IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

Case No. SC05-1225
TFB File No. 2002-00,195(2A)

JOHN JOSEPH KORESKO, V,

Respondent.
_____/

RESPONDENT'S INITIAL BRIEF ON CROSS-APPEAL AND ANSWER BRIEF

John A. Weiss
Attorney Number 0185229
2937 Kerry Forest Parkway, Suite B-2
Tallahassee, Florida 32309
(850) 893-5854
COUNSEL FOR RESPONDENT

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

Undersigned counsel does hereby certify that Respondent's Initial Brief on Cross-Appeal and Answer Brief in The Florida Bar, Complainant, v. John Joseph Koresko, V, Case No. SC05-1225, TFB File No. 2002-00,195(2A), is submitted in 14-point proportionately spaced Times New Roman font, and that the brief has been sent as an attachment in Word format to an email to the Supreme Court Clerk's office which was scanned and found to be free of viruses by Norton Anti-Virus for Windows.

_____

John A. Weiss
Counsel for Respondent

TABLE OF CONTENTS

Page

Page

TABLE OF CITATIONS

Cases **Page**

Cases **Page**

Florida Constitution

Florida Standards for Imposing Lawyer Sanctions

Rules Regulating The Florida Bar

PRELIMINARY STATEMENT

Respondent will use the same designations in his brief as set forth by the Bar in its Preliminary Statement. The Florida Bar will be referred to as such or as the Bar or as the Complainant. Respondent will be referred to as such or Mr. Koresko

References to the Report of Referee shall be by the symbol "RR" followed by the appropriate page number.

References to the transcript of the final hearing will be by the symbol "TR." followed by the volume and the appropriate page number. References to the transcript of the October 25, 2005 hearing on Respondent's Motion to Dismiss for Prosecutorial Delay will be by the symbol "TR. 10/25/05" followed by the appropriate page number.

Exhibits will be designated by the symbol "TFB Ex." For the Bar's exhibits and "R. Ex." for Respondent's exhibits.

JURISDICTIONAL STATEMENT

This is a case of original jurisdiction pursuant to Article V, Section 15, of the Constitution of the State of Florida.

STATEMENT OF THE FACTS

The Bar's Statement of the Facts is not accurate. In some instances the Bar states as facts allegations it made that were rejected by the Referee. Respondent respectfully suggests that the Court, rather than relying on the Bar's argumentative statement of facts, should rely on the Referee's findings. The Report of Referee was filed with this Court and is part of the record. The Referee's findings of fact are set forth under the Narrative Summary of Case, Section II.B., beginning on page 2 of the report.

The Referee's Recommendations as to Guilt, Section III, begin on page 8, subparagraph A. and continues through subparagraph G. ending on page 12. Those findings, which are essential to this Court's deliberations on both the Bar's appeal and Respondent's cross-appeal are set forth below verbatim:

> III. RECOMMENDATIONS AS TO GUILT.
>
> Based on the evidence presented, I make the following findings of fact and recommendations of guilt:
>
> A. The Bar conceded in its closing arguments that its allegations as set forth in paragraph 6 of its complaint were not proven by clear and convincing evidence. Accordingly, I find Respondent not guilty of

causing Mrs. Magee's signature on her 1988 will to be falsely witnessed and notarized. I further find Respondent not guilty of the serious allegation of false assertions to the Bar in that regard.

B. In essence, the Bar has charged that Respondent devised a fraudulent scheme to assist the Magees to evade tax liability, that he counseled them to engage in such a scheme, and that he failed to advise them that they were engaging in a criminal or fraudulent course of action. As I observed during my closing remarks at the conclusion of the formal hearing in this cause, the Bar's expert witness does not support these allegations. In essence, the Bar's expert stated that if the Magee Corporation had independent economic activity that the entire plan, while perhaps aggressive in pushing the envelope, was not illegal, did not violate various IRS provisions, and was defensible. Respondent's expert essentially testified in like manner. Accordingly, I do not find that there was clear and convincing evidence that Respondent committed the offenses alleged by The Florida Bar.

Specifically, I find that it was not improper to set up the Magee Corporation; it was not improper to have the Magee Corporation set up a retirement plan and trust; it was not improper to have Westinghouse transfer into the Magee Corporation Mrs. Magee's retirement assets; the retention of an outside administrator, Pen-Mont Services, was not inappropriate; it was not improper to purchase a note from FBCCII for $142,500; and it was not improper for FBCCIII to lend the Magees $142,500 to purchase outright their retirement condominium. In so finding, I note that the mere risk that the IRS will disallow a deduction does not mean that a plan is a fraudulent scheme to defraud taxing authorities.

I further note that the concept of setting up the timing on the investment certificate and the note and mortgage so that both come due in approximately 2016,

except for the .6 of 1% interest rate differential, which is FBCCII's fee, is not improper.

C. The Bar has not proven by clear and convincing evidence, indeed has presented no evidence, showing that Respondent mishandled the $20,000 surplus from Mrs. Magee's retirement funds. Those funds have remained untouched in an appropriate account from the date of their receipt notwithstanding the fact that Respondent was entitled to drawn down fees justly earned. Respondent has received no compensation for services rendered in 1988 or in 1996.

D. I find the Bar has failed to show that Respondent did not timely reply to Mr. Magee or Mr. Magee's lawyer's demands for information.

E. I find no clear and convincing evidence supporting impropriety in Respondent's setting up the Magee estate in Pennsylvania. The Court was notified of Mrs. Magee's death in Florida, of her residence in that state at the time of her death, and of the appointment of Mr. Magee as the administrator of her Florida estate.

F. As noted by me in my remarks of the conclusion of the hearing, I had concerns regarding the suit filed in Pennsylvania, on March 24, 2003, by First Business Credit Company II, and its subsequent handling by the Respondent. However, I also noted that I was not convinced that these issues had been properly pled by the Bar in its complaint. The Bar devoted very little focus or time on this lawsuit in the hearing.

The complaint with the Bar was filed on August 23, 2001, yet probable cause was not found until almost two years later on June 5, 2003. The Bar, because of its admitted lack of diligence in pursuing this case, did not serve a formal complaint until two years later on July 13, 2005. The Bar has offered no valid excuse for this delay. On November 14, 2005, I issued an order denying

> the Respondent's motion for prosecutorial delay. In that order, I concluded that to grant the Respondent's motion, I would have to find prejudice to the Respondent caused by the delay. In denying the motion, I concluded that the Respondent had failed to articulate any such prejudice caused by the Bar's delay which would make it manifestly unfair to proceed. In that finding, it was assumed by me that the Respondent would have to respond only to charges made by the Bar in its complaint.
>
> Having reviewed the Bar's complaint, I hereby conclude that it has not sufficiently pled or raised the filing of the lawsuit and its handling. The Bar and the Respondent, at the hearing focused on the central allegations of the complaint — the drafting of the wills and the tax plan. The Bar did not prove its allegations by a preponderance or a clear and convincing standard. It would be manifestly unfair, and violate due process, to make findings on the lawsuit issues that are not pled in the late-filed complaint. Therefore, I decline to consider the lawsuit issues. I would note however, this declination to rule is procedural and not substantive. There is nothing to prohibit the State of Pennsylvania (where all the lawsuit actions occurred) from reviewing these issues.
>
> G. I therefore recommend that Respondent be found not guilty of the misconduct and rule violations alleged in the Bar's complaint.

