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IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.: SC21-933

The Florida Bar File No. 2020-30,738(9A)

THE FLORIDA BAR,

Complainant,

v.

ODIATOR ARUGU,

Respondent.

RESPONDENT'S ANSWER BRIEF AND CROSS-INITIAL BRIEF

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PREFACE

This matter is before the Court on The Florida Bar's Petition for Review and the Respondent's Cross-Notice of Intent to Seek Review. For the sake of simplicity, Respondent is submitting a combined Answer Brief and Initial Brief. The Answer Brief is contained within pages 7 through 16. The Initial Brief of Respondent is contained in pages 16 through 21.

The Respondent/Cross-Petitioner, Odiator Arugu, will use the following designations and references as set forth below:

The Respondent/Cross-Complainant will be referred to as "Respondent".

The Complainant/Cross-Respondent will be referred to as "The Florida Bar" "TFB" or "the Bar".

Citations are to the record, including to the appropriate "Tab" number in the Index of Record.

Citations to "ROR" refer to the Report of Referee dated December 9, 2021 (Tab 34 in the Index).

Citations to "Tr." are to the transcript of the final hearing held on November 10, 2021.

Page numbers, where appropriate, will follow the page number and a colon (for example, Tr. 112:14 for page 112, line 14).

Citations to “Resp. Ex.” correspond to the exhibits Mr. Arugu admitted into evidence at the final hearing.

Citations to “TFB Ex.” correspond to the exhibits TFB admitted into evidence at the final hearing.

STATEMENT OF THE CASE

As the Statement of the Case and Facts of The Florida Bar is substantially accurate, the Respondent is not providing his own Statement of the Case and Facts. However, the Respondent’s argument will contain substantial additional facts interwoven with argument, with appropriate citations to the record.

SUMMARY OF ARGUMENT

The Florida Bar has petitioned for review seeking a rehabilitative suspension. Because the record reflects that the Respondent acted with negligence rather than intent, the 60-day suspension recommended by the Referee is an already-harsh sanction under the facts, case law, and standards.

The Respondent has cross-petitioned for review as to the recommended findings of guilt as to as to Rule 4-3.4, 4-4.1 and 4-8.4(c). Respondent contends that the Referee’s findings are not supported by evidence in the record. Respondent contends that he negligently believed

that his additions to the Freedom Mortgage Subpoena were minor and therefore allowed. This does, however, subject him to a finding of a violation of Rule 3-4.3 and Rule 4-8.4(d). Therefore, the appropriate sanction is a short-term suspension, in the range of thirty (30) to sixty (60) days, when Respondent's disciplinary history[1] is used as an aggravating factor.

ARGUMENT

I. ANSWER BRIEF - THE SUSPENSION ORDERED BY THE REFEREE IS A HARSH SANCTION IN LIGHT OF THE FACTS OF THIS CASE

A. STANDARD OF REVIEW

This Court's scope of review is broad when reviewing a referee's recommended discipline. *See Fla. Bar v. Altman*, 294 So. 3d 844, 847 (Fla. 2020). "[U]ltimately, it is the Court's responsibility," not the referee's, "to order the appropriate sanction." *Id.*; *see also* Art. V, § 15, Fla. Const. "[G]enerally speaking, this Court will not second guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions." *Fla. Bar v. Norkin*, 183 So. 3d 1018, 1023 (Fla. 2015).

B. ARGUMENT

[1] Respondent's prior discipline was not competence, but as to trust account keeping. (T. 66:10-12)

The Respondent did not engage in a bait and switch. That was a gross overstatement of what took place. (Tr.9:1-2) It is not clear how the additional items added to the subpoena would have necessarily helped the divorce case, but the Respondent was simply trying to cover all bases in serving his client's interests, and in defending against the claims of his client's father-in-law, David Filippone. The fact that he was trying to be thorough and complete is reflected in the testimony that all documents were not turned over to opposing counsel, pending the receipt of all requested documents from the lender. Before Respondent could gather all of his requested documents and turn them over to opposing counsel, he was disengaged from the case. (Tr. 106: 2-22)

Far from a case of deliberate or intentional dishonesty to gain advantage or hide information from the opposing party, this is clearly a case of a mistake in applying or understanding the family law rules as they applied to the subject Freedom Mortgage subpoena. Pursuant to the Standing Board Policies of The Florida Bar, 15.70, the Bar should not seek disciplinary action in the event of an isolated instance of malpractice. (Fla. Bar Stdng. Board P.) None of the disqualifying factors were present here, and the grievance committee should not have even found probable cause.

