Filing # 158184381 E-Filed 09/27/2022 10:47:03 AM

RECEIVED, 09/27/2022 10:48:21 AM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BRUCE JACOBS,

Respondent.

Case No.: SC20-1602

The Florida Bar File Nos.
2019-70, 188 (11H)
2019-70, 358 (11H)
2020-70, 056 (11H)

THE FLORIDA BAR'S REPLY BRIEF ON CROSS-REVIEW

Tonya L. Avery
Fl. Bar No. 190292
Bar Counsel
The Florida Bar
444 Brickell Ave, Ste. M100
Miami, FL 33131
(305) 377-4445
tavery@floridabar.org

Chris W. Altenbernd, Esq.
Fl. Bar No: 197394
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, FL 33602
(813) 221-1500
Fax No: (813) 222-3066
caltenbernd@bankerlopez.com

Patricia Ann Toro Savitz, Esq.
Fl. Bar No. 559547
Staff Counsel
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
(850) 561-5600
psavitz@floridabar.org

Joshua E. Doyle, Esq.
Fl. Bar No. 25902
Executive Director
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
(850) 561-5600
jdoyle@floridabar.org

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

A. Reply to the portions of Mr. Jacobs' answer brief that do not directly answer the Bar's initial cross-review brief. 2

B. Reply to the portions of Mr. Jacobs' brief that answered the Bar's initial cross-review brief. 12

I. The findings in the Report of Referee support a rehabilitative suspension; not a short suspension to deter future similar conduct. 12

II. Standard 7.1(b) supports a suspension as a sanction. 12

III. As recognized by the Referee, the aggravating factors clearly outweigh the mitigating factors. 12

A. Standard 3.2(b)(7) – refusal to acknowledge the wrongful nature of his conduct. 13

B. The overall balance of the factors does not eliminate the need for a rehabilitative suspension. 13

C. The case law, including two recent cases not available to the Referee, support a suspension of a year or longer. 13

CONCLUSION 17

CERTIFICATE OF SERVICE 18

CERTIFICATE OF TYPE SIZE & STYLE 19

TABLE OF AUTHORITIES

CASES

Azran Miami 2, LLC v. US Bank Trust, N.A.,
343 So. 3d 673 (Fla. 3d DCA, 2022) 3

Carrington Mortgage Services, LLC v. Nicolas,
343 So. 3d 605 (Fla. 3d DCA 2021) 4

JPMorgan Chase Bank, N.A. v. Llovet,
330 So. 3d 1006 (Fla. 3d DCA 2021) 7

JPMorgan Chase Bank, N.A. v. Llovet,
338 So. 3d 947 (Fla. 3d DCA 2021) 7

Ness Racquet Club, LLC v. Ocean Four 2108, LLC,
88 So. 3d 200 (Fla. 3d DCA 2011) 7

The Florida Bar v. Norkin,
132 So. 3d 77 (Fla. 2013) 13

FLORIDA STANDARDS IMPOSING LAWYER SANCTIONS

Standard 3.2(b)(7) 12
Standard 7.1(b) 11,12

RULES

Rule 9.410, Fla. R. App. P. 11

RULES REGULATING THE FLORIDA BAR

Rule 4-8.2(a) 7

OTHER AUTHORITIES

Martin A. Dyckman, *A Most Disorderly Court*, p. 12-13,116 (2008) 16

REPLY ARGUMENT

After a long delay, Mr. Jacobs filed an initial reply/cross-answer brief that substantially exceeded the permissible word count. He then moved this Court to file an amended brief that complied with the rules "without changing the arguments." However, Mr. Jacobs then filed an amended brief that is approximately 17,000 words long because he added 4000 words to the13,000-word limit rather than limit the reply portion of his brief to 4000 words. He added a large appendix, which this Court struck. Mr. Jacobs did not refile the appendix within the additional time provided by this Court.

The amended brief changed the structure of his arguments, adding additional case citations. The "answer" section of his brief is now the opening 57 pages, but only the content of pages 56 to 58 seems to address directly the issues raised in the Bar's cross-review of the recommended sanction. Mr. Jacobs' amended brief is primarily a very long reply brief addressing the issues related to the recommendations of guilt and adding new arguments that should not have been raised for the first time in a reply brief.

The Bar will respond briefly to the most objectionable arguments raised in the "answer" portion of Mr. Jacobs' brief, but it will not otherwise respond to portions of the "answer" that were really part of his reply brief. The Bar's reply brief will use the structure of Mr. Jacobs' brief in section A. In section

B, the Bar will reply to his limited arguments actually addressing the Bar's initial cross-review brief.