On page 5 of its brief, the Bar does not completely describe the March 5, 2003 letter that Mr. Magee wrote to Respondent. In that letter, Mr. Magee demanded, as set forth by the Referee on page 6 of his report, that

> Respondent remit to the estate of Marilyn Magee the sum of $163,592.59 without credit for the $142,500.00 of that sum used to purchase the La Brisa condo, that Respondent cancel and release the $142,500.00 mortgage held by FBCCII on the La Brisa condo and to provide

> Mr. Magee with a letter of credit in the amount of $200,000.00 allegedly to indemnify Mr. Magee and Mrs. Magee's estate for taxes, interest, penalties, accounting or legal fees incurred as a result of the plan devised by Respondent.

STATEMENT OF THE CASE

Respondent takes issue with the first paragraph of the Bar's Statement of the Case wherein it states that the pleadings from the March 24, 2003 suit brought by FBCCII "were unavailable to Bar Counsel . . . ."

It is undisputed that during his deposition on April 30, 2003, prior to probable cause being found and over two years prior to the filing of the Bar's formal complaint on July 13, 2005, Respondent advised the Bar of the FBCCII litigation. Specifically, Respondent advised the Bar that he had been sued by FBCCII as Executor of the Magee Estate and that the suit had been filed in the Court of Common Pleas in Pennsylvania. The Bar knew full well that Respondent practiced in the Philadelphia area and could have easily obtained any pleadings filed in the action.

Despite knowledge of the FBCCII litigation, the Bar did not present that issue to the grievance committee at its subsequent probable cause hearing.

There is some dispute between the Bar and the undersigned as to whether the litigation documents were provided to the Bar on June 11, 2003. It is immaterial, however. The Bar had two years from the time it was on notice of the filing of the

FBCCII suit to obtain the documents and to include those allegations in its complaint. It did not do so. The Bar Counsel who prepared and filed the Bar's complaint in the instant proceedings attended the April 20, 2003 deposition. The Bar *knew* that the litigation had been filed. Any attempt by the Bar to claim ignorance of the suit is, at best, disingenuous. Such statements should be completely disregarded by this Court in its deliberation on this matter.

The Bar sets forth on page 8 of its brief the allegations contained in paragraph 15 of the complaint. Those allegations included the discussion of the notice of default and alleged violations of various rules including conduct involving dishonesty, fraud, deceit or misrepresentation and various conflict of interest rules. These issues were squarely presented to the Referee through the complaint. Notwithstanding those factual averments, and the Bar's opportunity to prove up those allegations at final hearing, the Referee acquitted Respondent of all misconduct.

The Bar is careful to emphasize on page 9 of its brief that Respondent's answers to the Bar's interrogatories were 25 days late. Would that the Bar was as concerned about the four-year delay between the time Mr. Magee filed his complaint on August 23, 2001 and the Bar's filing of its formal complaint on July 13, 2005.

During pre-final hearing proceedings Respondent filed a Motion to Dismiss for Prosecutorial Delay. Hearing on that motion was held on October 27, 2005. Notwithstanding the Bar's four-year delay, and the fact that the Bar "admitted that it failed to diligently pursue this case by failing to promptly serve a formal complaint [for two years] after the finding of probable cause . . ." and the fact that the Bar "offered no valid excuse for this delay . . ." the Referee denied the motion. In so doing, however, the Referee noted in paragraph 8 of his November 14, 2005 order that he

> may take into consideration the Bar's delay in determining whether to recommend discipline, and, if so, the level of discipline.

The Bar acknowledges in its Statement of the Case that it only seeks review of that portion of the Referee's report pertaining to the Pennsylvania foreclosure action and the denial of costs. Accordingly, Respondent submits that *all* of the Referee's factual findings and determinations cannot be attacked by the Bar in any manner except as specifically related to the Pennsylvania foreclosure action and the denial of costs.

SUMMARY OF ARGUMENT

Mr. Magee filed his complaint against Respondent on August 23, 2001. Probable cause was found by the grievance committee on June 5, 2003. The Bar's formal complaint was not filed until July 13, 2005, four years after the filing of the

initial complaint and almost two years after probable cause was found. Prior to final hearing, Respondent moved to dismiss disciplinary proceedings for prosecutorial delay. On November 14, 2005, the Referee denied the motion because the Supreme Court decisions "appear to require a finding of prejudice to a respondent . . ." before such a motion can be granted. Respondent urges this Court to find that the Referee's denial of the motion to dismiss was inappropriate. To the extent that it is required, Respondent urges this Court to emphasize that a specific finding of prejudice is not necessary for a finding of prosecutorial delay. This Court's opinion in *Florida Bar v. Walter*, 784 So.2d 1085 (Fla. 2001), does not require prejudice for the dismissal of a case. It holds that if the Bar does not bring disciplinary proceedings within a "reasonable time" disciplinary proceedings may be dismissed for prosecutorial delay.

The Supreme Court has been chastising the Bar for over 40 years for failing to bring disciplinary proceedings with dispatch. Respondent argues that until the Bar knows that disciplinary proceedings will be dismissed for a lack of responsible prosecution, such inexcusable delays as have occurred in the instant case will continue.

In Point II Respondent argues that he should be awarded the costs of defending himself in these proceedings. At final hearing the Bar conceded that it had not proved the serious count of securing a false notarization and lying to the

Bar by clear and convincing evidence. The Bar presented no evidence whatsoever to prove up its allegation of mishandling of $20,000 in Respondent's client's surplus funds and his charging an excessive fee. The Referee specifically noted that the Bar's expert witnesses supported Respondent's position rather than the Bar's. In light of all of these circumstances, Respondent asks this Court to award him the costs of defending himself in like manner as the Bar would have been awarded costs had it prevailed.

Respondent argues in Point III that the Referee properly declined to consider allegations not raised by the Bar in its complaint. The Bar has not met the burden this Court places on an appellant to demonstrate that a referee's report is erroneous, unlawful or unjustified.

