

**IN THE SUPREME COURT OF FLORIDA**

THE FLORIDA BAR,

Complainant,

Case No. SC94171

v.

TFB No. 1998-10,679 (6A)

PHILIP WINSTON DANN,

Respondent.

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**CROSS APPEAL BRIEF AFTER REMAND**

**OF**

**THE FLORIDA BAR**

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## **SYMBOLS AND REFERENCES**

In this Brief, The Florida Bar will be referred to as "The Florida Bar," or "the Bar." The Respondent, Philip Winston Dann, Esq., will be referred to as "Respondent." Also:

"TRR-1" will refer to Volume 1 (Day 1) of the record Transcript of the Remand proceeding dated March 27, 2001 in Supreme Court Case No. SC94171.

"TRR-2" will refer to Volume 2 (Day 2) of the record Transcript of the Remand proceeding dated April 24, 2001 in Supreme Court Case No. SC94171.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar, except as clearly described or referred to herein as a Florida Rule of Civil Procedure (civil Rule).

## **STATEMENT OF THE CASE ON REMAND**

The trial of this case covered six days, April 5 through 9 and April 12, 1999. On July 6, 1999, the referee published his findings of fact and recommendations regarding guilt, pursuant to Rule 3-7.6(k)(1)(A) and (B). On November 30, 1999, after a hearing on sanctions, and pursuant to Rule 3-7.6(k)(1)(C), the referee published his recommendations as to

the disciplinary measures to be applied. The case was appealed by Respondent as to all three aspects. The Bar cross-appealed on the issue of appropriate sanction only.

The Court set oral argument for January 3, 2001. On December 29, 2000, Respondent filed an Emergency Motion for Remand and Motion for Relief from Judgment based on newly discovered evidence, and fraud, pursuant to Fla. R. Civ. P. 1.540(b)(2) and (3), respectively. The Bar objected to the remand in its own emergency filing. The oral argument proceeded as scheduled; however, rather than delving into the issues that had been briefed months before, the proceeding devolved into a motion hearing regarding the merits of Respondent's emergency motion and the "newly discovered evidence" attached to it. To say that the Bar was disadvantaged by the timing and turn of these events would be an understatement.

The Court remanded the case to the referee on February 9, 2001. It did not rule on the sufficiency of Respondent's motion predicated on civil Rule 1.540(b), preferring to let the referee determine any legal or factual issues relating to the motion. The Bar timely sought a rehearing on the remand issue, which was denied. The referee was briefed on and heard legal argument regarding the sufficiency of the Motion for Relief from Judgment. The referee ruled that his Report(s)

could not be considered a "final judgment" for purposes of a motion founded on Rule 1.540. Nonetheless, he proceeded to conduct an evidentiary hearing as to the "newly discovered evidence." The record reveals that the referee decided - notwithstanding any legal argument - that the fact that this Court had remanded the case implied that the Court desired such evidence to be heard. The Bar feels this was error.

The referee then conducted an evidentiary hearing taking up two days, March 27 and April 24, 2001. Four witnesses testified: Robert M. Lewis, Scott Hopkins, Suzanne Goldstone, and Louie N. Adcock, Jr. Thereafter, the referee issued another Report of Referee, in which he inserted commentary regarding the credibility of Messrs. Lewis and Hopkins. It also stated that the trial testimony given some two years previous by Suzanne Goldstone now was questionable.

The underlying facts of this case have been briefed to the Court in previous filings by both parties, and there is no need to reiterate those here. Only the facts modified by the referee after remand will be discussed in this brief.

