IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GREGORY GLEN SCHULTZ

Respondent.

CASE NO. 87,298

TFB NO. 95-11,133(6E)

INITIAL BRIEF

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, Gregory Glen Schultz, will be referred to as "Respondent."

'RR" will refer to the Report of Referee in Supreme Court **Case No.** 87,298, dated September 3, 1996.

"TR-1" will refer to the Transcript of the final hearing in the disciplinary case styled THE FLORIDA BAR v. GREGORY GLEN SCHULTZ, Case No. 87,298, dated July 19, 1996.

"TR-2" will refer to the Transcript of the findings of fact announced by the referee in the case styled THE FLORIDA BAR v. GREGORY GLEN SCHULTZ, Case No. 87,298, dated August 2, 1996.

"TR-3" will refer to the Transcript of a sanctions hearing before the referee in Case No. 87,298, dated August 5, 1996.

"TR-4" will refer to the Transcript of the supplemental evidentiary hearing in **Case No.** 87,298, dated August 26, 1996.

"TR-5" will refer to the Transcript of hearing before a Bar Grievance Committee in Case No. 87,298, dated November 15, 1995.

"TFB EXH (#)" and RESP EXH (#)" will refer to Exhibits entered into evidence at the final hearing before the Referee.

"**Rule**" or "**Rules**" will refer to the Rules Regulating the Florida Bar. **"Standard"** or **"Standards"** will refer to the Florida Standards for Imposing Lawyer Discipline.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent was charged with fraudulent conduct outside the practice of law. The conduct concerned Respondent's efforts to avoid a legitimate debt owed to Kenna's Travel Service ("Kenna's"), a small travel agency owned by Ms. Renna Van Nortwick ("Van Nortwick"), with whom Respondent had a long-standing business relationship. Van Nortwick was not a client of Respondent. RR at 1.

Respondent was a steady customer of Kenna's for nearly a decade. TR-1 at 21-22. In March and April, 1994, he bought four airline tickets on credit from Kenna's.[1] The cost of the four tickets totaled $2,009.80. RR at 2. While purchasing these tickets, Respondent indicated an inability to pay for the tickets right then. TR-1 at 23. In response, Kenna's extended credit to Respondent for sixty (60) days.[2] Id.

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[1] Ticket 7749919491, round trip (Costa Rica) for Sydney Mawby; Cost: $492.95; purchased March 24, 1994.

Ticket 7749919615, round trip (Costa Rica) for Respondent; Cost: $511.95; purchased April 8, 1994.

Ticket 7749919616, round trip (Costa Rica) for Sydney Mawby; Cost: $511.95; purchased April 8, 1994.

Ticket 7749919746, round trip (Costa Rica) for Frank Stritar; Cost: $492.95; purchased April 29, 1994. TR-1 at 23-26; RR at 2

[2] Kenna's had previously extended credit to Respondent as a courtesy, usually for 30 days; see TR-1 at 23; 27; 49-50.

After 60 days, Respondent again stated he could not pay, so Kenna's extended credit another 60 days. TR-1 at 27-28. The debt went unpaid through the second 60-day period. Id. During this 120-day period, Respondent continued to purchase tickets from Kenna's, paid for by credit card. TR-1 at 29. At no time during this period did Respondent express any dissatisfaction regarding Kenna's services. RR at 3; pee also TR-1 at 32; 36; 52.

On September 16, 1994, Respondent ordered another ticket on his credit card; at that point, Van Nortwick requested that Respondent bring a check with him when he picked up the ticket, in order to pay the outstanding debt. RR at 2; see also TR-1 at 30-31. Respondent went to Kenna's to pick up the ticket and, pursuant to Van Nortwick's request, wrote a check in her presence for $2,000.00.[3] RR at 2; pee also TR-1 at 32-34. However, Respondent+ again represented that he could not afford to pay, so Van Nortwick agreed to allow him to post-date the check for 100 days, to December 26, 1994.[4] RR at 2. see TR-1 at 34.

Respondent left Kenna's and went that same afternoon to his

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[3] Van Nortwick allowed Respondent to "round off" the debt to $2,000.00. RR at 2; see TR-1 at 34.

[4] Respondent represented that an estate he was settling would surely be completed by Christmas, that he would earn $9,000 in fees from it, and that Kenna's would be paid from those fees; RR at 2; see TR-1 at 34.

bank, where he stopped payment on the check he had just issued. RR at 2. Van Nortwick held his check until after December 26, then attempted to deposit it into her bank account. Id. The check was dishonored and returned to Van Nortwick. Van Nortwick referred the matter to an attorney, who contacted Respondent; Respondent asked to be given until the end of January, 1995 to pay the debt, and Van Nortwick again agreed to extend the time.[5] Id. When payment was still not forthcoming by mid-February, 1995, Van Nortwick filed a small claims action and a Bar complaint. She eventually agreed to settle the suit for less than the $2,009.80 due. Id.; pee also TR-4 at 310.

A final hearing was held on July 19, 1996, at which Respondent, Van Nortwick, and others testified. Respondent denied all allegations of misconduct. Before the grievance committee, Respondent had previously contended that errors Van Nortwick supposedly had made on tickets purchased after the four subject tickets entitled him to a set-off on his prior debt; he vaguely asserted that he was justified in stopping payment on the $2,000.00 check because Kenna's services had been lacking with regard to the after-issued tickets. See TR-5 at 79-93; 133.

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[5] This last extension of time was negotiated through Penfield Jennings, Esq. RR at 2; see TR-1 at 41-43.

