IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

GENEVA CAROL FORRESTER
Respondent.

Case No. SC01-1819
TFB No. 2000-11,503(6C)

_____/

INITIAL BRIEF
OF
THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar." The Respondent, Geneva Carol Forrester, will be referred to as "Respondent."

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC01-1819 held on February 11, 2002.

The Amended Report of Referee dated September 6, 2002 will be referred to as "RR."

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case No. SC01-1819.

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

STATEMENT OF THE CASE

On March 20, 2001, the Sixth Judicial Circuit Grievance Committee "C" found probable cause as to violation of the following rules: Rule 4-3.3(a), Rule 4-8.4(c), and Rule 4-8.4(d). The Florida Bar filed a Complaint in this matter on August 20, 2001. By order dated September 28, 2001, The Honorable Donald C. Evans, Circuit Court Judge, in and for the Thirteenth Judicial Circuit, was appointed as Referee in the case.

A final hearing was held in the matter on February 11, 2002. On April 18, 2002, the Referee issued a Report of Referee finding Respondent guilty of violating Rule 4-8.4(d) of the Rules Regulating The Florida Bar (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis). The Referee did not find Respondent guilty of violating Rule 4-3.3(a) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal), or Rule 4-

8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). The Referee recommended that Respondent be suspended from the practice of law for ninety (90) days.

Following the final hearing on February 11, 2002, Respondent hired a new attorney to represent her in the disciplinary proceedings. On May 2, 2002, Respondent, through her new attorney, filed a Motion for Rehearing, arguing that the 90-day suspension recommended by the Referee was too harsh and requesting that the sanction be modified to an admonishment. On May 10, 2002, the Referee issued an Order Granting Respondent's Motion For Rehearing and Amending The Report of Referee to reflect a recommendation of a public reprimand. The Referee did **not** issue an Amended Report of Referee at this time.

On May 16, 2002, the Florida Supreme Court issued its opinion in *Florida Bar v. Geneva Carol Forrester*, Supreme Court Case No. SC00-813, suspending Respondent for 60 days followed by probation for one year for violating Rule 4-3.4(a) (a lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding) and Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

On May 20, 2002, The Florida Bar filed a Motion for Rehearing, requesting the Referee to reconsider the recommended sanction of a public reprimand in light of the newly issued Order of discipline in *Florida Bar v. Geneva Carol Forrester*, No. SC00-813, and instead recommend a one year suspension. A hearing on the Bar's Motion was held on June 21, 2002. On July 2, 2002, the Referee issued an Order denying the Bar's Motion for Rehearing and ordering that the previously recommended discipline remain the same. The Order stated that the Referee had considered the cumulative disciplinary history of the Respondent. On September 6, 2002, the Referee issued an Amended Report of Referee, finding Respondent guilty of Rule 4-8.4(d), and recommending a public reprimand. The Referee considered as an aggravating factor Respondent's prior disciplinary offenses, however, the Report of Referee omitted any mention of the recent 60-day suspension. In the section of the Report listing the Respondent's past disciplinary record, the Report noted only the Respondent's prior admonishment in 1994, 24-month probation in 1995, and 90-day suspension and public reprimand in 1995. (RR 2). The 60-day suspension ordered May 16, 2002, in Supreme Court Case No. SC00-813 was not listed as prior discipline.

The Referee's Report was considered by the Board of Governors of The Florida Bar at its meeting which ended October 25, 2002, at which time the Board voted to file a Petition for Review of the Referee's Report and

request a one year suspension. The Board voted to petition for review of (1) the Referee's finding that Respondent did not violate Rule 4-8.4(c) (misrepresentation); (2) the Referee's refusal to consider as prior discipline Respondent's 60-day suspension; and (3) Referee's recommendation of a public reprimand. The Florida Bar filed a Petition for Review of the Referee's Report with this Court on November 4, 2002. Pursuant to Rule 3-7.7, the jurisdiction of this Court is invoked.

STATEMENT OF THE FACTS

Respondent represented Persha Bailey Crider in a child custody case in Pinellas County Circuit Court, Civil No. 97-5364-FD-17. Ms. Crider, who was the custodial parent of two minor children and living in Pinellas County, desired to prevent her former husband, Tracy Blaylock, from having any visitation rights with the children. (TR 30). Mr. Blaylock filed a counter-petition to obtain custody of the children. (TR 23, 24). Ms. Crider also sought to prevent her father (the maternal grandfather), Kenneth Ferguson, from having any contact with the children. (TR 115). Tracy Blaylock and Kenneth Ferguson lived in the same small town in Tennessee. (TR 55). Ms. Crider was concerned that Tracy Blaylock was allowing the children to see Mr. Ferguson, their grandfather. (TR 35). Ms. Crider had accused Mr. Ferguson of molesting the children. (TR 27). Ms. Crider and her husband, John Crider, filed injunction actions against Mr. Ferguson. (TR 16, 73).

Ms. Crider had also complained to the police that Mr. Ferguson was harassing her and her husband, was threatening to take the children, and threatening Mr. Crider. (R. Exh. 1). In 1996, based on Ms. Crider's allegations, Mr. Ferguson was charged with aggravated stalking, a felony. (TR 13). The Assistant State Attorney subsequently offered to reduce the charge to misdemeanor stalking and to withhold adjudication. (TR 15). On

February 10, 1998, Mr. Ferguson entered a plea of no contest to the offense of misdemeanor stalking. Adjudication was withheld and Mr. Ferguson received six months probation. (TFB Exh. 3, TR 18).

