IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
	)	**Case No. SC95556**
Complainant-Appellee,	)	
	)	
v.	)	**TFB Case No.**
	)	**No. 99-50,564(15E)**
JEFFREY BRIAN LATHE,	)	
	)	
Respondent-Appellant.	)	
_____	)	

THE FLORIDA BAR'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES REGULATING THE FLORIDA BAR

FLA. STANDARDS FOR IMPOSING LAWYER SANCTIONS

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

Undersigned counsel hereby certifies that the brief of The Florida Bar is submitted in 14 point, proportionately spaced, Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

PRELIMINARY STATEMENT

The bar will refer to the Report of Referee as RR with an appropriate page reference. The transcript of the final hearing will be referred to as T, followed by a page reference.

STATEMENT OF THE CASE AND FACTS

In order to supplement the facts submitted by respondent and to highlight certain points, the bar submits the following.

On May 28, 1998, Jeffrey Lathe and his clients failed to appear for a deposition. RR, p. 2. On June 18, 1998, the Court ordered that the deposition take place on August 6, 1998. RR, p. 3. Again, there was no appearance. RR, p. 3.

On September 9, 1998, the Court held a hearing on the matter. RR, p. 3. During the hearing, Mr. Lathe falsely represented to the Court that he had been ordered to be at a pretrial conference in another proceeding on the date of the deposition. RR., p. 3. Subsequent to the hearing, Mr. Lathe sent a letter to the judge in furtherance of his

misrepresentation. RR, p. 4. This letter stated in pertinent part:

> Conflict case for August 6, 1998
>
> CCH Incorporated v. Floyd O. Wilder, Palm Beach County Court Case No. MS 98-11065 RF. I was contacted by the Judicial Assistant for Judge Jeffrey Colbath.

Neither Judge Colbath nor his judicial assistant contacted Mr. Lathe to attend a pretrial conference. RR, p. 4. Judge Colbath and his assistant could not have contacted Mr. Lathe to attend a pretrial conference since Mr. Lathe had not entered an appearance in CCH Incorporated v. Floyd O. Wilder prior to the pretrial. RR, p. 5.

When the information provided to the Court was proved false, a hearing was held and Mr. Lathe was ordered to pay attorney's fees in the amount of $7,225.40. RR, p. 5. The Court found that:

> The disobedience by Jeffrey B. Lathe was willful, deliberate or contumacious, not an act of neglect or inexperience and that the interference with the judicial proceedings and delay prejudiced Plaintiff through undue burden and expense. RR, pp. 7-8.

Judge Lockett further found that Mr. Lathe "engaged in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation and demonstrated utmost disrespect to the Court." RR, p. 8.

Mr. Lathe sought certiotati review of the order imposing sanctions and the Fifth District Court of Appeal upheld the award of attorney's fees. RR, p. 5; Lathe v. Florida Select Citrus, Inc., 721 So.2d 1247 (Fla. 5th DCA 1998). The Fifth District Court of

Appeal stated: "It takes chutzpah to admit to lying to a court and yet still seek review of an order imposing sanctions. The petition for writ of certiorari is denied." Lathe, 721 So.2d at 1247.

The referee found that Mr. Lathe violated R. Regulating Fla. Bar 3-4.3, 4-3.3(a)(1), 4-8.4(c), and 4-8.4(d) and recommended that a 91 day suspension be imposed. RR, pp. 5-6. The referee found two aggravating factors:

> 9.22(i) substantial experience in the practice of law (admitted since November 5, 1982).
>
> 9.22(j) indifference to making restitution (as evidenced by Judge Lockett's findings that respondent willfully and intentionally refused to comply with the Order of October 6, 1998 and that respondent obstructed justice by his willful and dilatory tactics). RR, p. 9.

The referee found one mitigating factor:

> 9.32(a) absence of a prior disciplinary record.

In making his recommendation, the referee stated:

> I believe that respondent's misconduct in this case calls for more than a public reprimand or short term suspension. Respondent made a knowing misrepresentation to the court. When he submitted a letter to Judge Lockett, he repeated his misrepresentation and ignored his opportunity to correct his misconduct. This referee is also disturbed by respondent's

failure to diligently pay the court ordered sanctions.[1] RR, pp. 10-11.

The current proceeding is brought by Mr. Lathe to contest the disciplinary recommendation of the referee.