It should be noted that the section numbers in the headings identified in the table of contents of Mr. Jacobs' amended brief sometimes differ from the section numbers actually in the body of the brief. This reply will attempt to assist the Court in finding the location of each section in the answer portion of the brief.

A. Reply to the portions of Mr. Jacobs' answer brief that do not directly answer the Bar's initial cross-review brief.

Sections I and II. (AB:2-6).

In the Bar's initial statement of the facts, it explained that Exhibit 15, a motion to disqualify Judge Gundersen, was introduced as impeachment evidence to refute claims that Mr. Jacobs had changed his practice of attacking judges after the Third District issued its first order to show cause and after he apologized to that court. The Bar did not introduce this document as another count of the complaint or to seek another finding of guilt.

The Bar does believe that the continuing conduct of Mr. Jacobs in his filings, even in this case, confirm that a suspension for a longer period is needed – not to punish Mr. Jacobs – but to achieve true rehabilitation. But

Exhibit 15 plays little role, if any role, in assessing the length of the suspension that should be imposed in this case.

Section III. (AB:6-9).

The Bar has not sought disbarment in this case. Mr. Jacobs' claims that the Bar wishes to disbar him are simply incorrect. The Bar hopes that Mr. Jacobs can use the time of a rehabilitative suspension to address the causes of his conduct and to develop skills that will allow him to represent his clients effectively within the permissible range of good-faith legal argument.

The $40,000 he claims he has been ordered to pay as attorney's fees relates to a sanction order entered by the Third District on August 3, 2022. *See Azran Miami 2, LLC v. US Bank Trust, N.A.,* 343 So. 3d 673, 682 (Fla. 3d DCA, 2022). That case is pending in this Court on Mr. Jacob's notice seeking discretionary review. That case is not related to this proceeding. The fees imposed in that case are neither an aggravating nor mitigating factor for the determination of the proper sanction in this case.

Section IV. (AB:9-13) (issue presented in the brief, not in the table of contents).

This section discusses Mr. Jacobs' argument about his perceived First Amendment rights when filing pleadings and other documents for clients. It appears to relate to his review of the recommendations of guilt in the ROR. It is not an answer to anything in the Bar's cross-review initial brief. Thus, it is really part of his reply brief. Thus, the Bar does believe it has the right to respond to this argument despite the fact that it was placed in the answer section of his brief.

Section V. (AB:13-20)(as presented in his brief).

This section relates to his defense of selective prosecution, which is not relevant to the issue of the appropriate sanction. Again, the Bar does not believe it is allowed to reply to this content.

Section V(A). (AB:14-18) (section IV(A) in the table of contents).

This section argues that another lawyer lacked candor and impugned Judge Butchko. Mr. Jacobs argues that this lawyer should have been sanctioned. The Bar will not respond to this argument other than to point out that the Third District granted a petition for writ of prohibition, removing Judge Butchko when she was proceeding with contempt proceedings against the

lawyer mentioned by Mr. Jacobs. *See Carrington Mortgage Services, LLC v. Nicolas,* 343 So. 3d 605, 612 (Fla. 3d DCA 2021). That decision would seem to be an important fact that Mr. Jacobs has overlooked.

Section V(B). (AB:18-20) (section IV(B) in the table of contents).

This section deals with recent events in Hawaii. These events were not a part of the evidence in the proceedings before the Referee. The appendix containing information supporting this argument was stricken. This section of Mr. Jacobs' brief does not seem relevant to this Court's review of the appropriate sanction. Mr. Jacobs suggests that a bank is the driving force behind this disciplinary proceeding. Actually, a grievance committee found probable cause and the Board of Governors of The Florida Bar authorized the filing of this proceeding. No bank has played a role in this proceeding.

Section XIII. (AB:20-32) (Section V in the table of contents).

This section contains 5 subparts and discusses Mr. Jacobs' position that he had an objectively reasonable basis for what he said in the various pleadings. This argument is primarily a reply argument concerning the recommendations of guilt, but Mr. Jacobs may intend for this argument to

mitigate his sanction. The Bar will make limited comments addressing this section.

In subpart A, Mr. Jacobs claims that four attorneys testified that he had "an objectively good faith basis in fact" for the statements he made. (AB:22). Three of those witnesses testified exclusively at the sanction hearing. Richard Corona testified at the sanctions hearing that he had been mentored by Mr. Jacobs and had not witnessed misconduct by Mr. Jacobs. (TS1:132-146). He did not state that Mr. Jacobs had an objectively reasonable basis to make the statements at issue in this proceeding.

