IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BARTLEY CHARLES MILLER,

Respondent.

_________________________________/

Supreme Court Case
No. SC01-736

The Florida Bar File
Nos. 2000-51,031(11D)
2000-70,361(11D)

The Florida Bar's Answer Brief

VIVIAN MARIA REYES
Bar Counsel
Florida Bar No. 004235
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN ANTHONY BOGGS
Staff Counsel
Florida Bar No. 253847
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5839

JOHN F. HARKNESS, JR.
Executive Director
Florida Bar No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5839

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES .... ii - iv

STATEMENT OF THE CASE AND FACTS .... 1 - 14

SUMMARY OF ARGUMENT .... 15 - 17

ARGUMENT .... 18 - 36

I. RESPONDENT HAS FAILED TO MEET HIS BURDEN OF PROVING THAT THE REFEREE'S FINDINGS LACKED COMPETENT SUBSTANTIAL EVIDENCE. (Restated) ...... 18 - 24

II. RESPONDENT HAS FAILED TO ESTABLISH ERROR REGARDING THE REFEREE'S RECOMMENDATION OF A TWO (2) YEAR SUSPENSION. (Restated) .... 25 - 34

III. DID THE REFEREE PERMIT OPPOSING COUNSEL TO SUBMIT A RESPONSE TO THE BAR'S PROPOSED ORDER? (Restated) .... 35 - 36

CONCLUSION 37

CERTIFICATE OF SERVICE 38

CERTIFICATE OF TYPE, SIZE, AND STYLE AND ANTI-VIRUS SCAN 38

INDEX TO APPENDIX 39

TABLE OF AUTHORITIES

CASES **PAGE**

Corporate Management Advisors v. Boghos,
756 So.2d 246 (Fla. 5th DCA 2000) 35

Dodd v. The Florida Bar,
118 So. 2d 17 (Fla. 1960) 30, 31

Maradie v. Maradie,
680 So.2d 538 (Fla. 1st DCA 1996). 35

Patterson v. Weathers,
476 So.2d 1294 (Fla. 5th DCA 1985) 35

Santini v. Cleveland Clinic Florida,
232 F.3d 823 (11th Cir. 2000) 11, 23

The Florida Bar v. Agar,
394 So. 2d 405 (Fla. 1981) 29, 30

The Florida Bar v. Anderson,
538 So.2d 852 (Fla. 1989) 32

The Florida Bar v. Brooks,
336 So.2d 359 (Fla. 1976) 34

The Florida Bar v. Cox,
794 So.2d 1279 (Fla. 2001) 31

The Florida Bar v. Hagglund,
372 So. 2d 76 (Fla. 1979) 33

The Florida Bar v. Hmielewski,
702 So.2d 218 (Fla. 1997) 27, 29

The Florida Bar v. Kravitz,
694 So.2d 725(Fla. 1997) 32

The Florida Bar v. McLawhorn,
535 So. 2d 602 (Fla. 1988) 33

The Florida Bar v. Pearce,
356 So. 2d 317 (Fla. 1978) 33

The Florida Bar v. Sax,
530 So. 2d 284 (Fla. 1988) 33

The Florida Bar v. Temmer,
753 So. 2d 555 (Fla. 1999) 25

The Florida Bar v. Tobin,
674 So.2d 127 (Fla. 1996) 32

The Florida Bar v. Vining,
761 So.2d 1044 (Fla. 2000) 18, 25

The Florida Bar v. Wright,
520 So.2d 269 (Fla. 1988) 33

White v. White,
686 So.2d 762 (Fla. 5th DCA 1997) 35

CODE OF FEDERAL REGULATIONS

29 CFR 1601.28 13

RULES REGULATING THE FLORIDA BAR

4-3.3(a)(1) 18

4-3.4(a) 18

4-8.4(c) 18, 19

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

6.0 25

6.11 26

6.12 26

6.2 26

6.21 26

6.22 26

7.0 26

7.1 27

7.2 27

STATEMENT OF THE CASE AND FACTS

The Bar rejects the Respondent's Statement of the Case and Facts. Respondent's Statement makes no reference to the evidence presented by the Bar, is argumentative in nature, and misleading in regard to many of the references to the record. Therefore, the Bar will set forth below the genesis of this case as presented in an Order Imposing Sanctions issued by United States Magistrate Judge Barry Seltzer, as well as other facts based upon the record.

The fifty page "Order Imposing Sanctions" [1] was admitted into evidence by stipulation of the parties. (TFB Exh. 1; T. 4,5). In addition to the written stipulation, twenty documents were admitted as part of the Bar's case. Pertinent portions of Exhibit 2, the Order Imposing Sanctions, follow.

ORDER IMPOSING SANCTIONS

> THIS CAUSE is before the Court upon its sua sponte consideration of whether sanctions should be imposed against

---

[1] The order was entered in the case of Roberta Santini, M.D., v. Cleveland Clinic Florida, Case No. 98-6559-CIV-ZLOCH, U.S. District Court, So. District of Florida. Except where otherwise indicated by brackets, the narrative below is quoted directly from the order.

Plaintiff Roberta Santini, (current) attorney Bartley Miller, and (former) attorney Heidi Friedman for concealing from the Court and Defendant that Santini and her counsel had, in fact received an EEOC right-to-sue notice by February 2, 1998. The matter is before United States Judge Barry S. Seltzer pursuant to the consent of the parties.

BACKGROUND

On May 29, 1998, Robert Santini, M.D. brought this action against her former employer, Cleveland Clinic Florida . . . .[2]

(TFB Exh. 2, p. 1)

On March 22, 1999, the Clinic moved for summary judgment, arguing that Santini had failed to timely file [two of her claims] . . . .

With respect to [those two] claims, the sole issue raised by the Clinic [in a] summary judgment motion was whether Santini had failed to commence this action within 90 days of her receipt of the EEOC's Right to Sue Notice . . . .

