PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar." Gerald M. Kuchinsky, Appellant, will be referred to as "respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Lastly, the symbol "TFB" followed by a letter and number will designate the bar's trial exhibits.

STATEMENT OF CASE AND FACTS

In or about December 2000, the Respondent, Gerald M. Kuchinsky, was retained by Ji Fen Hong Sichewski ("Sichewski") to represent her in post divorce proceedings, inclusive of a then pending appeal. RR2. The Respondent was paid $2,500.00 for all of the legal services he provided to Sichewski on the appeal, as well as multiple matters concerning visitation and monetary disputes with the ex-husband. RR2; TT74-78. Prior to the filing this grievance, the Respondent provided a full refund of these fees to Sichewski. TT42.

While the Respondent did provide useful services in the trial court level, he admittedly failed to file an appellate brief on behalf of his client.[1] RR3; TT 74-78. Ultimately this led the husband's appeal being determined without the benefit of an opposing brief on the merits. RR3.

On October 10, 2001, the Fourth District Court of Appeals entered its Order which granted the husband's appeal and resolved the two appellate issues as follows:

> The father argues that the trial court erred in ordering him to pay guideline child support, without the adjustment which is required by section 61.30(11)(b), Florida Statutes

[1] It was the Respondent's testimony that he could not find a good faith basis to defend the appeal and that after fully researching the matter believed that the husband's legal position was correct. TT72. At this point in time the Respondent should have withdrawn from representation, but he did not do so.

> (1999), in cases in which the child spends a substantial amount of time with each parent. Because the child is with each parent on an equal amount of time, we agree with the father and reverse for a recalculation of child support. (citation omitted).
>
> The father also argues that the trial court erred when it changed residential custody, but did not change the visitation schedule. He presented evidence that the rotating schedule was having an adverse effect on the child. We cannot say that the trial court abused its discretion in not changing the visitation schedule. In view of the amount of time which has elapsed since that order was entered, however, that issue can be revisited when the trial court reconsiders child support. Affirmed and reversed in part. See TFB 1.

Upon his receipt of this Court Order, the Respondent struggled with how to remediate the appellate decision and decided that the best course of action was to file a Petition for Modification based upon a change in circumstances, which petition was invited by the second paragraph of the appellate decision. TT78-80. The Respondent completed a Petition for Modification and this pleading formed the basis of further litigation between Ms. Sichewski and her former husband.

In count II of the Complaint the Bar has alleged that the Respondent failed to adequately communicate with his client and that he failed to disclose that the appeal had been lost. However, the testimony adduced at trial from Sichewski and the Respondent is that there were phone calls, office meetings and even a few meetings

at Sichewski's place of employment. TT 28-38 & 49-51. Sichewski presented testimony that she made several repetitive attempts to secure telephone contact with the Respondent and that he cancelled a meeting or two late in the representation. TT 49-51. While Sichewski may have desired more communication (and perhaps Respondent should have been more receptive), the Rules require a certain minimum level of communication and it is Respondent's position that there was a minimum level of communication through most of the representation.

The more serious allegation contained in Count II is the claim that the Respondent did not tell his client that he failed to file a brief causing the appeal to be lost. The Referee accepted, Sichewski's belief that she was misled. RR 4. However, the Respondent testified that he explained in the predicament occasioned by his failure to file a brief and that there was a need to pursue her child custody issues through a Petition for Modification. TT 73-74. The Respondent further testified that, prior to his discharge he had consulted with counsel about his malpractice vis-a-vis the brief and that he was attempting to schedule a meeting between himself, his malpractice counsel and Sichewski to fully explain the ramifications of the malpractice claim. TT 83-86. However, due to the holiday season such a meeting was not scheduled prior to the Respondent's discharge. TT 83-86.

In late December of 2001, the Respondent was discharged and Sichewski hired other counsel to pursue her matters. The Sichewskis were divorced in 1999 and continued to litigate over custody, visitation and monetary issues until a few days before the final hearing in this matter, which litigation was finally resolved through mediation between the former husband and wife.