Respondent reprised this argument at the final hearing. The referee refused to credit this defense, dismissing it with this finding of fact:

> " . . . Prior to the [small claims] litigation [in 19951, Van Nortwick had no indication from Respondent that he objected to or was dissatisfied with her practices or services.

RR at 3. At trial, the referee also noted:

> ". . . The issue is not whether the stop payment wasn't proper. It's whether it was done with an improper motive." TR-1 at 123.

Beyond that, Respondent's entire defense was based on the premise that he had paid the debt on the four tickets, and stopped payment on the subject check because he disputed Van Nortwick's assertion that he still owed her for those tickets. See TR-1 at 124. Respondent contended that he was confused as to how much he owed, and whether he was paid up, and pointed to Van Nortwick's practice of not issuing monthly account statements as a source of his alleged confusion. TR-1 at 129.

However, Respondent admitted that he ordered, received, and did not pay for four tickets, ordered respectively on March 24, 1994, April 8, 1994 (two tickets), and April 29, 1994; to wit:

> Q: Do you disagree that you were granted credit by Ms. VanNortwick on those four particular tickets?
>
> A: Yes, she give me credit to put them on a bill.

TR-1 at 170. Respondent then asserted that on April 30 (the day after he ordered the last of the four tickets), he paid the entire bill, by tendering check 1782 for $1,235.95. TR-1 at 171.

In fact, Respondent testified that he wrote and issued two different checks at two different times for this same amount, $1,235.95, and personally tendered each such check Van Nortwick. TR-1 at 129-137; cf. TR-4 at 288. These two checks shall herein be identified as "putative" checks 1779 and 1782, because the Bar contends that Respondent's testimony concerning them is false, and that the documentary evidence of the checks' existence has been fabricated. That evidence consists of two original tissue carbons of checks 1779 and 1782 (i.e., the printed, carbonized tissues that underlay the original checks), which Respondent tendered to the referee.[6]

Significantly, Respondent admitted that neither check has ever been negotiated. TR-1 at 149. He further admitted that he never stopped payment on either check. Id.

Respondent testified that he wrote and personally tendered putative check 1782, for $1,235.95, on April 29, 1994 to Van Nortwick (TR-1 at 131), but he post-dated it to April 30th; see

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[6] Copies of the tissue carbons of putative checks 1779 and 1782 are attached and identified as Appendix Exhibits 1 and 2, respectively.

TR-1 at 158. Respondent asserted that, "a couple weeks later", Van Nortwick notified him that she had 'lost" or 'misplaced" the check, so Respondent issued the second putative check for the same amount. see TR-1 at 131-32. Respondent testified that he issued the second check 'in the first part of May." TR-1 at 163. He claimed that he also dated this second check 'April 30, 1994." Compare App. Exhibits 1 and 2.

Respondent gave conflicting and confusing testimony as to which putative check he issued first. **TR-1** at 160-63. As stated, he initially asserted that check **1782** was issued first. Later, he contended that check 1779 was actually the first one issued. See **TR-1** at 160. Respondent further maintained that he hand-delivered the second putative check. TR-4 at 288. Thus, Respondent testified that he personally delivered both checks to Van Nortwick. The originals of the two putative checks have never been produced.

Van Nortwick flatly denied that any such episode ever occurred. She denied that she had ever lost ***or*** misplaced any of Respondent's checks. **TR-1** at 60-61. She denied that she had ever received either putative check. Id. She denied that there had ever been any problem with any ticket Respondent had obtained from Kenna's. **TR-1** at **61-62.** She further testified that, prior

to her filing suit in 1995, Respondent had never disputed Kenna's ticketing or billing practices. TR-1 at 45.

On August 2, 1996, the referee issued his findings of fact. (TR-2). The referee credited and incorporated into his findings the testimony of Van Nortwick, essentially in its entirety. He disregarded the testimony and evidence offered by Respondent. The referee stated:

> "The Court finds that when Respondent tendered the $2,000 check to VanNortwick he did so with a dishonest, fraudulent, and deceitful intent, and with the intent to make a misrepresentation to VanNortwick as evidenced by his immediately stopping payment on the check. His act was contrary to honesty and justice."

TR-2 at 237. After issuing his main findings, the referee made the following comments about the evidence offered by Respondent:

> "Respondent tenders Exhibits 2 and 3. Exhibit 2 is a carbon that purportedly is a check, a carbon of a check, dated April 30, 1994 in the amount of $1,235.95 made payable to Kenna's Travel Service with various notations on it. The check number is -- the carbon indicates a Check No. 1779.
>
> "Respondent's exhibit 3 again is a carbon of what purports to be a check dated April 30, '94 made payable to Kenna's Travel Service in the amount of $1,235.95. The check was numbered 1782.
>
> "Respondent does not have the originals of these checks alleging that they were never cashed or negotiated by Kenna's Travel Service. Ms. VanNortwick testified, and the Court finds, that she never received these checks from Respondent.

> "T Court finds that these checks are a fabrication; that these were never tendered to Kenna's Travel Service. This is evidenced by the fact that Respondent's Exhibit [1 4-B is a check for which he does have the original, showing the front and back, dated April 6th, 1994, a check to Kenna's Travel Service in the amount of $1,235 even, is dated (sic) 1788, a date (sic) subsequent to the date (sic) on which he alleges these other checks were written."

TR-2 at 237-38 (emphasis added). (The latter-mentioned negotiated check, number 1788, is attached as Appendix Exh. 3.)

