IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

STUART L. STEIN,

Respondent.

_____/

CONFIDENTIAL
Supreme Court Case
Nos. 65,413 and
65,878

COMPLAINANT'S ANSWER BRIEF

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FILED
SID J. WHITE
APR 17 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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PREFACE

In this brief, The Florida Bar will be referred to as "the Bar" and Stuart L. Stein will be referred to as "Respondent" or "Mr. Stein". Abbreviations utilized in this brief are as follows:

"T1."	Transcript of final hearing, September 14, 1984
"T2."	Transcript of final hearing, January 11, 1985
"C."	Complaint by The Florida Bar
"R.R."	Report of Referee
"C.J."	Respondent's Consent Judgment
"S."	Stipulation of the parties dated September 18, 1984

STATEMENT OF THE CASE AND FACTS

Complainant is constrained to submit a Statement of the Case and Facts in that Respondent has submitted a factual rendition that is incomplete and inaccurately depicts the procedural posture in which the instant cases were presented to the Referee.

Respondent had been the subject of a disciplinary proceeding that was assigned Supreme Court Case Number 63,669. The Referee in that proceeding, the Honorable Edward Rogers, had recommended that Respondent receive a public reprimand after finding Respondent guilty of violations of the Code of Professional Responsibility. The report wherein the Referee made the aforesaid disciplinary recommendation was executed on April 26, 1984 and was transmitted to the Court on that date. Respondent thereafter filed a Petition for Review in Supreme Court Case Number 63,669 but failed to file an initial brief in said cause despite being granted an extension of time to file said brief by the Court.

The instant cases involved two separate complaints. The first complaint was filed on June 5, 1984 and assigned Supreme Court Case Number 65,413. The Honorable Ellen J. Morphonios was appointed Referee by the Chief Justice on June 25, 1984. The second complaint was filed on September 14, 1984 and assigned Supreme Court Case Number 65,878. The Honorable Ellen J. Morphonios was also appointed as Referee in that matter by the Chief Justice on September 21, 1984.

Case Number 65,413 came on for hearing on September 14, 1984 before the Referee. Respondent was found guilty of the charges contained in the Bar's complaint in Case Number 65,413 and this finding was verbally communicated by the Referee to the parties at the conclusion of the hearing (T1.88). Respondent thereupon entered into various discussions

with Bar Counsel which culminated in his knowingly and voluntarily tendering an unconditional guilty plea to the Referee on September 14, 1984 as to The Florida Bar Case No. 17A83F95 which was ultimately assigned Supreme Court Case Number 65,878 (T1.98).

The parties thereafter entered into a written Stipulation on September 18, 1984 which confirmed their oral understandings and Respondent tendered his written unconditional guilty plea to Case Number 65,878. The Stipulation was filed with the Court and approved by Orders dated September 24, 1984 and April 2, 1985. The Stipulation provided that the Petition for Review in Case Number 63,669 would be withdrawn and that Respondent would not appeal the disciplinary recommendation of the Referee in that matter. The Stipulation further provided that the parties were in agreement that it would be appropriate for the Court to hold in abeyance its final order of discipline in Case Number 63,669 until the Court received the Report of Referee in Case Numbers 65,413 and 65,878. The Stipulation and the Court's Order approving same do not state that Judge Morphonios was to determine discipline to be conferred on all three cases as asserted by Respondent in the factual recitation contained in his brief. Rather, they establish that Judge Morphonios only had jurisdiction as Referee in Case Numbers 65,413 and 65,878 and the Court would not enter an order in now uncontested Case Number 63,669 until it had an opportunity to review Judge Morphonios's recommendations in her two assigned cases.

A hearing was conducted on January 11, 1985 before Judge Morphonios as the disciplinary phase of the proceedings. The Referee had before her Respondent's unconditional guilty plea to the allegations contained in Case Number 65,878 and her finding of guilt in Case Number 65,413. The Referee entertained testimony from witnesses called by Respondent

and argument of counsel. At the conclusion of the hearing, the Referee announced that she had determined to accept the disciplinary recommendation of Bar Counsel and the Designated Reviewer and would recommend that Respondent be given a public reprimand and a ten (10) day suspension from the practice of law (T2. 117). The Board of Governors of The Florida Bar considered the Referee's disciplinary recommendation at their meeting of March 13-16, 1985 and determined to accept said recommendation. The Court and Respondent were advised of this determination and Respondent thereafter filed his Petition for Review and Initial Brief.