Mr. Filippone's name was on the deed with Mr. Rodriguez and the

wife. (Tr. 29:11-16) Even the deed was not readily available due to Mr. Rodriguez being employed in law enforcement; those deeds are protected from public view. (Tr. 31:1-7; Tr. 54:6-17) Mr. Filippone testified that his name was on the loan as well. (Tr. 37:4-7) Because this had not come to the attention of the attorneys in the case for several months, it was subject to extra scrutiny as a possible tactic by the wife. (Tr. p. 86-87; Tr. 115:1-14) Therefore, the subpoena was justified, as well as all of the categories of discovery included, even those that were added later. Through oversight, the Respondent failed to include all of those categories in the Subpoena attached to the Notice of Production Non-Party, and he thought it harmless and acceptable to add categories of requested documents. (Tr. 104:8-17)

Mr. Filippone also testified that he was worried about his credit going bad. (Tr. 42:11-12) The loan documents and credit reports requested of all parties, Mr. Rodriguez, the wife and Mr. Filippone, would have shed light on the issue as to whether Mr. Filippone was needed to obtain the loan. The Respondent's client had maintained that this was not necessary, as his own credit was sufficient. (Tr. 114:24, 115:4) Thus Mr. Rodriguez' fear of whether Mr. Filippone's claim was some tactic by his wife (Mrs. Rodriguez) to enhance her share of the home.

It also appears clear that there were behind-the-scenes actions that

led not just to the filing of the Bar complaint (Tr. 27-33), but also to a settlement which took place within just days after the Respondent was substituted out of the case. (Tr. 116:9 – 117:23) This activity in the shadows should also make the Court question whether the sanction is appropriate. Mr. Filippone did not want anyone to get into "his business," but he interjected himself in this when he claimed to have an interest in the home. He stated that his name was on every piece of paper, yet the Respondent's client did not believe that to be the case. (Tr. 34:23 - 35:2) Respondent stands accused of dishonesty and is facing a significant sanction, yet clearly those on the other side of the case – and even his own client – were concealing things from him.

Mr. Filippone may have believed that Mr. Luther (his daughter's attorney) had objected to the issuance of the Subpoena, yet there was no formal objection filed, just a letter demanding the retraction of the subpoena. (TFB Ex. 6: Tr. 122:11-13) The testimony was disputed as to whether Judge Higbee was overly concerned about the Subpoena. (Tr. 40; Tr. 162; Tr. 112) Certainly, that issue did not result in her issuing any sanctions order, and because of the intertwined issues that were argued at that hearing, it is not clear that the subpoena was of significant concern to her. All those persons aligned against the Respondent and his client

testified one way, and the Respondent testified the other way, but there was no documentation in the court minutes, nor a finding in a court order that suggest that Judge Higbee took a particularly dim view of what had transpired. (Tr. 40; Tr. 162; Tr. 112) Respondent is unequivocal that Mr. Luther brought up the Subpoena as the hearing was concluding. (Tr. 112: 1-7) This is consistent with the testimony of Attorney Hennen (Tr. 75:1-15), and it is consistent with Mr. Luther's testimony that the hearing was largely handled by Mr. Hennen. (Tr. 172:5-9)

Though he said it was none of the Respondent's business, Mr. Filippone admits that the file from the mortgage company would have reflected that he was making some of the mortgage payments. (Tr. 42:4-25) The Bar complaint was filed in respect to the Subpoena within a week of that Subpoena being filed. (Tr. 48-49) It can't reasonably be disputed that the intent of the Bar complaint was to gain an advantage in the civil dispute, even though it did not come to the Respondent's attention for several weeks.