Based on Respondent's uttering of false testimony, and submitting fabricated documents to the Court, the Bar sought disbarment at the sanctions hearing held August 5, 1996, and supported its argument with case precedent. TR-3 at 243-57. Respondent's counsel then pleaded with the Court to postpone its recommended sanction until another evidentiary hearing could be held, and more evidence gathered and submitted, to refute the finding that Respondent had fabricated the two tissue carbons of checks 1779 and 1782. TR-3 at 257-61.

Bar counsel strongly objected to "any evidentiary hearing related to any additional evidence" on the fabrication of evidence issue. TR-3 at 261. The referee relented, however, and granted Respondent 'an opportunity to present documentary evidence concerning this issue since this is an extremely important part." TR-3 at 267.

A supplemental evidentiary hearing was held August 26, 1996. See TR-4. Respondent submitted his bank records as composite exhibits. Those exhibits were as follows:

Exhibit A: A summary listing of checks prepared by Respondent from other documents.

Exhibit B: A group of selected checks.

Exhibit C: A composite of several checks and bank statements obtained from the microfiche files of Respondent's bank.

Exhibit D: Another group of selected checks.

By these submissions,[7] Respondent hoped to show that the two out-of-sequence tissue carbons which the referee found to be fabricated were not the only checks Respondent had drafted out-of-sequence. Indeed, that was the only purpose for which the referee gave Respondent the opportunity to present additional evidence, as he reminded Respondent's counsel during the hearing:

> ". . . I opened [this hearing] up for Mr. Schultz to show me that he was in the habit of writing -- not in the habit, but occasionally wrote out-of-sequence checks."

TR-4 at 300. Significantly, Respondent did not provide Bar counsel with copies of the documents he intended to submit prior to the supplemental hearing. See TR-4 at 277. The documents

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[7] Relevant pages from these composite exhibits are attached and identified as Appendix Exhibits 4 through 7.

submitted by Respondent apparently were enough to show the referee that Respondent did occasionally write out-of-sequence checks, because he stated:

> "I'll strike the comments I made at the last disciplinary hearing concerning there being clear and convincing evidence that Mr. Schultz had manufactured evidence.
>
> I find that the evidence is not clear and convincing at this point concerning that. It's curious concerning those out-of-sequence checks, but nothing more."

TR-4 at 308-09. The referee then recommended that Respondent be suspended from the practice of law for six months, as sanction for stopping payment on the fraudulent $2,000.00 check. TR-4 at 309. The referee further ordered Respondent to make restitution to Van Nortwick for the difference between the actual debt, $2,009.80, and the amount Respondent had previously negotiated and paid to settle Van Nortwick's civil suit. TR-4 at 310.

As part of this Statement the Bar adopts and incorporates the testimony of Kenna Van Nortwick. The Bar also adopts the factual findings contained in the referee's report, as well as the oral findings he pronounced on August 2, 1996, which are supported by competent and substantial evidence. See generally TR-2. The only difference between those two announcements is that, in his oral findings, the referee discussed the two tissue

carbons at length before finding them to be a 'fabrication." TR-2 at 238. The Report of Referee omits this finding, and omits all discussion of the tissue carbons.

Supplemental Facts

In this Statement the Bar also asserts two supplemental facts for the Court's consideration. These two facts were not specifically found by the referee in this case; however, they are irrefutable, and readily proven by the documentary evidence Respondent tendered at the supplemental hearing.[8]

These supplemental facts are:

(1) Respondent did not have sufficient funds in his account to cover putative checks 1779 and 1782 at the time he says he drafted and delivered them to Kenna's;

(2) Putative checks 1779 and 1782 are the only two checks that appear out of sequence during the relevant time period of January, 1994 through May, 1994.

At the supplemental hearing, Respondent introduced Exhibits A, B, C, and D, which document the activity in Respondent's checking account for March, April, and May, 1994. That period of account activity is relevant because: a) Respondent incurred the

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[8] These facts were not established because Respondent did not provide the Bar or the referee with a fair opportunity to examine his additional evidence prior to submitting it.

subject debt during March and April, 1994; and b) May, 1994 is when Respondent says he attempted to pay Van Nortwick (which attempts are supposedly evidenced by putative checks 1779 and 1782).

From the above-identified exhibits, the Bar has assembled a chronology of Respondent's checking account activity from January 1, 1994, through May 31, 1994.[9] This chronology is published and discussed in the Argument, goat at 30-31. As will be explained, the chronology not only proves the two additional facts asserted above, it also proves what Respondent knew or should have known about the available funds in his checking account at all times from January, 1994 through May, 1994.

The Report of Referee **was** issued on September 3, 1996. Thereafter, the record of the case was forwarded to the Court. The Board of Governors of The Florida Bar considered the matter at its September meeting, and thereafter voted to file a Petition for Review, in order to seek disbarment of Respondent. The Bar filed its Petition for Review on October 4, 1996. This Initial Brief followed.

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[9] The chronology begins at January 1st in order to provide an accurate starting balance.

SUMMARY OF THE ARGUMENT

The Report of Referee clearly shows that Respondent testified falsely throughout the proceedings below, in an attempt to promote specious, incredible defenses. This conduct alone would warrant disbarment.

In addition, the evidence adduced at the final hearing, as well as the supplemental hearing, proves clearly and convincingly that Respondent submitted fabricated evidence in defending his fraudulent, dishonest, and deceitful conduct in stopping payment on the subject check.

