IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	
	Supreme Court Case
Complainant,	No. SC01-114
v.	The Florida Bar File
JONATHAN ISAAC ROTSTEIN,	Nos. 2000-30,672(07C); 2000-32,134(07C); 2000-32,142(07C)
Respondent.	

_____/

On Petition for Review
of
the Referee's Report
in a Disciplinary
Proceeding.

RESPONDENT'S ANSWER BRIEF AND INITIAL BRIEF ON CROSS APPEAL

PATRICIA S. ETKIN
The Florida Bar No. 290742
WEISS & ETKIN
150 South Pine Island Road, Suite 320
954-424-9272
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION

In this brief, JONATHAN ISAAC ROTSTEIN is referred to as either "Respondent" or "Rotstein"; The Florida Bar is referred to as either the "Complainant" or the "Bar"; Linda Jarrett's personal injury case is referred to a the "Mars matter"; Respondent's letter purportedly written to Jarrett on July 8, 1998, is referred to as the 'Mars withdrawal letter"; Letter to The Florida Bar dated September 8, 2000, is referred to as "disavowal letter"; David A. Monaco is referred to as "Judge Monaco"; Richard B. Orfinger is referred to as "Judge Orfinger"; Robert K. Rouse, Jr. is referred to as "Judge Rouse"; Joseph G. Will is referred to as "Judge Will"; and all other witnesses are referred to by their respective names or surnames for clarity.

Abbreviations utilized in this brief are as follows:

"B-IB" refers to The Florida Bar's Initial Brief.

"TR" refers to the Transcript of Proceedings before the Referee held June 26, 2001, and June 27, 2001.

"ADM" refers to an admission made by the Bar in its Reply to Respondent's Request for Admissions.

"RR" refers to the Report of Referee dated June 27, 2001.

"B-EX" refers to Bar Exhibits introduced in the proceedings before the Referee as Complainant's Exhibits.

"R-EX" refers to Respondent's Exhibits introduced in the proceedings before the Referee. Note: the record reflects that the transcript of the depositions of Hood and Judge Orfinger were both marked and admitted as R-EX 13 [TR 357, 411].

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Statement of Facts that are set forth in The Florida Bar's Initial Brief are either incomplete or disputed. Accordingly, Respondent files this Statement of the Case and Facts.

This disciplinary proceeding was initiated on January 19, 2001, with the filing of a three-count Complaint against Respondent. Count I pertains to Respondent's representation of Linda Jarrett in a personal injury case and Respondent's correspondence relating to this representation that was provided during the pendency of the Bar/Grievance Committee investigation and prior to the probable cause vote. Count II pertains to Respondent filing a motion to enforce the settlement that his client, Margaret G. Beaver, agreed to accept at mediation. Count III pertains to Respondent filing a motion to enforce the settlement that his client, Olga Petrucha, agreed to accept at mediation.

A Referee was appointed on February 5, 2001. The final hearing before the Referee was held on June 26, 2001, and June 27, 2001.

Count I

Jarrett was injured in December 1997 in an accident that occurred during the

course of her employment with Publix. ADM 1; TR 12. In May 1998, Jarrett retained Respondent to represent her in a worker's compensation claim against Publix arising from the accident. ADM 2; TR 13.

In October 1999, Jarrett contacted the Bar to complain about her communication with Respondent which occurred during and related to the process of settling her worker's compensation claim. ADM 3; TR 13. In her Bar complaint, Jarrett referred to a second case, unrelated to her worker's compensation claim, that had not been settled. ADM 4; TR 13. The second case was a personal injury claim for dental injuries that Jarrett allegedly sustained in 1994 while eating an M&M [manufactured by the Mars Company]. ADM 5; TR 13. The conduct of Respondent that is the subject of this disciplinary proceeding involves Jarrett's personal injury claim. ADM 7; TR 14.

Jarrett retained Respondent in connection with the Mars matter in May 1998, at or about the same time that she retained Respondent in connection with the worker's compensation claim. ADM 6; TR 13. The statute of limitations on the Mars matter expired in December 1998. ADM 16; TR 15. Respondent neither filed a lawsuit on behalf of Jarrett nor withdrew from the representation of Jarrett with regard to the Mars

matter. ADM 17; TR 15.

In September 1999, Respondent realized that the statute of limitations had "been missed" and panicked. TR 47-48. Respondent created the Mars withdrawal letter to support that he withdrew from representing Jarrett in the Mars matter prior to the expiration of the statute of limitations. TR 16. When the Mars withdrawal letter was prepared, there was no ongoing Grievance Committee investigation. TR 48. Respondent is not sure if he mailed the Mars withdrawal letter to Jarrett. TR 50. Jarrett never received from Respondent the Mars withdrawal letter. B-EX 4.

Respondent did not become aware of Jarrett's Bar complaint against him until late November 1999. TR 48. In a letter [addressed to Jarrett] dated January 29, 2000, Respondent stated that he had withdrawn from the Mars matter because he "did not believe that we could prevail in that case in front of a jury of your peers." B-EX 2.[1]

Jarrett's Bar complaint was referred to the Grievance Committee for investigation. In a letter [dated February 26, 2000], sent by Respondent in response

[1] Respondent's letter was sent at the specific request of the Bar to further explain certain matters pertaining to Jarrett's Bar complaint.

to inquiry from the Grievance Committee Investigating Member, Respondent stated that he had withdrawn from representing Jarrett in the Mars matter on July 8, 1998, and enclosed a copy of the Mars withdrawal letter. ADM 20; TR 15; B-EX 3. In a second letter [dated May 14, 2000] in response to various inquires from the Grievance Committee Investigating Member, Respondent stated that "upon further review" he decided that he did not "want to sue the Defendant for dental injuries." B-EX 6.

On or about August 14, 2000, Respondent received the Notice of Probable Cause Vote scheduling the Jarrett Bar complaint for consideration by the Grievance Committee on August 30, 2000. TR 16; R-EX 2. Respondent contacted an attorney. TR. 389.

On August 16, 2001, at or about 10:00 a.m., the Staff Auditor of The Florida Bar appeared at Respondent's office to serve an Instanter Subpoena Duces Tecum, issued by the Grievance Committee, demanding that Respondent produce for inspection the following items:

> [A]ny and all local and remote electronic storage and retrieval devices capable of storing and retrieving electronic data regarding your firm's file for your client Linda Jarrett, including, but not limited to any and all of the following and any functionally similar media and devices: magnetic

> tape and disks, floppy disks, Zip drive and Zip discs, DD's and CD drives, and hard drive data storage disks, the hardware necessary to retrieve said data, including, but not limited to central processing units (CPU), viewing screens, monitors, modems, zip drives, scanners, servers, disc or tape drives, printers, peripherals, software for the computer equipment and programs contained on the drives, manuals for the operation of any computers and/or software together with all handwritten notes or printed material describing the operation of said computers and/or software, records of any purchases of any software and/or computers and any tape recordings, audio tapes and video tapes. B-EX 34.

Prior to the date that Respondent was served with the instanter subpoena, he had contacted counsel to request representation. TR 391. By letter dated August 16, 2000, faxed to Bar Counsel, Respondent's Counsel entered an appearance, confirmed Respondent's interest in cooperating with the Grievance Committee's investigation, but objected to the Instanter Subpoena Duces Tecum "based upon its scope, the substantial disruption that the requested access would cause to Mr. Rotstein's law practice, and concerns with regard to confidentiality of information stored in his computer relating to other clients of the law firm" and requested consideration of "issuing a new subpoena which provides Mr. Rotstein with a reasonable time to produce documents that are relevant to a particular complaint." R-EX 2. This letter

further advised that if the Bar declined to issue a new subpoena, Respondent would file a motion with the Supreme Court to quash the subpoena or for a protective order. R-EX 2. Although the Bar responded with a letter indicating that the Bar was "exploring the possibility of a new subpoena" [Bar R-EX 2], the Bar did not issue a new subpoena or initiate any further action with regard to the instanter subpoena. R-EX 2.