Case Number 65,413 involved Respondent undertaking representation of a client in connection with a claim for personal injuries sustained by said client in a fall at a department store (T1.51,54). Respondent thereafter failed to take any appropriate steps to pursue the client's claim despite numerous telephone inquiries regarding the claim (T1.56). Respondent placed the matter in his closed files without so notifying the client or making any attempt to carry out the obligations he had assumed to this client (T1.26 and R.R 2). The Referee found that Respondent neglected a legal matter by his actions or lack thereof (T1.91 and R.R.2).

Case Number 65,878 pertained to Respondent being retained to represent certain clients in a pending lawsuit wherein they were party plaintiffs. He received the sum of $2,500.00 as a retainer. On or about July, 1982, Respondent dictated a notice of trial requesting a trial date. The clients made numerous inquiries of Respondent regarding when their matter would be set for trial including occasions subsequent to the notice of trial being dictated. Respondent merely advised the clients that he was awaiting the setting of a trial date by the

presiding judge and he took no affirmative action to ascertain the current status of the matter including but not limited to review of his office file or the court file. In point of fact, the notice of trial had not been filed by Respondent. The clients ultimately had their case dismissed for lack of prosecution which was solely attributable to the Respondent's lack of action on their behalf for a period in excess of one year. Further, the clients requested an accounting from Respondent of the $2,500.00 retainer which request was ignored from the time of Respondent's discharge until the eve of the grievance committee hearing on this matter at which time a full refund was made of the retainer. Finally, Respondent failed to file a motion for leave of court to withdraw or enter into a joint stipulation for substitution of counsel after he was discharged by the clients. Since Respondent had submitted a written Consent Judgment whereby he unconditionally pled guilty to the formal complaint filed by the Bar in Case Number 65,878, no formal testimony was adduced from the clients but the foregoing facts are established by the record (C.J., C. and R.R. 2-4). Respondent also confirmed during his testimony at the January 11, 1985 hearing that he had admitted all allegations in the Bar's complaint (T2.61).

SUMMARY OF ARGUMENT

The arguments advanced by Respondent in his initial brief should be rejected by the Court for reasons summarized below and more fully set forth in the body of this answer brief.

In his first point on appeal, Respondent has failed to sustain his burden in seeking to overturn the Referee's findings of fact and disciplinary recommendation. Respondent has misapprehended the criteria utilized by the Court in formulating appropriate disciplinary sanctions and seeks to carve out a special exception for himself because he has deemed himself a "public figure." Moreover, any personal difficulties encountered by Respondent are not the type countenanced by the Court in reducing discipline and under the facts found or admitted should serve to enhance the discipline imposed. Disruptions caused by the break-in of his office should have put Respondent on his guard and made him even more diligent in responding to the telephonic inquiries of his clients. Instead they were ignored and the clients prejudiced as a result of Respondent's rather blatant neglect. The Referee has recommended an eminently fair measure of discipline that is consistent with disciplinary criteria enunciated by the Court, the cumulative nature of the misconduct, the particular facts of the cases under consideration including client prejudice and similar cases decided by the Court in the past.

Respondent's next argument that he was unable to review private reprimand cases and thereby deprived of certain constitutional rights is a non-issue that should be rejected by the Court. Respondent never made any request of The Florida Bar for such cases and never raised this as an issue before the Referee. This issue, such as it is, has not been

preserved for appeal and is therefore not subject to appeal. Further, the issue of private reprimand cases is moot in that there is extant a Referee recommendation for a public reprimand in Case No. 63,669 which Respondent has determined not to appeal and Respondent has argued for the imposition of a public reprimand as appropriate discipline. The issue as framed simply does not arise to the constitutional infirmity alleged by Respondent, especially since the Court has final say in disciplinary matters and, therefore, has the inherent authority to reduce the recommended discipline.

Finally, Respondent's argument that confidentiality has been breached by The Florida Bar raises another issue that should not be entertained by the Court. Respondent again makes argument outside the record and has failed to establish The Florida Bar breached confidentiality. It is quite plausible that Respondent's own efforts to obtain favorable testimony in these proceedings or his acrimonious matrimonial and partnership situations could have precipitated the events of which he complains. The Referee considered this issue and obviously did not feel The Florida Bar was responsible for the breach alleged by Respondent.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND DISCIPLINARY RECOMMENDATION WERE APPROPRIATE AND SHOULD BE ADOPTED BY THIS COURT.

Respondent's first point on appeal seemingly takes issue with the findings of fact in Case Number 65,413 and the appropriateness of the Referee's recommended disciplinary sanction. A respondent is required to meet a heavy burden when seeking to overturn a referee's findings of fact and report. Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a) provides in pertinent part that the referee's

> findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding.