In the case at bar, the Bar argues that Respondent was put on notice of its intent to try to prove misconduct because a paragraph alluded to an antecedent event to litigation brought against Respondent in his capacity as Mrs. Magee's executor. The Referee acquitted Respondent on allegations of misconduct regarding the antecedent incident. The Bar elicited virtually no testimony on the matter that was not raised. In fact, the Referee specifically noted on page 11 of his report that the Bar did not sufficiently plead the filing of the March 24, 2003 lawsuit. He further found that the Bar "devoted very little focus or time on [the March 24, 2003] lawsuit during final hearing."

It is fundamental due process that a lawyer must be put on fair notice of the charges brought against him before he can be found guilty of the allegations. *In re: Ruffalo*, 390 U.S. 544, 550 (1968).

In Point IV, Respondent addresses Issue II in the Bar's Initial Brief. There, the Bar argues to this Court that Respondent should be suspended for 91 days for the conduct discussed in Issue I (Point III of this brief) in its Initial Brief. Respondent objects to any discipline being imposed absent a dispositional hearing. This Court has repeatedly stated that due process requires that the accused lawyer has the opportunity "to explain the circumstances of the alleged offense and to offer testimony in mitigation . . . ." *Florida Bar v. Centurion*, 801 So.2d 858, 863 (Fla. 2000).

In Point V, Respondent addresses the Bar's Issue III as presented in its Initial Brief. Respondent objects to the Bar's being awarded any costs in this matter without first his having the opportunity to challenge those costs to the Referee below. In *Florida Bar v. Davis*, 419 So.2d 325 (Fla. 1982), the Court specifically held that the award of costs is discretionary and a lawyer's acquittal on some, or in this case, all charges before costs are assessed.

POINT I ON CROSS-APPEAL

THE REFEREE ERRED IN DENYING RESPONDENT'S MOTION TO DISMISS FOR PROSECUTORIAL DELAY.

On August 8, 2006, Respondent asked the Referee to dismiss disciplinary proceedings brought against him for prosecutorial delay. On October 21, 2005, six days before the hearing on Respondent's motion, The Florida Bar filed its response to the motion. On October 27, 2005, Respondent replied to the Bar's response and attached to his reply a suggestion of death filed in *Florida Bar v. Bodine*, Case SC04-697 (the attachments show that The Florida Bar filed a formal complaint against Mr. Bodine over three years after the initial complaint had been filed. Those proceedings were pending before a referee when Mr. Bodine passed away), pleadings filed by Robert M. Montgomery, Jr., versus The Florida Bar in the 15th Judicial Circuit seeking a writ of mandamus, injunctive relief and declaratory relief (Mr. Montgomery was complaining about the Bar's failure to promptly prosecute a grievance that he filed) and the Supreme Court 2005 public reprimand of sitting Circuit Judge Meryl L. Allawas for failing to "expeditiously [issue] rulings in a dozen cases, which conduct adversely impacted the administration of justice." The Bar subsequently filed a reply to Respondent's reply and a further reply was filed by Respondent.

The Referee held a hearing on Respondent's motion to dismiss on October 27, 2005. During the hearing, the Referee made the following statement:

> THE COURT: Let me make one comment. I was on the local grievance committee for three years back I believe in the 80's, if my memory serves me right. We were quite concerned on the grievance committee then of the delay in the Bar in filing proceedings after we found probable cause then. This was maybe not 20 years ago, but 10 or 15 years ago. Is it still a problem?

TR. 10/27/05, p. 17.

The Bar responded in part as follows:

> The Bar standards that are promulgated by the Board of Governors that Mr. Weiss has attacked requires bar counsel to file formal proceedings within four months after the determination of probable cause by the grievance committee. That is an aspirational standard. It was not met in this case. Frankly, it was not met in the Bodine case that Mr. Weiss has attached to his reply that has been filed just today.

TR. 10/27/05, p. 17. The Referee asked again if the Bar could explain why the complaint "didn't get filed for two years after probable cause was found." The Bar responded thusly:

> Absolutely. The individual who was charged with the responsibility of doing that did not do it. . . . It's human frailties.

TR. 10/27/05, p. 18. On November 14, 2005, the Referee issued his Order denying Respondent's Motion to Dismiss for Prosecutorial Delay. After observing that the Bar found probable cause on June 5, 2003 but did not serve its formal complaint

until July 13, 2005, the Referee noted that the Bar "admitted that it has failed to diligently pursue this case . . . [and] has offered no valid excuse for this delay." November 14, 2005 Order, par. 1-3.

In paragraph 6 of his Order, the Referee specifically noted that the Florida Supreme Court appears "to require a finding of prejudice" before an action can be dismissed. After finding no articulated prejudice, the Referee denied the motion. He added, in paragraph 8 of his Order, however, that he might

> take into consideration the Bar's delay in determining whether to recommend discipline, and, if so, the level of discipline.

In the Report of Referee filed on March 21, 2006, after the final hearing had been held, on page 11 the Referee made the following findings:

> The complaint with the Bar was filed on August 23, 2001, yet probable cause was not found until almost two years later on June 5, 2003. The Bar, because of its admitted lack of diligence in pursuing this case, did not serve a formal complaint until two years later on July 13, 2005. The Bar has offered no valid excuse for this delay.

RR. 11.

The Referee, Respondent submits, misinterpreted *Florida Bar v. Walter*, 784 So.2d 1085), when he ruled. *Walter* allows dismissal without a showing of prejudice for the Bar's failure to bring proceedings in a "reasonable time."

Had the Referee granted Respondent's motion he would not have had to suffer the time, expense and emotional turmoil of the final hearing.

Respondent urges this Court, through this appeal, to make plain that referees do, in fact, have the ability to dismiss an action for egregious delay on the Bar's part regardless of showing of actual prejudice to a Respondent. As long as The Florida Bar can argue to a referee that a case can only be dismissed upon an actual showing of prejudice, delay such as that having occurred in this action will be repeated over and over. Simply put, there is no incentive for The Florida Bar to act responsibly.

Under current case law, at least as it is currently interpreted by the Bar, there is no sanction that can be imposed on the Bar for failing to discharge its obligations to the bench, the Bar and the public responsibly. In the case at bar, the Referee found that the Bar "admitted that it has failed to diligently pursue this case . . ,", and that "the Bar has offered to valid excuse for this delay . . . ." Despite the fact that the initial complaint was filed with The Florida Bar on August 23, 2001 and that the formal complaint was not filed in the Supreme Court until July 13, 2005, almost four years later, the Referee would not dismiss the case because there was no actual prejudice to the Respondent. He only observed that the Bar's delay might be relevant in determining whether to recommend discipline and, if so, what sanction would be imposed on the accused lawyer. The Referee clearly felt his hands were tied.