After finding the Respondent guilty of all matters referenced in the Bar's complaint, the Referee has recommended that the Respondent be suspended from the practice of law for sixty (60) days and that he be placed on probation for two years with the following conditions:

1. Attendance at Ethics School;

2. During the first year of probation:

A) take and pass the ethics portion of the Florida Bar examination;

B) attend and complete a Florida Bar approved course on case management;

C) purchase and install computer software to track all client related deadlines;

D) purchase and maintain a manual system to track all client related deadlines;

E) reimburse the Bar's costs in this proceeding;

3. Pay all monitoring costs associated with the probation.

It is the Respondent's position that this sanction is not warranted under the circumstances and case law, and he is therefore appealing the Referee's sanction recommendation, as well as the finding of fact and guilt as to the alleged misrepresentation and lack of communication.

SUMMARY OF ARGUMENT

The real issue in this appeal is the appropriate sanction for an attorney who provides quality representation for a client on a multitude of trial level matters but fails to file an appellate brief which causes the reversal of a child support order which was wrong as a matter of law and remands a visitation issue back to the lower court for further review. Complicating this straight forward question is the lawyers prior disciplinary record for conduct that occurred in 1990, 1991 and 1996. This Court has consistently held that a public reprimand is the appropriate sanction for isolated acts of neglect and there is no need to deviate from this standard in this case. At most the Court should order a public reprimand and some of the rehabilitative and probationary terms recommended by the Referee.

The Respondent has also challenged the findings of guilt on two rule violations as the Bar has failed to meet its burden of proof. The Bar has presented insufficient evidence to prove that the Respondent made a misrepresentation by omission and the evidence that the Bar and the Respondent presented shows systematic communication, including telephone calls, office visits and personal trips by the Respondent to visit with his client at her place of employment. Accordingly the Referee's findings on these two matters should not be upheld.

ARGUMENT

I. A SIXTY DAY SUSPENSION IS NOT THE APPROPRIATE SANCTION FOR A LAWYER WHO FAILS TO FILE AN APPELLATE BRIEF ON BEHALF OF A CLIENT.

At issue in this appeal is whether a lawyer, who provides good and valuable services to a client, but who fails to file an appellate brief on behalf of a client, should be suspended from the practice of law for sixty days and placed on two years probation with various conditions and terms of such probation. It is the Respondent's position that this sanction does not comport with the Florida Standards for Imposing Lawyer Sanction or relevant case law.

It is well settled that a referee's findings of fact and guilt[2] are presumed to be correct and the appealing party has the burden to demonstrate that these findings are "clearly erroneous and lacking in evidentiary support." The Florida Bar v. Canto, 668 So.2d 583 (Fla. 1996); The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996). However, this Court has consistently held that it has a broader discretion when reviewing a sanction recommendation because the responsibility to order an

[2] The Respondent is appealing one finding of guilt (addressed later in this brief), but the real issue in this brief concerns the appropriate level of sanction.

appropriate sanction ultimately rests with the Supreme Court. The Florida Bar v. Thomas, 698 So. 2d 530 (Fla. 1997).

A. The Factual Predicate for the Disciplinary Sanction.

The complaining witness in this matter, Ji Fen Hong Sichewski, was divorced from her then husband in 1999. Since that time Ms. Sichewski has been in extended litigation with her ex-husband over custody matters and monetary issues. In fact, these post matrimonial matters were not resolved until just prior to the final hearing in this case. TT 46.

The Respondent was Ms. Sichewski's third lawyer.[3] TT47. At the time when she retained the Respondent, Ms. Sichewski was defending an appeal on two distinct issues. First the husband complained that the trial court had improperly calculated the amount of child support and second there was a visitation question that was occasioned by the post trial change of primary custodial parent to the father. See TFB 1. Thus, as the Respondent began his representation of Ms. Sichewski, she had already lost her position as primary custodial parent and was defending a child support calculation that was wrong as a matter of law.

[3] She had two other attorneys post her discharge of the Respondent.

The Respondent began work on the appeal (reading transcripts, the record and conducting legal research) but after many months of trying could not find a good faith basis on which to defend the appeal.[4] TT67-72. As such he did not file an Answer Brief resulting in the appeal being resolved without benefit of Ms. Sichewski's position being heard. While not condoning the Respondent's failure to file a brief or his decision not to withdraw when he reached the decision that he had no good faith argument, the appellate court ruling corrected the child support calculation to properly follow Fla. Stat. 61.30(11)(b) and deferred the visitation question back to the trial court for further review due to the passage of time.