It is important for this Court to remember that there is no specific requirement that a subpoena for documents be filed with the Court after it was served. The Respondent acknowledges that he thought that his Subpoena only had to be in substantial conformity with the one attached to

the notice, yet the fact that he filed the Subpoena, which would then be sent to opposing counsel electronically, overwhelmingly demonstrates that he was ignorant that there was any impropriety at that time. (Tr. 131:2-6) He only learned that he had gone afoul of the family law rules relating to subpoenas after the Bar complaint was filed. (Tr. 105:5-8) Respondent contends that this demonstrates that he was not being dishonest.

Respondent testified that the motion for protective order filed by Attorney Hennen was as to Husband's intended deposition of Mr. Filippone, and against Husband's proposed subpoenas to credit reporting agencies Equifax, Experian, TransUnion. No motion for protective order was filed as to the Subpoena and none of the items noticed for hearing included the Subpoena – this is why attorney Luther only mentioned the it at the end of the hearing. (Tr. 114:1-23) Truth be told, the information to be gained from Freedom Mortgage could have also been useful to attorney Luther, since it applied to both clients as well as Mr. Filippone.

The litigation was so acrimonious that a special master was appointed in respect to future depositions. It is also noteworthy that Mr. Luther's order on that issue included language that was not ruled upon by the judge; the special master was not for all discovery but only for the depositions, and Judge Higbee granted a re-hearing on that and limited

that ruling to depositions. (Tr. 176:23-178:21)

Though the Respondent finds himself under scrutiny of The Florida Bar, clearly this was a highly contested matter with tit for tat and questionable conduct on both sides, yet as is often the case, only one person is being scrutinized. And in fact, Respondent's conduct was not even intentional, unlike his opposing counsel, who advised his client not to appear for deposition. (Tr. 175:19-Tr. 176:6) Though it is not a listed factor, Respondent submits that this should be considered in mitigation.

Respondent urges this Court to consider this as well. When an attorney issues a Notice of Production of Non-Party, the first item of interest to the opposing party, is to whom the subpoena is directed. In many cases, both attorneys know in advance what general information that non-party possesses which might be relevant to the case. The Respondent assumed (incorrectly) that when attorney Luther didn't object to the "who" (the non-party to whom the Subpoena was directed), attorney Luther didn't plan to object, because the "what" of the subject would be various financial records of everyone having involvement in the loan. His mistaken assumption has been mischaracterized as dishonesty, but the sanction imposed by the Court should be commensurate with a competency violation, not a dishonest violation.

The Referee clearly was swayed by the Bar's use of the case of *The Florida Bar v. Berthiaume*, 78 So. 3d 503 (Fla. 2011). (Tr. 208:5-9) Respondent contends that the conduct in the *Berthiaume* case was sufficiently different and so much more egregious than the conduct of the Respondent that it has limited value for this Court. But the Referee recognized this, and thus she recommended the 60-day suspension.

First, Respondent maintains that it was an exaggeration by the Bar to argue that the conduct in *Berthiaume* is similar to the conduct of the Respondent. But second, having already brandished *Berthiaume* (whose commonalities were a subpoena to a bank) to the Referee to clear the bar for a finding of a Rule 4-8.4(c) violation, it is disappointing, at best, for the Bar to use that case again – with its vastly different facts and context – to argue for a rehabilitative suspension.

The Referee recognized that the conduct in *Berthiaume* was substantially more egregious, and this is why she recommended a 60-day suspension, rather than a rehabilitative suspension of 91 days. (Tr. 239:2-12) The Referee recognized that the conduct of Respondent warranted a sanction on par with the case of *The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002). The Bar contends that the Respondent's conduct is more egregious than in *Forrester*. The Respondent contends that the conduct in

Forrester is more egregious than his conduct, and that Respondent's conduct is more on par with the conduct in *The Florida Bar v. Cocalis*, 959 So. 2d 163 (Fla. 2007).