Further, Fla. Bar Integr. Rule, art. XI, Rule 11.09(3)(e) provides that

> upon review, the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful or unjustified.

Applicable decisions of the Court are in accord with the aforementioned Integration Rules. In attorney discipline matters, the ultimate judgment as to discipline remains with the Supreme Court. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). The initial fact-finding responsibility, however, is reposed with the referee. A referee's findings of fact should be accorded substantial weight and should not be overturned unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982); The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981); The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978); The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). The referee's findings of fact in disciplinary proceedings are entitled to the same presumption of correctness as the judgment of a trier of fact in a civil proceeding.

The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981).

Respondent would have this Court believe that the client in Case Number 65,413 was somehow at fault in the matter and that, due to circumstances beyond his control, Respondent bore little or no responsibility for what transpired. The Referee did not so find but did find a pattern of neglect that manifested itself in Respondent agreeing to undertake a matter; then not pursuing the matter despite numerous inquiries; and finally closing the file without notice to the client (R.R. 2).

It was clear to the Referee and it should be equally clear to this Court that the attribution of fault to the client is an exercise in obfuscation and that Respondent neglected a legal matter that was entrusted to him in contravention of his professional responsibilities. The Referee stated at the conclusion of the first hearing on September 14, 1984 that the client was not required to meet with Respondent after a grievance was filed with The Florida Bar (T1.89). Respondent was not even able to state conclusively what, if anything, was done on this matter (T1.23, 83, 84) and he testified that he closed the file without informing the client of this action (T1.26). The client, meanwhile, testified that, at the time the retainer agreement was signed, the Respondent was provided negatives of photographs of the accident scene and certain hospital bills (T1.31).

It would appear elementary that an attorney who was diligently pursuing a matter for recalcitrant clients would return their materials to them and advise them he was no longer pursuing the case. Respondent did not do so and he admitted it was wrong to let this case sit indefinitely with the statute of limitations running (T1.80). Closing

the file in the aforesaid manner was an act of neglect which evidenced a total and reckless disregard for the legal rights of the client. It is further compounded when the attorney can not provide documentation of any activity on behalf of the client such as a demand letter on the potential defendant or their insurance carrier or a copy of a lawsuit actually filed.

Respondent offered no testimony or evidence at the hearing held on September 14, 1984 that would justify overturning the Referee's findings of fact. The loss of the file is an unfortunate circumstance but by Respondent's own testimony the file was in his possession and closed (T1.26) prior to the alleged break-in at his office (T1.17). It is also noteworthy that the broken appointment with the client, that Respondent complains of, was made after the complaint was filed with The Florida Bar (T1.74) and that said complaint was date stamped as received by The Florida Bar on December 17, 1982 (Respondent's Exhibit #1, September 14, 1984 hearing). Respondent testified that the break-in of the law office occurred in July and August of 1982 (T1.17) which was prior to the filing of the complaint and that he attributed his not having this file to the break-in or return of the file to the client (T1.14). It is inexplicable that Respondent would make an appointment subsequent to the alleged break-in to discuss a file he no longer had in his possession and yet fail to apprise the client of such a fact which he knew or should have known at the time the appointment was made. Respondent, by his own admission, never even looked for the file until two weeks before the hearing before the Referee on September 14, 1984 (T1.85).

Respondent asserts that the disciplinary sanction recommended by the Referee was too severe based upon existing case law and against the weight of the evidence. It is, of course, the responsibility of this

Court to review the Referee's report and, if the recommendation of guilt is supported by the record, to impose the appropriate penalty. The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980).

Various purposes to be served by the process are considered by the Court in arriving at an appropriate disciplinary penalty. As the Court observed in The Florida Bar v. Pahules, 233 So.2d 130,132 (Fla. 1970) three purposes must be kept in mind when formulating the appropriate sanction in attorney disciplinary matters:

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

Respondent glosses over the purposes articulated by the Court which are to be served by disciplinary sanctions. He would have this Court primarily focus on the effect that a suspension would have upon him which is not the sole or primary consideration. It is respectfully submitted that the personal hardships, past and future, that Respondent wishes the Court to recognize are totally extraneous to the matters at hand and Respondent's reliance on The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983) is misplaced. The Lord case involved charges of failure to file income tax returns for a period of twenty-two years and respondent therein had already been the subject of criminal proceedings and sanctions. Hence, the Bar proceedings brought against Lord had their underpinnings in a criminal matter which had no doubt caused great personal hardship to that respondent. Respondent herein would elevate an event totally extraneous to these proceedings, a bitter dissolution of partnership, into a personal hardship which should militate the

discipline to be imposed. Such a position is without merit and should be rejected by the Court as any hardships suffered by Respondent pale in comparison to the hardship he has caused multiple clients.