During the course of the custody proceedings, the judge ordered an investigation and report by a child custody investigator. The investigator, Laurel Drew, issued her report on November 18, 1999. (TR 48). Ms. Drew recommended that the father, Tracy Blaylock, be awarded sole custody of the children with Persha Crider having visitation rights. (TR 31, 42). Ms. Drew's report was unfavorable to Ms. Crider's objectives which were to retain custody of the children and cut off all visitation rights of Mr. Blaylock, thereby preventing the children from visiting Tennessee, and preventing Mr. Ferguson from having any contact with the children. (TR 108-09, 115).

On February 4, 2000, Respondent filed an unverified Motion to Strike Report, seeking to strike the report of the child custody investigator. (TFB Exh. 1). In the Motion, Respondent accused Ms. Drew of being biased and of failing to conduct an adequate investigation. Respondent attacked Ms. Drew's reliance on the testimony of Mr. Ferguson, the children's grandfather, stating in paragraph 5 of the Motion:

> Ms. Drew was unconcerned, about the perverted and twisted mind of a child molester, the Former Wife's father, Mr. Kenneth Ferguson, who Ms. Drew considered a reliable witness. . . . Mr. Ferguson is a child molester and stalked his daughter, the Former Wife. **He was recently convicted of**

> **aggravated stalking in Florida, but Ms. Drew considers him a "crucial witness."** (emphasis in original).

Respondent also stated in paragraph 14: "Ms. Drew's flagrant disregard for evidence in her possession, failure to gather evidence, and naivete concerning family dynamics and child development will place the minor children within the control of a pedophile and convicted felon." (TFB Exh. 1). The words highlighted by the Respondent in paragraph 5 were the only words highlighted in the 16-paragraph motion.

Also on February 4, 2000, Respondent filed an unverified Motion to Compel, seeking to compel the production of certain documents from Ms. Drew. (TFB Exh. 2). In paragraph 5 of the Motion to Compel, Respondent again stated that "Mr. Ferguson is a child molester and stalked his daughter, the Former Wife. He was recently convicted of aggravated stalking in Florida, but Ms. Drew considers him a 'crucial witness.'" In paragraph 6, Respondent again referred to Mr. Ferguson as a "pedophile and convicted felon." (TFB Exh. 2).

At the time she filed the Motion to Strike and Motion to Compel, Respondent was aware that the felony charge against Mr. Ferguson had been reduced to a misdemeanor and that adjudication was withheld. On December 1, 1998, Mr. Ferguson's attorney, Charles Scott, had deposed Mr. and Mrs. Crider. Mr. Ferguson was contesting the injunctions filed against him by the Criders. (TR 16). The Respondent was present at the

depositions of Mr. and Mrs. Crider. (TR 82-83). At the final hearing, Mr. Scott testified to the following exchange with Mr. Crider at the deposition concerning the disposition of the stalking charge:

> [Mr. Scott]: "You alleged in your petition that Mr. Ferguson pled guilty to stalking; is that correct?"
>
> Mr. Crider's answer: "Yes."
>
> My question: "You were aware, were you not, that he had pled no contest to the charge?"
>
> His answer: "I think he was adjudicated guilty."
>
> My question: "Okay. You, in fact, had a conversation with the state attorney prior to his entry of a plea, didn't you?"
>
> Mr. Crider's answer: "Yes."
>
> My question: "And, in fact, the state attorney asked you if it would be okay with you that the charge be reduced to a misdemeanor; isn't that correct?"
>
> Mr. Crider's answer: "Yes."
>
> My question: "And the state attorney also asked you if there would be any objection to a withhold of adjudication; isn't that correct?"
>
> Mr. Crider: No.
>
> . . . .

Question: "You were not aware that adjudication was withheld?"

Answer: "No."

Question: "Were you aware that Mr. Ferguson's six month probation was about to expire in November of '98?"

Answer: "I am now."

(TR 17-18). Mr. Scott had a similar exchange with Mrs. Crider during her deposition. (TR 19). The Respondent sat next to her clients during both depositions, was attentive to the proceedings, and raised numerous objections. (TR 19). Respondent testified that she heard the statements made by Mr. Scott to her clients concerning the withhold of adjudication and reduction of the charge to a misdemeanor. (TR 83).

The next day, December 2, 1998, Respondent wrote a letter to the Clerk of the Pinellas County Criminal Court. (TFB Exh. 4). In the letter, Respondent requested the Clerk to send her a certified copy of the judgment and sentence in Mr. Ferguson's case, and enclosed a stamped self-addressed envelope. According to the dates stamped on the letter, the Clerk's office received Respondent's letter on December 4, 1998, and fulfilled her request on December 10, 1998. (TFB Ex. 4). Respondent testified that she did not see the Clerk's response to her letter when it came in. (TR 80).

Elizabeth Richards represented Mr. Blaylock in the custody proceedings. (TR 23). Because the Respondent continued to allege that Mr. Ferguson was a convicted felon, Ms. Richards called Mr. Ferguson's attorney, Charles Scott, to check on Mr. Ferguson's criminal history. (TR 28, 44). Ms. Richards felt it was important to know if there was a felony conviction that related to the children. (TR 28). In March of 1999, Mr. Scott showed Ms. Richards the disposition Mr. Ferguson had received in criminal court which stated that adjudication had been withheld. (TR 44). Ms. Richards instructed Respondent on more than one occasion, prior to Respondent's filing the Motion to Strike and the Motion to Compel, that Mr. Ferguson was **not** a convicted felon. (TR 39, 42-43).

On January 25, 2000, Respondent took the deposition of the child custody investigator, Laurel Drew. (TR 48). Respondent was not satisfied with Ms. Drew's report and sought to challenge the report. (TR 24). She questioned Ms. Drew about her interview with Mr. Ferguson and whether Mr. Ferguson told her about charges against him as a child molester. (TR 51). Ms. Richards, the opposing counsel, objected to the Respondent's allegations against Mr. Ferguson. (TR 52).