**STATEMENT OF THE FACTS ON REMAND**

The evidentiary hearing on remand focused on the issue of whether Suzanne Goldstone's trial testimony had been credible regarding the Walter Vossiek's mental status during 1992-93. The Court allowed Respondent to examine two employees of the State Attorney's Office, Robert Lewis and Scott Hopkins, regarding an internal SAO memorandum, and to bolster their credibility without first affording Ms. Goldstone the opportunity to explain or deny the document as a purported past inconsistent statement. This caused the Bar to examine the competence, interests, and biases of the two SAO employees. The employees testified that Ms. Goldstone made unrecorded statements to them in July, 2000 that differed from her April, 1999 trial testimony, and Mr. Lewis stated that was a reason he did not pursue criminal charges against Respondent. Ms. Goldstone flatly denied the assertions contained in the hearsay document which purportedly contradict her trial testimony. She reaffirmed her trial testimony in all respects and did not recant it. No independent proof showing clearly what Ms. Goldstone actually told the SAO employees in July, 2000 was ever adduced. Indeed, no such evidence exists. No evidence of any fraud was adduced, and no evidence of any inconsistent statement made by Ms. Goldstone prior to her trial testimony was presented. The only evidence

was the subject document, its authors' assertions regarding its accuracy, and Ms. Goldstone's denial of its accuracy.

**SUMMARY OF THE ARGUMENT ON REMAND**

Bar discipline cases tried before a referee are quasi-judicial, administrative proceedings which are reported to this Court for its ultimate approval. As such, Reports of Referee are non-final. Because they are not final, Florida Rule of Civil Procedure 1.540(b) (Relief from Judgment) cannot apply to Bar cases. Accordingly, this Court's remand of Respondent's motion founded on Rule 1.540(b) must be vacated, and the evidentiary hearing that ensued from the remand declared a nullity. This result is consistent with instances where newly discovered evidence was sought to be introduced or the proceedings reopened in other quasi-judicial, administrative proceedings.

Even if civil Rule 1.540(b) is held to apply to Bar cases, the remand should be vacated and the evidentiary hearing declared a nullity because Respondent's motion founded on Rule 1.540(b) was untimely under the strict time limit that rule sets forth for filing such a motion. Though Respondent's motion alleged fraud as a basis for relief or remand (under Rule 1.540(b)(3)), no such allegation of fraud was specifically pleaded, and no evidence of fraud was adduced on remand.

Even if civil Rule 1.540(b) applies and Respondent's motion is deemed timely, the post-trial, inconsistent statements purportedly made by witness Suzanne Goldstone is not a sufficient basis for remanding this case because after-discovered witness credibility issues are not a sufficient basis for remand when the witness was exposed at trial to cross-examination on that very issue.

The evidentiary hearing conducted pursuant to the remand was procedurally biased in Respondent's favor due to improper order of presentation of witnesses and bolstering of the witnesses.

Lastly, the evidence adduced on remand was not clear and convincing that Suzanne Goldstone's trial testimony should not be believed.

**CROSS-APPEAL ARGUMENT AFTER REMAND**

**I. RESPONDENT'S MOTION FOR REMAND WAS IMPROVIDENTLY GRANTED, AND THE EVIDENCE ADDUCED UPON REMAND MUST BE DISALLOWED.**

- A. Florida Rule of Civil Procedure 1.540(b) cannot apply to an unapproved Report of Referee recommending formal discipline against an attorney because such a report is not a final judgment, decree, order, or proceeding.

The unusual posture of this case on appeal stems from the fact that attorney disciplinary cases are original proceedings in this Court. A motion for relief from judgment predicated on Fla. R. Civ. P. 1.540(b) normally would be filed with the court that had rendered a final judgment, that is, the trial court. Here, however, the trial court (referee) and the reviewing court are two "divisions" of the same court. The trial aspect (before a referee) is a quasi-judicial proceeding, whereas the appellate review aspect is a legal proceeding. Thus, a proceeding before a referee is analogous to an administrative hearing held before an administrative law judge under Chapter 120, Florida Statutes.

In a judicial proceeding, a Motion for Relief from Judgment would properly be directed to the trial court, and that motion would be legally sufficient only if that court's prior judgment met the test for finality. Because Respondent's motion was filed with this Court, the Court properly directed the motion to the referee. At first glance, this appears to have been the legally correct thing to do - to

have the Rule 1.540(b) motion taken up by the "court" that had conducted the trial and considered the original evidence, as that "court" is in the best position to judge the sufficiency of the motion and the new evidence.