Shortly after the Court entered its order, the Respondent drafted and filed a Petition for Modification to address Ms. Sichewski's ultimate litigation goals and to cure the effects of the lost appeal. Shortly after filing the Petition for Modification, the Respondent was discharged because Ms. Sichewski believed that he was not communicating with her to her satisfaction. However, the record is replete with Ms. Sichewski's acknowledgment to phone calls she had with the Respondent and his secretary, to office visits and even the Respondent meeting his client at her place of employment. By Ms. Sichewski's own admission, she had regular communication with the Respondent. Perhaps not in the exact manner she desired, but it was

[4] The prior appellate attorney had also reached that decision. See TT 70.

communication. Accordingly, the Respondent should be found not guilty of having violated R. Regulating Fla. Bar 4-1.4(a) & (b).

B. Respondent did not make a misrepresentation to his client.

One of the issues raised by the Bar is Ms. Sichewski's claim that she was never advised that her appeal had been lost. While this point was strongly contested by the Respondent, the Referee found that the Respondent did not tell his client that he failed to file a brief causing the appeal to be lost.

At trial it was the Bar's burden to prove this allegation by clear and convincing evidence and the only evidence they presented was Ms. Sichewski's testimony that she believes that she was misled. However, the Respondent's testimony was clear. His testimony on this point was as follows:

> I called – I had spoken – contrary to what Mrs. Sichewski says in her recollection, I had discussed this with her several times. I told her I was unable to complete the brief, do the brief. And that, quite frankly, I had not done what I ought to have done. And that the matter was in serious trouble, because I hadn't done what I should have. But that I thought that there was a way that I could overcome that, okay.
>
> In October I spoke with her, and I said to her, this matter has come to an unhappy conclusion. But I believe

> that there's a way around this. And frankly, I think that there's a second way we can approach this, which would be successful in getting custody of Helen back for you. That was in October.
>
> And I recall that, because I went to her place of business, which is, as I say, is the festival flea market. TT73, l.11 to TT74, l.6.

The Respondent further testified that he discussed with Ms. Sichewski his belief that a Petition for Modification would provide a better avenue for relief because of (a) the passage of time and (b) certain language in the appellate decision. TT78-82. Also of importance is the Respondent's testimony that, prior to his discharge he had consulted with counsel about his malpractice vis-a-vis the brief and that he was attempting to schedule a meeting between himself, his malpractice counsel and Sichewski to fully explain the ramifications of the malpractice claim. However, due to the holiday season such a meeting was not scheduled prior to the Respondent's discharge.TT83-86.

In contrast to all of this precise testimony, is Ms. Sichewski's mantra that she did not know that the Respondent failed to file a brief. However, she admits to a meeting with the Respondent wherein she executes the Petition for Modification and the Respondent's testimony is that he informed her that the modification would correct the harm of not filing a brief.

In order for the Bar to prevail on this point and the alleged violation of R. Regulating Fla. Bar 4-8.4(c) [A lawyer shall not engage in conduct involving fraud,

deceit or misrepresentation.], they must prove by clear and convincing evidence that the Respondent made an intentional misrepresentation. See The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). The evidence presented at the final hearing fails to prove this alleged rule violation.

C. Neglect normally warrants a public reprimand.

The Respondent admitted that his failure to file the appellate brief was evidence of his neglect of a client matters, even though he provided numerous useful services to his client on trial level matter. The Florida Bar v. Price, 569 So. 2d 1261, 1263 (Fla. 1990) notes that:

> (d)ecisions of this Court have established that "(p)ublic reprimand is an appropriate discipline for isolated instances of neglect or lapses of judgement." (Citations omitted).

In Price, the attorney was publicly reprimanded for failing to consult with his clients about dismissing a bankruptcy case, actually dismissing the case and then failing to tell the client about such dismissal.

Similarly, an attorney was publicly reprimanded for neglect of a client matter by missing a statute of limitations and for failing to advise his client of same. The Florida Bar v. Whitaker, 596 So. 2d 672, 674 (Fla. 1992). The Court went on to state that:

> Our case law demonstrates that public reprimand is more appropriate in cases such as this which involve neglect of client matters. (Citations and footnote omitted).