SUMMARY OF ARGUMENT

A referee's recommendation of discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. The Florida Bar v. Niles, 644 So.2d 504, 506-507(Fla. 1994). The four cases cited by Mr. Lathe in support of his argument that the recommendation of ninety-one days is erroneous may be factually distinguished from the instant matter. A crucial distinction between the cases cited by Mr. Lathe and the instant matter is the fact that Mr. Lathe evidenced an indifference to paying the restitution that was ordered by the trial court and upheld by the Fifth District Court of Appeal. The bar does not agree with Mr. Lathe that the referee overlooked any additional mitigating factors. Generally, this Court "will not second-guess a referee's recommended discipline so long as that discipline has a reasonable basis in existing case law." The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997). Given that there is precedent for the imposition of a ninety-one day suspension for

[1]The failure to pay the court ordered sanctions refers to the fact that subsequent to the decision of the Fifth District Court of Appeal, Lathe failed to pay the sanctions and was held in contempt by the trial court. See, Bar exhibits 10, 11, and 12. After being jailed, Mr. Lathe obtained the funds to purge the contempt. T., pp 39-40, 57.

misrepresentation to a tribunal, the bar submits that the referee's recommendation should be approved.

ARGUMENT

A referee's recommendation of discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. The Florida Bar v. Niles, 644 So.2d 504, 506-507(Fla. 1994). In his report, the referee cited a line of short term, non-rehabilitative suspensions as well as a line of public reprimand cases but ultimately determined that this matter warranted more than a public reprimand or short term suspension. RR, pp. 9-10. The bar submits that this recommendation should be upheld.

I. THE CASES CITED BY RESPONDENT IN SUPPORT OF HIS ARGUMENT FOR A SHORTER TERM OF SUSPENSION MAY BE DISTINGUISHED.

Mr. Lathe has argued that he offered into evidence copies of several cases on the issue of the proper measure of discipline (Respondent's exhibit D) but the referee "absolutely failed to consider them, and made no mention of them in his Report." Respondent's Revised Brief, p. 9. The first case listed by Mr. Lathe was The Florida Bar v. Sax, 530 So.2d 284 (Fla. 1988). The referee noted the Sax case on page 10 of his report. Sax was an uncontested matter involving an improperly notarized pleading with a false factual averment and a public reprimand was imposed. Given that Mr. Lathe

concedes that this matter warrants at least a short term suspension, the bar will

not discuss the Sax case further nor the other public reprimand cases cited by the referee.[2]

The next case cited by Mr. Lathe that he provided to the referee was The Florida Bar v. Kravitz, 694 So.2d 725 (Fla. 1997). The referee was well aware of Kravitz since Mr. Lathe discussed the case in his final argument. T, pp. 79-80. Mr. Kravitz presented false evidence to the court, misrepresented to an individual that he would be arrested if the individual did not provide $4,000 by a certain time, misrepresented to opposing counsel that his trust account contained certain funds, and misrepresented to the court that opposing counsel had agreed to certain proposed orders. In deciding Kravitz, this Court noted that:

> In deciding to impose thirty days rather than ninety-one days, we are influenced by the fact that there has been no showing of any prior disciplinary infractions by respondent and by the fact that the referee has recommended probation. Kravitz, 694 So.2d at 728.

A key distinction between Kravitz and the instant case is that in Kravitz, the referee recommended only probation whereas the referee in the instant case recommended

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[2]These other cases were The Florida Bar v. Glant, 684 So.2d 723 (Fla. 1996), cert. denied, 117 S. Ct. 1334, 137 L.Ed.2d 502, 65 U.S. L.W. 3665 (1997); The Florida Bar v. Fatolis, 546 So.2d 1054 (Fla. 1989); The Florida Bar v. Batman, 511 So.2d 558 (Fla. 1987).

ninety-one days. The referee's recommendation should be given due deference.

The next case cited by respondent in support of a lesser term of suspension was The Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997). In Corbin, the attorney represented to the court in a motion for summary judgment that there was no issue of any material fact when he knew there was a genuine issue, submitted an affidavit signed by his client's mother that he knew was untrue, and misled the bar by misstatement in his initial response. The referee recommended a six month suspension which this Court reduced to ninety days. In aggravation, the referee found that Mr. Corbin, like Mr. Lathe, had substantial experience in the practice of law. The referee also noted that Mr. Corbin had a dishonest motive and a disciplinary history but his offenses were remote. The referee also considered in aggravation that Mr. Corbin had refused to acknowledge the wrongful nature of his conduct but this Court found that it was improper for the referee to have done so based on Corbin's claim of innocence.