Respondent submits that there is prejudice in *every* case that the Bar fails to timely prosecute. If not to the accused lawyer, it inures to the detriment of the public in that it might allow an unscrupulous lawyer to practice for an extended period of time after the Bar learns of misconduct. It prejudices the image of The Florida Bar and the Supreme Court of Florida by providing proof to the Bar's critics that the Bar does not responsibly handle its obligation to properly police its ranks. It injures the belief of the Bar's membership that the Board of Governors is dedicated to policing its ranks (e.g., Mr. Montgomery's suit against the Bar). Finally, it is simply unfair to accused lawyers (e.g., Mr. Bodine, who died before he was able to successfully defend his reputation). There is a saying, the undersigned does not know to whom it should be attributed, that "deadlines make us all better lawyers." Perhaps deadlines would make The Florida Bar more responsible.

Respondent cited numerous cases in his Motion to Dismiss for Prosecutorial Delay that stand for the proposition that this Court demands prompt and responsible prosecution by the Bar in bringing disciplinary proceedings. It is not Respondent's intention to repeat the arguments contained in that motion. They are available to the Court for review. Respondent would point out, however, that as far back as 1960, in *Murrell v. The Florida Bar*, 122 So.2d 169 (Fla. 1960), this

Court held that the Bar should handle disciplinary proceedings with dispatch. On page 174 of its decision in *Murrell*, the Court stated:

> [t]he minute such a proceeding is instituted the lawyer's professional reputation is shattered and in danger of being permanently impaired. Such charges should not be suspended in limbo. They should be dispatched and if found to be without merit the lawyer should be exonerated.

Several months later in *State ex rel. The Florida Bar v. Oxford*, 127 So.2d 107, 112 (Fla. 1960), the Court stated:

> Disciplinary proceedings should be handled with dispatch. While they are pending, the defendant is suspended in limbo and should he expire while so suspended, it would be a tragedy.

Unfortunately, Mr. Bodine died while in such limbo; truly a tragedy.

Seven years later, in *Florida Bar v. Wagner*, 197 So.2d 823, 824 (Fla. 1967), the Court declared, once again, that disciplinary proceedings should be handled with dispatch and "the responsibility for diligence must rest with the Bar."

Ten years after *Murrell*, in *Florida Bar v. Randolph*, 238 So.2d 635 (Fla. 1970), notwithstanding the Bar's being guilty of "unexplained unreasonable delays" (a virtually identical finding to the case at bar), the Supreme Court refused to dismiss the case and declared on page 638 of its opinion that:

> Such inordinate delays are indeed unfair and even unjust to the one accused. They permit violators to remain active in the practice. They dim the memories of witnesses. They mar effective and efficient enforcement

> of the canons of ethics. Worst of all, perhaps, they undermine the public confidence in the bar's announced determination to keep its own house in order.

It has been 36 years since the *Randolph* decision came down. The Bar is still taking an inordinate amount of time to prosecute its cases. The case against Mr. Koresko languished for four years between the filing of the initial complaint with the Bar until the formal complaint was served. He submits the delay, particularly in light of his exoneration of wrongdoing, was "indeed unfair and even unjust to the one accused." But, as the Court said in *Randolph*, worse of all, it could have "undermine[d] the public confidence in the Bar's announced determination to keep its own house in order."

As observed in Respondent's motion to dismiss, the President of The Florida Bar was quoted in the *Randolph* decision as saying that under the then new integration rule (now replaced by the Rules of Discipline)

> There will be no more two-and-a-half-year delays. Final disciplinary action will be complete within approximately six months.

He was wrong. Thirty-six years later we are looking at four-year delays.

It is time for this Court to put teeth in its warning in *Randolph* to the effect that:

> [T]he penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This is so even

> though the record shows that the conduct of the lawyer merits discipline.

Randolph, p. 639.

The Bar's failure to handle disciplinary proceedings with dispatch has continued since *Randolph.* In *Florida Bar v. Kaufman*, 347 So.2d 430 (Fla. 1977), the referee's recommended discipline was reduced in part because the case had been pending for three years. In *Florida Bar v. Rubin*, 362 So.2d 12 (Fla. 1978), the Supreme Court dismissed two guilty findings against Mr. Rubin by two different referees in part due to the Bar's delay in filing the referee's reports. In *Florida Bar v. Papy*, 358 So.2d 4 (Fla. 1978), the Supreme Court lowered the discipline imposed due to the four-year "inordinate delay" by the Bar in bringing disciplinary proceedings.

In *Florida Bar v. Davis*, 419 So.2d 325 (Fla. 1982), the Court rejected claims of delay, although the Court acknowledged that they were "regrettable" because the new revision to the Integration Rule would eliminate such delays. *Davis*, p. 327.

Obviously, the new integration rules did not eliminate the delay. See, e.g., *Florida Bar v. Fussell*, 474 So.2d 210 (Fla. 1985) and *Florida Bar v. James*, 478 So.2d 27 (Fla. 1985).

The delay did not end with the change of the millennium. In *Florida Bar v. Arnold*, 767 So.2d 438 (Fla. 2000), the referee found as mitigation the fact that "the Bar caused unreasonable delay that prejudiced Arnold." *Arnold*, p. 440.

In a recent case before this Court, *Florida Bar v. Barrett*, 897 So.2d 1269 (Fla. 2005), both the referee and this Court rejected complaints about prosecutorial delay from a respondent. In *Barrett*, however, it was specifically found that the four-year delay from the filing of the grievance until probable cause was found did not warrant dismissal because the Bar "actively pursued its claim against Barrett during this period of time." *Barrett*, p. 1274. There is no justification for such delays in the instant proceeding. Indeed, the Bar quite candidly and professionally acknowledged that there was no justification for its delay.

In 2001, this Court did, in fact, dismiss disciplinary proceedings against a lawyer for the Bar's delay. *Florida Bar v. Walter*, 784 So.2d 1085 (Fla. 2001). It did so even though the delay caused no prejudice to the accused lawyer. The Bar would distinguish *Walter* from the case at bar because the delay there lasted seven years, and it only lasted four years in the case at bar, and because the Court observed in *Walter* that it was a "close call." The primary distinguishing factor between *Walter* and the case at bar, however, is that in *Walter*, The Florida Bar continued working on the case as opposed to simply ignoring it. The Court noted

that the Bar attempted from 1993 until 1996 to get a statement from an out-of-state witness. The Bar had no such difficulties with Mr. Koresko's case.