By letter dated September 8, 2000, Respondent [through counsel] disavowed his representations to The Florida Bar regarding his handling of the Mars claim, including the Mars withdrawal letter. ADM 21; TR 17. R-EX 3. In his disavowal letter, Respondent apologized to both the Grievance Committee and Jarrett. ADM 22; TR 17; R-EX 3. [2]

[2] Respondent unequivocally disputes the assertion in the Bar's Statement of the Facts that Respondent admitted to his "intentional deceptions" "only upon becoming aware" of the "unequivocal evidence" [Pacifico affidavit] gathered by the Bar supporting "respondent's fraud." B-IB at 5. In her Memorandum of Law to Support Rule Violations [B-EX 33] and at final hearing, Bar Counsel maintained that it was Respondent's awareness of the Pacifico affidavit which prompted his admission of wrongdoing. TR 315. The Referee questioned Bar Counsel as to whether there was "anything in the record" to support this contention. TR 324. Bar Counsel ultimately recognized that there was no record support for her contention and redacted that portion of her memorandum at page 2 which referenced the Pacifico affidavit. TR

On September 28, 2000, an Amended Notice of Probable Cause Vote was mailed to Respondent scheduling Jarrett's Bar Complaint for a hearing before the Grievance Committee on October 25, 2000. R-EX3. This amended notice included new material to be considered by the Grievance Committee which had not been previously furnished to Respondent, specifically the Pacifico affidavit dated June 16, 2000. R-EX 3; B-EX 7.

On October 19, 2000, Respondent forwarded to The Florida Bar a supplemental statement with regard to Jarrett's Bar complaint in which he again apologized, expressed remorse, and reiterated the disavowal of his initial representations regarding the Mars matter, including the Mars withdrawal letter. ADM 26; TR 17; R-EX 4.

Respondent appeared before Seventh Judicial Circuit Grievance Committee "C" on October 25, 2000. ADM 27; TR 18. While appearing before the Grievance Committee, Respondent again disavowed his representations with regard to the Mars

---

331. Furthermore, contrary to Bar Counsel's reference to"ROR-A2", the Referee did not make any finding which would support that Respondent's admission of wrongdoing was precipitated by his awareness of "unequivocal evidence" gathered by the Bar.

matter, apologized, and expressed remorse. ADM 28;TR 18.

Thereafter, Respondent sent a letter to Jarrett dated December 11, 2000, wherein he asked for forgiveness, admitted wrongdoing, and suggested mediation so that he could compensate her for her injuries in the Mars matter. B-EX 9. Jarrett retained attorney Crowley to represent her. By letter dated January 16, 2001, Crowley advised Bar Counsel, in pertinent, that:

> Prior to engaging in settlement discussions with his attorney, I requested Mr. Rotstein provide me with his entire file on Ms. Jarrett's claim against Mars Company for my review. He immediately complied with my request. I then had the opportunity to review the merits of the substantive claim Ms. Jarrett would have had against Mars Company, had that civil action been pursued. Since her claim against the company was barred due to his inaction, Mr. Rotstein offered to put her in the same position she would have been in, had she prevailed against Mars. In short, he offered to "make her whole."
>
> I wish to report to you Mr. Rotstein and my client have settled. Mr. Rotstein has made a voluntary payment to Ms. Jarrett of $17,750, an amount which I negotiated for her and which I recommended that she accept. She accepted the settlement and she is pleased with the result.
>
> In my dealings with Mr. Rotstein's counsel, I was treated with the utmost courtesy and professionalism. It was clear to me that Mr. Rotstein regrets his error, and I am sure this has been a painful episode for him. It was also clear to me that he was motivated only by the desire to "do the right thing" and to insure that the harm caused by

his error was rectified. He followed through on this.

In view of the honest and remorseful manner in which Mr. Rotstein has addressed this situation, and in view of the fact that he has paid for it in real terms- with his checkbook- I urge the Florida Bar to extend him leniency in these proceedings. I urge the Bar to not seek a suspension of Mr. Rotstein's license. Rather, in my opinion, a public reprimand would seem to be an appropriate punishment under the circumstances.

R-EX 5 at P 3, 4.
Crowley's letter to Bar Counsel included as an enclosure a letter from

Jarrett to Bar Counsel, also dated January 16, 2001, which stated, in

pertinent part:

I appreciate Mr. Rotstein's honesty and his willingness to make up for his mistake. I appreciate that I did not have to engage in a protracted legal fight in order to get him to compensate me. I appreciate that he paid me voluntarily. Since he has done so, I can now accept his apology.

I have read Mr. Crowley's letter to The Florida Bar, and I agree with the statements he makes in it. It is not my role to say what punishment or fine The Florida Bar should decide upon for Mr. Rotstein in this matter. However, my primary focus has been to seek and obtain just compensation for the legal matter I originally placed in his hands, rather than seek to have his license to practice law taken away. Mr. Rotstein made a mistake, it is true. But he also paid for it- literally. If you and/or the court decides to impose a lesser punishment than suspension of his license, such as a public reprimand, I, as the

"victim" in this matter will be satisfied.

R-EX 5 at P 1, 2.

Count II

Beaver was injured in September 1998 in a slip and fall accident that occurred at Kmart. ADM 32; TR 21. In October 1998, Beaver retained Respondent to represent her in the personal injury claim against Kmart. ADM 33. TR 21. Respondent filed a lawsuit on behalf of Beaver against Defendant, Kmart Corporation, and, thereafter, engaged in pretrial discovery. ADM 35; TR 21

Beaver's deposition was taken on February 29, 2000. ADM 36; TR 21. Thereafter, Defendant filed a motion for summary judgment. ADM 37; TR 21. Defendant asserted that summary judgment was supported by Beaver's deposition testimony. ADM 38; TR 21. Defendant's motion for summary judgment was predicated upon Beaver's failure to establish the existence of liquid in the area in question and that Defendant had notice of a dangerous condition. ADM 40; TR 22. [3]

[3] Also see B-EX 29 at 30-31, for excerpts of Beaver's deposition testimony in the Kmart litigation, which devastated her case.

Mediation was held on March 16, 2000. ADM 41. TR 22. Beaver was present. ADM 42; TR 22. Attorney Michael Shiffman, Respondent's law partner, represented Beaver at mediation. ADM 43. TR 22.

Prior to mediation, Defendant filed a proposal for settlement confirming an offer to settle Beaver's claim for $1,500.00, inclusive of fees and costs. ADM 47; TR 22. At mediation, Defendant increased the amount offered to settle Beaver's claim to $4,250.00 and, in addition, agreed to pay for the entire cost of mediation. ADM 48; TR 23.

At mediation, Beaver determined that it was in her best interest to accept Defendant's mediation settlement offer rather than proceed to trial. ADM 50; TR 24. The settlement was confirmed by a Mediation Settlement Agreement that was voluntarily executed by Beaver on March 16, 2000. ADM 52; TR 24; R-EX 7.[4] Approximately one month after she executed the mediation agreement, Beaver sent a

---

[4] Pursuant to the terms of the Mediation Settlement Agreement, Beaver agreed to "execute a complete release".

letter to Respondent expressing her dissatisfaction with the representation by Respondent. ADM 54; TR 24. Thereafter, Beaver refused to execute the release to finalize the settlement. ADM 55; TR 24.

Respondent filed Plaintiff(s) Motion to Enforce Settlement. ADM 56; TR 24; B-EX 12. Thereafter, Defendant's counsel filed Defendant's Motion to Enforce Settlement. ADM 57, 60; TR 25; B-EX 13.

On September 5, 2000, Beaver appeared at the hearing on the motion to enforce settlement. ADM 65; B-EX 14. TR 25. At this hearing, Beaver had a full opportunity to fully explain her position to the judge [Evander]. ADM 69; TR 25. The judge granted [Defendant's] motion and ordered enforcement of the mediation agreement pursuant to an order that would allow disbursement of settlement proceeds in accordance with the mediation agreement. ADM 70; TR 25-26. The judge denied Defendant's request to assess attorney's fees and costs as sanction against Beaver. ADM 72; TR 26.