(TFB Exh. 2, p. 2)

[Supporting documents included] an August 12, 1997 letter to the EEOC from Heidi Friedman [Santini's prior attorney], an undated Right-to-Sue Notice, a March 2, 1998 Right-to-Sue Notice, the EEOC log, a receipt for certified mail, and a return receipt signed by Elsa Santini. Through its submissions, the Clinic established the following . . . .

4. On or about January 27, 1998, the EEOC issued an undated Dismissal and Notice of Right ("Right-to-Sue Notice" or "Notice"). The Notice informed Santini that the EEOC had closed its file on her Charge because it had adopted the findings of the

[2] Ellipsis is used herein due to the fact that the Bar has edited the lengthy order for purposes of this appeal.

local agency that had investigated it. The Notice further advised Santini that she had the right to bring a civil action in state or federal court. <u>And it unequivocally stated that she would lose this right if she did not file suit within 90 days after she received the Notice</u>. (Emphasis added.)

(TFB Exh. 2, pp. 3-4)

5. On January 27, 1998, the EEOC sent by certified mail the undated Right-to-Sue Notice to the address Santini had provided in her Charge [Her mother, Elsa Santini's address]. It also sent by regular mail a copy of the Notice to the Clinic's attorney (Tordella) and purportedly to Santini's attorney (Friedman) . . . .

7. On or about March 2, 1998, the EEOC mailed a second Right-to-Sue Notice to Santini and counsel for both parties.

8. On May 29, 1998 (122 days after issuance of the undated Notice, but 88 days after issuance of the March 2, 1998 Notice), Santini filed her Complaint, attaching the March 2, 1998 Notice only . . . .

(TFB Exh. 2, p. 4)

Having no evidence that Roberta Santini herself had received the first (undated) Right-to-Sue Notice, the Clinic argued that the 90 day period was triggered upon receipt of the (undated) Right-to-Sue Notice by Santini's mother on January 29, 1998 [When deposed, Roberta Santini did not admit to receipt of the undated letter.] . . . .

(TFB Exh. 2, p. 6)

Additionally, on behalf of Roberta Santini, attorney Miller submitted a memorandum opposing summary judgment. He contended that Santini's suit was timely filed because the 90 day period did not begin to run until his client's receipt of the (second) March 2, 1998 Right-to-Sue Notice . . . . [Miller argued that the] "Defendant has failed to produce any evidence that Plaintiff

received the first Dismissal and Notice of Right-to-Sue Letter" [and based his legal argument upon that assertion] . . . . Miller submitted an affidavit from attorney Heidi Friedman. Friedman['s affidavit] stated that she was Santini's attorney of record during the EEOC process and investigation . . . . She then averred, "The Affiant never received from the EEOC the undated Right to Sue letter notwithstanding the affiants [sic] name appearing on same. However, the undersigned did receive from the EEOC the Right to Sue letter dated March 2, 1998." Friedman Aff. at ¶ 3.

(TFB Exh. 2, pp. 9-11)

[Miller reasserted that position] [i]n his response memorandum . . . . [He added that] "Additionally, the facts are undisputed that Plaintiff's counsel, Heidi Friedman, only received one EEOC Dismissal and Notice of Right to Sue Letter dated March 2, 1998." Memorandum at 6 (DE 35) . . . .

(TFB Exh. 2, pp. 11-12)

After reviewing the parties' submissions, the Court concluded that the record was not sufficiently developed to enable it to determine whether there existed a genuine issue of material fact as to Roberta Santini's alleged receipt of the first (undated) Right-to-Sue Notice. [An evidentiary hearing was scheduled for May 21, 1999] Although it appeared that Elsa Santini may have received the first Notice, conspicuously absent from her affidavit was any indication of whether she had given the Notice to her daughter. Moreover, apparently standing by her deposition testimony, Roberta Santini failed to address in her subsequent affidavit whether she, in fact, had ever received the undated Right-to-Sue Notice from either the EEOC or her mother. Consequently, the Court scheduled an evidentiary hearing and ordered that Elsa Santini, Plaintiff Roberta Santini, and attorney Heidi Friedman appear and provide testimony.

(TFB Exh. 2, pp. 12-13)

On May 21, 1999, the Court commenced the evidentiary hearing. Despite being ordered to appear, Plaintiff Roberta Santini failed to do so. At the hearing, attorney Miller explained that Roberta Santini could not attend because she was unable to leave work. He stated that he would rely instead on Roberta Santini's deposition testimony and her affidavit. Elsa Santini and attorney Heidi Friedman did appear and testify at the hearing.

(TFB Exh. 2, pp. 13-14)

Elsa Santini

. . . Elsa Santini identified her signature on the January 29, 1998 return receipt but stated that she had no memory "whatsoever" of signing for any certified letter (despite having attested in her April 19, 1999 affidavit that a postman delivered to her residence a certified letter addressed to her daughter) . . . .

Notwithstanding that Elsa Santini denied any recollection of the certified letter, she testified that she never gave it to Roberta Santini . . . .

(TFB Exh. 2, pp. 14-15)

Heidi Friedman

Attorney Miller informed the Court that Heidi Friedman was present to testify but that he did not believe her testimony was necessary given the Clinic's reply memorandum . . . . Miller told the Court that he "just (did not) want to waste time in calling Ms. Friedman." Dissenting from this assessment of the conversation she informed the EEOC representative that she had not received a right-to-sue notice; the representative responded that they "will get right on it." Friedman also recalled later receiving the March 2, 1998 Notice, which she gave to Miller.

Friedman acknowledged that she had reviewed her firm's file on the Santini case before her testimony; she, however, did not bring the file with her. When defense counsel inquired whether she had observed the undated (first) Right-to-Sue Notice in the file,

Miller objected, asserting the attorney-client and work product privileges. Over Miller's objections, the Court directed Friedman to answer. She proceeded to admit the firm's file did contain the undated (first) Notice . . . .