The referee's reversal of his finding regarding fabrication of evidence is clearly erroneous, and without support in the record. The documentary evidence presented by Respondent at the supplemental hearing was, for all rights and purposes, irrelevant to the referee's earlier finding concerning fabrication of evidence. The only fact Respondent proved by his additional evidence is that, on a few occasions during the past four years, he wrote some out-of-sequence checks. In any given four-year span, practically anyone with a checking account will issue some out-of-sequence checks. The mere fact that Respondent occasionally wrote out-of-sequence checks, without more, proves nothing and means nothing; it is at best minimally relevant.

Yet, that fact was the only fact found by the referee at the close of the supplemental hearing. The referee held that this additional finding, by itself, was enough to overturn his previous finding that the evidence was fabricated.

Upon closer scrutiny, Respondent's additional evidence actually adds to the existing circumstantial proof that Respondent did, in fact, submit false evidence to the Court. The Bar argues that the referee reversed his prior finding primarily due to Respondent's obfuscation in the supplemental proceeding. Respondent confounded the proceedings and issues by offering selected bank records, and by failing to give the Bar or the referee a fair chance to preview the same. The Bar was unable to fully analyze the new evidence at the time it was presented, due to the posture of the case and the nature of the documents presented. Absent this obfuscation, the issue of fabrication likely would have been properly decided by the referee, as it had been previously.

ARGUMENT

I. DISBARMENT IS THE APPROPRIATE SANCTION FOR RESPONDENT'S UNDERLYING FRAUDULENT MISCONDUCT AND GIVING OF FALSE TESTIMONY IN THIS PROCEEDING.

A. Respondent Lied Under Oath and Presented Fabricated Evidence in Defending His Fraudulent Conduct.

The record provides ample evidence that Respondent repeatedly lied to the referee in attempting to fashion a plausible defense for his misconduct. The record shows that, with regard to all material factual issues, the referee credited Van Nortwick's testimony, and disregarded Respondent's version of events as not credible. Because there is no express finding that Respondent lied under oath, the Bar presents the following comparison between Van Nortwick's credited testimony and Respondent's discredited testimony.

In virtually every material respect, the testimony of Van Nortwick and Respondent were in direct conflict. Van Nortwick flatly denied that she had agreed not to deposit the $2,000.00 check until she and Respondent had an opportunity to reconcile their accounts. (TR-1 at 55). Respondent insisted that he had tendered the subject check conditioned on such an understanding, and that Van Nortwick had so agreed. TR-1 at 181.

Van Nortwick denied ever receiving putative check 1779. TR-1

at 59. She denied ever receiving putative check 1782. TR-1 at 60. Yet, Respondent testified that he personally delivered those two checks to Van Nortwick, at her place of business. See TR-1 at 131; TR-4 at 288.

Van Nortwick testified repeatedly that, prior to receiving Respondent's counterclaim to her small claims action, she received no indication whatever that Respondent was in any way dissatisfied with her services. TR-1 at 32; 36; 52. Respondent testified that he had discussed with Van Nortwick problems allegedly caused by two serious ticketing errors made by her. TR-1 at 135-36; cf. TR-5 at 79-83.

The referee disregarded Respondent's testimony with respect to these discrepancies; in any event, his testimony makes no logical sense. Respondent wants this Court to believe that Van Nortwick took personal delivery of the two putative checks, yet failed to negotiate either one. According to Respondent, Van Nortwick "lost" the first putative check (causing Respondent to issue the second one); the Court is left to wonder why he never stopped payment on that "lost" check.

Supposedly, Van Nortwick then found the "lost" check. At that point, she must have possessed both putative checks, because she found the lost check after Respondent allegedly replaced it

with the second putative check. According to Respondent, Van Nortwick told him that she would deposit the first check (the one she just 'found"), and tear up the second one and return the torn pieces to him. But, she never did deposit the "lost / now-found" check. Thus, the Court must suppose that Van Nortwick lost this check a second time, or failed to cash it for some unfathomable reason. The Court must further imagine that Van Nortwick neglected to send the torn remnants of the second check back to Respondent, since, as he testified, he never got them back.

Perhaps most incredibly, the Court must suppose that, during all the problems that she encountered in attempting to cash a check made out for $1,235.95, Van Nortwick never notified Respondent that the amount he owed was actually $2,009.80.

Moreover, after he settled Van Nortwick's civil claim nearly a year later, and it was apparent that neither putative check for $1,235.95 had ever been negotiated, Respondent still did not stop payment on either check. why? The only rational explanation is that neither putative check could be cashed, because neither had ever been delivered to Van Nortwick; yet Respondent manufactured the evidence to show that they had been delivered. Thus, it is highly significant that the referee specifically found that the putative checks were 'never tendered to Kenna's Travel Service"

and that Van Nortwick "never ever received these checks from Respondent." TR-2 at 238. It is equally significant that the referee did not withdraw either of those findings consequent to the supplemental hearing.

The referee found by clear and convincing proof that Respondent had stopped payment on the subject check with a fraudulent, deceitful, dishonest intent. By that finding, the referee clearly rejected Respondent's "payment" defense in its entirety. Thus, he found by implication that Respondent never was confused over the amount of the debt, that he never tendered to Van Nortwick putative checks 1779 and 1782 in a good faith attempt to pay the debt, and that he had not in fact paid or attempted to pay the debt (or some portion thereof) prior to the stop-payment episode. Similarly, the referee refused to credit Respondent's "set-off" defense, finding that, prior to the stop-payment episode, Respondent had never indicated to Van Nortwick any dissatisfaction with her ticketing practices. Thus, the clear import of the findings is that Respondent lied.