Sometime after Ms. Drew's deposition and before filing the Motion to Strike and Motion to Compel on February 4, 2000, Respondent testified that she asked her paralegal, Peter Cardinal, to check on the criminal charge

against Mr. Ferguson. (TR 93). Mr. Cardinal testified that he looked up the information on the criminal justice information system (CJIS), a computer link-up to the Pinellas County courthouse and found that Mr. Ferguson had been charged with aggravated stalking. (TR 93). He then looked up the statute number and found that the offense charged was a felony. (TR 94). Even though it would have been "very easy" to check the adjudication of the stalking charge on the CJIS screen, Mr. Cardinal did not do so. (TR 95).

Respondent testified before the Referee in this matter that shortly after filing the motions on February 4, 2002, she sent a private investigator to the courthouse to obtain a copy of the disposition in Mr. Ferguson's criminal case. (TR 82, 118). According to Respondent, this was the first time she saw the order withholding adjudication. (TR 82). Respondent did not correct her previously filed pleadings, or inform the court of the false statements contained in the pleadings. (TR 118).

Ultimately, the family court judge ordered that custody remain with Ms. Crider, and that Mr. Blaylock continue to have visitation rights with the children in Tennessee. (TR 41).

In the disciplinary proceeding, the Referee found by clear and convincing evidence that Respondent was aware of the disposition of Mr. Ferguson's case. Specifically, the Referee found:

> By clear and convincing evidence that on December 1, 1998 that the Respondent was advised the felony charge against Mr. Kenneth Ferguson had been reduced to a misdemeanor and adjudication was withheld. It is clear to this Court that the Respondent was aware of this at that time because on December 2, 1998 she made a specific inquiry of the clerk's office for verification of the conviction and sentence in Mr. Ferguson's case.
>
> This Court also finds that in February 2000 the Respondent made statements in a Motion to Strike the report of the Child Custody Investigator and a Motion to Compel that Mr. Ferguson was a convicted felon. Those statements, at the very least, exhibited callous indifference that disparaged Mr. Ferguson.

(RR 2).

SUMMARY OF THE ARGUMENT

The misconduct in this case centers around two motions filed by the Respondent in a custody case in which Respondent falsely stated that Mr. Kenneth Ferguson was a convicted felon. The evidence in the record shows that, at the time she filed the motions, Respondent knew that Mr. Ferguson was not a convicted felon. The Referee found that Respondent "was aware" that the felony charge against Mr. Ferguson had been reduced to a misdemeanor and adjudication withheld. Respondent violated Rule 4-8.4(c) when she knowingly made false statements of fact in the two motions she filed in a custody case. The Referee's finding that Respondent is not guilty of violating Rule 4-8.4(c) is clearly contradicted by the record evidence and the Referee's own findings.

The Referee erred in failing to consider as prior discipline the 60-day suspension imposed on the Respondent by this Court in its Order dated May 16, 2002. The Order was brought to the Referee's attention in a Motion for Rehearing filed by the Bar on May 20, 2002, before the Referee issued a report. The Referee's Amended Report recommending a public reprimand does not indicate that the Referee considered the recent 60-day suspension as part of Respondent's prior disciplinary record.

The Referee's recommendation of a public reprimand is an insufficient sanction for an attorney who knowingly made false and disparaging statements in pleadings filed in a civil case, and who has a history of four prior disciplines. Given the seriousness of the Respondent's misconduct, and her extensive record of prior discipline, a one-year suspension is the appropriate sanction.

ARGUMENT

I. THE REFEREE'S FINDING THAT RESPONDENT IS NOT GUILTY OF VIOLATING RULE 4-8.4(C) IS CLEARLY CONTRADICTED BY THE RECORD EVIDENCE AND THE REFEREE'S OWN FACTUAL FINDINGS.

In attorney disciplinary proceedings "[a] referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support of the record . . . . The party contending that the referee's findings of fact and conclusions of guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." *Florida Bar v. Cox*, 718 So. 2d 788, 792 (Fla. 1998). In the instant case, the Referee found Respondent not guilty of violating Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). This finding is clearly contradicted by the record before this Court and the Referee's own findings of fact.

In order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the necessary element of intent must be shown. *Florida Bar v. Fredericks*, 731 So. 2d 1249, 1252 (Fla. 1999). This Court has held that "in order to satisfy the element of intent, it must only be shown that the conduct was deliberate or

knowing." *Id*. In the instant case, the Referee's own findings lead to the conclusion that the Respondent's conduct was knowing.

The misconduct in this case centers around two motions filed by the Respondent in which she labeled Mr. Kenneth Ferguson as a convicted felon. At the time she filed the pleadings, Respondent knew that Mr. Ferguson was not a convicted felon. By filing pleadings with the court that she knew contained false statements, Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. The evidence presented at the final hearing revolved around the Respondent's knowledge regarding the disposition of the felony charge against Mr. Ferguson. The Bar presented evidence that, at the time she filed motions labeling Mr. Ferguson as a convicted felon, Respondent knew that the felony charge had been reduced to a misdemeanor and adjudication withheld.

In the Amended Report of Referee, the Referee found:

> By clear and convincing evidence that on December 1, 1998 that the Respondent was advised the felony charge against Mr. Kenneth Ferguson had been reduced to a misdemeanor and adjudication was withheld. **It is clear to this Court that the Respondent was aware of this at that time** because on December 2, 1998 she made a specific inquiry of the clerk's office for verification of the conviction and sentence in Mr. Ferguson's case.