Walter held that The Florida Bar must bring disciplinary proceedings within a "reasonable time after it obtains jurisdiction to proceed." While there were many other cases to which the Court could have referred as authority for that statement, it specifically cited *Florida Bar v. McCain*, 361 So.2d 700, 704 (Fla. 1978) and *Florida Bar v. Lipman*, 497 So.2d 1165 (Fla. 1986). In its proceedings against Mr. Koresko, however, the Bar did not meet the *Walter* mandate. Although Mr. Magee's grievance was filed *after Walter* came down, it still took the Bar four years to file its formal complaint. Two years of that delay was subsequent to the grievance committee's finding probable cause. Bar Counsel acknowledged to the Referee that the Bar did not meet its own standard requiring it to file the formal complaint within four months of probable cause being found. TR. 10/27/05, p. 17.

This Court has disciplined lawyers for neglect of a legal matter for delay less than two years. For example, in *Florida Bar v. Morse*, 784 So.2d 414 (Fla. 2001), a lawyer was given a ten-day suspension for neglect over an 18-month period. In disciplining Mr. Morse, the Court noted

> We cannot help but observe that prompt and competent attention to legal matters is a paramount duty of the legal profession, and every legal matter, no matter how small, deserves the diligence and proficiency the public expects from a Florida lawyer.

The bench, the Bar and the public expect exactly the same thing from The Florida Bar. Is it not hypocrisy for The Florida Bar to bring disciplinary proceedings against a Florida lawyer for neglect while not demanding the same of itself? If the public can demand "diligence and proficiency" from Florida lawyers, should it not demand such from The Florida Bar in policing Florida lawyers.

So long as The Florida Bar is secure that its delay, its failure to act with dispatch, its failure to bring disciplinary proceedings within a reasonable period of time will result in no sanctions unless prejudice is shown to the accused lawyer, the Bar will continue its irresponsible prosecution. When, as here, there is no discernible explanation for the delay, the lack of prejudice to a respondent should not be element in a referee's determination whether to dismiss a case. The responsibility for diligence rests on the shoulders of The Florida Bar. If it does not discharge duties responsibly, the case should be dismissed.

Respondent asks this Court to rule that the Referee erred in refusing to grant Respondent's motion to dismiss.

POINT II ON CROSS-APPEAL

THE REFEREE ERRED IN NOT AWARDING TO RESPONDENT HIS COSTS IN DEFENDING HIMSELF AGAINST THE BAR'S ALLEGATIONS.

Since August 23, 2001, Respondent has had to defend himself against charges brought by The Florida Bar. He had to fly to Florida (Respondent

practices in the Philadelphia, Pennsylvania area) for a deposition on April 30, 2003. He had to attend a hearing in Tallahassee, Florida on October 27, 2005 (Motion to Dismiss for Prosecutorial Delay). He had to travel to Tallahassee for final hearing on November 21 and 22, 2005. He had to pay for and transport to Florida his expert witness. His fact witnesses, James Curran, traveled at his own expense rather than charging Respondent. Mr. Curran's expenses should be reimbursed to him also.

In addition to the transcripts of the deposition, the motion to dismiss hearing and the final hearing, Respondent has had to incur numerous other expenses for trial preparation. Now, he is being required to respond to an appeal brought by The Florida Bar after the Referee has firmly rejected its case.

On pages 8-12 of his report, the Referee emphatically found for Respondent on the charges contained in the Bar's complaint. In his recommendations as to guilt section of his report, beginning on page 8, the Referee made the following findings:

> A. The Bar conceded in its closing arguments that its allegations as set forth in paragraph 6 of its complaint were not proven by clear and convincing evidence. Accordingly, I find Respondent not guilty of causing Mrs. Magee's signature on her 1988 will to be falsely witnessed and notarized. I further find Respondent not guilty of the serious allegation of false assertations to the Bar in that regard.

B. In essence, the Bar has charged that Respondent devised a fraudulent scheme to assist the Magees to evade tax liability, that he counseled them to engage in such a scheme, and that he failed to advise them that they were engaging in a criminal and fraudulent course of action. . . . The Bar's expert witness does not support these allegations. In essence, the Bar's expert stated that if the Magee Corporation had independent economic activity that the entire plan, while perhaps aggressive in pushing the envelope was not illegal, did not violate various IRS provisions, and was defensible. Respondent's expert essentially testified in like manner. Accordingly, I do not find that there was clear and convincing evidence that Respondent committed the offenses alleged by The Florida Bar.

* * *

C. The Bar has not proven by clear and convincing evidence, indeed has presented no evidence, showing that Respondent mishandled the $20,000.00 from Mrs. Magee's retirement funds. Those funds have remained untouched in an appropriate account from the date of their receipt notwithstanding the fact that Respondent was entitled to drawn down fees justly earned. Respondent has received no compensation for services rendered in 1988 or in 1996.

D. I find the Bar has failed to show that Respondent did not timely reply to Mr. Magee or Mr. Magee's lawyer's demands for information.

E. I find no clear or convincing evidence supporting impropriety in Respondent's setting up the Magee estate in Pennsylvania.

* * *

F. As noted by me and my remarks at the conclusion of the hearing, I had concerns regarding the

> suit filed in Pennsylvania, on March 24, 2003, by First Business Credit Company II and its subsequent handling by the Respondent. However, I also noted that I was convinced that these issues had been properly pled by the Bar in its complaint. *The Bar devoted very little focus or time on this lawsuit in the hearing.* (Emphasis supplied.)
>
> * * *
>
> Having reviewed the Bar's complaint, I hereby conclude that it has not sufficiently pled or raised the filing of the lawsuit [filed in Pennsylvania on March 24, 2003] and its handling. The Bar and the Respondent, at the hearing focused on the central allegations of the complaint—the drafting of the wills and the tax plan. The Bar did not prove its allegations by preponderance or a clear and convincing standard.

In essence, the Referee found that The Florida Bar brought a suit that should not have been tried. Its allegation that Respondent procured Mrs. Magee's signature and that he lied to the Bar about it (the events happened in 1988) were completely rebutted. Indeed, the "Bar conceded in its closing arguments . . ." that it did not prove its allegations by clear and convincing evidence. Those allegations, obtaining a fraudulent signature and lying to the Bar, were extremely serious allegations that the Bar had four years to investigate and prove. Its case was so bogus in this regard that it conceded at final argument that it could not prove its case.

As the Referee observed on page 8, section B of his report, the Bar charged Mr. Koresko with devising a "fraudulent scheme to assist the Magees to evade tax

liability" and that he counseled them in a fraudulent scheme and failed to advise them that they were engaging in a fraudulent and criminal course of action. As the Referee observed "the Bar's expert witness does not support these allegations.

