IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC03-1738

v.

TFB File No. 2003-00,725(2B)

ANDREW JAMES O'CONNOR

Respondent.
_____/

ANSWER BRIEF

Tiffany R. Collins, Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5845
Florida Bar No. 152218

John Anthony Boggs, Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 253847

John F. Harkness, Jr., Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390

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PRELIMINARY STATEMENT

Complainant will be referred to as The Florida Bar, or as the Bar. Andrew James O'Connor, Respondent, will be referred to as Respondent, or as Mr. O'Connor throughout this brief.

References to the Report of Referee shall be designated by the symbol RR followed by the appropriate page number (e.g., RR p. 2). References to the referee's Memorandum of Decision shall be designated by the symbol MOD followed by the appropriate page number (e.g., MOD p. 2).

References to specific pleadings will be made by title. References to Respondent's Initial Brief shall be identified as "IB" with the appropriate page number (e.g., IB p. 5). References to the Supplement to the Report of Referee shall be identified as "Supplement to RR." References made to the hearing transcripts shall be identified as Discipline Hearing TR (held on November 1, 2004) or Sanction Hearing TR (held on April 4, 2005) with the appropriate page number (e.g. Discipline Hearing TR p.3).

References made to The Florida Bar's Exhibits shall be identified as TFB-Exhibit with the appropriate page number (e.g. TFB-Exhibit A p.3).

STATEMENT OF THE CASE AND FACTS

Respondent was admitted to The Florida Bar on November 11, 1990. On April 30, 1992, The Supreme Court of Florida placed Respondent on emergency suspension for alleged threatening behavior toward a former girlfriend and a local Tampa radio personality. On or about April 30, 1992, Respondent was injured in an automobile accident. Shortly thereafter, all Bar proceedings were stayed and placed on monitor status. On January 27, 1994, the Supreme Court of Florida issued its order granting Respondent's Petition to Approve Voluntary Placement on Inactive List.

On at least three occasions, from 1995 to 2001, The Florida Bar advised Respondent that he was required to file a Petition for Reinstatement with the Supreme Court of Florida before his name could be removed from the Inactive Membership list. On January 16, 2003, Respondent filed an application for a limited law license in the Supreme Court of New Mexico. Respondent did not disclose that he was under emergency suspension in Florida. Further, Respondent advised the Supreme Court of New Mexico that a certificate of admission to practice and good standing in Florida was attached. No such certificate was attached. The Supreme Court of New Mexico issued a license based on the Respondent's assertion; however the Supreme Court of New Mexico realized that the required documentation was not attached and immediately began to revoke the license. Respondent's employment was subsequently terminated with the Office of Public Defender in Santa Fe, New Mexico.

On January 21, 2003, the Chief Clerk of the Supreme Court of New Mexico forwarded a letter to The Florida Bar reporting that the Supreme Court of New Mexico rejected Respondent's application and that the Court deemed his application to contain a material misrepresentation. By letter dated January 20, 2003, Respondent, in an attempt to obtain documentation of membership in good standing, advised Mr. John Harkness, Jr., Executive Director of The Florida Bar, that Respondent had never been disciplined.

On or about February 7, 2003, The Florida Bar advised Respondent that an investigation of his conduct in connection with the filing of his application for a limited license in New Mexico was underway. On August 7, 2003, the Second Judicial Circuit Grievance Committee "B" found probable cause for a violation of Rules 4-3.3(a)(1) (Candor Toward the Tribunal), 4-8.1(a) (Bar Admission and Disciplinary Matters), 4-8.4(a) (Violation of Rules), and 4-8.4 (c) (Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation), Rules Regulating The Florida Bar. On or about September 29, 2003, The Florida Bar served Respondent with a Formal Complaint and Request for Admissions.