Also material is the fact that Respondent changed his explanation several times concerning why he stopped payment on the subject check. For example, before the grievance committee, Respondent testified that he stopped payment immediately after

issuing the subject check "because I thought in the interim she may try to pass it to a third party B.F.P. And I said no, I'm not going to have that occur." TR-5 at 87. During the same testimony before the grievance committee, Respondent stated that he stopped payment on the check because Van Nortwick might accidentally deposit it. See TR-5 at 110.

However, during the final hearing, Respondent was asked the following question and gave the following answer:

> **Q:** What is your testimony, Mr. Schultz, as to why you stopped payment?
>
> A: To the best of my recollection, it was over the fact that I remember paying all my bills current.

(TR-1 at 187). It is thus apparent that, by the final hearing, Respondent had settled on a 'payment" defense to explain his motives, which defense the referee rejected.

Van Nortwick presented a factual, straightforward account of a debt incurred by a steady customer that went unpaid for some time, and of her trusting, non-confrontational attempts to collect it. In contrast, Respondent presented a convoluted tale that included his confusion over the amount due, his attempts to pay a lesser, inconsistent amount, his contentions about mistakes on other tickets, and his legalistic reasons for stopping payment on the subject check.

The only conclusion one may draw in the face of these conflicting stories is that one party is lying. If one assumes, arguendo, that Van Nortwick is lying, what could be her motive? If we take as her motive her interest in having the debt paid, telling the truth would yield the same result as lying, so why lie? After all, Respondent admitted he had incurred the debt, and had not paid it (until he settled Van Nortwick's civil suit). In contrast, however, Respondent could possibly avoid a finding of fraudulent intent by creating billing controversies where none really existed, and by claiming that he had attempted, albeit unsuccessfully, to pay the bill. Thus, whereas Van Nortwick had no reason to conform her testimony to known facts, or to amplify her basic complaint, Respondent had every reason to insist that his motives were pure, and to fashion insubstantial defenses to support that contention.

The referee -- the person best able to judge the credibility of witnesses -- found Van Nortwick's testimony to be credible, and he failed to credit Respondent's contrasting testimony. This Court has held on many occasions that factual findings based on a referee's perception of credibility will not be overturned unless there is no support in the record for those findings. See The Florida Rar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). In the

instant case, the record provides ample support to uphold the referee's finding of Van Nortwick's credibility.

As is argued below, Respondent's putative checks are, in a word, fakes, which were manufactured and presented in order to cast doubt on the Bar's circumstantial proof of Respondent's wrongful intent. Respondent's testimony and evidence were crafted to show that he had no improper intent. Yet, the referee found by clear and convincing evidence that Respondent did act fraudulently and deceitfully.

Accordingly, the referee's published findings amount to an implicit finding that Respondent testified falsely, though the referee did not express such a finding. The record shows that, in addition to testifying himself, Respondent engaged two other witnesses and submitted numerous documents in advancing his defense. The referee obviously believed none of it, because his several findings, when viewed as a whole, lead to the inescapable conclusion that he considered Respondent's testimony to be false.

B. Disbarment is the Appropriate Sanction for Respondent's Misconduct and Perjury in the Disciplinary Proceedings.

Lying under oath is one of the most serious ethical breaches a lawyer can commit. This Court has stated:

'No breach of professional ethics, or of the law,

> is more harmful to the administration of justice, or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty."

The Florida Bar v. Agar, 394 So. 2d 405, 406 (Fla. 1980) (quoting Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1960).

The opprobrium associated with a lawyer's intentional advancement of false testimony is reflected in the Florida Standards for Imposing Lawyer Sanctions. Under Standard 3.0, the Court must consider Respondent's mental state, pursuant to which the referee correctly found that Respondent intended to deceive and commit a fraud upon Ms. Van Nortwick. Pursuant to Standard 5.1(f), in cases involving "dishonesty, fraud, deceit, or misrepresentation, disbarment is appropriate when "a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely affects the lawyer's ability to practice." Clearly, Standard 5.1(f) applies here, based on the referee's finding of wrongful intent as to the underlying misconduct; i.e., stopping payment on the subject check. As such, Respondent's "other intentional conduct" in lying to the referee, the grievance committee, and within Van Nortwick's civil suit militates for disbarment.

Under Standard 6.1 (and absent mitigating or aggravating

Circumstances), disbarment is appropriate when a lawyer "with the intent to deceive the court knowingly makes a false statement or submits a false document" to a court of law (emphasis added). The Bar has herein shown that Respondent lied under oath on several occasions and presented a fraudulent defense. Accordingly, the Court should apply Standard 6.1 and disbar Respondent.

As for mitigating or aggravating circumstances, the referee noted Respondent's prior discipline as a factor that must be considered by the Court in aggravation, pursuant to Standard 9.22 (a). See TR-3 at 249; RR at 3-4. The referee found Respondent's dishonest or selfish motive as further aggravation, pursuant to Standard 9.22(b). RR at 4. The referee found that, pursuant to Standards 9.22(g) and (h), Respondent's refusal to acknowledge the wrongful nature of his conduct, and the vulnerability of Ms. Van Nortwick also constituted aggravating circumstances. RR at 4.

Though not found by the referee, the Bar herein contends that, under Standard 9.22(f), Respondent further aggravated his misconduct by giving false evidence, and submitting false documents during the disciplinary process. Significantly, no mitigating circumstances were found.

In The Florida Bar v. McKenzie, 581 So. 2d 53 (Fla. 1991), McKenzie had been charged with collecting an excessive fee in a probate matter. As in this case, McKenzie submitted false testimony to the referee, and refused to acknowledge the wrongful nature of his conduct. This Court disbarred McKenzie.