(TFB Exh. 2, pp. 15, 17)

The Court then inquired. Friedman acknowledged that Roberta Santini had forwarded to her attention the undated (first) Notice and that she had had a telephone conversation with Santini about that Notice in February 1998. The Court next inquired of Friedman whether that conversation with Santini occurred before or after her call to the EEOC. Friedman responded, "It was really around the same time because it is the last things, those were the last 2 things that I did on the file." Transcript at 65 (DE 50).

The Court then invited follow-up questions from counsel. Miller declined the invitation. Defense counsel, however, accepted. He referred Friedman to her affidavit, in which she averred that she had not received the undated Right-to-Sue Notice from the EEOC. He asked: "And as I now understand what from your testimony, while you didn't receive it from the EEOC your firm received it from your client?" Friedman responded: "My firm but not me necessarily. From the client, not from the EEOC." Transcript at 66 (DE 50).

(TFB Exh. 2, pp. 17-18)

At the conclusion of the testimony, the Court informed counsel that it would reconvene the hearing with Plaintiff Roberta Santini present . . . .

[Over] Miller's objection . . . Friedman, Santini, and Miller provided the following testimony:

1. On January 26, 1998, Friedman called Jeffrey Woods, an EEOC representative, and informed him that she had not yet received a right-to-sue letter. Her handwritten notes memorializing this conversation state: "Telephone conversation with Jeff Woods, EEOC, Right to Sue Letter should be sent. Just

needs signature." Friedman stated that she mistakenly testified at the May 21, 1999 hearing that this conversation was with Bob Mataxa in February 1998. This is the only telephone conversation Friedman recalls having had with any EEOC representative. Further, her time entries do not reflect any other conversation, and she does not have any notes reflecting another conversation.

(TFB Exh. 2, pp. 18-19)

2. On or before February 2, 1998, Plaintiff Roberta Santini did receive from the EEOC the first (undated) Right-to-Sue Notice. She then called Friedman to notify her that she (Roberta Santini) had received the Notice. Friedman informed Santini that she (Friedman) had not received it. The law firm's time records reflect a February 2, 1998 telephone conversation between Friedman and Santini. Santini immediately faxed the Notice to the firm. The faxed copy of the first (undated) Notice bears a fax date of February 2, 1998, and it contains the following notation by Santini: "To Heidi Friedman, Esq. from Roberta Santini, M.D." Friedman testified that she does not recall either the conversation with Santini or receiving the faxed Notice. She further testified that had she received the faxed Notice, she would have given it to Miller because she was no longer working on Santini's case.

(TFB Exh. 2, p. 19)

3. <u>Miller testified that he does not recall receiving the first (undated) Notice, which was faxed by Santini. Yet the law firm's time records reflect that on the day Santini faxed the Notice, Miller expended thirty (30) minutes on "[r]eceipt and review of right to sue letter; follow up on same</u>." (Emphasis added.) . . . [Further, a February 2, firm memo stated:]

> We received the right to sue letter on February 2, 1998, from our client. I am uncertain as to the exact date that it was filed. In any event, please prepare a complaint for sexual harassment, constructive discharge, negligent supervision and retention and any other causes of action which you believe are

> pertinent. I would like to have the complaint drafted by February 13, 1998. Also please see Heidi on this
>
> matter as she worked on the EEOC portion of the case . . . .

(TFB Exh. 2, pp. 19-20)

5. Before preparing his response to the Clinic's March 22, 1999 summary judgment motion, Miller called Friedman and asked whether she had received the first (undated) Right-to-Sue Notice from the EEOC. Miller testified that he also asked her to provide an affidavit to counter the Clinic's assertion that an attorney's receipt of a right-to-sue notice would trigger the 90 day period.

(TFB Exh. 2, pp. 20-21)

6. Two weeks later, Miller met with Friedman at her law office to discuss and prepare her affidavit. Friedman's firm - Miller's former firm - had kept its file on the Santini case. During their review of this file, Miller and Friedman examined the first (undated) Right-to-Sue Notice that Santini had faxed to the firm on February 2, 1998, and the February 1998 memorandum from Miller to Justin Senior. Miller testified that when he observed this Notice in the file, he was surprised and shocked and his "heart went into (his) stomach." Transcript at 121 (DE 49) . . . .

(TFB Exh. 2, p. 21)

9. Miller admitted that as an officer of the Court he knew that the Federal Rules of Civil Procedure required him to supplement his disclosures to defense counsel. But he stated that he had not thought to do so with respect to the evidence he encountered showing his and Santini's receipt of the first (undated) Notice. . . .

(TFB Exh. 2, p. 22)

10. . . . Attorney Miller acknowledged that he had, in fact,

informed Santini that she need not attend the hearing. According to Miller, he had misread the Court's Order and did not realize that Santini was required to attend. But he ensured Friedman's attendance, as ordered, by having her served with a subpoena; he also ensured Elsa Santini's attendance, as ordered.

(TFB Exh. 2, p. 23)

SANCTIONS

. . . This Court must determine whether sanctions against attorney Miller, Plaintiff Roberta Santini, and/or attorney Friedman are warranted and, if so, the nature thereof and the bases upon which they should be imposed.

(TFB Exh. 2, p. 25)

Attorney Miller

From the inception of this lawsuit, attorney Miller has repeatedly failed to disclose to the Court and to the Clinic that Plaintiff Roberta Santini and her counsel had, in fact, received an EEOC Right-to-Sue Notice more than 90 days before he filed her Complaint. The record is clear that Miller knew by February 2, 1998, that Santini had personally received the first (undated) Right-to-Sue Notice. Miller had not only reviewed the Notice, but had also prepared (or caused to be prepared) a memorandum to an associate directing that a complaint be drafted by February 13, 1998. Yet, in the Complaint, Miller made no reference to either Santini's or counsel's receipt of the first Notice; he instead attached to the Complaint only the second (March 2, 1998) Notice. Miller claims that by the time he had filed the Complaint four months later on May 29, 1998, he had forgotten that he and Santini had both received the first Notice . . . .