The judge neither referred Respondent to the Bar nor directed the institution of disciplinary proceedings against Respondent for filing the motion to enforce

settlement. ADM 74; TR 26. Further, the judge did not raise any question of impropriety with respect to Respondent filing the motion to enforce settlement. ADM 75; TR 27. Finally, at his deposition in this proceeding, Judge Evander was asked whether he considered it unethical for Respondent, as Beaver's attorney, to have filed a motion seeking enforcement of her settlement agreement reached at mediation. The judge responded that he did not consider it unethical. B-EX 26 at 9.

Count III

On June 10, 1998, Petrucha ingested a metal object (part of strainer) while dining at a restaurant. ADM 77; TR 27. On June 20, 1998, Petrucha retained Respondent to pursue a claim against the restaurant. ADM 78; TR 27. Approximately four days after executing the fee contract, Petrucha advised Respondent that she did not want to pursue her claim and was withdrawing the fee contract. ADM 82; TR 28. Thereafter, Petrucha engaged in direct communication with the restaurant's insurance company and was offered $115.00 in settlement of her claim. ADM 83; TR 28.

In October 1998, Petrucha rehired Respondent and requested that he pursue her claim. ADM 84; TR 28. Respondent pursued the representation of Petrucha. ADM

85. Respondent advised the restaurant's insurance company that Petrucha would not agree to settle her claim for $115.00. ADM 86; TR 28-29. In furtherance of the representation, Respondent filed a lawsuit on behalf of Petrucha against Defendant/restaurant and, thereafter, engaged in pretrial discovery. ADM 87; TR 29.

In or about September 1999, Defendant/restaurant filed a proposal for settlement and/or offer of judgment offering to settle Petrucha's claim for $115.00. ADM 88; TR 29. Respondent sent Petrucha a letter dated October 5, 1999 explaining a proposal for settlement**.** ADM 89; B-EX 18. Petrucha did not accept the $115.00 settlement offer pursuant to the proposal for settlement. ADM 91; TR 29. Defendant/restaurant increased its offer to $150.00, inclusive of fees and costs, to settle Petrucha's claim. ADM 92; TR 29.

Mediation was held on January 19, 2000. ADM 93; TR 29-30. Petrucha was present. ADM 94; TR 30. Respondent represented Petrucha at the mediation. ADM 95; TR 30. At mediation, Defendant/restaurant offered to settle Petrucha's claim for $500.00 with Defendant/restaurant to pay for the entire cost of mediation. ADM 97; TR 30.

At mediation, Petrucha agreed to accept Defendant/restaurant's mediation settlement offer. ADM 98; TR 30. Petrucha determined that it was in her best interest to execute the mediation agreement rather than proceed to trial. ADM 99; TR 31. The settlement was confirmed by a Mediation Settlement Agreement that was voluntarily executed by Petrucha on January 19, 2000. ADM 101; TR 31; R-EX 8.[5]

On February 8, 2000, Petrucha executed the release. R-EX 9. This release was forwarded to Defendant's counsel, together with a Joint Stipulation for Dismissal with Prejudice which confirmed the settlement. R-EX 10. By court order dated February 15, 2000, Petrucha's claim was dismissed. R-EX 11. Defendant's counsel forwarded to Respondent a settlement check in the amount of $500.00. R-EX 12 at 36.

Respondent reduced his attorney's fee to 20% of the recovery. ADM 105; TR 32. Respondent's attorney's fee, based upon the reduced percentage, was a total of $100.00. ADM 106; TR 32. The $100.00 is the total compensation that Respondent [would receive] as his fee for services that he or other attorneys in his firm provided

[5] Pursuant to the terms of the Mediation Settlement Agreement, Petrucha agreed to "execute a complete release".

Petrucha, which specifically included appearing at mediation and at the depositions of Petrucha and two employees of Defendant/restaurant. ADM 107; TR 33.

Respondent advanced costs and expenses totaling $387.85 in furtherance of the representation of Petrucha. ADM 108; TR 33. The costs advanced by Respondent included the filing fee, sheriff's service, court reporter for deposition, postage, and copying. ADM 109; TR 33. Petrucha was obligated to reimburse Respondent for the costs. ADM 110; TR 33. After deducting $100.00 for attorney's fees and $387.85 for costs and expenses, Petrucha's net recovery was $12.15. ADM 111; TR 33.

Respondent was advised by one of his employees that Petrucha did not want to sign the items that were necessary to finalize the settlement: the settlement check and settlement statement. ADM 113, 114; TR 34. Thereafter, Respondent filed Plaintiff(s) Motion to Enforce Settlement. ADM 115; TR 34; B-EX 19.

Respondent forwarded to Petrucha a copy of the motion to enforce settlement. ADM 118. After receiving a copy of the motion, Petrucha agreed to and did endorse the settlement check and execute the settlement statement in order to finalize the settlement in accordance with her mediation agreement. ADM 119; TR 34. Because

Petrucha agreed to finalize the settlement in accordance with the mediation agreement, a hearing on the motion to enforce settlement was not necessary. ADM 120; TR 35.

Counts II and III (Conflict of Interest Testimony)

Witness testimony was presented at final hearing pertaining to the disputed issue of whether Respondent's action in filing a motion to enforce settlement constitutes a conflict of interest in violation of Rule 4-1.7, as alleged in Counts II and III. The Bar introduced into evidence the deposition transcripts of Judge Will [B-EX 28]; Judge Monaco [B-EX 27]; Judge Rouse [B-EX 32]; and attorney Thomas E. Dukes [B-EX 31]. These transcripts were introduced in lieu of the witnesses' appearance at final hearing. In addition, Marla Rawnsley and Terrell J. La Rue testified regarding the conflict issue.

Judge Will testified that he did not recall ever handling a motion to enforce settlement filed by Respondent against one of his own clients. However, in testifying about the Bar's conflict case against Respondent, Judge Will stated:

> But I have to tell you that had that come before me I probably would have missed it. If I had - - if I had not missed it and I had caught it, I

> simply would have looked to the defense attorney on the other side of the table, asked them to make an ore tenus motion to enforce the settlement, and I would have continued on to hear the matter that day. Because while it may be a conflict of interest, in this particular context, with this particular kind of case, I really consider it to be a fairly insignificant one. One that's capable of being corrected by the judge on the spot without any kind of formal proceeding.
>
> So the answer is yes, I think it is a conflict. No, I don't think it is a serious one, and one that easily could have been corrected.

B-EX 28 at 9, 10.

When asked to explain why a conflict would not have occurred to him, Judge Will responded:

> If Mr. Rotstein had ever come to this court filing a Motion For - - to enforce a settlement agreement with one of his own clients, I don't think a bright light would have gone off over my head. I don't think I would have seen that that was a conflict. I would have seen it more as a - - as an expedient route to getting a case resolved that would have been a troublesome case mostly because of the personality of the client or the background of the client.

In almost all the cases that I heard over that period of time, the difficulty was the client. A person who had come to Mr. Rotstein thinking that they were going to get that pot of gold at the end of the rainbow only to find out at the end that they were not going to get enough to cover medical expenses and legal costs. And the disgruntlement that they felt was often turned on him.

He was kind enough to take their very poor case and try to do something for them with it. They were so disappointed that they didn't get a lot of money that they turned on him.

And one of the ways that they could turn on him was by not taking the settlement which caused us to have yet another case on the top of a 1200- case caseload. And so I would perhaps have not seen it in my effort to be expedient.