It is also important to note that a public reprimand is not precluded if the accused lawyer neglected more than one client matter. See for example The Florida Bar v. Barcus, 697 So. 2d 71 (Fla. 1997). In Barcus, the lawyer neglected several distinct cases for related clients and this Court reduced the referee's recommended thirty day suspension to a public reprimand. In making this change the Court relied upon The Florida Standards for Imposing Lawyer Sanctions (hereinafter referred to as "Standard ___"). While the Court discussed Standard 4.42 to explain why suspension is not appropriate due to the lack of intent and ultimate harm to the client, the better Standard for this case is Standard 4.43 which comments that:

> Public reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.[5]

The record makes no mention that respondent's action were anything but negligent. Accordingly, Standard 4.42 would not apply to this case either as this Standard requires a finding of (a) a knowing failure to provide services or (b) a pattern of neglect that "causes injury or potential injury to a client."

---

[5] An admonishment would be appropriate if little or no harm to the client was found. Standard 4.44.

D. **Mitigation and Aggravation require adjustment of a sanction.**

In calculating the appropriate sanction one must consider the mitigation and aggravation present in this case. The referee found three mitigating factors from the Florida Standards for Imposing Lawyer Sanction . They are:

9.32(d) - timely good faith effort to rectify misconduct (filed petition to modify and gave a full fee refund);

9.32 (e) - full and free disclosure and cooperation with the Bar; and

9.32 (i) - remorse.

The Respondent believes that the record also establishes the following mitigation:

9.32(b) - absence of a dishonest or selfish motive;

9.32(g) - otherwise good reputation and character;

9.32(h) - imposition of other penalty or sanction (the Respondent still a possible malpractice action);

9.32(j) - remoteness of prior offenses.

The last mitigating factor impacts the sole aggravating factor found by the referee, which is the Respondent's prior disciplinary record. See Standard 9.22(a). It is therefore important to discuss this disciplinary record which was introduced by the Bar during the final hearing. In 1993, Mr. Kuchinsky received an admonishment

for failing to timely withdraw from representation. Mr. Kuchinsky received a public reprimand in 1994 based upon a failure to act with reasonable diligence or to expedite litigation in relationship to actions occurring in 1990 and 1991. Both of these disciplinary actions are for conduct that occurred more than 13 years ago and the sanctions themselves are ten years old. The only disciplinary sanction of some what recent vintage is an admonishment from approximately six years ago for conduct that occurred in May and July of 1996 (more than eight years ago). Quite frankly, Mr. Kuchinsky's disciplinary record is stale and should not be used to create a large enhancement of the current sanction. See the Standards for Imposing Lawyer Sanction, standard 9.22(a).

The difficulty in this case is the value to assign this prior disciplinary record. This appears to be similar to the situation faced by the Court in imposing a proper sanction on a different lawyer. The Florida Bar v. Maier, 784 So. 2d 411 (Fla. 2001). In Maier, the Court suspended the lawyer for sixty days when that lawyer neglected a client matter, failed to properly communicate with the client and also failed to respond to the Bar notwithstanding a more extensive disciplinary record. Maier had a thirty-day suspension and two admonishments for similar misconduct. The Court in Maier stated that:

> . . . we do not believe that a public reprimand is sufficient in light of the fact that Maier's violations in the instant case involve the same type of misconduct that were the subject of her three previous disciplinary actions. See generally Florida Bar v. Morrison, 669 So.2d 1040, 1042 (Fla.1996) (finding that "[i]n rendering discipline, this Court considers the respondent's previous history and increases the discipline where appropriate"). Since this is Maier's fourth disciplinary proceeding in the last seven years, and Maier was suspended for thirty days in 1998, see Florida Bar v. Maier, 707 So.2d 1127 (Fla.1998), we believe that a sixty-day suspension is appropriate in the instant case.

The operative term from the Morrison decision, as discussed in Maier, is that the "Court considers the respondent's previous history and increases the discipline where appropriate." Even though the Maier Court was faced with a lawyer with a much longer disciplinary record, the Court took what was a public reprimand type of violation and enhanced it to a longer suspension (60 days) so that it was longer than her prior suspension of thirty days. In the case at hand the Respondent has never been suspended from the practice of law and if the Court decides that this prior record should cause a suspension in this case it is suggested that the recommended sanction be a ten (10) day suspension.