On November 1, 2004, a disciplinary hearing was conducted. On or about December 15, 2004, the referee provided Findings of Fact, wherein Respondent was found guilty of violating all alleged rule violations. A hearing to determine sanctions was held on April 4, 2005. The report of referee was provided to this Court on or about April 29, 2005. After the referee received a profane and vicious e-mail communication from

Respondent, the referee submitted a Supplemental Report of Referee, noting Respondent's offensive e-mail communication to Judge Dekker.

Subsequently, Respondent filed several pleadings seeking review of the referee's recommended discipline.

SUMMARY OF ARGUMENT

Pursuant to Rule 3-7.7(c)(5), "Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified." Respondent has not demonstrated that the referee's recommended discipline is erroneous, unlawful, or unjustified. Respondent challenged the recommended discipline by proffering the following arguments: 1) lack of jurisdiction of this Court; 2) lack of attestation of the initial complaint; 3) denial of due process rights at the grievance committee level; 4) denial of due process rights and a fair hearing due to prosecutorial misconduct; 5) denial of due process rights during the disciplinary hearing; 6) failure of the referee to consider the Standards for Imposing Lawyer Sanctions; 7) improper analysis of the facts and evidence by the referee; 8) erroneous analysis of the mitigating and aggravating factors; 9) violation of constitutional protections under the 5th and 6th Amendments; and 10) harshness of the recommended sanction.

The Florida Bar submits that Respondent's plethora of arguments is without merit. Under Rule 3-1.2, Rules Regulating The Florida Bar, this Court is vested with the jurisdiction to hear this matter. Further Rule 3-7.3(c), Rules Regulating The Florida Bar, provides "all complaints, except those initiated by The Florida Bar, shall be in writing and under oath." In accordance with the Rules, The Florida Bar initiated the disciplinary complaint against Respondent.

Respondent also argued a denial of due process rights at the grievance committee level. Florida case law established that a respondent attorney's due process rights at the grievance committee level are limited to notice and an opportunity to provide written statements for consideration by the grievance committee members. Respondent was afforded these rights; therefore no deprivation of due process occurred at the grievance committee level.

Respondent has argued that his due process rights were violated and he did not receive a fair trial because of prosecutorial misconduct by the Bar. Respondent pointed to the protracted discovery process and his allegations that the Bar withheld exculpatory evidence. This is categorically untrue. After an extended discovery search, within the bounds set by the referee, The Florida Bar provided Respondent with all documents which met the search criteria. It appeared that Respondent was unhappy with the results of the search, since the search did not provide any evidence which Respondent found useful at trial.

Respondent, again, alleged a violation of his due process rights because the referee considered the fact that Respondent was placed under emergency suspension in 1992. The underlying case was never adjudicated, a fact which The Florida Bar had acknowledged in discovery and at trial. An emergency suspension is a form of discipline as listed in the Rules Regulating The Florida Bar. Further Respondent petitioned this Court to lift the emergency suspension and said motion was denied. The language of the

order from the Supreme Court of Florida indicated that the suspension was in place until further order of the Court. The Court had an opportunity to remove the suspension, but opted not to do so. Accordingly Respondent remained under suspension by order of the Supreme Court of Florida.

Respondent argued that the referee failed to comply with The Florida Bar Standards for Imposing Lawyer Sanctions. The referee clearly addressed all relevant issues under the Rules Regulating The Florida Bar, Standards for Imposing Lawyer Sanctions, and Florida case law.

While Respondent argued that the referee failed to consider the Standards for Imposing Lawyer Sanctions, he contradicted himself by arguing that the referee erroneously confused the mitigating and aggravating factors in the instant case. The mitigating and aggravating factors to which Respondent referred are found in the Standards for Imposing Lawyer Sanctions. By Respondent's own acknowledgment, the referee considered the standards.

Respondent argued that his due process rights under the Fifth and Sixth Amendments were violated. As previously explained, Respondent suffered no deprivation of rights at any level of the disciplinary proceedings.