Marjorie Golant testified at the sanctions hearing. She testified that she had raised the robo-signing defense, and that some judges had found it meritorious, and others found it to be ridiculous. (TS2:5-6). She opined that Mr. Jacobs' reactions in court were due to his frustration. (TS2:16). She never said that Mr. Jacobs's statements were true, and she did not state that she believed that the judges who ruled against her arguments were dishonest, corrupt, or violating homeowners' constitutional rights.

Court Keeley was Mr. Jacobs' law partner for a time. (TS2:47). He testified at the sanction hearing. At the time of his testimony, his practice was not a foreclosure defense practice and included a substantial number of criminal cases. (TS2:47-48). He did some foreclosure work with Mr. Jacobs

and volunteered that he found the lack of due process in foreclosure cases shocking. (TS2:52-53). He believed that some of Mr. Jacobs arguments had merit, but he did not claim that the judges who had rejected those arguments were corrupt. He believed that Mr. Jacobs' "constant frustration": "led to this whole situation." (TS2:54).

Thus, these witnesses were not witnesses presenting evidence for Mr. Jacobs during the guilt phase of this proceeding. Their testimony tended to support the Bar's position that Mr. Jacobs needs a rehabilitative suspension to deal with the pent-up problems that are at least contributing to his repetitive violations of Rule 4-8.2(a).

In subsection B, Mr. Jacobs makes a similar claim that five judges testified on his behalf. He does not cite to the record. Judge Miller did testify during the guilt-phase hearing. (T2:142). He was uncertain whether he had sanctioned Mr. Jacobs but acknowledged that he had admonished Mr. Jacobs "from time to time." (T2:144). He was familiar with Mr. Jacobs' arguments and had ruled in favor of Mr. Jacobs on some arguments. When asked a question about a "good faith basis," he interrupted the question explaining that he did not think he could answer the question in "the way you've asked it." (T2:154). Judge Miller did not say that the judges on the Third District were acting improperly even though he had been reversed on

several occasions for ruling in favor of Mr. Jacobs. *See JPMorgan Chase Bank, N.A. v. Llovet,* 338 So. 3d 947, 948 (Fla. 3d DCA 2021); *JPMorgan Chase Bank, N.A. v. Llovet*, 330 So. 3d 1006 (Fla. 3d DCA 2021); *Ness Racquet Club, LLC v. Ocean Four 2108, LLC*, 88 So. 3d 200 (Fla. 3d DCA 2011).

In subsection C, Mr. Jacobs claims he still has a proper basis to say that this Court repeatedly declined to protect the constitutional rights of foreclosure defendants. But he now claims that he could properly say this because the Court "repeatedly declined to exercise jurisdiction so far." (AB-28). It is true that this Court has repeated declined jurisdiction in Mr. Jacobs' cases – because he has never presented this Court with a legal argument in any case that would have given this Court the constitutional authority to take the case.

Subsection D and E are similar and do not really relate to the issue of the appropriate sanction.

<u>Section XIV</u>. (AB:32-33) (Section VI in the table of contents).

In this section Mr. Jacobs claims he is protecting the rights of his clients and the integrity of the judicial system when he makes the comments discussed in the briefing. Mr. Jacobs tactics have undoubtedly delayed

foreclosures. Some clients have probably been able to stay in their homes longer than if they had been represented by a lawyer who confined his or her arguments to matters that could be alleged in good faith. When homeowners had no other defenses to a foreclosure because they had accepted the money from the bank to buy the house and then were unable to make the payments, his novel defenses and motions to disqualify judges may have been the only method to delay the foreclosure judgment. But the violations in this case involve impugning the integrity of judges, which is not a legal defense he was allowed to employ for his clients.

Section VIII. (AB:34-36).

In section VIII, Mr. Jacobs claims there is support for the defense of unclean hands. Obviously, the generic defense of unclean hands exists. But what Mr. Jacobs does not cite is any Florida appellate decision holding that the problems associated with robo-signing and the post-closing conduct of the people who securitized mortgages creates a defense that prevents a holder of a note secured by a recorded mortgage from foreclosing when the note is in default. Those issues might create legal claims by the people whose investments in the securitized mortgages were damaged by the post-closing misconduct. Those investors might reasonably sue the master

servicers or others involved in the misconduct that impacted the investments. But after the courts made it clear that the holder of the note had standing to enforce a note in default, his version of unclean hands simply was not a viable defense for the property owner in a foreclosure proceeding where the note was produced by the plaintiff or where a lost note was properly established by the plaintiff. This argument by Mr. Jacobs does not alter the fact that a two-year suspension is the appropriate sanction to address the violations in this case.