(TFB Exh. 2, pp. 25-26)

But even assuming that Miller did not recall his and/or Santini's receipt of the first (undated) Notice until he reviewed the

file on April 9, 1999, the Court would have no doubt that Miller thereafter deliberately concealed this material evidence. . . .

Miller commenced this course of deception with his response memorandum, in which he argued that the 90 days period began to run on March 2, 1998. Yet, his memorandum contained the glaring omission that both he and Santini had, in fact, received the first (undated) Notice by February 2, 1998. He remained silent as to this material fact knowing that it was critical to the proper resolution of the dispute. But his tactics went beyond material omission; he engaged in disingenuous argument: "Furthermore, Defendant has failed to produce any evidence that Plaintiff received the first Dismissal and Notice of Right to Sue Letter." Memorandum at 3 (DE 35). Miller made this argument knowing that the only reason the Clinic had failed to produce the evidence was because he (Miller) had failed to tender it . . . .

(TFB Exh. 2, pp. 28-29)

Miller then extended his deception to his presentation of evidence. To avoid summary judgment, Miller submitted the affidavits of Elsa Santini and Heidi Friedman, both of which were calculated to conceal the truth from the Court.... Moreover, attorney Miller sat silently by and permitted Elsa Santini to testify unequivocally that she had never given the Notice to her daughter, knowing that either she or someone in her household had, in fact, given it to Roberta Santini.

Even more troubling than his passivity in the face of Elsa Santini's testimony was Miller's submission to the Court of Heidi Friedman's affidavit. In this document, Friedman averred that she did not receive "from the EEOC" the undated Right-to- Sue letter, but that she did receive from the EEOC the Right-to-Sue letter dated March 2, 1998. Miller submitted this affidavit to the Court knowing that even though Friedman had not received the first (undated) Notice from the EEOC, she had received it from Roberta Santini . . . .

(TFB Exh. 2, pp. 29-30)

> Miller then called Friedman as a witness. Through careful questioning, he avoided eliciting from Friedman any response indicating that Santini had, in fact, received the first Notice and that he (Miller) had received it from Santini and reviewed it on February 2, 1998. And on the Clinic's cross-examination, Miller attempted to prevent Friedman from testifying that the first (undated) EEOC Notice was in the law firm's file by asserting the attorney-client and work product privileges . . . .

(TFB Exh. 2, p. 31)

Summary judgment was granted in favor of the Cleveland Clinic. Santini appealed. In Santini v. Cleveland Clinic Florida, 232 F.3d 823 (11th Cir. 2000), (TFB's Exh. 20), the Court rejected the argument advanced by Miller in the District Court. The Court held that:

> Here the EEOC reissued a Notice merely to correct a technical defect rather than pursuant to a consideration of the charge. Because the issuance of a second notice on March 2, 1998 is immaterial, the district court did not err in finding that Santini's federal claims were time barred.

An equitable tolling argument advanced by Miler was also rejected by the Appellate Court.

Respondent appealed the order imposing sanctions. In Case No. 01-11229 of the Non-Argument Calendar, an order was entered on February 15, 2002, affirming the imposition of sanctions. (TFB Exh. 21). The Court stated:

> after the expenditure of considerable briefing and hearing it

> was discovered that both Miller and Santini did, in fact, receive the first right-to-sue notice, and that Miller concealed that fact. He also assisted in the submission of a false affidavit and a misleading brief responding to the summary judgment motion, implying that Santini never received the first right-to-sue notice, even if not saying so explicitly. It was also discovered that Miller misled the court by knowingly allowing witnesses to testify at a hearing in the matter that created the impression that Santini had not received the first right-to-sue notice.

At the final hearing before the Referee, Respondent presented several witnesses. Jim Colon testified in behalf of the Respondent. Colon is an employee of the EEOC.[3] (T. 70). He was asked to look into the case file. Colon testified that after looking into the file "It was determined that in fact a right to sue was issued undated and when it came to the Commission's attention, a second right to sue notation, which was dated." (T. 71).

He added that it was the Commission's opinion that the first letter was "incomplete", because it was undated and therefore a second letter was sent. He stated that, in his opinion, the ninety day period should have been based upon the March 2nd letter. Colon also stated that there was "no reconsideration of the case. It clarified a document with an error." (T. 75-76).

---

[3] The record is silent as to Colon's position with the EEOC. It does not appear from the record that he was personally involved with this case. He testified that he "was asked to look into the case file as a result of the affidavit that's in front of this Court." The affidavit was signed and sworn to by Colon.

Fred Behul, an attorney for the Broward County Human Rights Division, also testified on behalf of the Respondent. Behul claimed to have familiarity and expertise in regard to the EEOC rules. (T. 81). He asserted that one "cannot toll a statute of limitations until you have a date certain." (T. 85)

On cross examination, when confronted with the Code of Federal Regulations, Behul acknowledged that 29 CFR 1601.28(E) does not require a date stamp (T. 94) and admitted that tolling begins on the date of <u>receipt</u>. (T. 96).

Behul then stated that:

> "I have nothing to do with the EEOC. I work for Broward County. (T. 96).

Behul added:

> "I don't know what their actual practice is on a daily basis in the Miami office. (T. 96).

Shari Levine, a legal assistant, worked with Heidi Friedman, Santini's first attorney in the EEOC case. She recalled receiving a fax of a right-to-sue letter on approximately February 12 or 13, from Dr. Santini. (T. 111). According to Levine, Heidi Friedman told her that since the letter was undated, she would ask the Commission for another letter. Heidi Friedman did not testify. Levine also stated that Friedman told her that someone in the EEOC advised her that the first letter could be disregarded. (T. 113). Jean Hunter testified that she knew the

Respondent for many years and that he was a truthful and honest person. (T. 123).