Respondent also maintained that the recommended sanction of disbarment is excessive and inconsistent with case law. Prior decisions of this Court indicate that Respondent's misrepresentation warrants disbarment.

Respondent also failed to mention his blatantly offensive conduct throughout the proceedings, which included a gender offensive and vulgar e-mail to the investigating member of the grievance committee, a series of racially offensive e-mails to bar counsel, and a profane and derogatory e-mail communication to the referee.

The Court should approve the discipline recommended by the referee and disbar Respondent from the practice of law in Florida.

ARGUMENT

ISSUE I

THE SUPREME COURT OF FLORIDA IS VESTED WITH THE AUTHORITY TO PRESIDE OVER THIS DISCIPLINARY MATTER.

Respondent has asserted that this Court and The Florida Bar, an arm of the Supreme Court of Florida, have no jurisdiction over this matter. IB p. 9. Pursuant to Rule 3-1.2, Rules Regulating The Florida Bar, this Court has jurisdiction over this matter. Rule 3-1.2 provides:

> The Supreme Court of Florida has the inherent power and duty to prescribe standards of conduct for lawyers, to determine what constitutes grounds for discipline of lawyers, to discipline for cause attorneys admitted to practice law in Florida, and to revoke the license of every lawyer whose unfitness to practice law has been duly established.

Respondent was admitted to The Florida Bar on November 11, 1990. While Respondent is a resident of New Mexico, his domicile has no effect on the Court's jurisdiction over him. Further, Respondent argued that the acts which formed the basis of the complaint occurred outside of Florida. IB p. 9. Again, this has no bearing on the Court's power to adjudicate this matter.

Respondent maintained that he is not a member of The Florida Bar and that his name does not appear in records of The Florida Bar. IB p. 10. The Florida Bar suspects that Respondent's assertion is premised on the fact that Respondent's name does not appear in the membership directory on The Florida Bar's website. The Florida Bar's

online directory does not list all the names of members of The Florida Bar. For instance, members who are suspended, delinquent regarding membership fees or continuing legal education requirements are not listed on the Bar's online directory. However, the members' names are listed in the official Bar database. Likewise, Respondent's name appears in the official Florida Bar database.

As a member of The Florida Bar, this Court has jurisdiction over disciplinary matters involving attorneys holding membership in The Florida Bar. Accordingly this Court has jurisdiction over this matter.

ISSUE II

THE FLORIDA BAR INITIATED THIS DISCIPLINARY PROCEEDING PURSUANT TO RULE 3-7.3(c), RULES REGULATING THE FLORIDA BAR.

Respondent argued that The Florida Bar has not complied with Rule 3-7.3(c), Rules Regulating The Florida Bar, because there was no written complaint by an attesting witness. IB p. 11. Rule 3-7.3(c), Rules Regulating The Florida Bar, provides:

> All complaints, **except those initiated by The Florida Bar**, shall be in writing and under oath. The complaint shall contain a statement providing: Under penalty of perjury, I declare the foregoing facts are true, correct, and complete. (Emphasis added)

On September 29, 2003, The Florida Bar initiated a complaint against Respondent after receiving a referral from the Clerk of Court of New Mexico. The Florida Bar acted as complainant in this matter. This is appropriate and consistent with the Rules Regulating The Florida Bar.

ISSUE III

RESPONDENT WAS AFFORDED FULL PROCEDURAL DUE PROCESS RIGHTS AT THE GRIEVANCE COMMITTEE LEVEL.