Respondent's claim that he is entitled to have his status as a "public figure" considered as part of the disciplinary formula because a public reprimand would have an exaggerated effect on him also deserves comment. All attorneys are held to the same standard in complying with the Code of Professional Responsibility and disciplinary sanctions for violations of that Code should not vary merely because a particular respondent deems himself a "public figure." Even the most tortured interpretation of The Florida Bar v. Lord, supra, and The Florida Bar v. Moran, 273 So.2d 379 (Fla. 1973), as cited by Respondent, does not support his position that a "public figure" should have discipline reduced because such status would enhance the effects of any public discipline.

The assertion by Respondent that the Referee failed to properly consider what impact a suspension would have on Respondent's clients truly begs the question. The better question is what effect would the failure to impose an appropriate sanction have on Respondent and society relative to his future fitness to practice law. As the Referee articulately pointed out in announcing her disciplinary recommendation:

> But standing out, jumping forward and in great capital letters to this referee was the fact that Mr. Stein didn't even bother to go check the files and to find out what situation he was in until just before the hearing before me in September of 1984. He already knew there was a public reprimand recommendation. I am not at all sure that Mr. Stein to this day understands the full significance and seriousness of the conduct which is alleged in these matters. Neglect, failure to conduct oneself in a professional manner in handling a client's case is extremely serious, and it affects not only just the attorney and the client that are involved, but the entire bar and the people have a right to know that The Florida Bar and the State of Florida is going

> to protect them from conduct of attorneys that falls far short of that which their canons of ethics require of us (T2.116, 117).

Respondent has cited a number of cases to establish that a public reprimand is the appropriate discipline in neglect cases. These cases should, of course, be considered but the Bar posits that the discipline meted out in the cases cited by Respondent can and will be contrasted with factually similar cases resulting in more severe discipline which is illustrative of the principle that the Court considers each case on its own merits. The Court recognized this principle in The Florida Bar v. Rubin, 362 So.2d 12, 16 (Fla. 1978) when it stated that:

> The power to render ultimate judgment in attorney disciplinary proceedings rests solely with this Court, and we have often stated that the exercise of that power should achieve a result which, in light of the circumstances of each case, will best protect the interests of the public, maintain the integrity of the Bar, and ensure fairness to the accused attorney (emphasis supplied).

The Court similarly stated in The Florida Bar v. Scott, 197 So.2d 518,520 (Fla. 1967) that:

> ... the degree of punishment in each case where violations of Canons of Professional Ethics are involved depends entirely upon the factual situation presented by the record in that particular case. Over the years this Court has not found any areas of black and white as to the degree of punishment to be imposed in all cases. Rehabilitation as well as punishment is involved in every case. Such factors call upon the total experience of the Justices of this Court in determining the appropriate judgment in each instance (emphasis supplied).

The factual situation and circumstances of Case Numbers 65,413 and 65,878 have aggravating features that should be considered by the Court. As previously stated, Respondent's cavalier handling of the client's file in Case Number 65,413 evidenced a reckless disregard for the legal rights of the client. Respondent acknowledged that he knew better and

that his closure of the file should have been communicated to the client (T1.26), thereby making his conduct more egregious. Respondent was also unable to definitively state what he had done on the file while it was an open file in his office (T1.23 83 84).

Respondent's acts of omission, however, as admitted and found in Case Number 65,878 are of even greater magnitude. Respondent has admitted all the allegations in that case by virtue of his Consent Judgment and therefore has not challenged the Referee's findings of fact in that case. Accordingly,it has been established that Respondent dictated a notice of trial requesting a trial date on his clients' pending action and that he responded to status inquiries by stating that he was awaiting the setting of a trial date by the presiding judge. The notice of trial was dictated on or about July, 1982 which was shortly before the break-in of his office (T1.17). Respondent could not explain why, in light of the known disruption to his office and the ongoing inquiries of his clients, he did not take some affirmative action to ascertain the status of the case (T2.62,63). Respondent admitted he was wrong in this regard and acknowledged the clients were hurt by his actions (T2.63). The specific nature of that harm was the dismissal of their cause for lack of prosecution in that Respondent took no action on their behalf for a period of over one year. Respondent then compounded his neglect by failing to account for the $2,500 retainer despite numerous inquiries until the day before the grievance committee hearing.