B-EX 28 at 11, 12

Judge Monaco acknowledged that he had considered Plaintiff (s) Motion to Enforce Settlement in a case styled Paula Sessions vs. Dalton Newsome. Significantly, this motion was similar in content to Plaintiff(s) Motion to Enforce Settlement filed by Respondent in Beaver and Petrucha. When questioned whether he perceived there to have been a conflict of interest, Judge Monaco candidly stated that the greatest likelihood was that he did not recognize a conflict of interest. B-EX 27 at 14.

Judge Rouse testified about one occasion when Respondent filed a Motion to Enforce Settlement that was presented to him for hearing. When asked whether he believed that it was unethical for Respondent's to seek the court's assistance to finalize a settlement, Judge Rouse responded:

> I'm not sure I ever thought about it in that fashion.
>
> I do not recall that I had noted that the motion was filed by the law firm against the law firm's own client until the time of the hearing when counsel was before the court. And I noted it at that time and advised whatever counsel was present that I did not think it was appropriate.
>
> I don't think I used the word "unethical," but I - - if there's a transcript

> of the hearing, I am - - I could be - - I could find that I'm mistaken about that.
>
> But I don't think I really considered it some kind of serious ethics violation which would make me pick up the phone and immediately call The Florida Bar, for example.
>
> ***
>
> So usually it's a matter of the defense counsel, at least in my experience, the usual practice would be for the defense lawyer to file a motion to enforce the settlement, and the court would, of course, at that point generally assist, as you put it.
>
> B-EX 32 at 17, 18.

Rawnsley is a certified mediator [TR 155] who primarily practices in insurance defense [TR 156]. She testified that she has seen motions to enforce mediation settlement agreements filed by plaintiffs [TR 161] and recalls that when one such motion was presented, Judge Monaco did not question whether plaintiff's counsel should have filed it [TR 162].

La Rue is a mediator and a board certified trial attorney. TR 192. He recalled an instance where one of his clients changed their mind after agreeing to settle a case and the settlement had been formalized with defense counsel. TR 209-210. While La Rue filed a motion that was not called a motion to enforce settlement, he did seek the

court's guidance. TR 210. La Rue felt that this was proper regardless of any duty owed to the client. TR 211-212. The court granted the relief which effectuated the agreed settlement. TR 211.

Character Testimony

Rawnsley and La Rue also testified as character witnesses at the final hearing. Other character witnesses were Rabbi Pinchas Esagui and attorneys Georgann D. McGreevy, Michael Nebel, and Charles David Hood, Jr. (by deposition). In addition to these witnesses, Judge Monaco, Judge Rouse, Judge Will and Judge Orfinger made favorable comments about Respondent during their pre-trial depositions.

Rawnsley has been a member of The Florida Bar since 1987. TR 154. She has known Respondent nine or ten years. TR 156-157. Rawnsley initially met Respondent when she was opposing counsel and has had frequent (weekly) contact with him. TR 157. Based upon her contact with Respondent as opposing counsel and as a mediator, Rawnsley found Respondent to be "as good as his word" and "very honest". TR 157. Rawnsley testified that she would not distrust Respondent because of the conduct which he admitted due to experience with him over a period

of ten years. TR 159. Rawnsley also testified that she was present when others within the legal community discussed Respondent and she heard no derogatory statements about his honesty. TR 159-160.

LaRue has been a member of The Florida Bar since 1972. TR 191. He has had regular contact with Respondent over the past four years as a mediator. TR 194. Based upon his contact with Respondent, LaRue found that Respondent was always honest with him. In addition, when LaRue could observe Respondent's interaction with his clients during the course of a mediation, he found Respondent was always honest with clients. TR. 195. LaRue also testified that he was present when others in the legal community discussed Respondent and he heard no derogatory comments about Respondent's honesty on his duty to his client. TR 197-198.

McGreevy has been a member of The Florida Bar since 1985. TR 183. McGreevy's professional contacts with Respondent began around 1991 when she was opposing counsel in personal injury cases, and in the last six years she has seen Respondent in a professional capacity at least once a week on average, and probably more that that in mediation. TR 184. At the time of her testimony, McGreevy had

been employed for the past 6 1/2 years as a full-time worker's compensation mediator for the State of Florida. TR 183. Based upon her contact with Respondent as opposing counsel and as a mediator, McGreevy found him to be candid. TR 184-185. McGreevy viewed Respondent as basically an honest person. TR 186. McGreevy also testified that she was present when others in the legal community discussed Respondent and she heard no derogatory statements about his honesty. TR 186.

Nebel has been a member of The Florida Bar since 1982. TR 359. He has known Respondent in a professional context for about seven years and has contact with him once a month through mediation. TR 360. Nebel has acted as a mediator in over 3500 cases. TR 359. Nebel found Respondent to be honest and a very good lawyer. TR 360. Nebel also testified that he was present when others in the legal community discussed Respondent and he heard no derogatory comments about Respondent with respect to his honesty and integrity. TR 360, 361.

Hood has been a member of The Florida Bar since 1978. R-EX 13 at 6. He has had contact with Respondent several times a week over a period of ten years as opposing counsel in about a thousand cases. R-EX 13 at 7-8. Hood found

Respondent to be a gentleman, direct, straightforward, professional, and honest. R-EX 13 at 8-9. Hood testified that he had contact with other attorneys in the community who knew Respondent and never heard an adverse statement about Respondent's character or abilities. R-EX 13 at 9. Hood also testified that he had no reason to believe that Respondent was unfit to practice law in any respect or in need of rehabilitation. R-EX 13 at 11.

Rabbi Pinchas Ezagui testified that Respondent contacted him regarding a personal matter involving Respondent's profession during the summertime last year [2000]. TR 371-372. Rabbi Ezagui further testified that Respondent informed him exactly what the issue was [TR 372] and that he wanted a spiritual perspective with respect to an act of wrongdoing and his desire to admit fault. TR 373. Rabbi Ezagui perceived that Respondent was "all in pieces" and gave Respondent support in what he wanted to do. TR 373. Rabbi Ezagui met with Respondent for over an hour. TR 375. Finally, Rabbi Ezagui testified that he considered Respondent as "super honest" and remorseful. TR 376.

During Judge Monaco's deposition, Bar Counsel asked whether he had formed

an opinion as to how Respondent conducts himself before the court. B-EX 27 at 6. Judge Monaco answered:

> I've never known Jon to be dishonest with the court. I have never known him to try to mislead the court. He's very forthright and very candid.
> I've told Jon this and I don't hesitate to tell you. I've always thought that Jon's – if Jon has a difficulty, it has been that his intake of some cases was perhaps not as stringent as it should have been. But beyond that….
> Jon does a good – tries a good case, he's honest, and he's candid.
> B-EX 27 at 7.

During Judge Rouse's deposition, Bar Counsel asked whether he had formed an opinion as to Respondent's character and reputation. B-EX 32 at 9. Judge Rouse answered:

> I'm not sure how to answer that.
> I have never found Mr. Rotstein to intentionally mislead the court, to mislead me about anything factual or legal. That is not to say he has never made an error or never made an argument that I disagreed with, but I have never found that he was intentionally misstating facts or misstating the law.
> B-EX 32 at 9.

During Judge Will's deposition, Bar Counsel asked him to explain his references to the fact that Respondent takes marginal cases. B-EX 28 at 30. Judge Will

answered:

> I mean he takes cases for people that no one else would take. Cases where people have gone into other law offices and the lawyers have rejected the cases because either the liability is thin or the damages are questionable.
> In our community, he—while I certainly don't agree with him, he provides a tremendous service to a whole lot of people who would otherwise not have access to the system.
> B-EX 28 at 30.

During Judge Orfinger's deposition, Bar Counsel asked whether he had formed an opinion as to whether Respondent is an honest attorney. R-EX 13 at 11. Judge Orfinger answered, " I think he is an honest attorney, but an overworked one." R-EX 13 at 11. Bar Counsel further inquired whether Judge Orfinger always held that opinion, and Judge Orfinger responded:

> Well, I'm not going to say that we have never had differences of opinion. You know, we -- we've had a few differences of opinion on matters where I have called into question what I thought were poor judgments on his part. I don't think that they related to dishonesty. I do think they -- you know, at least one instance that I'm thinking of that didn't reflect carefully thinking through the consequences of one's actions.
> But in general, while I was disappointed about one particular incident, it did not change my opinion that I think Jon is -- is an honest person who has got some organizational problems in the office relating not – relating back to the basic question of not carefully screening cases and having too many cases in the office that nobody can handle.