Respondent argued that he was denied due process and a fair hearing at the grievance committee level of these proceedings. IB p. 11. Bar grievance committee proceedings are principally investigatory; they are nonadversarial and an attorney under investigation has no right to confrontation, cross-examination, or a bill of particulars. The Florida Bar v. Swickle, 589 So.2d 901, 904 (Fla. 1991). In Swickle, the Court held that at a reasonable time before a finding of probable cause by a grievance committee, an attorney under investigation must be advised of conduct under investigation and rules that may have been violated, given all materials considered by the committee, and given an opportunity to make a written statement explaining, refuting, or admitting the alleged misconduct. Swickle at 3. Harvey S. Swickle argued that he was denied due process because he was not allowed to be present in the grievance committee meeting. This Court determined that the notice to Swickle was fair and in full compliance with the applicable rule. Swickle received notice on May 26, 1989, of the hearing scheduled for June 8, 1989. The notice identified the rules allegedly violated. Swickle was aware of the conduct under investigation. Further, Swickle was represented by counsel at the grievance committee hearing and was given an opportunity to cross-examine Bar witnesses. Also in The Florida Bar v. Committee, 2005 WL 2509186 (October 12,

2005), the Court held that the attorney's due process rights were not violated in a disciplinary proceeding, even though the attorney was not allowed to attend the grievance committee meeting, where the attorney was served with notice of the Bar's charges and was afforded an opportunity in the disciplinary hearing to be heard.

On or about July 2, 2003, Respondent was given notice of the alleged rule violations and that the grievance committee would review his case on August 7, 2003. See Notice of Review, p. 1. Respondent was provided with the review materials and given the opportunity to submit a written statement to the grievance committee. Respondent acknowledged receipt of the notice and provided statements refuting the allegations. See Respondent's Amended Statement Denying Alleged Misconduct and Motion to Dismiss and Respondent's Statement Denying Alleged Misconduct. Under the Rules Regulating The Florida Bar, Swickle, and Committee, Respondent's due process rights were not violated at the grievance committee level.

ISSUE IV

THE FLORIDA BAR DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT AND RESPONDENT WAS AFFORDED FULL DUE PROCESS RIGHTS.

Respondent maintained that The Florida Bar acted in bad faith and failed to comply with discovery requests. The Florida Bar emphatically denies the allegations, as the Bar has complied with all discovery orders of the referee. Respondent asked that the Bar provide letters, memoranda, and other documents which defined the meaning of "membership in good standing." On or about November 5, 2003, Respondent served Respondent's Request to Produce to Complainant. After a protracted discovery process, which included two motion hearings, The Florida Bar conducted an extensive search for documents from its Tallahassee and Tampa branch offices, which contained the terms "inactive," "define," "definition," and "membership in good standing." The search produced hundreds of pages of documents which were provided to Respondent. Respondent complained that the Bar withheld exculpatory evidence when the search results did not yield Respondent's desired result. Respondent's spurious and unfounded allegations have no basis in fact and The Florida Bar stringently denies Respondent's claims.

As has been the practice of Respondent throughout these proceedings, to file complaints against those prosecuting Respondent, Respondent filed a complaint against the undersigned and the presiding referee, The Honorable Kathleen Dekker. IB at p. 14.

It should be noted that the complaint against the undersigned was dismissed and the complaint against the referee was not processed.

ISSUE V

THE REFEREE DID NOT DENY RESPONDENT DUE PROCESS OR COMMIT REVERSIBLE ERROR IN CONSIDERING RESPONDENT'S EMERGENCY SUSPENSION.

Respondent argued that the referee erroneously introduced evidence of his emergency suspension. Rule 3-5.2 (Emergency Suspension and Probation), Rules Regulating The Florida Bar, provides:

> (a) Initial Petition. On petition of The Florida Bar, authorized by its president, president-elect, or executive director, supported by 1 or more affidavits demonstrating facts personally known to the affiants that, if unrebutted, would establish clearly and convincingly that an attorney appears to be causing great public harm, the Supreme Court of Florida may issue an order imposing emergency conditions of probation on said attorney or suspending said attorney on an emergency basis.