The Bar had access to its expert prior to the commencement of final hearing. That expert did not support the Bar's charges. Not to be deterred in its four-year quest to prosecute Respondent, the Bar presented its case anyway.

The Bar even charged Respondent with mishandling $20,000 of Mrs. Magee's surplus funds and with charging a clearly excessive fee (paragraph 10.f., Complaint, p. 5). The Referee found, in paragraph III.C., p. 10, that the Bar "presented no evidence, showing that Respondent mishandled the $20,000.00 surplus . . ." and that Respondent did not touch any of the surplus funds

> notwithstanding the fact that Respondent was entitled to drawn down fees justly earned. Respondent has received no compensation for services rendered in 1988 or 1996.

The Bar charged Respondent with extremely serious misconduct and then, despite four years' investigation, presented *no* evidence to support the charge!

Having been soundly rebuked by the Referee on the charges contained in its complaint, the Bar now asks this Court to discipline the Respondent for charges not made in the complaint; charges to which the Bar "devoted very little focus or time" at final hearing.

This case bordered on frivolous. The Bar's own expert witness did not support its theories. The Bar had to concede at closing argument that it could not even argue that it proved by clear and convincing evidence Respondent's fraudulent procurement of Mrs. Magee's signature or his lying to the Bar about it. The Bar charged Respondent with mishandling the surplus of money from her retirement account and charging an excessive fee even though it knew he never touched the funds and even though he never drew down any fees for his 1988 and his 1996 despite the clear authority to do so. The Bar now adds insult to injury by asking this Court to find Respondent guilty of charges not pled in the complaint.

In a case such as this, costs should be awarded to Respondent because the Bar has failed to present a justiciable issue, at least in part, as required by Rule 3-7.6(q)(4).

This Court has long held that referees have wide discretion in awarding costs. Specifically, in *Florida Bar v. Davis*, 419 So.2d 325 (Fla. 1982), this Court said

> We hold that the discretionary approach should be used in disciplinary actions. Generally, when there is a finding that an attorney has been found guilty of violating a provision of the Code of Professional Responsibility, the Bar should be awarded its costs. At the same time the referee and this Court should, in assessing the amount, be able to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are unreasonable.

In *Florida Bar v. McCain*, 361 So.2d 700, 707 (Fla. 1978), The Florida Bar, despite securing a disbarment, was awarded no costs because it took "an excessively broad approach" to its prosecution and because it "failed to early abandon counts that could not be proved."

When a lawyer prevails in his defense as here, the Bar's taking an excessively broad approach to prosecution and its failure to abandon counts that can't be proven should result, at least, in the costs in defending those charges being awarded to the respondent. Simply put, to do anything else is unfair.

The award of costs to successful respondents has been done in the past.

In *Florida Bar v. Bosse*, 609 So.2d 1320 (Fla. 1992), the Court awarded costs to Mr. Bosse to the same extent that the Bar would have recovered costs had it won. See, also, *Florida Bar v. Chilton*, 616 So.2d 449 (Fla. 1993).

Respondent asks for nothing more than The Florida Bar would have received had it won its case. The Bar seeks, as set forth on page 23 of its brief, $16,325.68 in costs even though Respondent was acquitted on every charge brought by the Bar. While he does not ask for the $1,250.00 the Bar would have received automatically for proving up any aspect of its case, he does ask that he be reimbursed his travel costs (his personal costs as well as travel expenses for his witnesses), his expert witness fees, his transcript costs, all miscellaneous costs that the Bar would have sought, and his cost of defending the Bar's appeal in this

matter. His argument, when boiled down to its essence, is that what is sauce for the goose should be sauce for the gander. Just as the Bar gets its costs when it wins, Respondent should get his costs when he wins.

POINT III
(addressing the Bar's Issue I in its Initial Brief)

THE REFEREE PROPERLY DECLINED TO CONSIDER ALLEGATIONS NOT RAISED BY THE BAR IN ITS COMPLAINT, PARTICULARLY IN LIGHT OF THE BAR'S DEVOTING "VERY LITTLE FOCUS OR TIME" ON THE ISSUE AND IN LIGHT OF THE BAR'S ADMITTED PROSECUTORIAL DELAY.

Rule 3-7.7(c)(5) of the Rules of Discipline states:

> *(5) Burden.* Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified.

The Referee's decision in this matter is neither erroneous nor unlawful. His decision is certainly justified. On page 11 of his report, the Referee found that

> Having reviewed the Bar's complaint, I hereby conclude that it has not sufficiently pled or *raised* the filing of the lawsuit and its handling. The Bar and the Respondent, at the [final] hearing focused on the central allegations of the complaint—the drafting of the wills and the tax plan. The Bar did not prove its allegations by a *preponderance* or a clear and convincing standard. It would be manifestly unfair, and violate due process, to make findings on the lawsuit issues that are not pled in the late-

> filed complaint. Therefore, I decline to consider the lawsuit issues.

RR. 11-12 (Emphasis supplied). The Referee's decision complies with the most basic principle of due process, "fair notice of the charge." *In re: Ruffalo*, 390 U.S. 544, 550 (1968).

The Referee did not solely focus on the Bar's failure to plead the March 24, 2003 litigation, he also relied on the manner in which the Bar raised the issue and the fact that the Bar "devoted very little focus or time on this lawsuit in the [final] hearing."

The Referee further stated on page 11 of his report that

> In denying the motion [to dismiss for prosecutorial misconduct], I concluded that the Respondent had failed to articulate any such prejudice caused by the Bar's delay which would make it manifestly unfair to proceed. In that finding, it was assumed by me that Respondent would have to respond only to charges made by the Bar in its complaint.

The Referee had three reasons for declining to rule on the "lawsuit issues."

(1) The Bar did not raise or plead impropriety as to the March 24, 2003 lawsuit despite having notice of the litigation for over two years prior to filing the complaint;

(2) The Bar "devoted very little focus or time on this lawsuit" during the final hearing; and

(3) The Referee found that it would be "manifestly unfair, and violate due process, . . ." to rule on the unpled issues on a complaint that, the Bar admitted, was filed after an unjustified two-year delay.

The Referee also properly noted that the parties at final hearing, including the Bar,

> focused on the central allegations of the complaint—the drafting of the wills and the tax plan. The Bar did not prove its allegations by a preponderance or a clear and convincing standard.

Respondent thought he was defending himself against the allegations in the complaint. Accordingly, he did not prepare for a defense of charges that were not pled. The Referee stated that

> It was assumed by me that the Respondent would have to respond only to charges made by the Bar in its complaint.

RR. p. 11.

Respondent assumed the same thing!