In *Cocalis*, this Court upheld a recommended public reprimand and ethics school for conduct which the Court deemed "sharp practice." *Cocalis* at 165. Respondent contends that his conduct was an error, and that he didn't know that the rule didn't allow for a substantially similar subpoena to be issued. (Tr. 105) Accordingly, Respondent truly should have been afforded ethics school in this case under Standing Board Policy 15.70 -- "The bar will not seek disciplinary action against a lawyer's isolated instance of malpractice based on incompetent representation unless the lawyer: (a) has also committed other violations of the Rules Regulating The Florida Bar; (b) is engaged in a pattern of incompetent representation; or (c) has received a prior disciplinary sanction for incompetent representation."

The disqualifying factors do not apply in this case. Respondent made a mistake. Unfortunately, rather than research to double-check what he had done, he doubled-down due to the acrimonious nature of the case. In so doing, he crossed the line into conduct prejudicial to the administration of justice, but not into the realm of dishonesty such that a significant

suspension is warranted. In *The Florida Bar v. Pahules*, 233 So. 2d 130 (Fla. 1970), this Court laid down its longstanding principle on the purpose of a sanction – it must be fair to society, it must be fair to the respondent, and it must serve to deter others. *Pahules* at 131. In the present case a short suspension serves these purposes, while a rehabilitative suspension exceeds what is fair to the Respondent.

II. CROSS INITIAL BRIEF - THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF A RULE 4-3.4, 4-4.1 AND 4-8.4(C) VIOLATION.

A. STANDARD OF REVIEW

A referee's findings regarding guilt are presumed to be correct and should be upheld unless clearly erroneous or without support in the record. *Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla.1986). “A party contending that a referee’s conclusions as to guilt are erroneous must demonstrate that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions.” E.g., *Fla. Bar v. Nowacki*, 697 So. 2d 828, 832 (Fla. 1997).

B. ARGUMENT

The Respondent testified that he believed that opposing counsel was simply attempting to trick him. (Tr. 103:10) He anticipated that if he were incorrect, and there was legal authority from opposing counsel, a formal

objection would have been filed. (Tr. 123:20-22) When this was not forthcoming, he thought the issue was over with and had been surpassed by other issues in the case. Although the Respondent intentionally added the items to the subpoena, and some rule violations cannot be challenged, Respondent's conduct cannot form the basis for finding of dishonesty.

Rule 3-4.3 is general misconduct, and certainly in light of the overall facts of the case and the other sanctions, the Respondent is no more culpable than his opposing counsel. But being a broad rule, Respondent cannot argue that there was no competent evidence to support the finding of guilt as to Rule 3-4.3.

As to Rule 4-3.4, there is not sufficient substantial competent evidence to support a finding of guilt by clear and convincing evidence. Respondent testified that he had received documents, that he realized the production was incomplete, and that he was attempting to secure missing documents when he was discharged from the case. This is not obstructing access to evidence. Again, the documents would have also been to Mr. Luther's benefit, as the subpoena requested documents relating not only to Mr. Filippone, but also to Mr. and Mrs. Rodriguez.

Similarly, as to Rule 4-4.1, there is insufficient evidence in the record to show by clear and convincing evidence that the Respondent made a

false statement to the lender. The subpoena in question contained additional categories of requested documents that Respondent deemed relevant and necessary. The Respondent asked attorney Luther his basis for contending that the Subpoena was materially different. (Resp. Ex. 7) Not receiving a reply or formal filed objection, Respondent assumed that attorney Luther was again trying to "trip me up." (Tr. 130:1-6) These facts do not support an interpretation of the Rule that would require Respondent to disclose the matter to the lender.

In respect to Rule 4-8.4(c), the Referee admitted that this was the most difficult (Tr. 207:20-21), and Respondent contends that the Referee erred when she believed that the evidence supported a finding of dishonesty. However, the Referee took great care to lay out various facts, including Respondent's lack of knowledge about the rules, in determining that the sanctions in the substantially more egregious *Berthiaume* case were not appropriate in the present case.