An aggravating factor that was found in this case that was not present in Corbin is:

> 9.22(j) indifference to making restitution (as evidenced by Judge Lockett's findings that respondent willfully and intentionally refused to comply with the Order of October 6, 1998 and that respondent obstructed justice by his willful and dilatory tactics). RR, p. 7.

This Court should give this aggravating factor due weight in considering the referee's

recommendation of ninety-one days. By order of October 6, 1998, Lathe was required to pay plaintiff's attorney's fees in the amount of $7,225.40. RR, p. 5. Lathe requested a stay during the pendency of the certiorari proceedings which stay was granted by order dated December 9, 1998. Bar exhibit 9. In his motion to stay, Lathe represented that he was able to post a bond and at the hearing on the motion on December 2, 1998, Lathe orally represented to the court that he had sufficient assets to pay the sums ordered. Bar exhibit 10. By order dated December 23, 1998, the Fifth District Court of Appeal upheld the award of attorney's fees against Lathe. RR, p. 5. By order dated February 2, 1999, Judge Jerry T. Lockett, Circuit Judge of the Fifth Judicial Circuit in and for Lake County, Florida found as follows:

> The Court finds that Lathe has the present ability to pay Plaintiff's attorney's fees and costs taxed against him.
> Lathe willfully and intentionally refused to comply with the order of October 6, 1998.
> Lathe's willful and intentional misconduct frustrated and abused the judicial process and demonstrated his total disregard of the judicial system and this Court.
> Lathe's misconduct further caused injuries to Plaintiff and Plaintiff has incurred additional attorney's fees and costs because of Lathe's willful and intentional refusal to comply with the Court Order. Bar exhibit 10.

After being jailed for contempt, Mr. Lathe paid the sums due. T, pp. 39-40, 57. The harm inflicted on the adverse party as well as the disdain for the legal system shown by Mr. Lathe merit the ninety-one day suspension recommended by the referee rather than

the ninety days imposed in Corbin.

The final case relied on by Mr. Lathe in his brief was The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983). At the time of the final hearing, the bar brought Oxner to the referee's attention, T, p. 72, and the case is cited by the referee in his report. RR., p. 10. In Oxner, the respondent, for the purpose of obtaining a continuance, advised a trial judge in a telephone conversation that he had personally excused a key witness and could not reach him. After speaking with the respondent, the trial judge called the witness without difficulty and found that he was never excused by the respondent nor had he spoken with the respondent. The respondent sought review of the referee's recommendation of a sixty day suspension, and this Court approved the recommendation.

Oxner did not involve the time and expense to the opposing party or the delay in the proceedings as did the conduct in the instant case. Furthermore, Oxner did not involve the very troubling aggravating factor that is present in this case. At the hearing on September 9, 1998, Mr. Lathe lies to Judge Lockett. Bar exhibit 5. Judge Lockett warns that he intends "to contact that Judge's office and confirm what you've told me" and further warns him "but woo [sic] be it to you if it isn't so." Bar exhibit 5, pp. 10-11. Instead of taking this opportunity to be truthful, Mr. Lathe next sends a letter to the judge in furtherance of the misrepresentation. RR, p. 4. When his adversary finally ferrets out

the truth of the matter, Mr. Lathe seeks certiorari review of the sanction and refuses to pay it until he is jailed for contempt. This conduct, in the bar's view, makes the conduct more egregious than the conduct in Oxner as well as the other short term suspension cases and warrants the additional safeguard of proof of rehabilitation.

II. THE REFEREE CONSIDERED THE APPROPRIATE MATTERS IN AGGRAVATION AND MITIGATION.

Mr. Lathe has argued that the referee failed to note several matters in mitigation. The bar respectfully disagrees.

The first matter raised by Mr. Lathe was purported full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings. Respondent's brief, p. 12. This matter was disclosed to the bar, not by Mr. Lathe, but by Judge Lockett in a letter dated October 2, 1998. Bar exhibit 4. Mr. Lathe raised six matters in his Answer as Affirmative Defenses including that the statement made by him "was not regarding a material fact" and that the statement "occurred as a result of the conduct of an attorney which was in violation of the Guidelines for Professional Conduct of The Florida Bar." Mr. Lathe was referring to his opposing counsel, Xiao Bing Xu, in this affirmative defense. T, 59. This affirmative defense appears to suggest that somehow Mr. Xu caused Mr. Lathe to make a misrepresentation. The bar is not certain as to what evidence supports Mr. Lathe's argument for full and free disclosure or a cooperative attitude. The bar does note that after the conclusion of the evidence on guilt, Mr. Lathe did concede

some of the rule violations. T, p. 66. If the Court finds that there is evidence to support this additional factor, the bar submits that such factor deserves little weight.

