

**IN THE SUPREME COURT OF FLORIDA
(Before a Referee)**

THE FLORIDA BAR,

Complainant,

vs.

NICOLAS JESUS GUTIERREZ, JR.,

Respondent.

Supreme Court Case
No. SC11-1265

The Florida Bar File
No. 2009-71,055 (11M)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-7.6(a) of the Rules Regulating The Florida Bar, review of the Conditional Guilty Plea and Consent Judgment for Discipline was undertaken. All of the pleadings, notices, motions, orders, and exhibits are forwarded with this report and the foregoing constitute the record in this case.

The following attorneys appeared as counsel for the parties:

On Behalf of The Florida Bar: William Mulligan, Bar Counsel
The Florida Bar
444 Brickell Avenue
Suite M-100
Miami, Florida 33131

On Behalf of the Respondent: John A. Weiss, Esq.
2937 Kerry Forest Parkway
Suite B2
Tallahassee, Florida 32309

Respondent has submitted a Conditional Guilty Plea and Consent Judgment for Discipline (“Consent Judgment”) which provides for a one (1) year suspension with special condition that Respondent attend and successfully complete Ethics School within one year from the date of the Supreme Court’s order of discipline. Respondent is responsible for paying all fees and expenses incurred with such workshop and shall submit proof of completion of the course to the Bar’s headquarters office within thirty (30) days of completion.

The position of The Florida Bar, as approved by a Designated Reviewer of the Eleventh Judicial Circuit, is that Respondent’s plea be accepted.

II. FINDINGS OF FACT:

A. Jurisdictional Statement:

Respondent, Nicholas Jesus Gutierrez is, and all times hereinafter mentioned was, a member of The Florida Bar and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Narrative Summary of Case:

Based upon the Consent Judgment, my findings of fact are as follows:

1. In or around February, 2008, Respondent was retained by

Oramys Collera ("Collera") and Jose Duran, Jr. ("Duran") to facilitate the sale of their boat manufacturing business to Arnaldo Gomez, Jr. ("Gomez").

2. Pursuant to his representation, Respondent prepared the original Memorandum of Understanding ("MOU-1") to operate as a contract for the sale of the business.

3. On or about February 5, 2008, MOU-1 was executed by all the parties.

4. Approximately one year later, MOU-1 became the subject of imminent civil litigation. It was at this time that Respondent contends that he discovered that the file copy of MOU-1 contained several errors.

5. Those errors included duplicate provisions and page numbers as well as the omission of half of a section concerning the amount of money due to Duran.

6. Respondent instructed Daniel Espino ("Espino"), a law firm associate, to draft a complaint. Espino, a recent admittee to The Florida Bar, prepared a draft of the complaint, attaching MOU-1 as an exhibit, and citing to the numerous errors and omissions contained therein.

7. Upon reviewing the draft, Respondent discussed with Espino the errors and omissions in MOU-1. It is Respondent's contention that he advised Espino that the complaint could not be filed as drafted and he further advised Espino that Respondent

would redraft the complaint.

8. On or about February 20, 2009, Respondent created an altered version of MOU-1 ("MOU-2"), inserting the missing language regarding Duran's payment, changing the margins of the document, and deleting duplicate provisions.

9. Respondent changed the signature page of MOU-2 as follows:

a. He inserted the original Gomez signature from MOU-1 as the Gomez signature for MOU-2.

b. He created a new jurat for the Gomez signature on the top of page 5 of MOU-2 and backdated the notarization.

c. Collera's wife, Barbie Collera, contends that she signed her husband's name on MOU-2. Respondent notarized the signature.

d. He also used the two original witnesses (a current employee and former employee of the firm) to Collera's signature as set forth in paragraph iii above as witnesses to the new Collera signature on MOU-2. Both witnesses were not present when Collera's signature was placed on MOU-2 but had been present when Collera signed MOU-1.

e. In the case of the former employee referenced above, Respondent listed her address on MOU-2 as if she still worked at his firm. The

address, however, was the same as it had been on MOU-1.

f. Respondent inserted the notarized jurat for the original Collera signature from MOU-1 as the notarized jurat for the Collera signature on MOU-2 discussed in paragraph iii above.

g. He inserted the original Duran signature and notarized jurat from MOU-1 as the Duran signature and notarized jurat for MOU-2.

10. On or about March 26, 2009, Respondent attached MOU-2 as an exhibit to the complaint (identifying it as a true and correct copy of MOU-1) and filed the complaint in the Miami-Dade County Circuit Court.

III. RECOMMENDATION OF GUILT: Based on the foregoing, I recommend that Respondent be found guilty of violating Rules 4-3.3(a) (False Evidence; Duty to Disclose), 4-3.4(a) (A lawyer shall not unlawfully obstruct another party's access to evidence. . .), 4-3.4(b) (A lawyer shall not fabricate evidence . . .), and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit and misrepresentation) of the Rules of Professional Conduct.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

A. Having reviewed the record of these proceedings, I find that Respondent's plea and the recommendation of The Florida Bar as to the terms of discipline are both fair to Respondent and in the best interests of the public.

B. In mitigation, I considered that Respondent would have offered evidence in mitigation as follows:

1. Absence of a prior disciplinary record;
2. Absence of a dishonest or selfish motive;
3. Full and free disclosure to the Bar and complete cooperation during these proceedings;
4. Character and reputation; and
5. Remorse.

C. Additionally, I considered the following cases involving similar misconduct in my review of this matter:

1. Florida Bar v. Gelman, 504 So.2d 1228 (Fla. 1987)
2. Florida Bar v. Rotstein, 835 So.2d 241 (Fla. 2003)
3. Florida Bar v. Hagendorf, 921 So.2d 611 (Fla. 2006)

D. Accordingly, Respondent's Conditional Guilty Plea and Consent Judgment for Discipline and the terms of discipline recommended by The Florida Bar are accepted and hereby adopted as the recommendation of this Referee in this matter.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

Personal History of Respondent:

Age: 47

Date admitted to The Florida Bar: April 21, 1989

Prior Discipline: None

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS

SHOULD BE TAXED: I find that pursuant to Rule 3-7.6(q) of the Rules of Discipline, reasonable costs are to be awarded to The Florida Bar. The amount to be assessed against Respondent shall be determined by the undersigned and shall be addressed by a separate order.

Dated this _____ day of _____, 2012.

**HONORABLE CATHERINE MARY POOLER
REFEREE**

Copies to: John A. Weiss, Esq., Attorney for the Respondent
William Mulligan, Bar Counsel
Kenneth L. Marvin, Staff Counsel