The Court has not always increased a disciplinary sanction when there is a prior record. For example an attorney has received a three year suspension and then after being reinstated received a public reprimand. The Florida Bar v. Chosid 500 So. 2d

150 (Fla. 1987); The Florida Bar v. Chosid, 869 So. 2d 541 (Fla. 2004) [table opinion]. It is also important to note that this Court has also given lesser value to older disciplinary orders. See for example The Florida Bar v. Nunes, 734 So. 2d 393 (Fla. 1999); Fla. Standard for Imposing Lawyer Sanctions, Standard 9.22 [Minor misconducts older that seven years not considered as aggravating under certain circumstances.]. Accordingly the Referee's enhancement of a public reprimand type violation to a sixty day suspension is not warranted due to the age of the prior discipline in this case.

A comment should also be made about the cases relied upon by the Bar and the Referee as the conduct contained therein is much more severe than that found in this case and may also have had more considerable aggravating factors. It should be noted that none of the cases cited by the Referee in his report resulted in a sixty day suspension or in the probationary conditions[6] set forth in the report. For example the attorney in The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997), failed to file a

[6] There was no testimony adduced at trial that the Respondent did not have a tickler system for his deadlines or that case management was a problem for him. Rather, the testimony was that he could not find a good faith basis to file a brief and made a poor decision not to withdraw from representation. Thus, the probationary terms related to case management and purchase of computer software has no reasonable nexus to the problem at hand. Further, the requirement of Ethics School and passing the ethics portion of the Bar Exam appear to be redundant.

lawsuit prior to the expiration of the statute of limitations and made multiple misrepresentations to the client that the case was progressing and active. The net effect of the misconduct was that the client was extremely prejudiced by a loss of the right to pursue their claims. In the case at hand, Ms. Sichewski's loss of custody was prior to the Respondent's representation and was not an issue on appeal. See TFB 1. Further, the Respondent by filing a Petition for Modification created the vehicle by which her claims were ultimately settled (even if we do not know the terms of such settlement).

The next case offered by the Bar was the Florida Bar v. Roberts, 770 so. 2d 1207 (Fla. 2000). In this case the misconduct had nothing to do with neglect of a client matter and the accused lawyer had a private reprimand, three admonishments and a 91 day suspension. The other cases cited by the Bar and the Referee suffer the same infirmity. The Florida Bar v. Jordan, 682 So. 2d 548 (Fla. 1996) [four other disciplinary cases, neglect and failing to respond to the Bar]; The Florida Bar v. Brakefield, 679 So. 2d 1249 (Fla. 1996) [complete neglect of three distinct clients]; The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999) [misrepresentation about nonexistent law suit] and The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993)

[lying to the court and neglect]. Accordingly, there does not appear to be a justification for the sanction recommendation in this case.

CONCLUSION

The Respondent neglected a client matter by failing to serve an appellate brief. While he provided other good and valuable services to this client and fully refunded all fees paid to him on the case (even though he worked on multiple matters for more than a year), he understands this was unacceptable conduct for an attorney and he is truly remorseful and professionally embarrassed by same. The Respondent is a good lawyer. and a good man. He cares for his clients and their cases. He has over the years provided countless hours of pro bono service and would be willing to provide additional hours if the Court desires to make that part of the disciplinary sanction herein.

The Referee in this case has improperly enhanced the recommended sanction by placing too much weight on the Respondent's very old disciplinary record. The conduct at issue in this case ordinarily results in a public reprimand and any enhancement from this mark is amply met by the probationary and rehabilitative terms (Ethics School, passage of Ethics Exam) set forth by the Referee.

WHEREFORE, the Respondent, Gerald M. Kuchinsky, respectfully requests this Court to find him not guilty of having violated R. Regulating Fla Bar 4-1.4(a) & (b) and 4-8.4(c) and impose a public reprimand as a sanction for the remaining disciplinary violations.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished served via U.S. Mail on this ___ day of November, 2004 to Lillian Archbold, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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 the computer disk filed with this brief has been scanned and found to be free of viruses, by McAfee.

Respectfully submitted,

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TFB No. 710822

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

SC03-1744

Complainant-Appellee,

v.

The Florida Bar File

GERALD M. KUCHINSKY, No.2002-51,794(17C)

Respondent-Appellant.

_____/

RESPONDENT'S INITIAL BRIEF

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