The instant remand, however, never addressed the threshold question of whether Rule 1.540(b) can apply to quasi-judicial Bar proceedings. A more fundamental issue is whether a Report of Referee made pursuant to R. Regulating Fla. Bar 3-7.6(k) can be considered a "final judgment, order, decree, or proceeding" within the meaning of Rule 1.540(b). This Court, and not a referee, must make the decision regarding that legal issue. If a referee's report cannot be considered a final judgment, then Rule 1.540(b) cannot apply under its own terms, regardless of the civil or quasi-judicial nature of the case.

The Bar contends that a Report of Referee is never a "final judgment," and that, as such, civil Rule 1.540(b) cannot apply to Bar disciplinary proceedings. By its Order of Remand, however, the Court seems to have presupposed that a motion founded on Rule 1.540(b) would apply to this matter without first determining whether a Report of Referee could be considered a "final judgment" within the meaning and context of that rule. The determination of this issue is important from a substantive and procedural due process perspective, in

this and future Bar cases. Within attorney disciplinary proceedings conducted under the Rules Regulating The Florida Bar, the Florida Rules of Civil Procedure generally will apply "except as otherwise provided in" Rule 3-7.6. R. Regulating Fla. Bar 3-7.6(e). Such proceedings are administrative in character; that is, they are quasi-judicial and neither civil nor criminal. Id.

In this remand proceeding, the pivotal legal issue is whether the civil rule which Respondent invoked on an emergency basis in requesting a remand can even operate to permit such a remand. The Bar contends that Fla. R. Civ. P. 1.540(b) does not and cannot apply to Bar proceedings; nor, moreover, should it apply.

Florida Rule of Civil Procedure 1.540(b) provides that, in civil cases, under certain circumstances, and within certain time frames, a party may be relieved from a final judgment upon proper motion, in the interest of justice. The rule is an exception to the strong bias in the law for finality of judgments. Rule 1.540(b) states as follows:

**Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence

which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

Fla. R. Civ. P. 1.540 (b) (2000). In the instant controversy, Respondent moved the Court to remand this case based on reasons (2) and (3) as enumerated and stated above. The motion was filed on an emergency basis, mere days before the oral argument, and to it was appended the so-called "newly discovered evidence," an internal office memorandum containing attorney work product discovered from the Sixth Judicial Circuit State Attorney's Office. The memorandum was the work product of Robert M. Lewis, an assistant state attorney. The document set forth Mr. Lewis' reasons why he did not recommend criminal prosecution of Respondent for the same conduct that

the Florida Bar had previously and successfully prosecuted Respondent for ethical violations. In pertinent part, the document characterized and paraphrased the substance of a witness interview Mr. Lewis had conducted on July 24, 2000 of Suzanne Goldstone, the complaining witness in the Bar proceeding.

The Bar concedes that Respondent could not by due diligence have discovered the memorandum in time to move for a new trial or rehearing; thus, the Bar agrees that the document attached to Respondent's Motion for Relief from Judgment meets the test for "newly discovered evidence" as set forth in the quoted rule. The Bar, however, contends that Rule 1.540(b) in its entirety cannot apply to this disciplinary proceeding, for the simple reason that the Report of Referee which Respondent has appealed is not a "final judgment, decree, order, or proceeding" within the meaning of the rule. (For the same reason, civil Rule 1.530 [Motions for New Trial and Rehearing] also cannot apply to non-final Reports of Referee; thus, the language in Rule 1.540(b) referencing the "time for a new trial or rehearing" makes that calculus for "newly discovered evidence" non-applicable as well.)

In Florida, in every attorney disciplinary proceeding that is assigned to a referee -- whether the case proceeds to trial or settles via a consent agreement -- the referee must

make a Report of the case and transmit it to this Court for its ultimate approval. By rule, each such report must set forth the referee's findings of fact, recommendations regarding guilt, and recommendations regarding appropriate sanction. See R. Regulating Fla. Bar 3-7.6(k)(1)(A)(B)(C) (1999).