On April 21, 1992, The Florida Bar filed a Petition for Emergency Suspension based upon a complaint by Respondent's former girlfriend, for Respondent's alleged threatening behavior toward her and a Tampa radio personality. On April 30, 1992, the Supreme Court of Florida issued an Order placing Respondent under emergency suspension. On or about April 30, 1992, Respondent was reported to have been injured in an automobile accident. On June 24, 1992, The Supreme Court of Florida granted The Florida Bar's Motion for Extension of Time to File Complaint. The Florida Bar's complaint was to be filed within 60 days after notification that Respondent was able to participate in the proceedings. On October 14, 1993, Respondent filed a Notification of

Ability to Participate and a Motion for Dissolution of Emergency Suspension. Pursuant to Rule 3-5.2(e)(1), the time for The Bar to file its complaint was tolled. Rule 3-5.2(e)(1) provides in pertinent part:

> (e) Motions for Dissolution.
>
> (1) The attorney may move at any time for dissolution or amendment of an emergency order by motion filed with the Supreme Court of Florida, a copy of which will be served on bar counsel. Such motion shall operate as a stay of any other proceedings and applicable time limitations in the case and, unless the motion fails to state good cause or is procedurally barred as an invalid successive motion, shall immediately be assigned to a referee designated by the chief justice. The filing of such motion shall not stay the operation of an order of emergency suspension or probation entered under this rule.

On November 17, 1993, The Supreme Court of Florida issued an Order Denying Motion for Dissolution, thus Respondent's suspension was not lifted. The Court's Order Denying Motion for Dissolution restarted the 60 day filing period. The Bar's complaint was due to be filed by January 16, 1994. On December 15, 1993, Respondent filed a Petition for Placement on The Inactive List For Incapacity Not Related to Misconduct. Admittedly the alleged misconduct which gave rise to the Emergency Suspension in Case No. 79,713 was never litigated or adjudicated because of Respondent's having successfully sought leave to be placed on Inactive Status.

During the disciplinary hearing, The Florida Bar advised the court that The Florida Bar did not file a complaint in the underlying case because Respondent sought leave to be

inactive. Respondent's emergency suspension was still effective and Respondent was aware of this fact.

Further, it was within the referee's discretion to determine what evidence would be admissible. The rules of evidence are relaxed in disciplinary proceedings and any evidence deemed relevant in resolving factual questions may be considered. The Florida Bar v. Jasperson, 625 So.2d 459, 463 (Fla. 1993). The referee had discretion in ruling on motions. The Florida Bar v. Roth, 693 So.2d 969, 972 (Fla. 1997). In The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986), the Court held that in disciplinary proceedings, the referee's function is to weigh evidence, determine its sufficiency, and to make factual findings. Moreover, any conflicts in evidence are properly resolved by the referee sitting as court's finder of fact. The Florida Bar v. Simring, 612 So.2d 561 (Fla. 1993). Accordingly, the referee was well within her discretion to consider the emergency suspension and to allow documentary evidence of same to be entered in the record.

ISSUE VI

THE REFEREE PROPERLY CONSIDERED THE STANDARDS FOR IMPOSING LAWYER SANCTIONS AND THOROUGHLY ANALYZED THE APPLICABLE STANDARDS IN THE REPORT OF REFEREE.

Contrary to Respondent's assertion, the referee did consider the Standards for Imposing Lawyer Sanctions. In the report of referee, Judge Dekker set out the aggravating and mitigating factors she weighed in making her recommendation. The referee specifically cited the Standards for Imposing Lawyer Sanctions in the report of referee, reprinted for the reader's ease:

> The Florida Standards for Imposing Lawyer Sanctions provide the following factors to consider in recommending sanctions: duties violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating circumstances. Pursuant to Standard 5.11(f), The Florida Standards for Imposing Lawyer Sanctions, disbarment is an appropriate sanction for Respondent's violations because he engaged in "intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on [his] fitness to practice." Similarly, pursuant to Standard 6.11(a), the Florida Standards for Imposing Lawyer Sanctions, disbarment is an appropriate sanction because Respondent knowingly made a false statement or submitted a false document with the intent to deceive the Supreme Court of New Mexico. RR p. 3.