The failure of Respondent to take affirmative action in light of the break-in of his office should act as an aggravating factor rather than a mitigating factor in that there was a greater duty to ascertain the existence and status of files. As noted by the Referee in her report:

> Though Mr. Stein's office was disrupted by a burglary, and the file could not be found, it does not absolve him from his duty to his client (R.R.4).

The fallacy of the office break-in issue is further established by the fact that the neglect of client matters in Case Numbers 63,669, 65,413, and 65,878 occurred over a number of years, some of which pre-dated the July-August, 1982 break-in (T1.17). The uncontested Referee Report in Case Number 63,669 establishes neglect that occurred in 1981. Case Number 65,413 contains a finding by the Referee of neglect that occurred between one (1) and two (2) years prior to September 20, 1983 (R.R. 2) and Case Number 65,878 contains a finding by the Referee of neglect that occurred from January, 1982 to February, 1983 (R.R. 2-3).

In addition to the egregious nature of Respondent's misconduct, the instant cases come before the Court in the posture that there is extant a Report of Referee in Case Number 63,669 which recommends a public reprimand. The disciplinary record to be considered therefore includes a prior act of misconduct which resulted in a recommendation of public reprimand together with the acts of misconduct found by the Referee in Case Numbers 65,413 and 65,878. This Court has consistently held that prior disciplinary action is relevant to the imposition of discipline for breach of the Code of Professional Responsibility. The Florida Bar v. Solomon, 338 So.2d 818 (Fla. 1976). But for the fortuitous circumstance that Case Number 63,669 had not resulted in a final disciplinary order at the time of the September 14, 1984 hearing and the parties thereafter entered into a Stipulation approved by the Court whereby one final disciplinary order would be entered on all three cases (Case Numbers 63,669, 65,413 and 65,878), Respondent would have had a

prior disciplinary history.

The case most on point with the procedural posture of these three cases is The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981). The Court in that case had before it a Referee Report which involved alleged acts of misconduct which occurred before or about the same time as those of the last prior complaint considered by the Court. The Court stated that, in considering appropriate discipline, past derelictions of responsibility were usually considered and, when appropriate, the penalty increased. Under the peculiar facts of Greenspahn, however, the Court determined that appropriate discipline would be arrived at from the totality of the conduct as though all charges had been presented in one proceeding. Reviewing the totality of the acts committed in the case before them (frequent acts of neglect and failure to deliver clients' funds) together with the prior established acts of misconduct, the Court added an additional term of suspension to that which had previously been ordered.

Review of the totality of the acts committed in Case Numbers 65,413 and 65,878 as heretofore discussed, together with the prior acts of misconduct as set forth in the Referee's Report in Case Number 63,669, should result in the Referee's recommended disciplinary sanction being adopted by this Court. Parenthetically, it is interesting to note that the Bar went to such lengths to be fair to Respondent that the Referee commented that had it not been for the Bar's recommended discipline she would have recommended far more than the ten-day suspension suggested to her by the Bar (T2.117).

While the Court considers each case on an individual basis in

fashioning the appropriate disciplinary sanction, it does consider, as one factor, the punishment imposed on other attorneys for similar misconduct. The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1980). In cases similar to the matters under review, the public reprimand sought by Respondent has not always been the appropriate punishment and more severe discipline such as suspension from the practice of law has been administered.

In The Florida Bar v. Pincus, 300 So.2d 16 (Fla. 1974), respondent undertook representation of two separate clients. In one case, respondent failed to meet a court deadline and allowed his client to suffer a default and default judgment. The client ultimately, however, suffered no loss. He also took the client's $50.00 cost deposit and converted it to his own use. In the second case, respondent allowed the statute of limitations to run on his client's claim. Upon rehearing, the Supreme Court ordered a six (6) month suspension. The Court articulated language that is particularly apropos to the three matters that Respondent herein neglected:

> The charges of professional misconduct of which the respondent has been found guilty are serious ones. In both cases, the respondent failed to fulfill the responsibilities he accepted when he undertook the representation of his clients. No principle is more fundamental to our legal system than the assumption that lawyers will competently and zealously protect the legal rights of clients who have entrusted legal matters to their care. Pincus at 18.

Case Number 63,669 involved a summary judgment being entered for failure to answer requests for admissions. The Referee therein found that although Respondent was attempting to withdraw, he took no action to advise his client of the receipt of the requests and the need to respond. The failure to do so was found to be a failure on Respondent's

part to take reasonable steps to avoid foreseeable prejudice to the rights of his client. Case Number 65,413 involved a failure to prosecute a personal injury claim and arbitrarily closing the file while the statute of limitations continued to run. Case Number 65,878 involved the clients' case being dismissed due to lack of prosecution by Respondent. These three matters are not so dissimilar from Pincus, supra, that it can be said that any term of suspension is inappropriate and they certainly are not insignificant neglect cases as postulated by Respondent.