The next factor asserted by Mr. Lathe was the existence of other penalties and sanctions. The referee was fully aware of the sanction to pay the other side's attorney's fees since, given the contempt finding, he considered it in aggravation under indifference to making restitution. Further, Fla. Stand. For Imposing Law. Sancs. 9.4(a) holds that forced or compelled restitution should not be considered in aggravation or mitigation. Had Mr. Lathe simply paid the attorney's fees when due, the bar submits that the conduct would not have been aggravating or mitigating. However, his contempt of his court ordered obligation imposed by Judge Lockett and upheld by the Fifth District Court of Appeal evidences an indifference to restitution pursuant to Fla. Stand. For Imposing Law. Sancs. 9.22(j) that mandates significant consideration.

The bar submits that the referee made no error. However, should this Court see other factors in mitigation, the bar submits that little weight should be given to them.

III. THE APPROPRIATE MEASURE OF DISCIPLINE IN THIS CASE IS THE NINETY-ONE DAY SUSPENSION RECOMMENDED BY THE REFEREE.

There is a line of cases where this Court has meted out rehabilitative suspensions to attorneys who chose to make knowing misrepresentations to a tribunal. For this proposition, the following cases were cited in the Report of Referee. See, The Florida Bar v. Cibula, 725 So.2d 360 (Fla. 1998) (Misrepresentations to court, regarding

attorney's income at hearings in connection with his alimony obligations, warranted a 91 day suspension); The Florida Bar v. Norvell, 685 So.2d 1296 (Fla. 1996) (Multiple violations including knowingly making a false statement of material fact to a tribunal warranted a 91 day suspension); The Florida Bar v. Schramm, 668 So.2d 585 (Fla. 1996) (Schramm was suspended for 91 days for making misrepresentations, including lying to the court with respect to his assertion that he had a calendar conflict in a motion for continuance, and for failing to represent his client); The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990) (Making misrepresentations to court and to opposing counsel to obtain a costs judgment warranted a six-month suspension); The Florida Bar v. Fischer, 549 So.2d 1368 (Fla. 1989) (The Supreme Court rejected a referee's recommendation of a 60 day suspension in favor of a 91 day suspension for perpetrating a fraud on the court); See also; The Florida Bar v. Kleinfeld, 648 So.2d 698 (Fla. 1994) (Violation of R. Regulating Fla. Bar 4-3.3(a)(1) by falsely impugning the honesty of a judge coupled with less serious violations resulted in three year suspension).

These cases were discussed at length in Mr. Lathe's brief, and the bar will not detail them again. Suffice it to say, that the bar does not agree that Mr. Lathe's conduct was less egregious than the cases wherein rehabilitative suspensions were ordered.

Discipline for misrepresentation runs the gamut of possible sanctions. In The Florida Bar v. Cibula, which involved misrepresentations to a court by an attorney in a

personal matter as opposed to the context of representing a client, this Court noted:

> In determining the appropriate discipline in this case, we have reviewed cases, like the present one, involving misrepresentations by an attorney to a court in a personal matter-- as opposed to misrepresentations made to others or misrepresentations made in the context of representing a client. The discipline imposed in those cases ranges from disbarment to suspension of more than ninety days to public reprimand. Like the present case, most of the cases where suspensions of more than ninety days were imposed involved only one of two instances of misconduct, and some even involved significant mitigating circumstances. Cibula, 725 So.2d at 364 [citations omitted].

The cases concerning attorney misrepresentation arise in many different settings and contexts, and the discipline imposed appears to turn on subtle factual distinctions. Generally, this Court "will not second-guess a referee's recommended discipline so long as that discipline has a reasonable basis in existing case law." The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997). The referee in the instant case had the opportunity to observe the testimony and demeanor of Mr. Lathe. The referee determined that rehabilitation was warranted, and the bar submits that the referee's recommended suspension period should not be decreased.

CONCLUSION

The referee's recommendation of a ninety-one day suspension requiring proof of

rehabilitation should be approved.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer Brief was served upon Jeffrey Brian Lathe, 303 Evernia Street, West Palm Beach, FL 33401, by regular U.S. mail this ___ day of May, 2000 and a copy to Billy Jack Hendrix, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300

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Ronna Friedman Young

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