Further the referee articulated the potential harm that Respondent's misrepresentation could have had on the judicial system, reprinted below:

> Potential injury caused by Respondent's misconduct includes the risk of jeopardizing the outcomes of the criminal cases in which Respondent served as defense counsel. If Respondent had continued practicing as an attorney and it was later discovered he did not have a valid license to practice law, any number of cases could have been overturned for lack of counsel, causing harm to the judicial system. Respondent's conduct also potentially harmed the legal profession, which relies on the integrity of its members. Respondent's dishonesty reflects poorly on the profession as a whole. RR pp.4-5.

The referee considered the mitigating factors offered by Respondent's counsel, but the findings contradicted most of the mitigating factors. RR at 6. The referee specifically discussed her reasoning for rejecting some of the mitigating factors. RR at 6.

Respondent further argued that Rule 1-3.2(a) of the Rules Regulating The Florida Bar does not clearly define the phrase membership in good standing. Rule 1-3.2(a), provides:

> (a) Members in Good Standing. Members of The Florida Bar in good standing shall mean only those persons licensed to practice law in Florida who have paid annual membership fees or dues for the current year and who are not retired, resigned, delinquent, inactive, or suspended members.

Respondent questioned whether this definition put Respondent on notice that Respondent was not a member in good standing. Respondent's purported lack of understanding regarding the rule is questionable. Respondent was aware that he had been placed on an emergency suspension in 1992 and, at his request, Respondent was classified as an inactive due to medical incapacity. Even if Respondent did not believe

that the emergency suspension was still effective, Respondent was aware that he was an inactive member of The Florida Bar. Rule 1-3.2, Rules Regulating The Florida Bar, contains provisions regarding inactive members of The Florida Bar. Rule 1-3.2 provides in pertinent part:

> (c) Inactive Members. Inactive members of The Florida Bar shall mean only those members who have properly elected to be classified as inactive in the manner elsewhere provided.
>
> Inactive members shall:
>
> (1) pay annual membership fees as set forth in Rule 1-7.3;
>
> (2) be exempt from continuing legal education requirements;
>
> (3) affirmatively represent their membership status as inactive members of The Florida Bar when any statement of Florida Bar membership is made;
>
> (4) not hold themselves out as being able to practice law in Florida or render advice on matters of Florida law;
>
> (5) not hold any position that requires the person to be a licensed Florida attorney;
>
> (6) not be eligible for certification under the Florida certification plan;
>
> (7) not vote in Florida Bar elections or be counted for purposes of apportionment of the board of governors;
>
> (8) certify upon election of inactive status that they will comply with all applicable restrictions and limitations imposed on inactive members of The Florida Bar.
>
> Failure of an inactive member to comply with all requirements thereof shall be cause for disciplinary action.

> An inactive member may, at any time, apply for reinstatement to membership in good standing in the manner provided in Rule 1-3.7.

A plain reading of the rule is informative regarding inactive membership and membership in good standing. Further, Rule 3-4.1 (Notice and Knowledge of Rules), Rules Regulating The Florida Bar, provides in pertinent part:

> Every member of The Florida Bar and every attorney of another state or foreign country who provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of this court and its agencies under this rule and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court.

In the referee's Memorandum of Decision, the referee noted that Respondent was advised by the Bar on at least three occasions, at various intervals from 1995 through 2001, prior to the filing of an application for limited license in New Mexico, that he was required to go through the reinstatement process in Florida. MOD pp. 2-3. Respondent maintained that he did not understand his membership status in Florida. However, at the disciplinary hearing, The Florida Bar introduced into evidence two letters, dated February 28, 1995, and October 31, 2001, which advised Mr. O'Connor of the reinstatement process and the requirement that he complete the process before he could practice law again. Mr. O'Connor acknowledged receiving the October 31, 2001, correspondence, but stated that he did not believe the reinstatement manual was enclosed as indicated in the letter. MOD p. 3. Respondent denied receipt of the February 28, 1995 letter. MOD p.