The only instance in which a Report of Referee may be considered final without this Court's review and approval is when the report does not recommend that formal discipline be imposed, and it is not appealed. R. Regulating Fla. Bar 3-7.7(a)(3). The fact that this particular rule specifically describes a singular instance when a referee's report may be considered "final" strongly suggests that in all other instances, including the instant one, the report is not final. Indeed, this Court has stated on many occasions that it reserves unto itself the final, ultimate authority for approving the referee's factual findings, recommendations of guilt, and recommendations as to appropriate discipline. The Florida Bar v. Maier, 784 So. 2d 411 (Fla. 2001); The Florida Bar v. Grosso, 760 So. 2d 940 (Fla. 2000); The Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989).

This reservation of final authority is consistent with the paradigm of quasi-judicial, administrative regulation crafted by the Florida Legislature and administered by the

executive branch in the State of Florida, by and through the statutory provisions of the Administrative Procedures Act ("APA"), as set forth in Chapter 120, Florida Statutes. All other professional discipline imposed by the State of Florida is done pursuant to the APA, where the results of quasi-judicial proceedings conducted thereunder are expressly deemed not to be final judgments, and there is no provision for application of a motion for relief from judgment. Under the APA, state agencies reserve unto themselves final authority for approving the results and recommendations of the quasi-judicial hearings, as does this Court in the context of attorney discipline cases. Such procedural relief from quasi-judicial hearings may be expressly granted under each agency's rulemaking authority; however, no such grant appears within Chapter 120 itself.

Similarly, no provision for relief from judgment appears within Chapter 3 of the Rules Regulating The Florida Bar (the Rules of Discipline). Certainly, it is within this Court's inherent power to provide for such procedural relief from quasi-judicial, non-final judgments, through its own rulemaking power. However, the Court as yet has not done so.

Under the APA, an administrative law judge hears cases affecting substantial interests, and then submits to the licensing agency a recommended order consisting of factual

findings, conclusions of law, and recommended disposition or penalty. See § 120.57(i) Florida Statutes (1999). The agency may adopt the recommended order as the final order of the agency; it may also reject or modify the findings and legal conclusions; and it may not reduce or increase a recommended penalty without first reviewing the complete record of the proceeding. § 120.57(j) Florida Statutes (1999). All of these attributes are fairly consistent with the role and function of this Court in Bar disciplinary proceedings.

A few courts have addressed the issue of permitting motions for rehearing or motions for relief based on "newly discovered evidence" within the context of administrative proceedings under the APA. In Collier Med. Ctr. v. State Dep't of Health & Rehabilitative Servs., 462 So. 2d 83 (Fla 1<sup>st</sup> DCA 1985), the court held that the hearing officer had properly denied a motion to produce newly discovered evidence after the quasi-judicial hearing had been closed. The First District stated:

"[T]o allow a party to produce additional evidence after the conclusion of an administrative hearing below would set in motion a never-ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by the Administrative Procedures Act."

Id. at 86. The First District has decided similar issues in similar fashion; see Miami Jewish Home & Hosp. for Aged, Inc. v. Agency for Health Care Admin., 710 So. 2d 77, 78 (Fla. 1<sup>st</sup>

DCA 1999) (holding that hearing officer properly denied MJH's motion to reopen the record based on newly discovered evidence)(citing Lawnwood Med. Ctr. v. Agency for Health Care Admin., 678 So. 2d 421, 425 (Fla. 1<sup>st</sup> DCA 1996), review denied, 690 So. 2d 1299 (Fla. 1997). See also Florida Dep't of Transp. v. J.W.C Co., 396 So. 2d 778, 786 (Fla. 1<sup>st</sup> DCA 1981). In a similar vein, the First District has held that Fla. R. Civ. P. 1.530 [Motions for New Trial and Rehearing] does not apply to quasi-judicial hearings under the APA. See Systems Management Associates, Inc. v. State, Dep't of Health & Rehabilitative Servs., 391 So. 2d 688, 689 (Fla. 1<sup>st</sup> DCA 1980).