> This Court also finds that in February 2000 the Respondent made statements in a Motion to Strike the report of the Child Custody Investigator and a Motion to Compel that Mr. Ferguson was a convicted felon. Those statements, at the very least, exhibited callous indifference that disparaged Mr. Ferguson.

(RR 2) (emphasis added).

The Referee found that, on December 1, 1998, Respondent clearly "was aware" that the felony charge against Mr. Ferguson had been reduced and adjudication withheld. The Referee also found that Respondent made statements in the Motion to Strike and the Motion to Compel that Mr. Ferguson was a convicted felon. The only logical conclusion to be drawn from these findings is that Respondent knew that Mr. Ferguson was not a convicted felon when she filed the two motions. Respondent knowingly made a false statement of fact to the court when she stated in the two motions that Mr. Ferguson "was recently convicted of aggravated stalking in Florida," and referred to him as "a pedophile and convicted felon."

The evidence in the record supports a conclusion that Respondent acted knowingly when she falsely labeled Mr. Ferguson as a convicted felon. Mr. Ferguson's plea and disposition took place in February 1998. Respondent knew by at least December 1, 1998, that Mr. Ferguson had **not** been convicted on the stalking charge. On that date, Mr. Ferguson's attorney, Charles Scott, deposed Respondent's clients, John and Persha Crider, and

questioned them repeatedly regarding their knowledge of the disposition of the charge against Mr. Ferguson. Mr. Scott asked Mr. Crider, "You were aware, were you not, that [Mr. Ferguson] had pled no contest to the charge?" (TR 17). Mr. Scott then asked, "And, in fact, the state attorney asked you if it would be okay with you that the charge be reduced to a misdemeanor, isn't that correct?" (TR 17-18). Mr. Scott continued to ask Mr. Crider whether he knew that adjudication had been withheld, and that Mr. Ferguson's probation expired in November 1998. (TR 18). Mr. Scott repeated the exchange with Persha Crider. (TR 19). The very next day, December 2, 1998, Respondent wrote to the Clerk of Court to request a copy of the conviction and sentence in Mr. Ferguson's case. (TFB Exh. 4, 79). The Clerk's stamp on the letter indicates that Respondent's request was fulfilled on December 10, 1998. (TFB Exh. 4).

Mr. Blaylock's attorney, Elizabeth Richards, also informed the Respondent about the disposition of the criminal charge against Mr. Ferguson. Ms. Richards testified that during the litigation of the custody case, Respondent repeatedly alleged that Mr. Ferguson was a convicted felon, causing Ms. Richards to call Mr. Ferguson's attorney, Charles Scott, to check on Mr. Ferguson's criminal history. (TR 28). In March of 1999, Mr. Scott showed Ms. Richards the disposition Mr. Ferguson had received in criminal court stating that adjudication

had been withheld. (TR 44). Ms. Richards testified that she told the Respondent on at least three occasions that Mr. Ferguson was **not** a convicted felon. (TR 42-43).

The evidence shows that Respondent learned from both Mr. Scott and Ms. Richards that the stalking charge against Mr. Ferguson had been resolved with a plea to a misdemeanor and withhold of adjudication. Respondent nevertheless continued to allege that Mr. Ferguson was a convicted felon. It was in the interest of Respondent and her clients to portray Mr. Ferguson in the worst possible light. Respondent was not happy with the investigator's recommendation that custody of the children be awarded to their father, Mr. Blaylock. (TR 24, 48). One of Respondent's objectives in the Motion to Strike was to discredit the report of the child custody investigator by claiming that she had relied on the input of a convicted felon and a pedophile. (TR 32-33).

The clear and convincing evidence shows that Respondent knew when she filed the Motion to Strike and the Motion to Compel that Mr. Ferguson was **not** a convicted felon. The Respondent knowingly made false and disparaging statements in the pleadings she filed with the court. The Referee erred in not finding Respondent guilty of violating Rule 4-8.4(c) prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

II. THE REFEREE ERRED BY FAILING TO CONSIDER AS PRIOR DISCIPLINE RESPONDENT'S RECENT 60-DAY SUSPENSION.

Respondent's recent 60-day suspension should have been considered as prior discipline by the Referee. According to The Rules Regulating The Florida Bar, Rule 3-7.6(k)(1)(D), the report of referee must contain a statement of prior discipline, and after a finding of guilt, all evidence of prior disciplinary measures may be offered by bar counsel subject to appropriate objection or explanation by respondent. The Referee's Amended Report, which lists three prior instances of discipline, omits any mention of the Respondent's most recent disciplinary sanction, a 60-day suspension imposed by this Court in *Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002), issued on May 16, 2002.

On May 20, 2002, the Bar filed a Motion for Rehearing, for the purpose of bringing this case to the Referee's attention, and requesting the Referee to reconsider the recommended sanction of a public reprimand in light of Respondent's prior disciplinary history. (The Referee had not yet issued an amended report of referee. On May

10, 2002, the Referee had issued an order granting the Respondent's Motion for Rehearing and reducing the initially recommended 90-day suspension to a public reprimand). After a hearing, the Referee issued an Order denying the Bar's Motion for Rehearing, and ordering that the previously recommended sanction (a public reprimand) remain the same. Although the Order dated July 2, 2002, recognized this Court's recent ruling imposing a 60-day suspension, the Amended Report of Referee dated September 6, 2002 does not include the 60-day suspension as part of Respondent's past disciplinary record. (RR 2-3).