R-EX 13 at 11.

The Bar then asked Judge Orfinger to elaborate about the "particular incident" in which he was disappointed. R-EX 13 at 11. Respondent's counsel objected to the Bar's efforts to obtain testimony from Judge Orfinger regarding any particular incident, unless it related to the subject of this proceeding. R-EX 13 at 12. Bar Counsel did not pursue this line of inquiry. R-Ex 13 at 12. Bar Counsel and Respondent's counsel stipulated to using Judge Orfinger's deposition transcript at final hearing. R-EX 13 at 16.

Judge Orfinger's Testimony at Final Hearing

The Bar did not introduce Judge Orfinger's deposition transcript at final hearing. Instead, the Bar announced an intention to call a "rebuttal witness" [Judge Orfinger] after the following exchange between Bar Counsel and Respondent during cross-examination:

Q Sir, were you - - did you ever counsel a client to lie to the court?

***

A I would say no.

TR 401.

Prior to the Bar calling their rebuttal witness, Respondent explained his answer to the

foregoing question on redirect examination. TR 401-404. On recross examination, Bar Counsel questioned Respondent whether Judge Orfinger imposed a $12,000.00 sanction and dismissed the case. TR 404. Upon concluding cross-examination, Bar Counsel stated that she would like to call Judge Orfinger as a rebuttal witness. TR 404. Respondent's counsel objected to the rebuttal testimony on grounds of remoteness, relevancy, and uncharged misconduct. TR 404-406. In addition, Respondent's Counsel informed the Referee that Bar Counsel had taken Judge Orfinger's deposition and there was a transcript. TR 405. The deposition transcript of Judge Orfinger was then introduced into evidence at the request of Respondent's counsel. TR 409-411; R-EX 13. Judge Orfinger was allowed to testify over objection by Respondent's counsel. TR 425-438.

In arguing discipline, the Bar asked for a three-year suspension [TR 443] based in part upon the rebuttal testimony of Judge Orfinger. The Bar claimed that such testimony established that Respondent did not "learn a lesson" from the incident with Judge Orfinger. TR 439 The Bar also claimed that Respondent had lied to the Referee by stating that he had "never been sanctioned" and "never counseled clients to make

misrepresentations to the court." TR 443.

Report of Referee

On August 3, 2001, the Referee issued a report recommending that Respondent be found guilty of certain rule violations. Respondent does not dispute that the Referee found Respondent guilty of the rule violations set forth in the Bar's Statement of the Case.

As a disciplinary sanction the Referee recommended that Respondent be suspended from the practice of law for one-year and prove rehabilitation prior to reinstatement; that Respondent retake the ethics portion of the Bar; that Respondent pay all costs of the disciplinary proceeding; and that "Respondent's failure to comply with any of the above shall be deemed cause to subject respondent to further disciplinary proceedings." RR 5.

Petition for Review

On September 5, 2001, the Bar served a Petition for Review "seeking enhancement of the one-year suspension sanction recommended by the referee to a three year suspension." On September 6, 2001 Respondent served a Cross Petition

for Review pertaining to findings, rulings and recommendations of the Referee. Each party filed a motion for extension of time, resulting in the following briefing schedule: Initial Brief of the Bar to be served up to and including November 5, 2001; Answer Brief of Respondent to be served up to and including January 3, 2001.

Respondent files this Answer Brief and Initial Brief on Cross Appeal in support of Respondent's request that this Court reject the Referee's recommendations as to guilt of certain disciplinary rule violations as well as discipline. Respondent seeks to reduce the disciplinary suspension recommended by the Referee to 10 days.

SUMMARY OF ARGUMENT

Respondent initially engaged in deceptive actions in an effort to conceal error regarding his failure to timely file suit on behalf of a client in a personal injury matter. Respondent repudiated these actions and repeatedly disavowed his misrepresentation prior to, during, and subsequent to the Grievance Committee hearing that was scheduled to consider the client's Bar complaint. Respondent testified truthfully concerning his actions and expressed remorse. Respondent suggested that the client retain counsel. The client did and her claim against Respondent for his inaction was settled. The client has been made whole. The client has forgiven Respondent. The Bar has not.

This case is **not** about false testimony; this case is **not** about fraudulent conduct; this case is **not** about creating fictitious court documents. This case is about an attorney who made a mistake, admitted it, apologized for it, and made amends. It is about a wrong that was made right. This is significant mitigation, deserving of substantial consideration.

The Referee's recommendation of guilt as to a violation of Rule 4-3.3, as

charged in Count I of the Bar's Complaint, is clearly erroneous because Respondent did not make any false statement or provide false testimony in any court proceeding. Further, the Referee's recommendation of guilt as to a violation of Rule 4-1.7, as alleged in Counts II and III, is clearly erroneous because there was no evidence of any actual conflict of interest presented at final hearing. In the alternative, Respondent asserts that any violation of Rule 4-1.7 is de minimus, caused little or no client injury, and does not justify the imposition of discipline.

The Referee recommended a one-year suspension. Respondent asserts that this disciplinary recommendation is improperly based upon the Referee's consideration of uncharged misconduct. Furthermore, this disciplinary recommendation is improperly based upon the Referee's finding that Respondent's objection to an unreasonable, unduly burdensome instanter subpoena duces tecum, issued by the Grievance Committee, constitutes an aggravating factor.

Respondent maintains that neither the one-year suspension recommended by the Referee nor the three-year suspension sought by the Bar is supported by existing case law. In lieu thereof, Respondent would urge this Court to impose a suspension of

10-days as discipline for the misrepresentation that is the subject of Count I.

Finally, this Court should not approve the other conditions recommended by the Referee; to wit: Respondent retake the ethics portion of the Bar exam and that Respondent be subject to further disciplinary proceedings for his failure to fully comply with "any of the above" [recommendations].

ARGUMENT

VI. THE REFEREE'S RECOMMENDATION THAT RESPONDENT SHOULD BE FOUND GUILTY OF VIOLATING RULE 4-1.7, AS ALLEGED IN COUNTS II AND III, IS CLEARLY ERRONEOUS.

A. A violation of Rule 4-1.7 must be supported by clear and convincing evidence demonstrating that Respondent's independent professional judgment on behalf of the client in filing a motion to enforce a written mediation settlement agreement was materially limited by Respondent's own interests.

The Bar has the burden to present clear and convincing evidence to establish that the code of conduct governing lawyers has been breached. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978); . The Florida Bar v. Rayman, 238 So.2d 594 (1970). The Bar does not meet its burden by merely asserting that Respondent's conduct is violative of a particular disciplinary rule; the Bar must establish, by clear and convincing evidence, the elements of the rule that is alleged to have been violated. A referee's recommendation of guilt of a disciplinary rule violation should be rejected as clearly erroneous when such recommendation is based upon an assertion, rather than evidence establishing the violation.

In the instant case, although the Bar asserted a violation of Rule 4-1.7, neither the Bar nor the Referee identified any interest of Respondent that was in conflict with the interests of either Beaver or Petrucha. Furthermore, the Bar did not present

evidence establishing that any such purported interest materially limited Respondent's exercise of independent professional judgment. These elements are necessary to support a finding that the filing of the motion to enforce the written mediation settlement agreement constituted a violation of Rule 4-1.7.