Section IX. (AB:36-42).

This section is a rambling discussion of the First Amendment, judicial independence, and other topics. It seems to be an argument aimed more at the sanction imposed by the Third District, than an argument addressing the proper sanction in this proceeding.

Section X. (AB:42-44).

This section discusses Mr. Jacobs' apology to the Third District and why he decided to raise selective enforcement as a defense when it became clear to him that his apology "was not working." (AB:43). He continues to assert his claim that all of his statements have a reasonable basis in fact. If

anything, this argument supports the Bar's position that a rehabilitative suspension is needed for the purpose of rehabilitation in this case.

Section XI and XII. (AB:44-55).

These two arguments are odd claims that "fruit of the poisonous tree" should prevent a sanction in this case. The argument begins with the premise that the Third District "initiated criminal contempt proceedings." (AB-44). That is simply incorrect. The Third District did not commence a contempt proceeding in which it could impose a criminal sanction such as thirty days in jail. It invoked its right to impose a sanction as specifically authorized by Florida Rule of Appellate Procedure 9.410. It had no need to recuse itself when it invoked this rule.

Section XIII. (AB:56-58).

This section is the only section that appears to answer an argument presented in the Bar's cross-review. It will be addressed later in this brief. *Infra* p. 13.

B. Reply to the portions of Mr. Jacobs' brief that answered the Bar's initial cross-review brief.

I. The findings in the Report of Referee support a rehabilitative suspension; not a short suspension to deter future similar conduct.

This argument does not appear to be discussed in the answer section of Mr. Jacobs' brief. The Bar continues to maintain that a recommendation of a 90-day suspension is not compatible with the Referee's findings of fact in the ROR.

II. Standard 7.1(b) supports a suspension as a sanction.

The amended answer brief makes no reference to Standard 7.1(b) whatsoever. Mr. Jacobs does not seem to understand the harm involved in filing pleadings that impugn the integrity of judges and courts. He never really explains why he can have an objective belief that judges are corrupt or violating people's constitutional rights by failing to accept his "systemic fraud" and "unclean hands" defense when he has never convinced any appellate court to adopt these theories. Standard 7.1(b) supports the imposition of a suspension and the facts in this case support a rehabilitative suspension of at least two years.

III. As recognized by the Referee, the aggravating factors clearly outweigh the mitigating factors.

Mr. Jacobs' brief contains a reference to aggravating factors only once – in a sentence claiming that those factors fit "opposing counsel's fraudulent misconduct" rather than his own. (AB:2). In the same sentence he claims that the mitigating factors apply to him because he "is fundamentally risking his livelihood to protect his clients' constitutional rights." Otherwise, he does not respond to this argument.

A. Standard 3.2(b)(7) – refusal to acknowledge the wrongful nature of his conduct.

Mr. Jacobs does not answer this argument. Instead, he makes it very clear throughout his brief that he does not believe his conduct is or was wrongful at all.

B. The overall balance of the factors does not eliminate the need for a rehabilitative suspension.

Mr. Jacobs does not answer this argument.

C. The case law, including two recent cases not available to the Referee, support a suspension of a year or longer.

Mr. Jacobs' amended brief partially addresses this argument on pages 56 to 58. These pages of his amended brief should be read by the Court in their entirety because they are a good synopsis of his position in this case.

Mr. Jacobs claims that the Bar is "intellectually dishonest" in its comparison of him to the respondent in *The Florida Bar v. Norkin*, 132 So.

3d 77 (Fla. 2013). (AB-56). But the Bar was careful to disclose to this Court the differences between Mr. Norkin's case and Mr. Jacobs' case. (Cross-IB. p. 76-77). The Bar submits that the comparison of these two cases supports a rehabilitative suspension and not a 90-day suspension.

Mr. Jacobs does not respond to the two newer cases discussed in this portion of the Bar's brief. Instead, he claims he had an "honorable motive" and was protecting his clients' constitutional rights by the statements attacking trial judges, the Third District, and this Court in documents filed for clients in various legal proceedings. The Referee found no such honorable motive. Whether Mr. Jacobs believes his assertion of an honorable motive or whether this claim is simply a statement that he now thinks will "work" better than his earlier apology, this claim is further confirmation that a rehabilitative suspension of at least two years is needed in this case.

It is abundantly clear that Mr. Jacobs has lost the ability to distinguish between a lawyer's disagreement with the result in a case, and a lawyer's discovery of facts establishing that judges or courts are acting unlawfully or dishonestly. Even now, he argues that his statements impugning judges and courts at all levels are objectively reasonable because he is right and they are wrong about the application of the UCC to notes and mortgages, and a holder's standing to enforce notes and mortgages. Because he maintains

that he has decided he is right about the law and the judges' decisions do not follow his views, he claims he can state in pleadings for clients that those judges and courts are violating the constitutional rights of homeowners and that the judges are co-conspirators with an evil banking industry.