3. Respondent indicated that he received contradictory information from various Florida Bar representatives, yet Respondent made no effort to clear his confusion. MOD p. 3. The referee noted that Respondent did not take steps to gather additional information about the reinstatement process. The referee made the following statement in the Memorandum of Decision, reprinted for the reader's ease:

> In an April 4, 2003, letter to the Bar, Mr. O'Connor stated he did not "understand that a petition for reinstatement was required to become an active member." Although this ignorance seems to be contradicted by the fact that on December 31, 1997, he had already sent the bar a petition for removal of inactive status (the online form), Mr. O'Connor explained that he saw that petition as merely a form, not as a formal petition. Mr. O'Connor stated that at the time he filed the application for a limited license in New Mexico, on January 15, 2003, he believed he was a member in good standing with the Florida Bar. He stated this was his belief because his status was inactive for medical incapacity not related to misconduct; he thought good standing meant never disciplined or disbarred. At the time of his limited license application, he did not think his emergency suspension would impair his standing with the Bar and he did not think his standing was affected by being on the inactive list. Mr. O'Connor stated that prior to submitting his limited license application, he did not read the Rules of the Florida Bar, call the Florida Bar Ethics Hotline for an advisory opinion, or contact membership records to obtain his status. MOD p. 3.

While Respondent tried to persuade the Court that he was confused, the evidence and Mr. O'Connor's testimony indicated that Respondent was placed on notice, actual and constructive, that he was required to complete the reinstatement process before he

could return to membership in good standing. The documentary evidence presented at the hearing and Respondent's own testimony support the Bar's position that Respondent was well aware of his membership status in Florida prior to filing an application for a limited license in New Mexico. Respondent's misconduct constituted more than a mere "technical violation," as Respondent would lead the Court to believe. IB p. 24. Respondent knowingly made a material misrepresentation to the Supreme Court of New Mexico.

ISSUE VII

THE REFEREE ACTED PROPERLY WITHIN HER DISCRETION AND ASSESSED THE CREDIBILITY OF THE WITNESS AND THE EVIDENCE.

The standard of review in attorney discipline cases is a well established principle, i.e., that a referee's findings of fact enjoy a presumption of correctness that will be upheld unless the challenging party can show that the facts are unsupported by the evidence in the record, or are clearly erroneous. The Florida Bar v. Cox, 718 So.2d 788, 792 (Fla. 1998); The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1983). Moreover, the Court will not reweigh the evidence and substitute its judgment for that of the referee if there is competent substantial evidence to support the referee's findings. See The Florida Bar v. Smith, 866 So.2d 41, 45 (Fla. 2004); The Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992), as cited in The Florida Bar v. Lecznar, 690 So.2d 1284, 1287 (Fla. 1997). The referee as the trier of fact, is in best position to assess the credibility of the witnesses and the evidence.

Judge Dekker carefully and methodically stated in her Memorandum of Decision, the specific aspects of Respondent's testimony and the evidence she considered in making her recommendation. As the case law held, the referee's decision is presumed correct unless unsupported by evidence. The Florida Bar v. Cox, 718 So.2d 788, 792 (Fla. 1998); The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1983). Judge Dekker reviewed the documentary evidence offered at the hearing and assessed the credibility of

the Respondent's testimony. Therefore, Respondent's argument that the recommendation is unsupported by evidence is incorrect.

ISSUE VIII

REFEREE PROPERLY CONSIDERED THE RELEVANT AGGRAVATING AND MITIGATING FACTORS IN MAKING HER DECISION.

Respondent stated that the referee confused the aggravating and mitigating factors. We disagree. The referee correctly analyzed the relevant aggravating and mitigating factors in the instant case.

