievances. TT 551-552. The Respondent introduced several of these

responses dated September 26, 2012, October 22, 2012, and an undated response. Resp. Ex 22, 23 & 24.

The applicable portion of R. Regulating Fla. Bar 4-8.4(g) reads as follows:

> (g) fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made:
>
> (1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors;
>
> (2) within 10 days of the date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors;

On the evidence before the Referee it is evident that the Respondent did respond to the Bar multiple times, inclusive of significant personal contact with the investigating member of the Grievance Committee even though he was represented by counsel at that time. The Respondent did in fact prepare a timely response and provide same to his counsel. See Resp. Ex. 21. The record below also indicates that the Respondent's then counsel received multiple extensions, as he awaited exhibits that were never sent to him by the Bar. On balance the Respondent respectfully contends that there is no a clear and convincing evidence of a violation of R. Regulating Fla. Bar 4-8.4(g) and as such there is also no violation of R.

Regulating Fla. Bar 4-8.4(a) which requires a predicate that a Rule of Professional Conduct be violated.

I. Conclusion.

The Bar paints with a very broad brush in an attempt to avoid the specifics of the Respondent's representation of the Gielchinskys and that through the Respondent's efforts an extremely large settlement was received and that a second matter settled for a significant sum right after the Respondent withdrew because of his fee dispute with his clients. It is respectfully, contended that the Respondent provided ethical representation to his clients and that he should be found not guilty of all rule violations alleged by the Bar.

II. A NINETY-ONE DAY SUSPENSION IS AN INAPPROPRIATE SANCTION UNDER THE FACTS OF THIS CASE, ESPECIALLY WHEN THE RESPONDENT WAS DENIED A HEARING TO PRESENT EVIDENCE OF MITIGATION.

The Referee in this case has failed in her obligation to carefully consider all factors in reaching an appropriate sanction recommendation and has further failed to balance the severity of the alleged unethical activity against the mitigation and aggravation that was present in the record. This Court has consistently held that it has a broad discretion when reviewing a sanction recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997). The Court should

exercise its discretion in finding the Referee's proposed sanctions legally unsupported and too harsh under the facts of this case.

A. Mitigation.

The Respondent was not allowed an opportunity to present evidence on mitigation at a sanction hearing which he believed would be held if the Referee found him guilty of any of the rule violations plead in the Bar's complaint. However, the record can be used to establish certain uncontroverted testimony presented by the Respondent. While The Florida Bar stipulated that the Respondent could establish Florida Standards for Imposing Lawyer Sanctions (hereinafter "Standard"), Standard 9.32(g) (otherwise good character and reputation) in order to avoid conducting an evidentiary hearing, the Referee and this Court were denied an opportunity to understand the compelling nature of same as no testimony was allowed in this regards; not just as a mitigator but the depth and significance of same and a denial of due process.

A significant mitigating factor clearly and convincingly present on the record is Standard 9.32 (i) (unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay.). The representation at issue began in 2005. The first Bar grievances were submitted in the fall of 2011. Probable cause was found on September 27, 2013

and the Bar filed its formal complaint a year later on October 7, 2014. Both parties sought and secured continuances of trial dates due to the change in Bar counsel and discovery issues. This matter was pending before a Referee for almost two years, with both parties secured continuances. However, it did take the Bar two years to investigate these complaints and then another year to file its formal complaint post the finding of probable cause and this fact tilts the scale as a mitigating factor. See *The Florida Bar V. Wolf*, 930 So. 2d 974 (Fla. 2006) [one-year delay from a trust account audit to the formal complaint being filed.]

In addition to the foregoing, it is respectfully contended that all of the testimony in this case demonstrates that Standard 9.32 (b) absence of a dishonest or selfish motive applies herein.

B. Aggravation

In terms of aggravation the Respondent must admit that he has been disciplined once, a public reprimand in August of 2010 for conduct that occurred ten years ago in 2007. The failure to conduct an evidentiary hearing on sanction prevented the Respondent from discussing this prior matter to explain why the misconduct discussed in the public reprimand was unrelated to the practice of law and was an outgrowth of a failed personal relationship. Thus the Referee and this Court were deprived of an opportunity to fully understand how, or even if, this prior public reprimand added any significant weight to the sanction discussion.

The Respondent would also have to concede that he is an experienced member of the Bar. Standard 9.22 (i) substantial experience in the practice of law.