As stated at the outset, the Bar does not accept the Respondent's Statement of the Case and Facts. Among the misleading statements which should be rejected prior to considering the Argument portion of Respondent's brief is the following initial sentence:

> This case involves attorney Bartley C. Miller's (hereinafter referred to as "Miller") good faith belief and interpretation of the extremely technical and ever evolving legal procedures in employment discrimination litigation.
>
> (p. 5)

Respondent continues:

> In late January, 1998, the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") issued a Right to Sue Letter that it declared was inadvertently sent to Miller's client Dr. Roberta Santini. The EEOC within weeks of issuing the invalid letter advised Miller's then associate, Heidi Friedman, to disregard the letter and that a valid and complete Right to Sue Letter would be forthcoming. (Testimony of Shari Levine, transcript p. 113, lines 3-22).
>
> (p. 5)

Respondent's adroit draft suggests direct and official involvement of the EEOC regarding the issue of which letter governed. In fact, the EEOC "declared" nothing.

Respondent also testified at the final hearing, and his testimony has been addressed in his Initial Brief. The Bar will address Respondent's testimony in the

Argument portion of this Answer Brief.

SUMMARY OF ARGUMENT

Respondent's first argument ostensibly pertains to the correctness of the factual findings of guilt. The Referee found that Respondent was in violation of three rules.

Respondent has not recognized the authority applicable to appellate review of factual findings. Furthermore, he has not presented any coherent argument to the effect that there is a lack of competent substantial evidence. Rather, he seeks to reargue the legal issue of the ninety day calculation, and to defend his conduct, apparently seeking de novo review.

Respondent totally ignores the Bar's evidence. He advances his argument without references to the record or any citations to authority.

The Bar has presented an edited version of a fifty page order dealing with Respondent's misconduct. That evidence established that Respondent was guilty of deception, misrepresentation, concealment, disingenuous arguments and more. The factual details, based upon extremely competent and substantial evidence, are set forth extensively in the Bar's Statement of the Case and Facts and in the Argument portion of this brief.

As stated above, Respondent seeks to reargue the basis for calculating the ninety day filing period for an EEOC complaint. That matter has been resolved adversely to the Respondent and his client. That reargument is not relevant or material. Respondent's misconduct rests upon independent factual findings by the Magistrate.

In the process of arguing this non-issue, Respondent resorts again to disingenuous argument. He seeks to mislead this Court by creating the impression that the EEOC took a position regarding the ninety day controversy. Respondent refers to three individuals who expressed their beliefs about various actions of the EEOC. All were witnesses after the fact, i.e., Respondent received no communications from those witnesses upon which he could have based his conduct. Further, those witnesses and their testimony were thoroughly discredited at the final hearing.

With regard to Respondent's second argument, it is well settled law that the Court will not second guess a Referee's recommendation of discipline so long as there is a reasonable basis in the existing case law. The cases relied upon by the Bar set forth a range of discipline from one-year suspension to disbarment. The Referee's recommendation of a two-year suspension is within the range set forth in the existing case law and should not be disturbed.

Respondent's third Argument contains no reference to the record. No facts were submitted to the Referee to support the claim that Respondent was not consulted regarding the proposed Report of Referee. Matters outside the record will not be considered on appeal. Furthermore, the Bar's Appendix establishes that Respondent's trial counsel was given an opportunity to comment on the proposed Report of Referee. Finally, the two cases cited by Respondent pertain to situations where findings were included in an order which had not been presented to the trier of fact and/or concededly did not reflect his thinking. No such claim has been advanced by the Respondent .

ARGUMENT I
(Restated)

RESPONDENT HAS FAILED TO MEET HIS BURDEN OF PROVING THAT THE REFEREE'S FINDINGS LACKED COMPETENT SUBSTANTIAL EVIDENCE.

As the Court stated in The Florida Bar v. Vining, 761 So.2d 1044 (Fla. 2000):

> A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See Florida Bar v. MacMillan,* 600 So.2d 457, 459 (Fla. 1992); *Florida Bar v. Vannier,* 498 So.2d 896, 898 (Fla. 1986). If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *See MacMillan,* 600 So.2d at 459. The party contending that the referee's findings of fact and conclusions as to 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. *See Florida Bar v. Miele,* 605 So.2d 866, 868 (Fla. 1992).

The Referee found that Respondent violated Rules 4-3.3(a)(l) (A lawyer shall not knowingly make a false statement of material fact or law to a tribunal); 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 proceeding; nor counsel or assist a witness to testify falsely); and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct.

Respondent, in Argument I, purports to raise the issue of whether the Bar proved its case by clear and convincing evidence. However, he does not bother to discuss the case law regarding the Referee's findings of fact, nor apply, nor refer to any evidence produced by the Bar, nor provide any references to the record.

Respondent does not even attempt to argue a lack of competent substantial evidence. As reflected in the Magistrate's order on sanctions, which was upheld on appeal, the Respondent had tried to prevent the appearance of Heidi Friedman as a witness and sought to prevent her from testifying as to the receipt of the first letter. (TFB Exh. 2, pp. 15, 17). Respondent denied seeing the first letter, but records of the law firm established that he did, as did a memo to the law firm (TFB Exh. 2, pp. 19-20).

Respondent met with Friedman to participate in the preparation of her affidavit. Respondent saw the first letter in her file. Respondent admitted that he had a duty to supplement his disclosures, but did not think of it regarding the first letter. (TFB Exh. 2, p. 21, 22). Respondent claimed at the final hearing that he

erroneously admitted a duty to supplement. (T. 206). Nevertheless, he did conceal the truth in other contexts as the Magistrate concluded.

The Magistrate found that Respondent had repeatedly failed to disclose that Roberta Santini and attorney Friedman had received the first letter and "deliberately concealed" that fact. He had omitted any reference to that fact in his response memorandum and charged the Plaintiff Clinic with failure to provide the letter, when he had failed to tender it. (TFB Exh. 2, pp. 25-26, 28-29). He persisted in blaming the Clinic for his misconduct at the final hearing. (T. 205). Respondent "extended his deception" by submitting affidavits designed to conceal the truth, and by deceptive questions and objections. (TFB Exh. 2, pp. 29-31). Additional misconduct of the Respondent is set forth in detail in the Magistrate's Order (TFB Exh. 2) and the portions thereof contained in our Statement of Case and Facts.