In the present case, the Respondent believed his actions permissible in that he had given notice of the intent to issue the Subpoena but omitted certain related items.[2] Respondent truly believed that the additions he

[2] *Berthiaume* would be persuasive if the Respondent had never done a notice of production non-party but simply sent the subpoena to the mortgage company.

made were not material, as all of the issues for which he sought discovery were relevant issues in the case.

It was a significant reach for the Bar to argue that the *Berthiaume* case was persuasive, because in that case, the subpoena in question was purely and unequivocally fraudulent, as there was not even an open case in which to issue the subpoena. The error of the Respondent does not compare to the calculated scheme of the Respondent in *Berthiaume*. Recognizing this fact, the Referee at least appropriately receded to a recommendation of a non-rehabilitative suspension. (Tr. 239:11)

Respondent's deliberate act in typing up additional items to add to an otherwise clearly proper subpoena – based on his misunderstanding of the applicable rules – does not provide substantial competent evidence of dishonesty by the clear and convincing evidence standard. Therefore, the Referee erred, and there is no substantial competent evidence to support the finding of an intent to deceive.

Respondent's opposing counsel admitted that the divorce case was contentious. (Tr. 145:1-2) and that there were five divorce lawyers for Mr. Rodriguez. (Tr. 144:24) He also admitted that there was ongoing post-judgment litigation, thus, the acrimony could not be blamed on the Respondent. (Tr. 182:1-15) Opposing counsel Luther also admitted that

throughout the case on multiple occasions, as was his practice, the Respondent asked him to support his legal position. (Tr. 156) After Mr. Luther sent Respondent the letter about the additional items on the subpoena, the Respondent contacted him virtually immediately by email -- "Please advise why the issued subpoena is materially different, and under what rule of court that you are objecting, and I will comply with your request." (Resp. Ex. 7, Pg. 1; Tr. 94, 102) This is in keeping with the widespread requirement among opposing trial lawyers to confer on matters before filing motions and setting hearings. Therefore, what was transpiring was not any attempt at dishonesty or deception, but two attorneys locking horns in an acrimonious case, with one's side of the case having used the Florida Bar disciplinary process to further punish the other – the Respondent.

CONCLUSION

This case is simply a Rule 4-8.4(d) case, conduct prejudicial to the administration of justice. Respondent's conduct was not intentional. It was undertaken in error. This is evidenced by the fact that his Notice of Production Non-Party said the subpoena would be in substantially the same form. The rules do not allow for a deviation, and Respondent was unaware of this. This conduct did create some disruption in the case and

production of documents that were objected to, at least informally.

Respondent was not trying to hide or secret anything from the opposition. Otherwise, Respondent would not have filed the issued subpoena with the Court and thereby electronically served the same on the opposition on the same day. Therefore, there was sufficient competent substantial evidence to support the Rule 3-4.3 and Rule 4-8(d) violations, but not the other rules. Those violations do not support the length of suspension imposed, much less a rehabilitative suspension. The suspension period for the Respondent should be reduced or, at the most left the same, perhaps with an additional requirement of ethics school.

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CERTIFICATE OF SERVICE

I certify that the foregoing has been e-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, and a copy provided by email this 11th day of April, 2022, to the following via email: Tiffany A. Roddenberry, Esq. and Kathryn Isted, Esq., Holland & Knight, LLP, 315 South Calhoun Street, Suite 600, Tallahassee, Florida 32301, tiffany.roddenberry@hklaw.com, jennifer.gillis@hklaw.com, kathryn.isted@hklaw.com, jennifer.gillis@hklaw.com; Daniel J. Quinn, Bar Counsel, 1000 Legion Place, Suite 1625, Orlando, Florida 32801, dquinn@floridabar.org; Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300, psavitz@flabar.org; and to the Respondent Odiator Arugu, Esq., 1510 East Colonial Drive, Suite 303, Orlando, FL 32803, thefloridalawfirm@gmail.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Arial, 14-point font, in compliance with Rule 9.045(e) of the Florida Rules of Appellate Procedure.

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