C. Sanction

In *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), the Supreme Court stated that in selecting an appropriate discipline the fundamental issues that must be addressed are: fairness to both the public and the accused; sufficient harshness in the sanction to punish the violation and encourage reformation; and that the severity of the sanction is appropriate to function as a deterrent to others who might be tempted to engage in similar misconduct. Also see *The Florida Bar v. Pahules*, 233 So. 2d 130 (Fla. 1970).

In reaching a sanction resolution it is important to note the bulk of the conduct at issue herein occurred between 2006 and 2011 which is more than five years from the date of said conduct. Also relevant is a consideration of the testimony from both the Respondent and Robert Gielchinsky that during the professional relationship that they also became close personal friends, which relationship no longer exists due to the fee dispute that arose between them and the other conduct discussed above.

At the core of the Bar's case is the claim that the Respondent "manufactured" a conflict of interest so he could withdraw from representing Gielchinsky and still protect his contingent fee. Putting aside that the Respondent

withdrew from the *Vibo* case without objection[18] at the time that a conflict arose between the Respondent and Gielchinsky over securing the legal fees that Mr. Weil and the Respondent believed were due to them under their fee agreements,[19] there is an adverse finding to the Respondent in the *Aldar* case. The sanction that is to be imposed must also take into account the findings that the Respondent was late in responding to a grievance, although the Respondent's testimony and exhibits do show that he provided an initial response to his lawyer on a timely basis that for some reason did not find its way to the Bar (Resp. Ex. 21) and that he presented extensive responses after that time to the Bar (Resp. Ex. 22, 23 & 24). There is also a disputed Referee finding of neglect on the *Pool People* case. This Court should be less persuaded that the lack of prosecution dismissal was clear and convincing proof of neglect or that the time frame while the case was on appeal should be considered as neglect. The Referee also found a violation of the communication rules but it is also evident that there was significant communication between the Respondent and his client throughout all of these

---

[18] See Resp. Ex. 10.

[19] Both the Respondent and Mr. Wiel prevailed on this point before Judge Venzer in the *Vibo* case and they also prevailed on the appeal. See Resp. Ex. 13.

cases via e-mail,[20] telephone and personal meetings, but it appears that the Referee felt that there was a lack of effective communication at certain key times in the representation that resulted in her finding of a violation of the communication rule.

A review of the case law submitted by the parties indicates that many of the above violations standing alone would warrant a public reprimand or perhaps even an admonishment for minor misconduct. Yet the Referee is recommending a ninety-one-day rehabilitative suspension for conduct that occurred more than five years ago.

While we do understand the Bar's argument that the Respondent's prior public reprimand should be considered as an aggravating factor to increase the sanction in this case, but is clear that the events that lead to the Respondent's prior public reprimand occurred ten years ago; were unrelated to the practice of law and arose from a failed personal relationship. In regards to the weight to give this prior disciplinary sanction this Court does not always increase the sanction to a higher level of sanction. See for example *The Florida Bar v. Chosid*, 500 So. 2d 150 (Fla. 1987) [lawyer suspended from the practice of law for three years]; *The Florida Bar v. Chosid*, 869 So. 2d 541 (Fla. 2004) (table citation) [lawyer received public reprimand as his second disciplinary sanction]; *The Florida Bar v. Herman*, 171

---

[20] Both parties submitted as evidence in this case a variety of e-mails between the lawyer and client. See for example Resp. Ex. 18 which is a composite of e-mails on the *Pool People* case.

So. 3d 122 (Fla. 2015) (table citation) [lawyer suspended for six months); *The Florida Bar v. Herman*, -- So. 3d --, 2016 WL3763418 (Fla. 2015) (table citation) [lawyer received public reprimand as second sanction).

The Report of Referee references several of the Florida Standards for Imposing Lawyer Sanctions but does not explain how they impact the resolution of a sanction in this matter and why the lesser sanctions would not also apply in this case.[21] ROR 13. For example, the Report of Referee makes reference to the diligence Standard 4.42 which states that a "suspension is appropriate when":

> a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
> b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

It is respectfully contended that the Bar, has not established that the Respondent "knowingly" failed to perform services for a client or he engaged in a pattern of neglect, when the only example set forth in the Report of Referee is the claim of neglect of the *Pool* People case.