The issue of subsequently imposed discipline was addressed by this Court in *Florida Bar v. Wilson, III*, 714 So. 2d 381 (Fla. 1998). In that case, the referee recommended a 90-day suspension, followed by a two-year probation for an attorney's violation of Rules 4-1.9 and 4-8.4(d). In determining the recommended discipline, the referee considered Wilson's disciplinary record, which included only a private reprimand in 1992. *Id*. at 383. After Wilson filed a petition for review, the Court suspended him for 90 days in another disciplinary matter (*Wilson I*). Wilson argued that *Wilson I* should not be considered in determining an appropriate discipline in the current case. *Id*. at 384. This Court held that *Wilson I* should be considered as cumulative misconduct in determining discipline. The Court stated:

> The referee could not consider *Wilson I* because it was still pending when he entered his report in the instant case. *See Florida Bar v. Inglis*, 660 So. 2d 697 (Fla. 1995) (referees in three different cases involving same attorney could not consider cumulative misconduct because no basis for such a finding exists until this Court takes action). However, now that *Wilson I* is final, we find that the cumulative misconduct it represents warrants a more severe sanction than that recommended by the referee.

714 So. 2d at 384.

The Court also noted that, because the misconduct in *Wilson I* occurred close in time to the misconduct at issue in the current case, it constituted cumulative misconduct which should be considered a relevant factor when determining an appropriate penalty. *Id*. Cumulative misconduct can be found when the misconduct occurs near in time to the other offenses, regardless of when discipline is imposed. *Florida Bar v. Golden*, 566 So. 2d 1286, 1287 (Fla. 1990). This Court generally imposes a greater sanction for cumulative misconduct than for isolated misconduct. *Wilson* at 384.

In the instant case, the Referee could not have considered this Court's May 16, 2002 decision in *Florida Bar v. Forrester* when he entered the May 10, 2002 Order recommending a public reprimand. Unlike *Wilson*, where the referee had already issued his report and the respondent had filed a petition for review, the subsequent discipline in the instant case was brought to the Referee's attention before the issuance of the Amended Report. In fact, just

days after the May 16, 2002 Order, Bar counsel filed a Motion for Rehearing requesting the Referee to consider as prior discipline the 60-day suspension in *Forrester I*. The Referee's Amended Report indicates that he did not do so. The Referee clearly erred in failing to consider Respondent's 60-day suspension as part of her past disciplinary record. This Court, in imposing an appropriate sanction, should consider *Forrester I*, and increase the sanction accordingly.

III. THE REFEREE'S RECOMMENDED SANCTION OF A PUBLIC REPRIMAND IS INCONSISTENT WITH THE STANDARDS FOR IMPOSING LAWYER SANCTIONS AND THE CASE LAW.

This Court has held that "'[i]n reviewing a referee's recommendation of discipline, this Court's scope of review is somewhat broader than that afforded to findings of facts because, ultimately, it is [the Court's] responsibility to order an appropriate punishment.'" *Florida Bar v. Forrester*, 818 So. 2d 477, 483 (Fla. 2002) (quoting *Florida Bar v. Maier*, 784 So. 2d 411, 413 (Fla. 2001)). In making this determination, this Court considers not only case law but also the Florida Standards for Imposing Lawyer Sanctions. *Id*. The Referee's recommended sanction of a public reprimand is inconsistent with the Standards for Imposing Lawyer Sanctions and the relevant case law.

A. A public reprimand is an inappropriate sanction given the seriousness of Respondent's misconduct and her extensive disciplinary history.

The Florida Standards for Imposing Lawyer Sanctions provide a format for bar counsel, referees, and the Court to determine the appropriate sanction in attorney disciplinary matters. Standard 6.1 relates generally to sanctions appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court. Standard 6.12 specifically provides that, absent aggravating or mitigating circumstances, "[s]uspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action." Standard 7.2 provides that, absent aggravating or mitigating circumstances, "[s]uspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system." Respondent's misconduct falls squarely within the parameters of Standards 6.12 and 7.2. A suspension is the appropriate sanction for the Respondent who knowingly made false and disparaging statements in pleadings filed with the court in order to advance the objectives of her client's custody case.

Standard 8.2, relating to prior discipline, provides that suspension is appropriate when a lawyer has been publicly reprimanded for similar conduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession. Respondent has engaged in similar misconduct in the past. In *Forrester I, supra*, this Court found that Respondent violated Rules 4-3.4(a) and 4-8.4(c) when, during a deposition, she concealed an exhibit that was relevant to the case, and then misrepresented her knowledge of the document's whereabouts. 818 So. 2d at 483. In the instant case, Respondent filed two motions that contained false allegations that Mr. Ferguson was a convicted felon. The respondent's stated objective in the litigation was to prevent Mr. Ferguson from having any contact with his grandchildren (her client's children). (TR 115). Similar to Respondent's actions in concealing the deposition exhibit, the false allegations about Mr. Ferguson were intended to gain a tactical advantage in a civil suit. Respondent made knowing misrepresentations in both cases. In *Forrester I*, Respondent's evasive answers to opposing counsel regarding the location of the exhibit were found to be intentionally misleading. *Id*. at 483. In the instant case, Respondent filed two motions with the court stating that Mr. Ferguson was a convicted felon, knowing this to be untrue.

The Standards also require the consideration of aggravating and mitigating factors. The Referee found three aggravating factors in this case: prior disciplinary offenses, refusal to acknowledge wrongful nature of the conduct, and

substantial experience in the practice of law. The Referee found one mitigating factor: character or reputation.