Even though a Rule of Court may be inapplicable or not pertinent to an administrative hearing, an administrative agency may use its broad rulemaking authority to create such procedural and/or substantive rights of due process. See Florida Dep't of Corrections v. Provin, 515 So. 2d 302, 304-05 (Fla 1<sup>st</sup> DCA 1987) (rejecting DOC's contention that standards generally applicable to *judicial* proceedings under Florida Rule of Civil Procedure 1.530 are also applicable to guide the agency's discretion in determining whether to grant motions for rehearing in quasi-judicial setting; and discussing how the agency under its broad rulemaking power had adopted a similar, but not identical, substantive right of due process) (emphasis in original).

This Court adopted R. Regulating Fla. Bar 3-7.6(k) (requiring reports of referee); it reserved unto itself the sole authority for rendering final judgments in Bar cases; and it possesses the inherent power to make rules that create or define the procedural and substantive due process rights of the parties in Bar cases. Given these realities, the answer to the question posed by Rule 3-7.6(e) -- whether the general "Procedures Before a Referee" rule (3-7.6) operates to negate the application of Fla. R. Civ. P. 1.540(b) in Bar cases -- is self-evident. It does negate the operation of that civil rule. Therefore, it appears that the Court improvidently granted Respondent's motion for remand in this case. Accordingly, the evidentiary hearing conducted pursuant to the remand is a nullity, as is the revised Report of Referee that resulted from the hearing.

That having been said, the law and logic demand that the following be held to be correct: that a Report of Referee made pursuant to Rule 3-7.6(k) is not a final judgment; that in its Rules of Discipline this Court could have declared such reports to be final judgments, but did not; that the non-final nature of such reports as implied within Rule 3-7.6 operates to deny the applicability of Fla. R. Civ. P. 1.540(b), precisely because such reports are non-final and because the express language of that civil rule requires a "final

judgment" as a predicate to the applicability / operation of that rule; that the Court could create or adopt a rule within the Rules of Discipline that is the functional equivalent of Fla. R. Civ. P. 1.540(b), but as yet it has not done so. All of these assertions are self-evident.

Therefore, as of now, no relief from judgment based on Florida Rule of Civil Procedure 1.540(b) is available to any party in a quasi-judicial Bar proceeding, regardless of how fortunate or unfortunate that result might be in any particular case. The Rules of Discipline as set forth in the Rules Regulating The Florida Bar would first need to be amended in order to grant the relief Respondent sought in his motion.

Should this Court affirm its remand, and/or support the legitimacy of the proceeding engendered by it, it will set the stage for a never-ending cycle of motions for remand in Bar cases based on post-hearing witness credibility issues, as occurred here. Because the referee in this instance commented on the credibility of witnesses Robert Lewis and Scott Hopkins, the post-remand credibility of those two witnesses would appear to be fair game for any such motion the Bar might entertain, since the remand hearing essentially boiled down to their word and their credibility against Ms. Goldstone's. Such a result would create a terrible precedent in attorney

disciplinary cases. This cannot have been foreseen by this Court, nor its intended result.

**II. THE EVIDENTIARY HEARING ON REMAND WAS PROCEDURALLY FLAWED, AND THE EVIDENCE ADDUCED WAS NOT CLEAR AND CONVINCING THAT ANY PREVIOUS FACTUAL FINDING SHOULD BE REVISED.**

On February 9, 2001, the Court remanded this case back to the referee, so that he could hear and decide the sufficiency of Respondent's motion for relief from judgment founded on civil Rule 1.540(b). The Bar sought a rehearing in this Court on the issue of remand, but that motion was summarily denied. After being advised in the premises, the referee ruled that his Report(s) of Referee could not be considered a "final judgment" for purposes of a motion founded on Rule 1.540(b). Nevertheless, he proceeded to conduct an evidentiary hearing as to the "newly discovered evidence" Respondent had attached to his motion.