In The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992), the Court held that "repeated misrepresentations and false testimony while under oath demonstrates an unfitness to practice law. Dishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members." Id. at 56. Graham had been charged with misappropriation of funds. He was found to have submitted false testimony throughout the disciplinary process, and was disbarred. Similarly, Respondent has testified falsely under oath throughout these proceedings. Like Graham, he has exhibited **a** marked disregard **for** the truth. Like Graham, he should be disbarred.

Though the case law reveals numerous examples where attorneys who rendered false testimony were given sanctions less than disbarment, those lesser sanctions are the exception, whereas disbarment is the rule. As the Agar Court explained:

> 'However, to the extent that those cases with lighter punishments do not substantially differ from the instant case in the degree of participation by the

attorney or some other significant factor, they represent the exception to the general rule of strict discipline against deliberate, knowing elicitation or concealment of false testimony."

Agar, 394 So. 2d at 406.

Respondent's conduct reveals a fundamentally dishonest character. He deceived and committed a fraud upon Ms. Van Nortwick in the underlying offense, and then lied to the Bar and to the referee, in addition to lying under oath within Van Nortwick's civil claim. This deceitful conduct, in addition to Respondent's underlying fraudulent conduct, warrants disbarment where no mitigating factors have been adduced, and where significant aggravating circumstances are proved to exist.

II. THE REFEREE'S REVERSAL OF HIS PREVIOUS FINDING THAT RESPONDENT HAD FABRICATED EVIDENCE IS IN CONFLICT WITH THE RECORD, AND IS CLEARLY ERRONEOUS.

A. The Reversal Is Inconsistent With All Other Findings of the Referee.

In issuing his findings of fact subsequent to the final hearing of this matter, the referee stated:

> 'The Court finds that these checks are a fabrication; that these were never tendered to Kenna's Travel Service. This is evidenced by the fact that Respondent's Exhibit [] 4-B is a check for which he does have the original, showing the front and back, dated April 6th, 1994, a check to Kenna's Travel Service in the amount of $1,235 even, is dated (sic) **1788**, a date (sic) subsequent to the date (sic) on which he alleges these other checks were written."

TR-2 at 237-38. After viewing the additional evidence tendered by Respondent at the supplemental evidentiary hearing, the referee stated:

> "I'll strike the comments I made at the last disciplinary hearing concerning there being clear and convincing evidence that Mr. Schultz had manufactured evidence.
>
> I find that the evidence is not clear and convincing at this point concerning that. It's curious concerning those out-of-sequence checks, but nothing more."

TR-4 at 308-09. The Bar contends that the referee's reversal on this factual finding is inconsistent with his other findings, and is therefore clearly erroneous. No competent, substantial evidence was adduced at the supplemental hearing that would support reversal of the original finding of fabrication.

Respondent's tissue carbon evidence raises a number of troubling questions. First is the amount of the checks. The tissue carbons purport that both checks were written for $1,235.95. However, that amount bears no relation whatever to the four ticket costs that comprise the subject debt. The ticket costs were, respectively, $492.95, $511.95, $511.95, and $492.95. No combination of these unit prices in any way totals $1,235.95.

It is apparent that, at some time previous to buying the four subject tickets, Respondent owed Kenna's Travel Service

$1,235.00 as a separate, pre-existing debt. This fact is evidenced by Respondent's issuance of check number 1788 to Kenna's Travel Service on April 6, 1994, in the amount of $1,235.00. See App. Exh. 3. Van Nortwick received and promptly deposited that check, and it cleared Respondent's bank on April 8, 1994, thus taking care of the antecedent debt.

Respondent knew or should have known that he paid $1,235.00 to Van Nortwick on April 6, 1994. However, some three weeks later, Respondent allegedly issued-a check for a near-identical amount, and thereafter allegedly issued yet another check for the same amount in order to 'replace" the putative check that had become "lost." The problem, of course, is that Van Nortwick had already cashed the first check -- the real check -- three weeks prior to the supposed issuance of the first putative check, and five weeks prior to the second one. The amount of the real check, and the amounts shown on Respondent's tissue carbons, are essentially identical -- and that amount bears no relation whatever to the four subject tickets.

Respondent offered no credible justification for the amount of the two putative checks, nor any credible reason as to why he wrote them. Further, he offered no credible explanation for the inexplicable notations that appear in his handwriting on the

disputed tissue carbons. See TR-1 at 162-66. He offered no credible explanation as to why the second putative check (tissue carbon) bears the same date as the first. See TR-1 at 163.

At times, Respondent's story confused even him. For example, concerning the "lost" check episode, Respondent first testified before the grievance committee that Van Nortwick told him (upon supposedly "finding" the first putative check) that she was going to cash the first check, and tear up the second. See TR-5 at 74. However, at the final hearing, Respondent testified:

> Q: Do you have an explanation as to why Ms. VanNortwick would not deposit one or the other of these checks into her account when you testimony is that she lost one and wanted a second one?
>
> A: I cannot explain it, because she told me when she found the second check, "I am depositing the second check and I am destroying the first."

TR-1 at 166-67 (emphasis added). Though this is one of the more glaring inconsistencies in Respondent's testimony, it is certainly not the only one. Respondent's testimony is riddled with statements that contradict each other.