The Respondent was admitted to the Florida Bar in 1973. (TR 80). At the time the misconduct occurred in this case, Respondent had been practicing law for 27 years. In 1994, Respondent received an admonishment for violating Rule 4-1.7(a) (representing adverse interests). Respondent failed to withdraw from representing both parties in an adoption proceeding when a conflict between the parties arose. In 1994, Respondent received 24 months' probation for violating Rule 4-1.16(d) (protection of client's interest) for failing to refund unearned fees when discharged by three clients. In 1995, Respondent received a 90-day suspension for violating rule 4-1.5(a) (illegal, prohibited, or clearly excessive fees), and a public reprimand for trust accounting violations. Respondent was required to repay an excessive fee. And most recently, in *Forrester I*, Respondent received a 60-day suspension for violating Rule 4-3.4(a) (concealing evidence) and Rule 4-8.4(c) (misrepresentation) when she concealed an exhibit at a deposition and misrepresented its whereabouts when questioned about her actions. As

discussed previously, the recent 60-day suspension was not included as part of Respondent's disciplinary record as reflected in the Amended Report of Referee issued in the instant case.

As this Court concluded in *Forrester I*, "a sanction harsher than a public reprimand should be imposed based on the fact that Forrester has three prior disciplinary actions." 818 So. 2d at 484. The Court's rationale is even more compelling in the instant case, given that the Respondent now has **four** prior disciplinary actions. Given the Respondent's extensive disciplinary history, the Referee's recommendation of a public reprimand is an insufficient sanction and does not accord with the Standards for Imposing Lawyer Sanctions.

B. A one-year suspension is the appropriate sanction for Respondent who made false and disparaging statements in pleadings filed with the court in order to gain a tactical advantage in a civil suit.

This Court has held that "a public reprimand should be reserved for isolated instances of neglect, lapses of judgment, or technical violations of trust accounting rules without willful intent." *Florida Bar v. Schultz*, 712 So. 2d 386, 388 (Fla. 1998). This is not such a case. Respondent was informed on more than one occasion that Mr. Ferguson's charge resulted in a withhold of adjudication and not a felony conviction. Nevertheless, she submitted two motions in a custody case declaring Mr. Ferguson to be a convicted felon in an attempt to influence the court

in favor of her client's position. This was not an act of neglect, or a minor lapse of judgment. The Referee's recommended sanction of a public reprimand is wholly insufficient considering the seriousness of Respondent's misconduct.

In *Florida Bar v. Cibula*, 725 So. 2d 360 (Fla. 1998), the respondent was suspended for 91days for misrepresenting his annual income in a contempt action brought by his former wife for nonpayment of alimony. Cibula argued that his misrepresentations to the court were negligent and not intentional because he did not know at the time he testified what his income would be. *Id*. at 362. This Court upheld the referee's finding of an intentional misrepresentation. The evidence showed that, although Cibula may not have known at the time of his testimony what his total income would be, he knew that it would be in excess of $36,000 per year. *Id*. The Referee recommended a 60-day suspension. This Court disagreed and imposed a 91-day suspension. This Court stated:

> Lawyers have an ethical responsibility as officers of the court to rise above the tactics that all too often permeate a dissolution proceeding. Not only does the law demand truthfulness under oath, but the obligations of our profession demand it. As former Justice Ehrlich has stated, "our profession can operate properly only if its individual members conform to the highest standard of integrity in all dealings within the legal system." *Florida Bar v. Colclough*, 561 So. 2d 1147, 1150 (Fla. 1990) (Ehrlich, C.J., concurring in part, dissenting in part).

725 So. 2d at 365.

Respondent should receive a more severe sanction than the attorney in *Cibula*. Like Cibula, Respondent made a knowing misrepresentation to the court. However, while Cibula's disciplinary record consisted of a public reprimand, Respondent has four prior instances of discipline, including periods of probation and two suspensions, which should be considered in aggravation.

In *Florida Bar v. Corbin*, 701 So. 2d 334 (Fla. 1997), the respondent received a 90-day suspension for filing a summary judgment motion and attached affidavit containing information he knew was untrue. Corbin represented a landlord in an action against tenants for failure to pay rent. The defendants provided Corbin with copies of canceled checks showing rental payments for several of the months in question. Corbin subsequently filed a motion for summary judgment in which he represented that there was no genuine issue as to any material fact when he knew there was a genuine issue of material fact regarding the rental payments. *Id*. at 335. Corbin also attached to the motion an affidavit he prepared, signed by his client's mother, stating that no rent had been paid after August 1990. At the time he prepared the affidavit, Corbin knew the information contained in the affidavit was untrue. *Id*. The Referee rejected Corbin's defense that he relied on his client's mother's assertion that the signature on the back of the checks was a forgery, and found Corbin guilty of violating Rules 4-3.3(a) (false statement to a tribunal); 4-

8.1(a) (false statement of material fact in a disciplinary matter); and 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). *Id*. at 336. The referee considered in aggravation Corbin's three prior private reprimands, but considered in mitigation the remoteness of the offenses. Like Corbin, the Respondent in the instant case filed motions knowing they contained false information. Like Corbin, the Respondent claims to have relied on information provided by her client without checking the accuracy of the information. However, unlike Corbin, who had three prior private reprimands remote in time, the Respondent in this case has four prior disciplinary offenses, including a public reprimand, probation, and two suspensions.

Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989), is a case in which two attorneys submitted a brief to the court containing misrepresentations of facts. Only when the opposing party moved for sanctions did the respondents acknowledge the misleading nature of their representations. Both respondents were found guilty of: conduct contrary to honesty, justice, or good morals; conduct prejudicial to the administration of justice; and conduct adversely reflecting on fitness to practice law. *Id*. Respondent McClung was also found guilty of conduct involving dishonesty, fraud, deceit, or misrepresentation. Respondent Anderson was found not guilty of misrepresentation based on evidence that she was unaware of the details on which the misrepresentation was based,

even though she was involved in preparation of the brief. *Id*. at 853. Respondents argued that they were merely negligent, but did not knowingly mislead the court and should receive a private reprimand. This Court imposed a 30-day suspension on respondent McClung and publicly reprimanded respondent Anderson, stating, "We are concerned that respondents not only misrepresented the facts to the district court but failed to correct the misrepresentations even when they were brought to their attention." *Id*. at 854. Respondent's misconduct is similar to respondent McClung who misstated facts in a brief submitted to the appellate court. Like McClung, Respondent did not correct the false statements in her two motions. Unlike McClung, who had no disciplinary record, Respondent has a history of four prior instances of discipline. The principle of cumulative misconduct requires that Respondent receive a more severe sanction.

In *Florida Bar v. Burkich-Burrell*, 659 So. 2d 1082 (Fla. 1995), Burkich notarized interrogatory responses completed by her client/husband, but failed to read or review them for correctness and truthfulness, even though she had personal knowledge of the prior accident and injuries. Her husband had omitted material facts concerning a prior accident and the medical treatment he had received. *Id*. at 1083. Burkich was found guilty of violating Rule 4-3.4(a) (obstruct another party's access to evidence); Rule 4-4.1(a) (knowingly make a false statement of material

fact or law to a third party) and (b) (fail to disclose a material fact); Rule 4-8.4(a) & (c) (conduct involving dishonesty, fraud, deceit or misrepresentation). *Id*. at 1082. In mitigation, the referee considered the husband's alcohol abuse and his physical and mental abuse of Burkich, Burkich's lack of prior discipline, and lack of experience in personal injury litigation. In aggravation, the referee considered Burkich's refusal to acknowledge the wrongful nature of her conduct, her evasive answers and selective recall during the proceedings, and lack of credibility. *Id*. at 1083. On appeal, Burkich argued that she could not be found guilty of the violations charged because she had no duty to review her client/husband's answers to the interrogatories for correctness. *Id*. This Court held that an attorney has a duty to review a client's sworn answers to interrogatories for correctness, even when the answers have been prepared by the client and a paralegal. *Id*. at 1084. This Court imposed a 30-day suspension in light of the unique facts of the case and the mitigating. *Id*. *See also Florida Bar v. Elster*, 770 So. 2d 1184, 1186 (Fla. 2000) (attorney found guilty of conduct involving dishonesty, fraud, deceit, or misrepresentation by assuring client his deportation could be stopped when he knew or should have known this to be untrue).

The Respondent's conduct in this case is more egregious than that of Burkich. Respondent's client, Persha Crider, told her that Mr. Ferguson had been **charged** with aggravated stalking. (TR 104). However, Respondent stated in her pleadings that "[Mr. Ferguson] was recently **convicted** of aggravated stalking in Florida" and that he was a "**convicted felon**." Respondent had no basis for stating that Respondent had been convicted, nor did she bother to check on the disposition of Mr. Ferguson's case before making the false statements, even though it would have been easy to do so. The evidence shows that Respondent had been told several times that the felony charge was reduced and adjudication withheld. Despite Respondent's knowledge of the actual disposition of Mr. Ferguson's case, she labeled him a convicted felon in two motions she filed in the custody case. Moreover, the mitigating factors present in *Burkich* are not present here. Burkich had serious personal problems and no prior disciplinary record. In contrast, Respondent has an extensive disciplinary record, including suspensions of 60 and 90 days.

It is well established that "[i]n rendering discipline, this Court considers the respondent's previous disciplinary history and increases the discipline where appropriate." *Florida Bar v. Bern*, 425 So. 2d 526, 528 (Fla. 1982). "The Court deals more harshly with cumulative misconduct than it does with isolated misconduct.

Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct." *Id*. The respondent in *Bern* entered into a business transaction with a client, failed to adequately account for fees received, and failed to return $250 to the client from the proceeds of property sales. Bern had previously received two private reprimands and one public reprimand. This Court rejected the referee's recommendation that respondent again be publicly reprimanded, and imposed a 91-day suspension, finding that "[t]he referee's discipline does not accord with the principle of cumulative discipline." *Id*.

In *Florida Bar v. Williams*, 753 So. 2d 1258, 1263 (Fla. 2000), this Court recognized that "enhanced discipline is permissible when multiple violations occur or the attorney has a prior history of misconduct." Williams had been disciplined on three prior occasions, receiving an admonishment, a public reprimand, and a 20-day suspension plus one-year probation. This Court approved the referee's recommendation of a one-year suspension plus probation, stating, "[w]ith each of Williams' violations, this Court has imposed more severe discipline. Yet Williams has continued to engage in conduct that violates the Rules Regulating the Florida Bar." *Id*. The Court also noted that several of the violations in the instant case were of a similar type as his past violations. *Id*.

In *Florida Bar v. Lord*, 433 So. 2d 983, 986 (Fla. 1983), this Court defined the three objectives of Bar discipline: (1) fairness to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer; (2) fairness to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and (3) deterrence to others who might be prone or tempted to become involved in like violations.

The Referee's recommendation of a public reprimand in this case does not accord with the objectives of Bar discipline to protect the public and deter other attorneys from similar misconduct. Also, a public reprimand does not accord with the principle of cumulative discipline as enunciated by this Court. Respondent has been before this Court on four previous occasions. The first time, she received an admonishment, the second time a 24-month probation, the third time a 90-day suspension and public reprimand, and recently, a 60-day suspension. Given that this case represents the Respondent's fifth disciplinary proceeding, a rehabilitative suspension of one year is warranted.