To be clear, it is a rare lawyer who has practiced as long as Mr. Jacobs who does not believe in his or her heart that the lawyer lost a case that should have been won. One of the hardest parts of being a zealous advocate is the lingering sense of disappointment in oneself and in the judicial process when a lawyer fervently believes that his or her position is correct, and yet the decision-maker sees it otherwise.

Indeed, even trial judges sometimes feel that way when they are reversed by a higher court. And appellate judges sometimes feel that sense of disappointment when the opinion they write is only a dissent for themselves.

But a lawyer must have the ability to accept the final outcome of the judicial process as the legitimate outcome of a constitutional, adversarial process – without regard to whether that final decision comes from a single trial judge or an appellate court. The rule of law, which is vital to the existence of our state as a constitutional democracy, depends upon each

lawyer's ability to see beyond his or her personal belief as to what the law should be and to accept the final outcomes of courts.

It is a lawyer's right, if not actually a lawyer's obligation, to engage in vigorous free speech to advocate changes in the law when a lawyer believes those changes will make the law of Florida better. But it is not the right of an officer of the court to accuse judges and courts of unlawful actions because they will not adopt the changes advocated by the lawyer.

The Bar fully recognizes that it can be a lawyer's or a judge's duty to report actual, unlawful conduct by a judge or justice. When Judges Joseph McNulty and Robert Mann reported the misconduct of Justice David McCain to the JQC in 1973, they had an objectively reasonable basis to make that report and their courage played a role in changing history. Martin A. Dyckman, *A Most Disorderly Court,* p. 12-13,116 (2008).

But regrettably, Mr. Jacobs is persisting in an unending pattern of impugning judges and the courts when he has no objective factual basis for his claims. He either cannot grasp, or at least claims the inability to grasp, the difference between advocating for changes in the law and perceiving corruption in the judicial process where it does not exist. One way or the other, he has no remorse for his misconduct.

Until he takes the steps needed to address this problem, whatever its cause may be, he will continue to harm the reputation of judges and the judiciary by his false claims. And the public cannot be safely represented by him because he will continue to conflate their valid legal objectives as his clients with his own objectives as David taking on Goliath.

CONCLUSION

The Bar asks this Court to accept the Referee's three findings of guilt. It asks that the Court reject the recommendation of the Referee for a non-rehabilitative, 90-day suspension and impose at least a two-year rehabilitative suspension. The Court should impose the costs recommended by the Referee.

Respectfully submitted,

/s/ Chris W. Altenbernd
Chris W. Altenbernd, Esq.
Florida Bar No: 197394
Email: service-caltenbernd@bankerlopez.com
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, FL 33602
(813) 221-1500
Fax No: (813) 222-3066

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 27th day of September, 2022, to:

David J. Winker David J. Winker, PA 4270 S. Lejeune Rd. Coral Gables FL 33146 (305) 801-8700 dwinker@dwrlc.com *Attorney for Respondent*	Bruce Jacobs Jacobs Legal, PLLC Alfred I. Dupont Building 169 E. Flager St., Ste. 1620 Miami, FL 33131 (305) 358-7991 efile@jakelegal.com Attorney for Respondent
Richard A. Greenberg Rumberger, Kirk, & Caldwell 101 N. Monroe St., Ste 120 Tallahassee, FL 32301 rgreenberg@rumberger.com docketingorlando@rumberger.com rgreenbergsecy@rumberger.com *Attorney for Respondent*	Tonya L. Avery Bar Counsel The Florida Bar 444 Brickell Ave, Ste M100 Miami, FL 33131 tavery@floridabar.org Attorney for The Florida Bar
Patricia Ann Toro Savitz, Esq. Staff Counsel The Florida Bar 651 E. Jefferson St. Tallahassee, FL 32399 psavitz@floridabar.org *Attorney for The Florida Bar*	

/s/ Chris W. Altenbernd
Chris W. Altenbernd, Esq.

CERTIFICATE OF TYPE SIZE & STYLE

I certify that this document complies with the applicable font and word count limit requirements of Florida Rule of Appellate Procedure 9.045. The font is 14-point Arial. The word count is 3479. It has been calculated by the word-processing system and excludes the content authorized to be excluded under the rule.

/s/ Chris W. Altenbernd
Chris W. Altenbernd, Esq.