The Bar makes much of the fact that Respondent knew about the March 24, 2003 litigation at the time of the final hearing. That does not equate to his being prepared to defend that action. In its Issue I, the Bar argues that Respondent had "a conflict of interest and that his pervasive presence is detected in virtually every phase of the rollover plan he created, . . ." The Referee acquitted Respondent on all allegations of wrongdoing regarding the creation and the administration of the

plan. In fact, the Referee specifically noted that the Bar's own expert witness did not support its charges. The Referee also found Respondent innocent of all of the allegations of conflict of interest that were included in the Bar's complaint.

In essence, the Bar, having been soundly defeated in its allegations against Respondent (the Referee found the Bar did not prove misconduct by even a preponderance of the evidence, let alone the clear and convincing standard required in these proceedings, see, e.g., *Florida Bar v. Rayman*, 238 So.2d 594 (Fla. 1970)), and after devoting very little focus or attention to the March 24, 2003 litigation, has now realized that it made a strategically bad decision. Under the guise of this Court's ruling that a referee's finding of misconduct not squarely within the four corners of the complaint can be considered by the Court, the Bar is now asking this Court to give it a second chance notwithstanding the fact that it failed to plead the charges and it failed to devote much focus on them. The Bar should not be allowed to second-guess itself and ask the Court to change the consequences of its lapses, its failure to investigate and plead and its evidentiary shortcomings.

At final hearing the Bar did not call to testify the lawyer representing FBCCII, Sean P. Flynn. It did not call as a witness Lawrence Koresko, the owner of 99% of FBCCII. It proved neither wrongful motive by Mr. Koresko nor by FBCCII. The Bar ignores the following:

1. FBCCII is a separate legal entity from Mr. Koresko;

2. Mr. Magee's demand in his March 2003 letter that the mortgage for $142,500 be cancelled but his potential to still claim the value of $142,500 certificate held by FBCCII could result in that entity having an exposure of $300,000. Lawrence Koresko, as 99% owner, had the absolute right to bring suit;

3. Respondent was the executor of Mrs. Magee's Pennsylvania estate (and the Referee found no impropriety in Respondent's opening the estate);

4. The March 24, 2003 litigation was *not* a foreclosure suit. It was more akin to a suit allowing FBCCII to obtain a set-off from Mr. Magee's ridiculous claim; and

5. The suit has not been prosecuted at all.

The Bar charged Respondent with lying, fraud, counseling clients to engage in criminal conduct, misrepresentation to the Bar and conflict of interest, among many other rule violations. The Referee specifically found that Respondent did not lie about the execution of the 1998 will (and inherent within that ruling, that Mr. Magee did, in fact, lie), that Respondent did not mislead the Bar, that the Bar's expert witness did not support the Bar's allegations regarding the impropriety, including fraud and illegality, of the plan set up for the Magees, and that Respondent did not misuse the surplus funds from the Magees' retirement plan or charge an illegal or clearly excessive fee (not a penny of the surplus money was

disturbed, including interest, and the Respondent did not receive *any* fees for his 1988 and his 1996 work despite the fact that he had specific authorization to take the fees out of the surplus funds). The Bar did not prove up its case. It now wants a second chance.

The distinction in every one of the cases cited by The Florida Bar is that the referee found misconduct by the respondent lawyer. No such finding occurred here. The respondent in each one of those cases had the burden of showing on appeal that the referee's findings, recommendations and conclusions were "erroneous, unlawful, or unjustified." They did not meet their burden.

In the case at bar, unlike the cases cited by the Bar, it is The Florida Bar that has the burden of proving the report of the Referee is "erroneous, unlawful, or unjustified." The mere fact that the Bar disagrees with the Referee's conclusion is not grounds to grant it relief.

In *Florida Bar v. Solomon*, 711 So.2d 1141 (Fla. 1998), this Court noted that the additional conduct found by the referee was "clearly within the scope of the Bar's accusations." Such is not true in the case at bar. The Bar claims that its reference to the notice of default included in paragraph 15 of its complaint somehow includes conduct taken subsequently in a different forum. In fact, the facts and circumstances of the March 24, 2003 filing are altogether different from

the default letter. More significantly, the March 24, 2003 action was not a mortgage foreclosure action.

In Mr. Koresko's case, the Referee noted that the Bar did not focus on the unincluded charges. Such does not seem to be the case with Mr. Solomon. The entire focus of the Bar's case against Mr. Solomon was on his lack of diligence and incompetence.

While the opinion is somewhat unclear, it does appear that the Court may be alluding in *Solomon* to the Referee's considering conduct not specifically charged in his determination as to the discipline to be imposed. Such is obviously not the case here; Respondent was acquitted of all charges.

It is unclear in *Florida Bar v. Stillman*, 401 So.2d 1306 (Fla. 1981), how the information not included in The Florida Bar's complaint was used. It appears that the misconduct was primarily used in determining the discipline to be imposed. The respondent in *Stillman* was disciplined for misappropriating funds entrusted to him by a client and for being convicted of grand larceny. Those were the referee's findings of misconduct. The additional information, i.e., the unreported criminal matter and respondent's lying in his testimony before the referee, were considered separate offenses but were used in determining whether he should be disbarred. Clearly, *Stillman* is distinguishable from the case at bar.

Similarly, *Florida Bar v. Nowacki*, 697 So.2d 828 (Fla. 1997), is distinguishable. Ms. Nowacki was charged with violating Rules 4-1.3 and 4-1.4 of the Rules Regulating The Florida Bar by, basically, failing to properly prosecute her client's case. The referee found that, although it was not specifically alleged, she had taken no action in pursuing a settlement agreement for her client. That finding, however, was clearly within the scope of the Bar's allegations that Ms. Nowacki had failed to adequately communicate with her client and provide him information about the case. Furthermore, it appears that the client specifically included that allegation in the grievance that he filed against her. While perhaps Ms. Nowacki's failure to pursue the settlement was not specifically pled, it was clearly part and parcel of the Bar's allegation that she did not handle her client's case properly. In that case, the Court felt that the allegations were clearly within the scope of the Bar's complaint. The Bar's attempt in the instant case against Mr. Koresko, however, is to add new charges that occurred subsequently to the allegations contained in the complaint, not as part and parcel of the allegations contained in the complaint.

This Court's decision in *Florida Bar v. Vaughn*, 608 So.2d 18 (Fla. 1992), is not support for the Bar's position in the case at bar. The Court specifically noted on page 20 of its opinion that the language in paragraph 6 of the Bar's complaint "certainly put Vaughn on notice that his lack of cooperation was at issue." The

Court went on to state that Mr. Vaughn's "lack of cooperation had been established by clear and convincing evidence." Most significantly, unlike the instant proceedings, Mr. Vaughn "was given an opportunity to respond to those allegations." He then admitted that he "knowingly failed to respond to the Bar's inquiries." Fn. 3.