C. The cases presented by Respondent in support of a public reprimand are factually dissimilar from the instant case and do not support the recommended sanction.

The Referee initially recommended a 90-day suspension, but amended his recommendation to a public reprimand after the Respondent filed a Motion for Rehearing. In the Motion for Rehearing, Respondent presented several cases in which attorneys who violated Rule 4-8.4(d) received a public reprimand. The cases relied upon by the Referee in amending the recommended discipline to a public reprimand are factually dissimilar to the instant case, and involve attorneys with little or no history of prior discipline. None of the cases relied upon by the Referee involve misconduct consisting of making false statements of fact in pleadings submitted to a court.

For example, in *Florida Bar v. Buckle*, 771 So. 2d 1131 (Fla. 2000), an attorney who represented a criminal defendant was found guilty of sending the alleged victim a humiliating and intimidating letter designed to cause her to abandon her criminal complaint against his client. The referee found Buckle guilty of violating Rules 4-4.4, 4-8.4(a), and 4-8.4(d). In aggravation, the referee considered Buckle's age of 52, his two prior admonishments, his substantial experience in the practice of law, a pattern of misconduct, multiple offenses, and his refusal to acknowledge the wrongful nature of his conduct. *Id*. at 1132. This Court imposed a public reprimand. *Id*. at 1134. *Buckle* is distinguishable from the instant case. Buckle, whose disciplinary record consisted of two

admonishments, had not previously been publicly reprimanded. In contrast, the Respondent has been disciplined four times, including two suspensions.

Florida Bar v. Sayler, 721 So. 2d 1152 (Fla. 1998), is another case presented by the Respondent in support of a public reprimand. In *Sayler*, the attorney violated rules 3-4.3, 4-4.4, and 4-8.4(d) by sending a threatening letter to opposing counsel which "would only embarrass, frighten or otherwise burden" the recipient. *Id*. at 1154. In aggravation, the referee considered Sayler's substantial experience in the practice of law and his refusal to acknowledge the wrongful nature of his conduct. *Id*. This Court approved the recommended sanction of a public reprimand and six months' probation. *Id*. at 1155. Unlike the Respondent in the instant case, the attorney in *Sayler* had **no record of prior discipline**.

In *Florida Bar v. Uhrig*, 666 So. 2d 887 (Fla. 1996), the respondent, who represented a client in a child support enforcement matter, sent a humiliating and disparaging letter to the opposing party, his client's former husband. The referee found Uhrig guilty of violating Rule 4-8.4(d). This Court approved the referee's recommendation of a public reprimand. Again, unlike the Respondent, Uhrig had **no record of prior discipline**.

In *Florida Bar v. Johnson*, 511 So. 2d 295 (Fla. 1987), an attorney, who was also an ordained minister, sent several letters to a former client in an attempt to collect his legal fees, threatening the client with what God would do to him if he did not pay the money he owed. The referee also found that Johnson executed a limited partnership agreement with no intent of contributing $5,000 to it, as stated in the agreement. This Court imposed a public reprimand. Johnson had **no prior disciplinary record.**

Finally, Respondent cited in support of a public reprimand, *Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001), in which the attorney, on repeated occasions, made disparaging and profane remarks to litigants, opposing parties and other lawyers. The referee found Martocci guilty of two counts of violating Rule 4-8.4(d). In mitigation, the referee found that Martocci had a good reputation and **no prior discipline**. Aggravating factors were Martocci's substantial experience in the practice of law, a pattern of unethical misconduct, and refusal to acknowledge the wrongful nature of his conduct. *Id*. at 1075-76. This Court approved the recommended discipline of a public reprimand plus two years' probation.

All of these cases are distinguishable from the instant case. With the exception of the respondent in *Buckl*e, who had two prior admonishments, none of the other respondents had a history of prior discipline. In contrast, the

Respondent has a record consisting of four prior disciplines, including two suspensions. Moreover, the facts of the instant case are dissimilar to the facts of the cited cases. None of the attorneys in the cited cases filed false pleadings with the court. These cases do not support the imposition of a public reprimand as the appropriate sanction for Respondent's misconduct.

CONCLUSION

Respondent, an experienced attorney, filed two motions that contained false allegations labeling Mr. Ferguson as a convicted felon. Respondent's objective in the custody case was to prevent Mr. Ferguson from having any contact with her client's children. The record evidence shows that Respondent knew, prior to filing the motions, that Mr. Ferguson was not a convicted felon. Because Respondent acted knowingly when she included false statements about Mr. Ferguson in the motions that she filed with the court, she is guilty of conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c).

The Respondent's recent 60-day suspension was not considered by the Referee in assessing discipline. The misconduct occurred close in time to the misconduct in the instant case, and this Court's Order imposing the 60-day suspension was brought to the attention of the Referee before the Referee issued his report. In imposing an appropriate sanction in this case, this Court should consider the Respondent's recent suspension as part of her disciplinary history.

Given the seriousness of the Respondent's misconduct and her extensive record of prior discipline, the referee's recommendation of a public reprimand does not adequately serve the goals of attorney discipline and is

inconsistent with the relevant case law and the Standards for Imposing Attorney Discipline. Respondent's misconduct warrants no less than a one year suspension from the practice of law and an assessment of the Bar's costs in these proceedings.

Dated this _____ day of December, 2002.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express, Airbill Number 5061991071 to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to **Scott K. Tozian**, Attorney for Geneva Carol Forrester, 109 N. Brush Street, Suite 150, Tampa, FL 33602; by regular U.S. mail to **John Anthony Boggs**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of _____, 2002.

_____
William Lance Thompson
Assistant Staff Counsel

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font, and the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton Antivirus for Windows.

_____
William Lance Thompson