The Referee's focus appears to be on the order that granted the Respondent's withdrawal in the *Pool People* case. However, as is explained above, at most the Respondent committed a scrivenors error in not having revised the language in the

---

[21] Without a sanction hearing, the Referee was deprived of an opportunity for the Respondent to provide argument on these Standards and more importantly argument on the case law being advanced by the Bar or case law that could have been provided by the Respondent to counter same.

order at the time of the hearing to reflect what had occurred at the hearing, rather than what he had anticipated happening at the hearing when he drafted the order prior to the hearing.

The last Standard referenced by the Referee was Standard 7.2 which discusses that a suspension would be required in a circumstance 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." While the Report of Referee finds the Respondent guilty of certain rule violations, there is no specific finding that these violations were "knowing" or intentional.

The Referee also lists a variety of case law, most of which do not address the issue of an appropriate sanction for the facts of this case, but were only inserted by the Bar to remind the Court that harsher sanctions are the "new normal." See for example, *The Florida Bar v. Rosenberg*, 169 So. 3d 1155 (Fla. 2015).

The Referee is recommending a 91-day suspension and cites to two 91-day suspension cases. It is believed that these two disciplinary matters will be the focus of the Bar's sanction argument. However, if you carefully look at the facts of each case you will see that they do not support the imposition of a rehabilitative suspension in this matter. In *Norvell* a lawyer who had previously lost his license due to a felony conviction engaged in very serious misconduct that included making clear misrepresentations to a Bankruptcy Court Judge, had purchased (or

was trying to purchase) the *res* at issue in the underlying litigation and had engaged in a conflict of interest. Putting aside the distinction between the prior disciplinary matters (prior public reprimand in case *sub judice*), it is evident that the facts were more egregious in *Norvell* than those found in the instant matter. Likewise, in *The Florida Bar v. Ticktin*, 14 So. 3d 928 (Fla. 2009), the lawyer engaged in a very pervasive conflict of interest, wherein, among other things, he replaced his client as CEO of a corporation, cancelled all of his client's ownership interest in same and caused actual prejudice to that client. In this case, the Gielchinskys did not suffer the same level of harm. The *Pool People* case was still viable at the time of trial in this case and the testimony at trial was that they had not paid the *Vibo* judgment. The Referee also cited to *The Florida Bar v. Shankman*, 41 So. 3d (Fla. 2010) which was a six-month suspension but admitted that the facts of that case were much more severe. We agree with that proposition.

The Report of Referee also cites to *The Florida Bar v. Grosso*, 647 So. 2d 840 (Fla. 1994) who was suspended for 10 days and until such time as he Respondent to an outstanding grievance. In this case, at most, the Respondent was late in responding after having provided his then counsel with a timely response.

CONCLUSION

The Respondent, verily believes that this Court should find him not guilty of the matters set forth in the Report of Referee. He gave "his all" for these clients

over a quarter of his carreer. The clients, who he befriended, believed in his abilities and continued to give him multiple matters to represent them. When success was finally at hand in the most important case, *Vibo*, and it was settled, the clients engaged in conduct that conclusively showed that they would not pay any fees that were due and this created a conflict of interest causing the Respondent to withdraw from all pending matters for these clients. This decision caused the now former clients to engage in a scorched earth campaign to intimidate the Respondent into not collecting his fees earned over a multi-year period, inclusive of filing their own Bar grievances and having others do likewise. Because of this the Respondent hired ethics counsel to assist him in navigating the conflicts that had arisen in an effort to act in accordance with all of his ethical obligations. Notwithstanding the Referee's findings he respectfully urges this Court to find that he did act ethically and if the Court decides to agree with the Referee on some of these factual ground that it disapprove the recommended 91-day suspension recommended by the Referee. The Respondent, Byron Gregory Petersen, respectfully requests that he be found not guilty and in the alternative if found guilty that this case be remanded to the Referee for a sanction hearing.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served electronic mail only mail on this 10th day of February, 2017 to Frances R. Brown-

Lewis & Navin Ramnath, Bar Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 (fbrownle@flabar.org; smiles@flabar.org; nramnath@flabar.org); Adria E. Quintela, Staff Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 (aquintel@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 e-mail forwarded to the Court has been scanned and found to be free of viruses, by ESET Nod 32.

Respectfully submitted,

RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

By: _____
KEVIN P. TYNAN, ESQ.
TFB No. 710822