This Court has not been reluctant to suspend an attorney for neglect of civil legal matters even in the absence of a stated prior disciplinary record. The failure to obtain a corporate charter, over a period of nearly three (3) years, resulted in a four (4) month suspension in The Florida Bar v. Collier, 435 So.2d 802 (Fla. 1983). Failure to notify a client that a corporate charter was granted and failure to carry out other duties involved in the incorporation resulted in a one (1) year suspension in The Florida Bar v. Gunther, 390 So.2d 1192 (Fla. 1980). In The Florida Bar v. Fuller, 389 So.2d 998 (Fla. 1980), the respondent received a one (1) month suspension for agreeing to pursue the claims of two Canadian businessmen against a Florida corporation, accepting a $1,000 retainer and thereafter not effectively communicating with his clients and not proceeding with the action as originally agreed. Filing suit on behalf of a client and thereafter failing to take any action to prosecute the case resulting in its dismissal for lack of prosecution brought a thirty (30) day suspension in The Florida Bar v. Baccus, 376 So.2d 5 (Fla. 1979).

Finally, Respondent's protest that in each case, at worst, he neglected a legal matter which, in and of itself, would assuredly have

warranted no more than a private reprimand overlooks two key factors. First and foremost, prejudice attached to the legal rights of his clients. Secondly, this Court has articulated a doctrine whereby a series of acts of misconduct, which individually may not be of great magnitude, will be viewed in the aggregate as a serious breach of ethics warranting sterner sanctions. The Florida Bar v. Abrams, 402 So.2d 1150 (Fla. 1981) and The Florida Bar v. Brigman, 307 So.2d 161 (Fla. 1975). The combination of these two factors should elevate these matters beyond the minimal significance that Respondent would attach to them and result in the Court imposing the discipline recommended by the Referee.

II. THE INABILITY OF RESPONDENT TO REVIEW PRIVATE REPRIMAND CASES WAS NEVER RAISED BEFORE THE REFEREE AND IS THEREFORE NOT SUBJECT TO APPEAL; IS MOOT BECAUSE OF THE PROCEDURAL POSTURE OF THESE CASES; AND, IF CONSIDERED BY THE COURT, DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW.

Respondent made no request of The Florida Bar for private reprimand cases during the pendency of Case Numbers 65,413 and 65,878 and the lack of any such request is reflected in the record of proceedings before this Court. Further, the issue of lack of access to private reprimand cases is not an issue made part of the record of these proceedings nor was it otherwise brought before the Referee in Case Numbers 65,413 and 65,878 so that she could enter a ruling thereon. Accordingly, Respondent has waived his right to raise this issue for the first time on appeal and the issue as framed by Respondent is not subject to appeal.

It is a fundamental principle that an appellate court can only properly review determinations of lower tribunals based on the record established below.Tyson v. Aikman, 31 So.2d 272 (Fla. 1947); Altchiler v. State of Florida Department of Professional Regulation, 442 So.2d 349 (Fla. 1st DCA 1983); Hillsborough County Board of County Commissioners v. Public Employee Relations Commission, 424 So.2d 132 (Fla. 1st DCA 1982); Coca-Cola Bottling Company v. Clark, 299 So.2d 78 (Fla. 1st DCA 1974); Seashole v. F & H of Jacksonville, Inc., 258 So.2d 316 (Fla. 1st DCA 1972); Bailey v. State of Florida, 173 So.2d 708 (Fla. 1st DCA 1965). As expressed by the court in Hillsborough County Board of County Commissioners, supra,

> An appeal ... is a proceeding to review a judgment or order of a lower tribunal based upon the record made before the lower tribunal. An appellate court will not consider evidence that was not presented to the lower tribunal because the function of the appellate court is to determine whether the lower tribunal committed error based on the issues and

evidence before it. Hillsborough County Board of County Commissioners, supra, at 134.

Courts have not hesitated to strike matters that are dehors the record. Mann v. State Road Department, 223 So.2d 383 (Fla. 1st DCA 1969). Respondent's second point on appeal should suffer a similar fate and The Florida Bar requests that it be stricken.