Attorney/client conflict situations that are contemplated by Rule 4-1.7(b), the language of which is cited by the Referee in his Report [RR 4], involve actions by a lawyer to advance his own interests to the detriment of a client. The instant case, however, does not involve such conduct by Respondent. On the contrary, this case involves a court filing by Respondent, containing neutral language and lacking a prayer for relief, which brings to the court's attention client refusal to finalize a settlement, as required by the written mediation settlement agreement voluntarily executed by the client. Such filing could protect the client from assessment of fees and costs as sanctions for failure to comply with the settlement agreement, if the opposing party initiates action to enforce the agreement and enforcement is ordered by the court.

Is a court filing under this circumstance unethical and a per se violation of Rule 4-1.7? Judge Evander who presided at the hearing on the motion to enforce Beaver's

settlement did not think so when he ordered enforcement or when he testified in this disciplinary proceeding. B-EX 26 at 9.

Finally, there is no caselaw authority or ethics opinion which support the Bar's position that the filing of motion to enforce settlement by plaintiff's counsel is a per se violation of Rule 4-1.7.

Under the circumstances presented in this case, the Referee's recommendation that Respondent be found guilty of conflict of interest in violation of Rule 4-1.7 is clearly erroneous and should be rejected.

B. Even if filing a motion to enforce a written mediation settlement agreement is found to constitute a per se violation of Rule 4-1.7, the violation is de minimus, caused little or no client injury, and does not justify the imposition of any discipline.

Rule 3-7.6 (k)(1)(B) of the Rules Regulating The Florida Bar mandates that a referee's report include "recommendations as to whether the respondent should be found guilty of misconduct justifying disciplinary measures." Hence, a guilty finding involves a two-step analysis: (1) finding a disciplinary rule violation and (2) deciding whether the misconduct warrants the imposition of discipline. Accordingly, the Rules Regulating The Florida Bar establish a process by which a referee may find a respondent guilty, without imposing a disciplinary sanction.

Moreover, this Court has approved a referee's findings of guilt as to a violation of a disciplinary rule, but determined that no discipline is warranted. See The Florida Bar v. Fetterman, 439 So.2d 835 (Fla. 1983), where this Court found specific disciplinary rule violations involving attorney advertising, but declined to impose a disciplinary sanction. Instead, Fetterman was cautioned against further use of the improper advertisement.

The de minimus nature of the violation is established by the testimony of Judge Will, Judge Monaco, and Judge Rouse, as quoted in the Statement of the Case and Facts. These judges confirmed that they did not recognize the filing of a motion to enforce settlement by plaintiff's attorney to be either a clear conflict or unethical. Neither did attorney La Rue when he made a similar filing because his client refused to comply with an agreed settlement.

Insofar as client injury is concerned, the Referee found:

> The possibility of potential injury to the clients from those two acts were very minimal in that I believe that the evidence clearly showed that the judge in both those cases was going to order the client to comply with the settlement that was reached in the mediation, and so that the amount of potential injury to the client from Mr. Rotstein's filing those pleadings in conflict with his client's interest is minimal, if any. There is

a potential injury to the client in each one, but it's minimal.

TR 479-480.

The Referee's finding confirms that enforcement of the Beaver and Petrucha written mediation settlement agreements was inevitable. Accordingly, it is a distinction without a difference as to which party made the filing which brought the clients' noncompliance to the court's attention.

Under these circumstances, even if Respondent's actions are found to be violative of Rule 4-1.7, the imposition of discipline is not warranted.

VII.

THE REFEREE'S RECOMMENDATION THAT RESPONDENT SHOULD BE FOUND GUILTY OF VIOLATING RULE 4-3.3, AS ALLEGED IN COUNT I, IS CLEARLY ERRONEOUS WHERE RESPONDENT TESTIFIED TRUTHFULLY AND FULLY DISAVOWED THE MISREPRESENTATION PRIOR TO, DURING, AND SUBSEQUENT TO THE GRIEVANCE COMMITTEE HEARING.

The instant case involves misrepresentation regarding Respondent's withdrawal from the representation of Jarrett which Respondent made during the course of a Bar/Grievance Committee investigation and which he fully disavowed prior to the Grievance Committee hearing at which time Jarrett's Bar Complaint was considered.

Rule 4-8.1(a) of the Rules Regulating The Florida Bar provides that a lawyer shall not "knowingly make a false statement of material fact" in connection with a disciplinary matter. This is the applicable disciplinary rule violation.

Respondent also was charged with and found guilty of violating Rule 4-3.3 of the Rules Regulating The Florida Bar (candor toward the tribunal) which prohibits the making of a false statement of material fact or law to a tribunal. The comment to this rule suggests that a tribunal is a court

proceeding. However, the instant case does not involve a false statement made in any court proceeding and further, does not involve any false testimony. Accordingly, Rule 4-3.3 does not apply. This Court should reject the Referee's recommendation of guilt as to a violation of Rule 4-3.3 as clearly erroneous.

V I I I .

THE REFEREE'S FINDING IN AGGRAVATION THAT RESPONDENT'S NONCOMPLIANCE WITH AN INSTANTER SUBPOENA DUCES TECUM, ISSUED BY THE GRIEVANCE COMMITTEE, CONSTITUTES BAD FAITH OBSTRUCTION OF THE DISCIPLINARY PROCEEDING IS CLEARLY ERRONEOUS IN THAT RESPONDENT HAD AN ABSOLUTE RIGHT TO ASSERT OBJECTIONS TO THE UNDULY BURDENSOME SUBPOENA AND, IF NECESSARY, TO SEEK PROTECTION FROM THE COURT.

Respondent complied with all subpoenas duces tecum, issued by the Grievance Committee requesting specific documents. TR 91, 343, 345. However, on August 16, 2000, representatives of the Bar appeared at Respondent's office at 10:00 a.m. armed with an instanter subpoena directing that the Bar's representatives be given immediate complete access to Respondent's entire computer system. R-EX 2; TR 91. Respondent believed the instanter subpoena to be unduly burdensome and contacted counsel [TR

93] who immediately asserted objections to the Bar staff investigators and Bar Counsel. TR 94. Counsel requested that the Bar consider issuing a new subpoena. TR 94; R-EX 2. Respondent was never served with a new subpoena. TR 94.

Nowhere in the Rules Regulating The Florida Bar is a Grievance Committee authorized to use its investigative power to create, in essence, a "search warrant." Respondent had an absolute right to object to an instanter subpoena duces tecum, issued by the Grievance Committee, that was unreasonable, unduly burdensome, disruptive, and did not adequately ensure that information pertaining to other clients contained within the law firm's computer system was protected from third-party scrutiny.[6] Respondent could

---

[6] Rule 3-7.11(g), Rules Regulating The Florida Bar recognizes that a respondent can claim a privilege or right properly available under applicable law in response to a Grievance Committee subpoena. The right to be free from unreasonable search and seizure is clearly such a right. The Rules Regulating The Florida Bar establish a procedure by which The Florida Bar can seek to have a respondent held in contempt for an improper refusal to comply with a Grievance Committee subpoena. The Bar did not take any action to obtain a judicial determination as to the validity of Respondent's objections.

and did promptly assert both objections as well as an intention to seek court review of the instanter subpoena should the Bar insist on compliance. Judicial review was unnecessary because in response to Respondent's objections, the Bar confirmed that it would not pursue the objectionable instanter subpoena, but would explore the possibility of a new subpoena. It never did.

In the absence of evidence that Respondent refused to comply with a subpoena that passed judicial muster, thereby requiring compliance, there is no basis for either the Bar to assert, or the Referee to find, bad faith obstruction of disciplinary proceedings. Accordingly, the Court should reject the Referee's finding [RR 5, TR 476] that Respondent's timely good-faith objection to the instanter subpoena constitutes bad faith obstruction.

IX.

THE BAR'S PRESENTATION OF WITNESS TESTIMONY THAT IS NEITHER THE SUBJECT OF NOR RELATED TO THE MATTERS THAT ARE THE SUBJECT OF THE BAR'S COMPLAINT CONSTITUTES A CLEAR VIOLATION OF DUE PROCESS AND IS FUNDAMENTAL ERROR WHEN SUCH TESTIMONY IS RELIED UPON BY THE BAR IN SEEKING AND BY THE REFEREE IN RECOMMENDING ENHANCED DISCIPLINE.