For her part, Van Nortwick remembered receiving a check for $1,235.00; i.e., check 1788. See TR-5 at 43. However, she flatly denied ever losing or misplacing any of Respondent's checks, and denied that she had ever received either putative check. TR-1 at

59-60. The referee clearly credited Van Nortwick's testimony in this respect, as he did regarding all other material aspects of this case. Thus, he found, by implication, that Respondent had testified falsely about personally delivering, or otherwise transmitting, either or both checks to Van Nortwick.

The referee was concerned that checks 1779 and 1782 appear to have been written out of sequence with respect to Respondent's other checking account activity. (The disputed checks appear out-of-sequence only if one accepts Respondent's testimony as to when he wrote them.) However, the questions raised by the tissue carbons go beyond the mere fact that they were (according to Respondent) written out-of-sequence. For example, Respondent's bank records clearly show that, at the times he says he wrote and tendered putative checks 1779 and 1782, his account had insufficient funds to cover either or both checks. Moreover, the records clearly show that checks 1779 and 1782 are the only two checks that appear out-of-sequence in the relevant time frame; i.e., the first five months of 1994.

The following chronology of Respondent's checking account activity, drawn from his own documentary evidence, proves these material facts clearly and convincingly:

RESPONDENT'S OPERATING ACCOUNT

(Balance forward to January 1, 1994: $174.19)

JANUARY, 1994

CK#	DATE	PAYEE	DEBIT	CREDIT	(POSTED)	BALANCE
1769	*12/31/93*	FEDEX	*50.50*		*1/10/94*	124.69
D	*1/31/94*	*Deposit*		*600.00*		*724.69*
SC	*1/31/94*	*Service chrge*	11.22			713.47

FEBRUARY, 1994

CK#	DATE	PAYEE	DEBIT	CREDIT	(POSTED)	BALANCE
1770	*2/1/94*	Kenna's TRAV	449.35		*2/4/94*	264.12
1771	*2/1/94*	GREG SCHULTZ	*75.00*		*2/1/94*	189.12
D	*2/4/94*	*Deposit*		1500.00		1,689.12
1772	*2/4/94*	OHIO CENT.	1,460.95		*2/9/94*	228.17
1773	*2/7/94*	SAT PROGRAM	15.00		*2/15/94*	213.17
1774	*2/8/94*	CLW HIGH SCH	*50.00*		*2/17/94*	163.17
1775	*2/10/94*	TONY FRAZIER	160.00		*2/17/94*	3.17
1776	*2/10/94*	FEDEX	*62.00*		*2/17/94*	< 58.83>
D	*2/11/94*	*Deposit*		*250.00*		191.17
sc	*2/28/94*	*Service chrge*	11.24			179.93

MARCH, 1994

CK#	DATE	PAYEE	DEBIT	CREDIT	(POSTED)	BALANCE
1777	*3/1/94*	THOMPSON SHIP	805.00		*3/4/94*	< 625.07>
D	*3/4/94*	*Deposit*		*800.00*		174.93
1778	*3/11/94*	VOID*				*174.93*
1779	**Out of sequence**					**see below**
D	*3/18/94*	*Deposit*		*400.00*		**574.93**
1780	*3/21/94*	KUTCHINS BIS.	370.00		*3/28/94*	**204.93**
1781	*3/21/94*	SUNSTAR EMC	24.69		*4/1/94*	180.24
1782	**Out of sequence**					**see below**
SC	*3/31/94*	*Service chrge*	11.11			169.13

APRIL 1994

CK#	DATE	PAYEE	DEBIT	CREDIT	(POSTED)	BALANCE
D	*4/1/94*	*Deposit*		*5983.00*		6,152.13

1783	*4/5/94*	KUTCHINS BIS. 371.00		*4/8/94*	5,781.13
1784	*4/5/94*	FEDEX 56.50		*4/11/94*	5,724.63
1785	*4/5/94*	CAPITAL CONNEX 35.56		*4/12/94*	5,689.07
1786	*4/5/94*	INTERSTATE T. 150.00		*5/3/94*	5,539.07
1787	*4/5/94*	GREG SCHULTZ 100.00		*4/6/94*	5,439.07
D	*4/6/94*	*Deposit*	150.00		5,589.07
1788	*4/6/94*	Kenna's Tr. 1,235.00		*4/8/94*	4,354.07
1789	*4/8/94*	GREG SCHULT 1,100.00		*4/8/94*	3,254.07
1790	*4/15/94*	HART EQUIP. 1,182.09		*4/20/94*	2,071.98
1791	*4/25/94*	SYDNEY MAWBY 523.08		*4/28/94*	1,548.90
1792		VOID**			1,548.90
1793	*4/26/94*	FRANK STRITAR 931.72		*5/2/94*	617.18
D	*4/28/94*	*Deposit*	250.00		867.18
1794	*4/29/94*	FRANK STRITAR 733.77		*5/5/94*	133.41
SC	*4/30/94*	*Service chrge* 5.67			127.74
1782	*4/30/94*	***Kenna's Tr. 1,235.95***		**(NEVER *CASHED)***	---

MAY 1994

CK#	DATE	PAYEE	DEBIT	CREDIT	(POSTED)	BALANCE
1795	*5/3/94*	THOMPSON SHIP 225.60			5/6/94	< 97.86>
D	*5/4/94*	*Deposit*		300.00		202.14
1796	*5/9/94*	FEDEX 45.00			*5/13/94*	157.14
1797		VOID**				157.14
D	*5/13/94*	*Deposit*		*500.00*		657.14
1779	*4/30/94*	***Kenna's Tr. 1,235.95***			***(NEVER CASHED)***	---
1798	*5/13/94*	KUTCHINS BIS. 371.00			*5/23/94*	286.14
1799	*5/16/94*	COLUMBIA MA. 50.00			*5/27/94*	236.14
1800	*5/26/94*	FEDEX 77.00			*6/1/94*	159.14
1801	*5/31/94*	YMCA VOLLEYB 20.00			*6/9/94*	139.14
SC	*5/31/94*	*Service chrge* 11.42				127.72

* Copy of voided check provided by Respondent; **see** App. Exh. 6.
** Check identified as voided by Respondent within RESP EXH A; no copy of actual check available; **see** App. Exh. 7.