The Bar concedes that, in its argument to the referee on this issue, it argued that the findings of fact contained in reports of referee were analogous to a "final judgment" in a civil bench trial, and, as such, Rule 1.540(b) would apply to Bar cases to permit motions for relief from judgment. The thrust of the Bar's argument before the referee was that Respondent's motion must be denied because, even if Rule 1.540(b) applied, the timing of Respondent's motion exceeded

the strict time limit of one year that is clearly expressed in that rule. The Bar still feels that, even if a Rule 1.540(b) motion is held to apply to Bar cases, Respondent's motion missed the one-year window of time to permit a valid application of that rule. (The motion was filed December 29, 2000; the initial Report of Referee was filed July 6, 1999; the Amended Report including recommended sanction was issued November 30, 1999.)

Be that as it may, the referee agreed with Respondent that his Report of Referee should not be considered a "final judgment." Nonetheless, he proceeded to conduct an evidentiary hearing regarding the "newly discovered evidence." It appeared that the referee felt constrained to hear the evidence merely because this Court had remanded the case. See TRR-1, page 23, line 21 to page 24, line 8.

So, the referee then conducted an evidentiary hearing over two days, March 27<sup>th</sup> and April 24<sup>th</sup>, 2001, at which four witnesses testified: Robert M. Lewis, Scott Hopkins, Suzanne Goldstone, and Louie N. Adcock, Jr. Thereafter, the referee issued another Report of Referee, in which he inserted commentary regarding the credibility of Messrs. Lewis and Hopkins. It also stated that the trial testimony given some two years previous by Suzanne Goldstone now was questionable.

Mr. Lewis and Mr. Hopkins are employed by the State

Attorney's Office for the Sixth Judicial Circuit, from whence the internal memorandum that is the "newly discovered evidence" was discovered by Respondent pursuant to a public records request. Both were present for the interview of Ms. Goldstone conducted on July 24, 2000, which occurred at their offices in Clearwater, Florida. The subject document is in fact Mr. Lewis' attorney work product. Not surprisingly, the testimony of Mr. Lewis and Mr. Hopkins completely supported the accuracy and legitimacy of the assertions contained in the document. All agree that the interview they conducted of Suzanne Goldstone was not recorded or taken down in any way. Thus, there exists no independently verifiable evidence of the actual questions, answers, comments, or remarks made in the interview. The evidentiary hearing consisted of Messrs. Lewis and Hopkins relating what Suzanne Goldstone told them, and Ms. Goldstone relating what she told the two men. To say that the two versions are in stark contrast with one another would be an understatement. The Bar contends that, because no actual record of the interview exists, and because of the upside-down order of the evidence presented at the hearing, no clear and convincing evidence requiring revision of the Report of Referee was adduced on remand.

The evidentiary hearing on remand focused on the issue of whether Suzanne Goldstone's trial testimony had been credible

regarding the Walter Vossiek's mental status during 1992-93. Since the case had been remanded in order to determine the sufficiency of Respondent's Motion for Relief from Judgment, the referee allowed Respondent to put on his evidence first. Thus, Respondent was able to call and examine Messrs. Lewis and Hopkins two employees of the State Attorney's Office, so that they could bolster the reliability of the hearsay document, the internal SAO memorandum, and bolster their own credibility as witnesses. Respondent's entire presentation consisted of such bolstering. All this was done without first affording Suzanne Goldstone the opportunity to explain or deny the document as a purported inconsistent statement. Indeed, Respondent did not even call Ms. Goldstone as a witness.

The Bar recognizes that the Florida Rules of Evidence are relaxed in Bar cases. The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986). As such, § 90.614, Florida Statutes (Prior Statements of Witnesses) and its progeny of case law does not strictly apply to this proceeding or remand issue. However, the Court at least should be mindful, and guided by, the principles of fairness and of evidence embodied by that statute. It cannot be stated forcefully enough that the entire issue and hearing on remand involved post-trial - not prior - statements purportedly made by Suzanne Goldstone which were asserted by her interviewers to be inconsistent with her

trial testimony. Once the referee permitted the interviewers to go first with their assertions, and hours of bolstering, the Bar was compelled to call Ms. Goldstone to rebut the assertions. By then, however, the die had been cast. No one even seems to care that we were talking about unrecorded statements purportedly made some 15 months after the trial of this case.