Even more compelling than the non-appealable nature of the issue is the fact that it is rendered moot by the procedural posture of these cases. Respondent requested that the Referee in Case Numbers 65,413 and 65,878 impose a public reprimand (T2.109). In his brief, Respondent also suggests that a public reprimand would be appropriate discipline. If a public reprimand is conceded at the outset, it is difficult to envision how the issue remains a viable one. Respondent has not suggested that three (3) separate acts of misconduct would warrant a private reprimand and has stated in his brief that each matter, in and of itself, would have warranted no more than a private reprimand. Accordingly, Respondent should not be heard to complain about lack of access to private reprimand cases when he has acknowledged the foregoing.

Respondent also undoubtedly realizes that a prior private reprimand for neglect coupled with a new charge of neglect will result in discipline greater than a private reprimand. The Florida Bar v. Harrison, 398 So.2d 1367 (Fla. 1981). This is especially true since the Court has stated that a public reprimand should be reserved for instances of isolated neglect. The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980).

Respondent's argument that the Referee in Case Number 63,669 abused his discretion in recommending a public reprimand is again an issue that was waived and therefore not subject to appeal. Respondent entered into

a Stipulation on September 18, 1984 wherein he affirmatively stated he would not appeal the Report of Referee in Case Number 63,669 and that his Petition for Review, previously filed in that matter, was withdrawn (S. paragraph one (1)). Respondent's attempt to do an end run around the Stipulation should not be permitted and the argument not even entertained by this Court.

Finally, even if Respondent's second point on appeal is considered on its merits, these proceedings and the issue as framed do not rise to the constitutional infirmities ascribed to them. The Bar concedes this Court has inherent authority to reduce recommended discipline if the facts warrant such a reduction. It is difficult to fathom a denial of fundamental constitutional rights when the Court has institutional knowledge of the private reprimand cases cited by Respondent and can consider them if appropriate. It is even more difficult to fathom such a denial when Respondent never sought access to such cases; never perfected this as an issue in proceedings before the Referee below; and argues for a public reprimand as appropriate discipline.

The "property" right argument advanced by Respondent is equally curious. Fortunately, this Court has never ascribed to the practice of law proprietary rights or the morals of the marketplace. On the contrary, this Court stated in Lambdin v. State, 9 So.2d 192,193 (Fla. 1942) that:

> Practice of the law is an impersonal name applied to the mechanics of administering justice through the medium of judges and lawyers. The administration of justice is a service rendered by the State to the public and exacts of those who engage in it the highest degree of confidence and good faith. No service furnished by the State more vitally affects the public. We practice law by grace, not by right. The privilege to practice law is in no sense proprietary. The State may grant it or refuse it, or it may withdraw it from those who abuse it.

The passage of time since that decision has perhaps eroded the perception that some may have of this honored profession but the foregoing should stand as ample rebuttal to the mercenary argument advanced by Respondent.

III. RESPONDENT HAS FAILED TO ESTABLISH THAT THE FLORIDA BAR BREACHED CONFIDENTIALITY AND THAT THIS ALLEGED BREACH SHOULD HAVE ANY BEARING ON THESE PROCEEDINGS.

Respondent did raise the issue of alleged breach of confidentiality before the Referee but only for mitigation of punishment and not as the basis for dismissal of charges. For the reasons previously stated in answer to Respondent's second point on appeal, it would appear he did not preserve this point for appeal and it is therefore not subject to appeal. Should the Court determine to consider this issue, however, it should be noted that The Florida Bar v. Rubin, supra, resulted in dismissal of disciplinary proceedings premised upon findings that the Bar as an entity engaged in a pattern of unjustified delays as well as breach of confidentiality. Respondent made no such showing below.

The testimony of the one witness Respondent did present on this issue, Mayor Glenn Dufek of Oakland Park, was vague, evasive and based upon multiple hearsay. Dufek testified that any matters involving Respondent and the Bar were too complicated for him to understand and that notice of pending Bar proceedings came to him from a source who attributed the information to yet another party (T2.26). Dufek even testified on cross-examination that he had no personal knowledge of the facts and circumstances of the Bar cases (T2.30). The foregoing hardly constitutes the definitive showing that would provide a basis for dismissal of charges. At most, it shows dissemination of indefinite information by a source not employed by the Bar and outside its immediate control. In fact, the scenario presented by Respondent involves such a volatile political situation that it is well within the realm of probability that the "Bar problems" of Respondent were fabri-

cated in an attempt to discredit his candidacy for city attorney and that the source of these rumors had no actual knowledge of Bar proceedings.

Further, Respondent compelled the attendance of the witnesses he presented at the January 11, 1985 hearing through the Referee's subpoena power. The record is devoid of any attempt by Respondent to subpoena and compel the attendance of witnesses with more direct knowledge of the alleged breach of confidentiality.