Respondent does, however, attempt to reargue a non-issue, namely whether Respondent's theory of the proper calculation of the ninety day time period was correct. The Eleventh Circuit found that it was not. However, even if Respondent's legal position ultimately prevailed, that would not justify his conduct, amply detailed in the Order, which violated the Rules of Professional Conduct. It is that conduct discussed in detail by the Referee, which Respondent inadequately addresses.

Despite the case law governing factual findings of the Referee (cited above), and the appellate ruling affirming the dismissal of the suit, and the affirmance of sanctions against Respondent, an attempt is made to reargue the legal issue of calculation of the time period.[4] Assuming arguendo that this Court believes that the basis of calculating the ninety day period should be revisited, the Respondent's argument is frivolous.

Respondent improperly suggests in his Argument, as well as the Statement of the Case and Facts, that the EEOC was directly involved, and its statements supported Respondent's legal position. For example, Respondent states in his brief (p. 1) that:

> The EEOC, within weeks of issuing the invalid letter advised Miller's then associate, Heidi Friedman, to disregard the letter and that a valid and complete Right to Sue letter would be forthcoming.

Note first that <u>there was no testimony from any source that the EEOC advised anyone that the first letter was invalid</u>. Respondent's reference to the record, p. 113, lines 3-22, reveals a portion of paralegal Shari Levine's testimony as

---

[4] In addition to the affirmance by the Eleventh Circuit, it is uncontradicted that the ninety day period begins on the date of <u>receipt</u>. That is clearly stated in the letters. (TFB Exhs. 6A, 6G). It is also stated in 29 CFR 1601.21(E). Therefore, the significance of an undated letter is zero. Respondent's own witness acknowledged that this was the case. (T. 96).

to what Friedman told her. The double hearsay is admissible. However, no reference to an "invalid" letter is included in her testimony and no portion of her testimony alleged that the EEOC employee said that a "valid" letter would be sent after the initial one. Those words were supplied by the Respondent. The words that "The EEOC . . . advised" were also somewhat misleading, insofar as only one conversation with one employee was the subject of Levine's testimony regarding what Friedman told her.[5] Supposedly, that employee said that the first letter could be disregarded. However, Friedman's own notes from her file revealed only one conversation, and not the one reported by Levine. (TFB Exh. 2, pp. 18-19).

Respondent repeatedly describes the first letter as "invalid" and the second letter as "valid". No decision of any Court is cited in support of that description. Respondent also repeatedly refers to pronouncements as to what the EEOC did.[6] Those assertions are inaccurate. They merely reflect opinions of witnesses regarding the activities of the EEOC pertaining to the two letters. Equating that testimony to official acts of the EEOC is ludicrous.

---

[5] The order on sanctions discussed Respondent's efforts to prevent Friedman's testimony.

[6] For example: The EEOC "declared" that a letter was inadvertently sent (R's brief, p. 1); The EEOC itself believed the first letter was a nullity (R's brief, p. 10); The EEOC issued the second valid Right to Sue letter. (R's brief, p. 2).

Respondent relies upon the testimony of John Colon, Fred Behul, and Shari Levine's testimony discussed above. All of these witnesses provided testimony that was after the fact. Neither Colon, Behul or Levine communicated with the Respondent regarding the alleged position of the EEOC. Even if all of them were authorized representatives of the EEOC, which they are not, Respondent could not have justified his conduct on the basis of information that he never received. That is, no witness stated that Respondent was provided with information from the EEOC which voided the effect of the first letter. Yet Respondent asserts in his brief the absurd contention that he was "entitled to believe and did believe the January 1998 letter had no legal effect." (R's brief, p. 10). If that was the case, why did he testify that when he saw the letter in Friedman's file "his heart went into [his] stomach? (TFB Exh. 2, p. 22).

Furthermore, what did these other witnesses actually say? Jim Colon was an employee of the EEOC. He was asked to review the file. He testified that the first letter was incomplete (T. 75) and the second letter provided a date.

Colon believed that the second letter should have governed, but conceded that there was no reconsideration of the case reflected in the second letter (T. 75-76). The Eleventh Circuit opinion held that under the circumstances, the first letter governed, notwithstanding Colon's opinion. <u>Santini v. Cleveland Clinic Florida</u>,

232 F.3d 823 (11th Cir. 2000).

Fred Behul was not an employee of the EEOC, but claimed that his employment with a Broward County agency provided familiarity with EEOC rules. (T. 81). He testified that one cannot toll a statute of limitations until you have "a date certain" (T. 85). Behul's position, however, was negated when he conceded that the Code of Federal Regulations, 29 CFR 1601.28(E), does not require a date stamp and that tolling begins on the date of receipt of the certified letter (T. 96). Behul added: "I have nothing to do with the EEOC. I work for Broward County." (T. 96). He also declared: "I don't know what their actual practice is on a daily basis in the Miami office. (T. 96)

In sum, Respondent's argument is misleading and frivolous. Respondent has failed to meet his burden of establishing error as to the findings of guilt.

ARGUMENT II
(Restated)

RESPONDENT HAS FAILED TO ESTABLISH ERROR REGARDING THE REFEREE'S RECOMMENDATION OF A TWO (2) YEAR SUSPENSION.

In The Florida Bar v. Vining, 761 So.2d 1044 (Fla. 2000), this Court held that a Referee's recommendation of discipline would not be second guessed if there is a reasonable basis in existing case law. There is a reasonable basis in existing case law to support a two suspension. Furthermore, this Court has held that the Standards Imposing Lawyer Sanctions will also be considered. The Florida Bar v. Temmer, 753 So. 2d 555 (Fla. 1999).