In the case at bar, Respondent was not given the opportunity to present a complete defense to the unpled charges being considered by the Referee. As the Referee observed, both the Bar and the Respondent at the final hearing "focused on the central allegations of the complaint—the drafting of the wills and the tax plan." RR. 11.

The Court's decision in *Florida Bar v. Fredericks*, 731 So.2d 1249 (Fla. 1999), is a slightly different fact situation than the case at bar. Mr. Fredericks argued that it was improper for the referee to consider evidence of prior misconduct while determining guilt or innocence in the case before the referee. As the Court pointed out on page 1251 of its decision, however, Mr. Fredericks did not object to the admission of that evidence "and, instead, explained the circumstances surrounding the discipline." The Court noted, however, that the referee's findings were not based solely upon the evidence that Mr. Fredericks objected to on appeal.

The second issue in *Fredericks* relevant to the case at bar also does not support the Bar's position. In essence, the referee held that Mr. Fredericks was guilty of *rule violations* not pled in the complaint. However, the Court specifically noted that "the complaint alleged the actual conduct which formed the basis of the violation . . . ." In other words, the lawyer was given the opportunity to defend the factual allegations. Once The Florida Bar had proven misconduct by clear and convincing evidence, however, the referee was not limited to the specific rule violations pled.

At the end of its point, the Bar argues that because the complaint placed Mr. Koresko on notice that his conduct connected to the notice of default was allegedly improper, that he was then put on notice that FBCCII bringing an action against him in his capacity as personal representative of the Magee Estate was allegedly improper. The Bar misses the fact, however, that the Referee found Respondent not guilty of all allegations pled in the complaint, including that regarding the threatened foreclosure action. If the Bar could not prove by clear and convincing evidence misconduct regarding the default letter, it certainly cannot bootstrap those unfounded allegations to bring charges regarding an action brought by a third party against Respondent.

POINT IV
(addressing the Bar's Issue II in its Initial Brief)

THIS COURT HAS REPEATEDLY HELD THAT NO DISCIPLINE CAN BE IMPOSED WITHOUT FIRST AVAILING THE OPPORTUNITY TO A RESPONDENT TO EXPLAIN THE CIRCUM-TANCES OF THE ALLEGED MISCONDUCT AND TO OFFER MITIGATION; THEREFORE, THE BAR'S DEMAND FOR A 91-DAY SUSPENSION IS INAPPROPRIATE.

The Bar demands that this Court suspend Respondent for 91-days for charges not pled in the complaint, for charges the Referee found were given "very given little focus or time . . ." by the Bar during final hearing (RR. 11) and for which the Referee found that it would be "manifestly unfair, and violate due process, . ." to make findings on the lawsuit at issue. Such a demand is completely inappropriate. More significantly, however, it flies in the face of this Court's pronouncements. For example, *Florida Bar v. Centurion*, 801 So.2d 858, 863 (Fla. 2000), this Court stated:

> As to the discipline imposed, due process requires that the attorney be allowed to explain the circumstances of the alleged offense and to offer testimony in mitigation of any penalty to be imposed. See *Florida Bar v. Carricarte*, 733 So.2d 975, 978 (Fla. 1999).

No dispositional hearing was held in the case at bar. Indeed, none could be held because Respondent was acquitted of all allegations charged in the complaint.

Respondent has not been given the opportunity to explain the circumstances of the alleged misconduct. He has not had the opportunity to argue the appropriate Florida Standards for Imposing Lawyer Sanctions to the Referee or to argue the mitigation specifically allowed under Standard 9.3. Furthermore, the Referee has the discretion, should there be any misconduct, to reduce the discipline for the Bar's irresponsible and admittedly without basis egregious delay in bringing these proceedings.

The Bar's assertion on page 20 that the record is devoid of any evidence refuting the Bar's allegations in regard to the March 24, 2003 litigation misses the point. The Bar has the burden to prove misconduct. Respondent does not have to prove his innocence. The dearth of evidence showing innocence on Mr. Koresko's part is because: (1) the issue was not properly pled and, therefore, was not an issue that Respondent had to address at the final hearing; (2) while the Bar peripherally touched on the issue, the Referee himself noted that the Bar spent very little time on this matter; and (3) the Bar is now second-guessing its decision not to prove up its case and not to devote more time to it. This Court should not allow such tactics to be used by the Bar.

The Bar also completely ignores the fact that the Referee specifically found that no action had been taken to prosecute the March 24, 2003 action since it had been filed. RR. 8. Clearly, the suit was filed as a precautionary measure by

FBCCII and Lawrence Koresko to insure that Mr. Magee could not secure a $300,000 windfall against them.

Respondent submits that the issue of discipline cannot be properly briefed without a referee's specific findings of misconduct and without Respondent being given the opportunity to explain the circumstances of the misconduct and to present mitigation of discipline. None of the cases cited by the Bar are even remotely on point and the citations to them are inappropriate at this juncture.

POINT V
(addressing the Bar's Issue III in its Initial Brief)

THE BAR HAS NOT PREVAILED IN THESE DISCIPLINARY PROCEEDINGS AND, THEREFORE, IS NOT ENTITLED TO ANY AWARD OF COSTS.

Absent a finding of misconduct by the Referee, there can be no discussion of costs. Until such time as Respondent is found guilty of misconduct, and until such time as a discipline has been recommended, any discussion of costs is premature. Respondent does assert, however, that even if any misconduct is found in these proceedings, he has the right to ask the Referee to deny the Bar award of all of its costs. *Florida Bar v. Davis*, 419 So.2d 325 (Fla. 1982). There the Court held that "the referee and this Court" can take into consideration a lawyer's acquittal on some charges or can hold that the Bar's costs are unreasonable.

Any discussion of costs at this time is premature and, absent a hearing, should not be heard by this Court.

CONCLUSION

Respondent asks this Court to find that the Referee erred in denying Respondent's motion to dismiss for prosecutorial delay. This Court should dismiss these proceedings for the Bar's failure to bring disciplinary proceedings in a reasonable time.

The Court should award Respondent the costs he incurred defending himself below and for having to respond to the Bar's appeal.

Should this Court not dismiss these proceedings as sought by Respondent, it should deny the relief sought by the Bar and uphold all of the Referee's findings, conclusions and recommendations.

Respectfully submitted,

John A. Weiss
Attorney Number 0185229
2937 Kerry Forest Parkway, Suite B-2
Tallahassee, Florida 32309
(850) 893-5854
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Answer Brief were hand-delivered to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and that copies were sent by U.S. Mail to Donald M. Spangler, Bar Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this ____ day of July, 2006.

_____

John A. Weiss