At final hearing, the Bar presented witness testimony pertaining to other allegedly unethical conduct that was unrelated to the allegations set forth in the Bar's Complaint for the purpose of arguing "cumulative misconduct" as a basis to enhance discipline. B-IB 14. The Bar's efforts in this regard began at the deposition of Judge Orfinger when the Bar attempted to elicit testimony regarding a "particular incident" of allegedly unethical conduct. The Bar did not pursue this line of inquiry at deposition when Respondent's counsel objected. Nevertheless, the Bar persisted in efforts to bring this matter to the attention of the Referee at final hearing through Respondent's testimony and the ostensible use of Judge Orfinger as a rebuttal witness.

The incident occurred, probably "five or six years ago". TR 432-433. At that time, Judge Orfinger was a circuit judge in the civil division. TR 426.

Respondent withdrew from the representation of plaintiffs who then asked for a continuance so they could secure new counsel. TR 427. Judge Orfinger later learned that Respondent's clients did not really want to go to trial and Respondent apparently indicated to them that Judge Orfinger wasn't going to give them another continuance so "apparently they concluded that if they discharged [Respondent], I would probably give them a continuance to engage new counsel and that they could then at some point later subsequently re-engage [Respondent]". TR 428. Judge Orfinger felt that was participating in something that "if not over the line, was awfully close to it." TR 428.

Judge Orfinger scheduled a hearing where Respondent's former client and Respondent were present. At this hearing, Judge Orfinger confronted Respondent and "although I disagree with the action that Mr. Rotstein and the clients did, to his credit, he didn't dodge the issue. He owned up to it and said, that's what we talked about; yeah, that's what we did." TR 429-430. Judge Orfinger then took "appropriate action" which was to "sanction" Respondent by suggesting that Respondent "take care of the attorneys fees." TR 428, 431.

Judge Orfinger did not formally issue an order. TR 431. He told Respondent that " he needed to take care of this" and "get the attorneys fees paid." TR 431.

Judge Orfinger testified that this incident was the "only incident that I ever had involving [Respondent] that I felt reflected some ethical concerns". TR 434-435. The incident did not change Judge Orfinger's opinion that Respondent is an honest person. R-EX 13 at 11. When specifically asked whether he believed the incident indicated a lack of honesty, Judge Orfinger stated:

> I don't think it was a lack of honesty. I think it was a -- I think it was poor judgment.
>
> I think that Jon's client's desperately wanted a continuance. And I think that they all talked about this and clearly did not think through the ethical ramifications of what it would look like to an outsider if you discharge your lawyer with the idea that there is a high probability that you may re-engage him in the future if you can get a continuance.
>
> But I don't think -- after conducting a hearing on this with the other lawyer present, with the clients present, questioning them all, and understanding that I was very unhappy, I did not come away with the idea that they sat down and carefully thought through this is how we're going to commit a fraud on the court.

> I think that it was just a case of not really thinking about it much at all, as opposed to intentionally trying to commit a fraud on the court.
>
> TR 435-436.

The incident described by Judge Orfinger, which occurred five or six years ago, is clearly outside the scope of the Bar's Complaint. Further, the incident did not result in disciplinary proceedings and the imposition of a disciplinary sanction. Accordingly, the incident does not constitute "prior misconduct" and should not be treated as either prior misconduct or the equivalent thereof in this proceeding. Nevertheless, the Bar used this incident as a basis to allege that Respondent was previously sanctioned for making "misrepresentations to a tribunal" which the Bar argued constituted a "pattern of misconduct". TR 448. Furthermore, the Referee's comments at final hearing, suggest that in recommending a disciplinary sanction the Referee considered the "totality of circumstances", including the incident described by Judge Orfinger that did not result in a "formal proceeding" -- not even a "court-ordered sanction." TR 481-483

The Bar relies upon The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981) as authority for the admissibility of evidence pertaining to the incident with Judge

Orfinger, arguing that it relates to questions of fitness to practice law and to appropriate discipline. B-IB 13-14. However, the Bar's reliance is misplaced. Stillman does not authorize the presentation by the Bar of uncharged misconduct to determine either fitness or discipline. In fact, this Court has receded from Stillman. See The Florida Bar v. Vernell, 721 So.2d 705 (Fla. 1998) wherein a referee's recommendation of guilt as to a specific disciplinary rule violation that was not charged in the Bar's complaint was rejected as violating due process:

> The United States Supreme Court has held that because Bar disciplinary proceedings are quasi-criminal in nature, attorneys must know the charges they face before proceedings commence. *See In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 122, 20 L.Ed.2d 117 (1968), *modified on other grounds*, 392 U.S. 919, 88S.Ct. 2257, 20 L.Ed.2d 1380 (1968). The absence of fair notice as to the reach of the procedure deprives the attorney of due process . . . . *See also Florida Bar v. Price*, 478 so.2d 812 (Fla. 1985) (rejecting "for due process reasons" referee's finding that attorney committed perjury at trial and during disciplinary hearing where perjury was not charged). Such matters may only be prosecuted after notice and due process concerns are met such as by a new proceeding. We recede from any language in prior opinions that may support a contrary result. See, e.g., *Florida Bar v. Stillman*, 401 So.2d 1306 (Fla. 1981). Vernell at 707.

See also The Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999) which reiterated the Vernell holding that "a finding of an uncharged rule violation based on conduct that

is not within the scope of the specific allegations of the complaint is a violation of due process." Fredericks at 1253 FN1. As stated by this Court in Fredericks:

> [U]nder our case law, specific findings of uncharged conduct and violations of rules not charged in the complaint are permitted where the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint. Fredericks at 1253.

Based upon the principle of due process and this Court's holdings in Vernell and Fredericks, it was error for the Bar to present, and for the Referee to consider, evidence of uncharged misconduct in determining discipline.

X.

THE REFEREE'S RECOMMENDATION OF A ONE-YEAR SUSPENSION, WITH OTHER CONDITIONS, FOR MISREPRESENTATION WHICH IS FULLY DISAVOWED PRIOR TO THE GRIEVANCE COMMITTEE HEARING IS CLEARLY EXCESSIVE AND CONTRARY TO EXISTING CASE LAW.

[Answer to Bar's Initial Brief]

A. Caselaw supports a suspension ranging from 10 to 90 days; mitigating factors warrant a 10-day suspension

This Court has rejected a referee's disciplinary recommendation that conflicts with existing caselaw. The Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997). In the instant case, the Referee has recommended a one-year suspension which the Bar seeks to increase to three years. However, neither the Referee's recommendation of a one-year suspension nor the three-year suspension recommended by the Bar is

supported by caselaw.

The Referee cites no caselaw in his report to support a one-year suspension.

In the Initial Brief, the Bar cites The Florida Bar v. Klausner, 721 So.2d 720 (Fla. 1998) to support a three-year suspension and asserts that the fraudulent conduct in Klausner is similar to Respondent's misconduct. B-IB at 17. However, the misconduct in Klausner involved forging signatures on multiple documents in multiple cases and making false statements to the court concerning the signatures. Criminal proceedings were brought. Klausner pled nolo contedere to felony charges of scheming to defraud, forgery and uttering forged instrument and no contest to misdemeanor charges of perjury when not in an official proceeding and making a false official statement.

It is difficult to comprehend any similarity between the instant case and Klausner[7]. Klausner's conduct was fraudulent and criminal. The misconduct in the

---

[7] The Bar also cites disbarment cases. However, like Klausner, these cases involve dissimilar conduct which is more egregious than Respondent's misconduct. The Florida Bar v. Orta, 270 So.2d 689 (Fla. 1997)(felony convicted attorney who was seeking reinstatement from a disciplinary suspension and who engaged in multiple offenses involving dishonesty, including making false statements under oath to government entities); The Florida Bar v. Budnitz, 690 So.2d 1239 (Fla. 1997) (allegations of making false statements of material fact to a grand jury which led to New Hampshire disbarment for knowingly making false statements in a disciplinary proceeding. This Court found it notable that Budnitz did not aver that the challenged conduct did not take place nor did he

instant case involves deceptive actions initially undertaken by Respondent (and later repudiated) in an effort to conceal error regarding his failure to timely file suit in the Mars matter.