Respondent claims that his conduct should be governed by those standards which are based upon negligent conduct. His argument in support of that position is that Respondent was negligent in "determining whether he should have taken the stance that he did." The Bar assumes that this Court will properly assess the logic of that position. It is additionally noted that the Referee found Respondent's actions were intentional. (ROR, p. 9).

The Bar would submit that the following Standards are applicable to this case:

6.0 Violations of Duties Owed to the Legal System

6.11- Disbarment is appropriate when a lawyer: (a) with the intent to deceive the court, knowingly makes a false statement, or submits a false document; or (b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

6.12- Suspension 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.

Additional applicable Standards follow:

6.2 Abuse of the Legal Process

6.21 - Disbarment is appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

6.22- Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

Respondent through his machinations directly interfered with the legal process. Standard 6.22 addresses when an attorney directly interferes with a legal proceeding.

Additional Standards which govern in this case follow:

7.0 Violations of Other Duties Owed as a Professional

7.1 - Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional and with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a client, the public, or the legal system.

7.2 - Suspension 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 intentionally failed to disclose a crucial piece of evidence that he knew was the main focus of the legal proceeding. He also engaged in a pattern of deceit throughout the case. Respondent did not concede that he received the letter until he was exposed at the hearing before the Magistrate. Despite his concession he continued his evasive actions. Respondent did not disclose he had actually reviewed the file at his firm, nor did he disclose to the Magistrate he had reviewed the right to sue letter back on February 2, 1998.

There are also a number of cases which support the Referee's recommendation. In The Florida Bar v. Hmielewski, 702 So.2d 218 (Fla. 1997), the respondent's client had surreptitiously removed medical records from the hospital whose property they were. The hospital was therefore unable to find or produce this critical evidence. The hospital requested that respondent produce any of the client's father's records that he had in his possession. The respondent falsely stated that all records in his client's possession had already been provided

to the hospital. The respondent also misrepresented to the court that the hospital had failed to maintain critical patient records during the pertinent time frame. As a result of the respondent's misleading representations, the hospital was put to substantial trouble and expense trying to locate the medical records. Similarly in the instant case, on September 14, 1998, Respondent was requested to produce documents through the Notice of taking Deposition of Roberta Santini (his client) in paragraphs three and four of the Request for Production of Documents which specifically sought the following documents:

> 3. Originals, or legible copies, of any and all correspondence (or other documents) between her and the Division of Unemployment Compensation of the Department of Labor and Employment Security.
>
> 4. Originals, or legible copies, of each and every document that she submitted to or received from, or that was created by, the Broward County Human Rights Division or United States Equal Employment Opportunity Commission or any other person or entity in conjunction with her discrimination charge(s) against Defendant.
>
> (TFB Exh. 5)

Respondent brought some of the documents, but alleged he did not have the first right to sue letter. However, as evidenced by his time sheets and the faxed letter, both he and his client had the letter as of February 2, 1998. Neither Respondent or his client produced the letter sought by the Defendant. Respondent

argued, as did Hmielewski's counsel, on page three of his "Response" that the "Defendant has failed to produce any evidence that Plaintiff **received** the first Dismissal and Notice of Right to Sue Letter." Respondent made this argument after he had already seen the faxed letter sent by his client and received by his firm on February 2, 1998. This is just one of Respondent's many bad faith actions.

In Hmielewski, the referee found that the respondent was overzealous, got caught up in his own lie, and allowed it to perpetuate in violation of his duty to the Court and to opposing counsel. The Supreme Court was mindful of this finding and considered respondent's strong character evidence and his relatively unblemished record and approved a three year suspension instead of disbarment. In the instant case, Respondent's pattern of deceit continued past the discovery stage. Indeed, Respondent took his pattern with him to the federal courthouse where the Magistrate uncovered what clearly should have been disclosed by Mr. Miller.

In The Florida Bar v. Agar, 394 So. 2d 405 (Fla. 1981), the respondent called as a witness the client's wife who testified falsely. The respondent knew of the fraud, but never told the court.

The Respondent in the instant case submitted affidavits he prepared. These affidavits omitted any mention of receiving the first right to sue letter. At the May

21, 1999 evidentiary hearing, Respondent questioned Elsa Santini, his client's mother. She testified she had no recollection of receiving the first right to sue letter despite the fact that her affidavit acknowledged receiving it. She also testified she had never given the first right to sue notice to her daughter. Respondent stood silent and allowed her to testify unequivocally that she never gave the right to sue letter to her daughter. He never corrected the record knowing someone had given his client the letter.

Respondent's client was ordered by the court to appear at the hearing. Despite the court's order, Respondent told his client her attendance was not necessary. Additionally, Respondent submitted Heidi Friedman's affidavit and argued in his "Response" that the only Right to Sue Notice from the EEOC which Ms. Friedman received was dated March 2, 1998. Respondent attempted to prevent Ms. Friedman from testifying, but the court ordered her to testify. Respondent questioned her, but avoided any questions that referred in any manner to the faxed letter.

In Agar, the respondent pled nolo contendre to a misdemeanor offense of solicitation to commit perjury. He was disbarred. Here, Respondent participated in the presentation of perjured testimony by his silence. In Agar the Supreme Court reiterated its prior statement in Dodd v The Florida Bar, 118 So. 2d 17 (Fla. 1960)

in which the Court held:

> No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done ***it deserves the harshest penalty***.(at 19, emphasis supplied)

Respondent's pattern of deceit was more egregious than the respondent in The Florida Bar v. Cox, 794 So.2d 1279 (Fla. 2001). In Cox, the prosecutor's entire motivation was to protect the confidential informant. In the instant case, the Respondent was guilty of a series of acts. The Referee in Cox gave much credence to her character witnesses. Cox was also very remorseful. Respondent's numerous acts of misconduct and lack of remorse makes his case more egregious than Cox. Cox received a one year suspension.