The above chronology accurately reconstructs Respondent's check register for the relevant time periods. The accuracy of this check register is hardly disputable, as it derives from

Respondent's own evidence. The chronology establishes these two uncontrovertible and highly relevant facts:

(1) Respondent did not have sufficient funds in his account to cover checks 1779 and 1782, either on April 29, 1994, or "two weeks later," on or about May 13, 1994 -- the respective dates on which he testified he drafted and delivered them to Kenna's.

(2) Checks 1779 and 1782 are the only two checks that appear out of sequence during this pertinent time period.

Respondent testified that, on April 29, 1994, he wrote and delivered to Van Nortwick putative check 1779, for $1,235.95. TR-1 at 131; TR-5 at 74. He testified that he dated the check April 30th. TR-1 at 158. However, the chronology of account shows that, on April 30, 1994, Respondent's available funds totaled $127.74.[10]

Respondent testified that, two weeks later (i.e., on or about May 13, 1994), he wrote and delivered to Van Nortwick the second putative check for $1,235.95. TR-1 at 131-32. He testified that he also dated this check April 30th, even though he issued in May. TR-1 at 163. However, the chronology shows

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[10] Any question the Court may have as to the accuracy of this daily balance, or of the chronology itself, can be answered by reference to Appendix Exhibits 4 through 7, from which the Bar reconstructed this chronology.

that, on May 13, Respondent's available funds totaled $657.14. It was indeed fortunate, from Respondent's perspective, that Van Nortwick never actually received or negotiated either putative check; if she had, Respondent's account would have been seriously overdrawn.

As for the second fact, a review of the chronology reveals that, of the 33 checks written on Respondent's account from January 1, 1994 through May 31, 1994, only two appear to have been written out of sequence -- the two putative checks that have never been cashed. This coincidence (which the referee called "curious"), coupled with the fact that Respondent had insufficient funds to pay the two checks when he says he drafted and delivered them, severely undermines Respondent's defense of attempted payment, while upholding the validity of the referee's original finding that the tissue carbons had been fabricated.

The above account chronology is highly relevant to the question of whether Respondent fabricated the tissue carbons and testified falsely concerning the same. Respondent admitted that he personally managed this account during the first five months of 1994, and performed monthly reconciliations on the account during that time frame. TR-5 at 105-06. He further stated that no other person balanced his account during that time frame. TR-1

at 108. Thus, the above chronology demonstrates what Respondent knew or should have known about his available funds during the months of March, April, and May, 1994. As such, Respondent's testimony concerning the putative checks must be false, because he knew at the time he wrote both checks that his account did not have funds sufficient to cover them.

The only rational conclusion is that Respondent never drafted or tendered either "check." When faced with Van Nortwick's Bar complaint, Respondent manufactured the tissue carbons in order to show that he lacked the intent to defraud Van Nortwick through the stop-payment -- and to undermine her credibility by claiming that she "lost" payments he which had conscientiously made. By showing that he had attempted to pay a lesser amount, and that the debt nonetheless remained because Van Nortwick had failed to cash either putative check, Respondent hoped to explain away the uncontrovertible fact of his stopping payment on a three-month post-dated check on the same day he wrote it. That is the only plausible explanation for his testimony and exhibits.

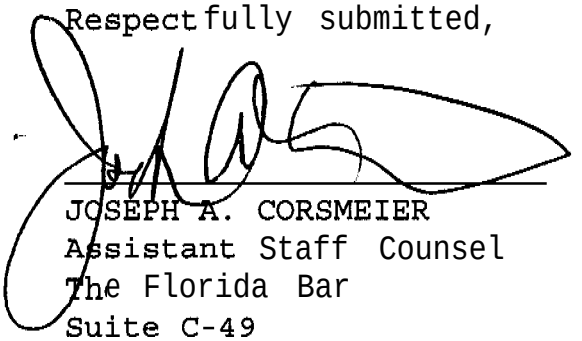
All the independent, competent evidence in this case clearly and convincingly shows that Respondent first committed a fraud upon Van Nortwick by stopping payment on the check, and then lied

under oath about the tissue carbons and the checks they supposedly represent. The referee's initial finding regarding fabrication of evidence was clearly correct, and his withdrawal of his prior finding on that issue must be rejected.

CONCLUSION

For the reasons shown above, this Court should disbar Respondent for his underlying fraudulent conduct and for testifying falsely under oath. Further, the referee's original finding that Respondent fabricated evidence should be reinstated, since there is clear and convincing evidence of the fabrication. In addition to the disbarment, Respondent should be required to make restitution to Ms. Van Nortwick, as prescribed by the referee.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief has been furnished by Regular U.S. Mail to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and copies have been furnished by Regular U.S. Mail to Jay A. Hebert, Esq., Counsel for Respondent, at The Hebert Law Group, P.A., Suite 1, 13560 - 49th Street North, Clearwater, FL 34622; and to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 by Regular U.S. Mail all this 6th day of November, 1996.

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