This Court has recognized the distinction between fraudulent conduct and deceptive conduct in determining discipline. In The Florida Bar v. Varner, 780 So.2d 1 (Fla. 2001), an attorney placed a fictitious file number on a notice of voluntary dismissal of his client's claim against an insurer and submitted the fictitious notice to the insurer after he received settlement payment from the insurer, when in fact no lawsuit had been filed. The Bar sought a 91-day suspension citing as support cases involving fraud. However, this Court rejected the fraud cases cited by the Bar as inapplicable stating that the conduct at issue in Varner involved an "attempt to deceive, not an intent to defraud." Varner at 5. Likewise, this Court rejected the misrepresentation cases cited by Varner as support for the 30-day suspension that was

---

acknowledge the wrongful nature of the misconduct); The Florida Bar v. Cox, 718 So.2d 788 (Fla. 1998) (found guilty of 27 violations in four separate cases, several of which involved dishonesty and misrepresentation, including creating and signing various false documents to earn an extraordinary fee, and improper notarization of a will. Cox was previously disciplined for dishonesty and misrepresentation to his law firm and clients); and The Florida Bar v. Barenz, 500 So.2d. 1344 (Fla. 1987) (misconduct which included conversion of insurance premiums to her own use).

recommended by the referee because the cases cited by Varner did not involve "commission of a criminal act or the use of court documents as a means to deceive others". Varner at 5. In suspending Varner for 90-days, this Court relied upon The Florida Bar v. Morse, 587 So.2d 1120 (Fla. 1991). Morse failed to file a lawsuit prior to the expiration of the statute of limitations and when the error was discovered, he developed a deception to conceal the error. The 90-day suspension was based, in part, upon the fact that Morse did not inform the client of the true outcome or the fact that the firm had committed malpractice and that he did not advise the client to seek other counsel.[8]

Varner and Morse represent caselaw support for a 90-day suspension for deceptive conduct that involves an attempt to conceal error in the representation of a client. However, the instant case is less egregious than Varner in that it does not involve the commission of a criminal act or the use of court documents as a means to

[8] Unlike Morse, Respondent did take remedial action prior to the Grievance Committer's consideration: he disavowed his false statements; he admitted error to the Bar and the client; he suggested that the client contact counsel; and he did resolve the matter to the client's complete satisfaction.

deceive. In addition, the instant case is less egregious than Morse because of the remedial action undertaken by Respondent: disavowal of his misrepresentation; admission of error; suggestion to the client to obtain counsel; and resolution of the matter to the client's complete satisfaction. Accordingly, a suspension for 90-days or less as a disciplinary sanction is clearly warranted.

An examination of caselaw involving misrepresentation to the Bar or Grievance Committee suggests that a 10-day suspension would be the appropriate disciplinary sanction. See The Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997) (10 day suspension for numerous violations, specifically including misrepresentation to the Bar in letter responding to Bar inquiry). See also The Florida Bar v. Stockman, 370 So.2d 1146 (Fla. 1979) (60-day suspension for fabricating five explanatory letters to client regarding handling of his case which had been dismissed for lack of prosecution and initially denying the fabrication to the Bar Investigator. In a subsequent meeting with the Investigator and Grievance Committee member, Stockman admitted that he had panicked and fabricated the letters to cover his own negligence).

Moreover, although Respondent did not testify falsely nor was he found guilty

by the Referee of having testified falsely in disciplinary proceedings, an examination of caselaw involving false testimony in disciplinary proceedings suggests support for a suspension ranging from 10 to 90 days as appropriate. The Florida Bar v. Lund, 410 So.2d 922 (Fla. 1982) (10 day suspension for untruthful testimony before Grievance Committee); The Florida Bar v. Morrison, 496 So.2d 820 (Fla. 1986)(Morrison failed to timely file an appellate brief and then made misrepresentations to the Grievance Committee regarding the date of the mailing. Although Morrison recanted her testimony, she was unable to account for discrepancies in her representations subsequent to her recantation. Morrison was suspended for 10 days); The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979) (90 day suspension for lying under oath to the Grievance Committee, referee, or both to hide the fact that Neely took advantage of clients for own personal gain); hearing); and The Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997) (90-day suspension for misrepresenting material facts to the court, submitting a false affidavit, and deliberately trying to mislead the Bar by making

a misstatement in his initial response). [9]

In addition to caselaw analysis, this Court takes into consideration three purposes in determining appropriate discipline:

> [T]he judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.
>
> The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970).

Caselaw establishes a suspension ranging from 10 to 90 days based upon the misconduct involving misrepresentation that is the subject of Count I of the Complaint. In the instant matter, a suspension of 10 days is particularly appropriate, considering the three purposes of discipline in conjunction with the significant remedial action that Respondent undertook in an effort to correct his errors. Such remedial action is

---

[9] The Florida Bar v. Corbin, 701 So.2d 334, 337 (Fla. 1997) at footnote 1 cites cases ranging from public reprimand to 90-day suspension for making false statements to a court or deliberate lack of candor in legal proceedings.

evidenced by Respondent's disavowal of his false statements (which occurred prior to, during, and subsequent to the hearing scheduled by the Grievance Committee to consider Jarrett's complaint), his apology to Jarrett and the Bar, his compensation to Jarrett for his inaction, and his remorse.

B. The Referee's recommendation that Respondent be required to retake the ethics portion of the Bar exam as part of the disciplinary sanction should be rejected.

Requiring Respondent to retake the ethics portion of the Bar examination is an unduly burdensome sanction which is clearly unwarranted. Respondent's voluntary actions of disavowing the misrepresentation, apologizing, and making Jarrett whole, evidence Respondent's appreciation for ethical behavior. In addition, the substantial character testimony in the record establishes that Respondent's actions were an aberration and that he enjoys a good reputation for honesty in the legal community. Finally, the record also reflects that numerous judges made favorable comments regarding Respondent's character.

C. The Referee's recommendation that Respondent's failure to comply with "any of the above" shall be deemed cause to subject Respondent to further disciplinary proceedings should be rejected.

Respondent should only be subject to further disciplinary proceedings based

upon actions which are violative of the Rules Regulating The Florida Bar. He cannot be further disciplined for failure to "retake the ethics portion of the bar exam" and pay the costs of these proceedings. The Referee's recommendation to subject Respondent to further disciplinary proceedings for failure to comply with "any of the above" is clearly erroneous and should be rejected.

CONCLUSION

Respondent urges this Court to reject the one-year suspension recommended by the Referee as well as the three-year suspension recommended by the Bar as contrary to existing caselaw. In lieu thereof, Respondent respectfully requests that this Court find Respondent not guilty of a conflict of interest with regard to Counts II and III, and order a 10-day suspension, with payment of costs, as a disciplinary sanction for misrepresentation that is set forth in Count I of the Bar's Complaint.

Respectfully submitted,

_____

PATRICIA S. ETKIN
The Florida Bar No. 290742
WEISS & ETKIN

150 South Pine Island Road, Suite 320
Plantation, FL 33324
954-424-9272
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Respondent's Answer Brief and Initial Brief on Cross Appeal was forwarded by U.S. mail to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to: Elizabeth Sikora Conan, Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida 32804-6314, and John A. Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this _____ day of January, 2002.

_____
PATRICIA S. ETKIN

Counsel for Respondent

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that Respondent's Initial Brief is submitted in Times New Roman 14-point font, proportionately spaced.

_____
PATRICIA S. ETKIN
Counsel for Respondent