The Bar, on its own initiative, however, did seek to investigate this allegation when Respondent brought it to the Bar's attention prior to the January 11, 1985 hearing. The Bar's investigation failed to establish that confidentiality was breached by any representative of The Florida Bar and the Referee was so informed (T2.113). The Referee was evidently satisfied with this explanation and determined further inquiry was not necessary (T2.114). The Referee did not characterize the Bar's investigation as perfunctory and the Bar is at a loss how Respondent could so characterize it.

It should be further noted individuals without any connection with the Bar were very intent on harming Respondent's professional reputation. For example, Respondent entered into evidence at the January 11, 1985 hearing a newspaper article describing his withdrawal from consideration for the position of city attorney for Oakland Park (T.2 44,45). This article makes no mention of Bar proceedings which establishes there was no pervasive or deliberate attempt to breach confidentiality on the part of The Florida Bar or any person who serves in a voluntary capacity with The Florida Bar. Respondent did testify that the individuals who were trying to harm him professionally, his former partner's wife and his ex-wife, were at city hall giving negative

information about him (T2.44) but again there is no showing that their negative information involved Bar matters nor does the record reflect any attempt by Respondent to compel the attendance of these individuals to give testimony.

Respondent attempts to shore up his allegations by providing a copy, in the appendix of his brief, of a letter from his former partner's wife to the Bar. Perusal of the record does not show that this letter was ever placed into evidence before the Referee. Respondent has again run afoul of the basic precept that a party may not include, anywhere in his brief, material outside the record and that it is proper for the Court to strike same. Altchiler v. State Department of Professional Regulation, supra at 350.

Should the Court determine to entertain this material, however, it must be noted that the letter on its face shows that it was unsolicited and the Bar does not know the source of the writer's information. It is quite plausible that after the hearing held on September 14, 1984, Respondent contacted various potential witnesses in preparation for the disciplinary phase of the proceedings and that somehow word of these proceedings reached the author of the letter. Also there would be absolutely nothing improper in the Bar contacting this individual or any other individual for use as a possible rebuttal witness to Respondent's claims of office disruption. The Bar would only be required to advise potential witnesses of the confidential nature of the proceedings and would not be guilty of a breach of confidentiality if potential witnesses took it upon themselves to publicize a pending matter.

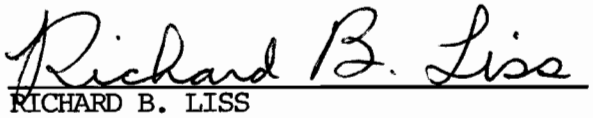
It bears repeating that in this instance no such contact was initiated by the Bar nor was the writer of the letter utilized as a

witness. In point of fact, the Bar did not dispute the office break-in but attempted to show it as an aggravating factor (T2.62,63). There is obviously a vendetta on the part of his ex-wife and former partner's wife which the Bar can not control and is not responsible for. These individuals will apparently go to any length to deprive Respondent of elective office (T2.42) and appointive office (T2.44). There is absolutely nothing in the record that would support a claim that The Florida Bar did anything to further the machinations of these individuals.

CONCLUSION

By reason of the foregoing, The Florida Bar requests this Honorable Court approve the Referee's findings of fact in Case Number 65,413, approve Respondent's Consent Judgment and the Referee's findings of fact in Case Number 65,878 and approve the Referee's disciplinary recommendation in the aforesaid cases that Respondent receive a public reprimand and be suspended from the practice of law for a period of ten (10) days. It is further requested that the Court's final order of discipline encompass, in one order, Case Numbers 65,413 and 65,878 as well as Case Number 63,669 pursuant to previous Stipulation of the parties which was approved by this Court. Finally, The Florida Bar requests that total costs in the amount of Two Thousand Nine Hundred Four Dollars and Eighty One Cents ($2,904.81) be assessed against Respondent based upon the Referee's recommendation in Case Number 63,669 that costs in the amount of One Thousand Two Hundred Ninety Three Dollars and Twenty One Cents ($1,293.21) be assessed against Respondent and the Referee's recommendation in Case Numbers 65,413 and 65,878 that costs in the amount of One Thousand Six Hundred Eleven Dollars and Sixty Cents ($1,611.60) be assessed against Respondent.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was sent by U.S. Mail to Alice M. Reiter, Esquire, attorney for Respondent, at 1136 Southeast Third Avenue, Fort Lauderdale, Florida 33316 on this 15th day of April, 1985.

Richard B. Liss

RICHARD B. LISS
Bar Counsel