The bizarre and unfair posture of the proceeding placed the Bar in the unenviable position of testing the competence, interests, and biases of the two SAO employees. The employees testified that Ms. Goldstone made unrecorded statements to them in July, 2000 that differed from her April, 1999 trial testimony, and Mr. Lewis stated that was a reason he did not pursue criminal charges against Respondent. No independent proof showing clearly what Ms. Goldstone actually told the SAO employees in July, 2000 was ever adduced, because no such evidence exists. No evidence of any fraud was adduced, and no evidence of any inconsistent statement made by Ms. Goldstone prior to her trial testimony was presented. The only evidence was the subject document, its authors' assertions regarding its accuracy, and Ms. Goldstone's denial of its accuracy.

For her part, Ms. Goldstone flatly denied that she had stated anything to Messrs. Lewis and Hopkins on that day in July, 2000 that contradicted, or differed materially from, her

trial testimony given in April, 1999. She denied the assertions contained in the hearsay document which purportedly contradict her trial testimony. She reaffirmed her trial testimony in all respects and did not recant it. For purposes of brevity and clarity, here is a sampling of the gist of her testimony:

[Discussing the internal memorandum]

Q: Were you perplexed upon reading this document?

A: Yes.

Q: Did it make any sense to you, what you read in this document?

A: Well, it's not what I - that's not what I said out there and it's not what I believe today.

TRR-1, page 177, lines 20-25. And again:

Q: It says: "We talked with her about the lucid periods, and she indicated that by that she meant there were periods in which Vossiek knew exactly what was going on." Do you see that statement?

A: Yes.

Q: Is that what you told Mr. Lewis and Mr. Hopkins on that day?

A: No.

Q: Did you ever even suggest or imply that statement to them?

A: No.

Q: Okay, I'll continue. "Although she initially began suggesting that she'd had questions about Vossiek's competency throughout the entire period, she told us clearly that during at least the first two years, summer of '92 through summer of '94, Vossiek was lucid and knew what he was doing for the majority of that time." Are you seeing that statement there?

A: Yes.

Q: Is that a true statement of what you told these gentlemen on that day?

A: No.

Q: Is there any way in your mind that some kind of miscommunication could have occurred on that subject?

A: Well, I don't know what they thought I said, but that's not what I said.

TRR-1, Page 180, line 12 through Page 181, line 13. See also generally, TRR-2, Page 187. And finally, Bar counsel and Ms. Goldstone engaged in the following colloquy:

Q: In your mind, did you make any statement to Mr. Lewis that you felt differed materially from how you testified before Judge Menendez two years ago?

A: No.

Q: Did you ever tell Mr. Lewis that Mr. Vossiek was, and I quote, "was competent during large portions of the

period of time in question?"

A: No.

TRR-2, Page 37, lines 3-12.

Thus, there is no question that: a) there is a complete and utter conflict in the evidence regarding what Suzanne Goldstone told the two SAO agents in July, 2000; b) No independent evidence exists to clearly and convincingly resolve this conflict; and c) Ms. Goldstone's testimony on remand mirrors her trial testimony.

What is the Court to make of this?

The Bar contends that, had Ms. Goldstone been examined before the two SAO agents -- that is, had she first been "afforded an opportunity to explain or deny the prior statement," as the rules of evidence require -- the hearing might well have been cast in an entirely different light for the fact-finder. The Bar's probing of the SAO employees' credibility, competence, interest, and motives would have been placed in proper context, rather than appearing as so much sniping, devoid of reason or context. The bolstering of the SAO employees' credibility by Respondent may have come across much differently, had that followed, rather than preceded, Ms. Goldstone's testimony. Some of the facts adduced may have taken on heightened meaning, if presented in different order.