The Respondent has provided this Court with a series of cases that provides a low range of discipline. However, the cases provided by the Respondent are far less egregious. Respondent's path of deception included false affidavits, false testimony, attempting to prevent the court from hearing testimony that would be damaging to him, lying to the court by telling the court he needed to see the file from his old firm when he already seen it, and filing misleading memoranda to the court.

In The Florida Bar v. Tobin, 674 So.2d 127 (Fla. 1996), the respondent's action was not a pattern of deception, but rather dealt more with contempt of court and improperly withdrawing funds. In Tobin, the respondent knowingly withdrew funds without giving notice to the opposing side. Notice was required by the local rules. Tobin also disbursed funds even though he knew there was an emergency hearing the next day to recover the improperly withdrawn funds. Tobin also was held in contempt for failure to disperse the funds. Tobin was found by the court to have violated different rules than Mr. Miller. Tobin's actions were different and less egregious than those of Mr. Miller. Mr. Miller's path of deception is totally dissimilar to the Tobin case and the rules considered by the court are different and therefore inapplicable.

In The Florida Bar v. Kravitz, 694 So.2d 725(Fla. 1997), the respondent made two misrepresentations to the court. He made two other misrepresentations to a witness and lawyer. Although the respondent's action in Kravitz were serious, it is not nearly as serious as Respondent's myriad of deceptions.

In The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989), the respondent and another attorney were sanctioned for an uncorrected misrepresentation to the court. However, they ultimately acknowledged the misleading nature of their misrepresentation. The Court found respondent Anderson less culpable.

Respondent's course of conduct was not one misrepresentation, but a myriad of misrepresentations.

In The Florida Bar v. McLawhorn, 535 So. 2d 602 (Fla. 1988), the respondent's action were far less egregious. The court did not find respondent's actions intentional or done to accomplish an improper purpose. Mr. Miller's actions were both intentional and in "bad faith."

The Florida Bar v. Sax, 530 So. 2d 284 (Fla. 1988) dealt with the submission of a notarized pleading knowing it contained an untrue factual averment. Respondent did that and much more.

In The Florida Bar v. Wright, 520 So.2d 269 (Fla. 1988), the respondent was a party in a dissolution action and failed to reveal any property sales contract he had an interest in. Clearly this case is not applicable.

In The Florida Bar v. Hagglund, 372 So. 2d 76 (Fla. 1979), the respondent filed a false and incorrect affidavit. Mr. Miller filed several incorrect and false affidavits in conjunction with many more misrepresentations.

In The Florida Bar v. Pearce, 356 So. 2d 317 (Fla. 1978), the respondent participated in plans for witnesses to testify falsely. However this Court summarized the Referee's Report including this statement: "at the disciplinary hearing, the witnesses' testimony varied on the extent of Respondent's

participation in the preparation of the false story." (At 319). The evidence regarding Pearce was apparently weak, and affected the Referee's determination that a public reprimand was appropriate. Respondent's actions were more egregious. He tried to prevent witnesses from testifying, elicited false testimony, and submitted false affidavits to the court.

In The Florida Bar v. Brooks, 336 So.2d 359 (Fla. 1976), the respondent testified falsely before a coroner's inquest. This case is totally different to the facts in our case. The respondent in Brooks was not even before a tribunal. Respondent's deceit was to a court. Therefore this case is not applicable.

It is clear that the Referee's recommendation of two years suspension in the instant case is within the range of discipline imposed in analogous cases and should be upheld.

ARGUMENT III
(Restated)

DID THE REFEREE PERMIT OPPOSING COUNSEL TO SUBMIT A RESPONSE TO THE BAR'S PROPOSED ORDER?

Respondent provides no reference to the record in support of his contention. Respondent did submit the claim to the Referee on rehearing that counsel was not permitted to respond. However, he submitted no supporting material, e.g. an affidavit of trial counsel which supports this argument. Respondent did not request an oral hearing to present evidence as to this matter. Matters outside the record should not be considered on appeal. Patterson v. Weathers, 476 So.2d 1294 (Fla. 5th DCA 1985). That principle applies to evidence not provided to the Court. Maradie v. Maradie, 680 So.2d 538 (Fla. 1st DCA 1996).

Furthermore, Respondent's claim is false. A copy of the proposed Report of Referee was sent to Respondent's counsel with a cover letter, a copy of which is attached hereto as Appendix A.

Furthermore, the cases cited by Respondent have no application here. In White v. White, 686 So.2d 762 (Fla. 5th DCA 1997), the party who drafted the order included a specific matter not considered by the Court. The Respondent makes no such claim herein. In Corporate Management Advisors v. Boghos, 756 So.2d 246 (Fla. 5th DCA 2000), the party who drafted the judgment did not

disagree that the findings of fact reflected defense counsel's opinions and not those of the judge.

Factually and legally, Respondent's argument is incorrect and frivolous. It should be rejected.

CONCLUSION

Respondent has not established the existence of error. The Referee's Report should be approved .

____

VIVIAN MARIA REYES
Bar Counsel
TFB No. 004235
The Florida Bar
444 Brickell Avenue
Suite M-100
Miami, Florida 33l3l
Tel: (305) 377-4445

JOHN ANTHONY BOGGS
Staff Counsel
Florida Bar No. 253847
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5839

JOHN F. HARKNESS, JR.
Executive Director
Florida Bar No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5839

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Answer Brief was forwarded via Airborne Express, airbill no. 3370018820, to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Edmund M. Aristone, Jr., Attorney for Respondent, 1151 North Atlantic Boulevard, # 11C, Fort Lauderdale, Florida 33304, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this __4th__ day of November, 2002.

____

VIVIAN MARIA REYES
Bar Counsel

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

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

____

VIVIAN MARIA REYES
Bar Counsel

INDEX TO APPENDIX

A. A copy of the cover sheet sent to Respondent's counsel and the "Communication Result Report" dated May 14, 2002.