For example, at no time after interviewing Ms. Goldstone,

and drafting the subject document, did Mr. Lewis ever contact any agent of The Florida Bar and advise that Ms. Goldstone had provided statements which he felt contradicted her trial testimony. Moreover, he never even advised Ms. Goldstone herself of that during the interview. See TRR-1, Page 187. Thus, Mr. Lewis himself never afforded Ms. Goldstone the opportunity to explain or deny any purported inconsistency. Mr. Lewis seems to have played this interview very close to the vest both during and after the interview. One might well wonder why that occurred.

The Bar and Respondent could argue the relative merits of this stark evidentiary conflict, *ad nauseam*, and it would never produce clear and convincing evidence of anything requiring a revision of the facts contained in the Report of Referee dated July 6, 1999. It appears that the referee may have credited the testimony of the two SAO agents because Ms. Goldstone's testimony followed theirs, giving the impression that she was there to defend her trial testimony rather than they being there to defend their internal memorandum. It also appears that the referee may have credited the testimony of the two SAO agents because both of them were saying one thing, and Ms. Goldstone, alone, was saying another. This two-against-one dynamic was set up in the first place by the SAO agents themselves, who controlled the circumstances of her

interview, including the decision not to record or transcribe it.

What needs to be clearly understood here is that, in every instance where Ms. Goldstone's statements were recorded (at the grievance committee, at trial, and at the remand proceeding), her statements remain consistent. It is only in the single instance where her statements were not recorded that her statements are alleged to have been inconsistent - which, when once again placed on the record, she flatly denied. Thus, the theory goes, she lied every time she was placed on the record and told the truth only when not on the record, and then, again on the record, denied that she had told the truth off the record. This theory stretches the bounds of credulity.

Lastly, as argued before by the Bar in this controversy, the sole issue on remand involved the credibility of Ms. Goldstone. At the trial of this case in April, 1999, the referee heard the testimony of Ms. Goldstone, and made a determination of her credibility, after Respondent had fully exercised his right to confront Ms. Goldstone. In the criminal context -- where a person's liberty is at issue as opposed to the privilege of a professional license -- it has been held that a post-trial motion seeking a new hearing based on "newly discovered evidence" of a key witness' credibility

is insufficient to cause a remand or a different result. See Hallberg v. State, 621 So. 2d 693 (Fla. 2d DCA 1993) (holding that allegedly newly discovered evidence concerning credibility of a victim did not entitle criminal defendant to a new trial where the victim's credibility was attacked at trial). Surely, a Bar respondent is not accorded more procedural and substantive rights than a man defending his liberty.

#### **CONCLUSION**

For all the foregoing reasons, the Bar respectfully requests that this Court enter an order vacating the remand of this case, and striking both the remand proceeding and the revised Report of Referee which ensued. For the reasons stated in the Bar's previous brief, the discipline recommended by the referee in this case should be disapproved, and Respondent should be disbarred for five (5) years and thereafter until readmission through the Florida Board of Bar Examiners, including retaking the Florida Bar Examination and Multi-State Professional Responsibility Examination. In addition, as a condition to any readmission to practice, Respondent must restore to the Estate of Walter Vossiek any

and all fees and disbursements he received from the estate  
after Mr. Vossiek's death on June 22, 1997.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Cross-Appeal Brief After Remand has been furnished by regular U.S. Mail to Thomas D. Hall, Clerk, The Supreme Court of Florida, at 500 South Duval Street, Tallahassee, Florida 32399; a copy by regular U.S. Mail to Scott K. Tozian, Counsel for Respondent, at 109 N. Brush Street, Suite 150, Tampa, Florida 33602; and a copy by regular U.S. Mail to John Anthony Boggs, Staff Counsel, The Florida Bar, at 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 27th day of October, 2001.

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**CERTIFICATION OF FONT SIZE AND STYLE**

I HEREBY CERTIFY that the foregoing brief was produced in WordPerfect 8.0 software format using 12 point Courier New font. The accompanying computer diskette containing this brief in electronic format was scanned for viruses using Norton Antivirus.

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