The referee also considered Respondent's gender offensive e-mail communication to the investigating member of the grievance committee at the grievance committee level. TFB-Exhibit A, Sanction Hearing TR at p. 6. Respondent directed a series of racially offensive communications to the undersigned during the proceedings. TFB-Exhibits B – E, Sanction Hearing TR p. 7. Further, Respondent sent an e-mail message to the judicial assistant to the referee questioning the referee's competency. TFB-Exhibit F, Sanction Hearing TR at p. 7. Respondent's disrespectful and hostile conduct continued after the referee recommended that Respondent be disbarred. Respondent directed an extremely hostile and profane e-mail to the referee. The referee supplemented her Report of Referee to note, on the record, the crude and disrespectful e-mail communication Respondent sent to Judge Dekker. See Supplement to RR.

The Supreme Court of Florida noted that attitude is a proper consideration in the imposition of discipline. The Florida Bar v. Levin, 570 So.2d 917, 918 (Fla. 1990). See also The Florida Bar v. Thompson, 50 So.2d 1335, 1336 (Fla. 1986). In Levin, the

Court stated that the tone of the respondent's argument reflected a lack of understanding of the seriousness of the charges against him. Levin at 2.

ISSUE IX

RESPONDENT'S MISREPRESENTATION TO THE SUPREME COURT OF NEW MEXICO WARRANTS DISBARMENT.

A review of the Standards for Imposing Lawyer Discipline indicates that disbarment is appropriate. The Florida Bar submits that Standard 5.11(f), The Florida Standards for Imposing Lawyer Sanctions, disbarment is an appropriate sanction for Respondent's violations because he engaged in "intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on [his] fitness to practice." Similarly, pursuant to Standard 6.11(a), the Florida Standards for Imposing Lawyer Sanctions, disbarment is an appropriate sanction because Respondent knowingly made a false statement or submitted a false document with the intent to deceive the Supreme Court of New Mexico. This dishonest behavior occurred when Respondent filed his application for a limited license to practice law in New Mexico, in which he claimed to be a member in good standing with The Florida Bar, while he knew or had reason to know that he was not a member in good standing.

The Florida Supreme Court has long recognized that disbarment is consistent with the Court's recognition that falsification of a Florida bar admission application warrants revocation of the license to practice law. See The Florida Bar v. Budnitz, 690 So.2d 1239, 1240 (Fla. 1997) (ordering disbarment in Florida of attorney who knowingly made false statement of material fact in disciplinary matter in New Hampshire). RR p. 4. The

Court also addressed this issue in The Florida Bar v. Webster, 662 So.2d 1238, 1240-1241 (Fla. 1995). On May 24, 1990, David Webster, a member of both The Florida Bar and District of Columbia Bar, was suspended from the practice of law in Florida for trust account violations. While under suspension, Webster filed a motion for temporary admission to the Micronesia Bar. As part of his bar application, Webster stated that he was "not under an order of suspension or disbarment from any other authority." Webster attached a certificate of good standing with the District of Columbia Bar, which he did not advise of his Florida suspension. Further, in May 1991, Webster applied for admission as an attorney in the Republic of Palau. In his application, Webster stated that he was a member in good standing in the District of Columbia Bar but, again, failed to disclose his Florida Bar membership or his suspension. The Court determined that Webster engaged in intentional misrepresentation by omission. Webster at 2. The Court reasoned that disbarment was the appropriate sanction because Webster intentionally deceived the Micronesia and Palau Bars for his personal gain. Webster at 3.

Similarly in the instant case, Mr. O'Connor misrepresented his membership status in Florida to the Supreme Court of New Mexico to obtain a limited license to practice in New Mexico. RR at p. 4. Mr. O'Connor stated that he advised his employers at the Public Defender's Office that he was an inactive member of The Florida Bar. However, he did not disclose the fact that he was placed on emergency suspension in 1992. Further, Respondent's application indicated that a certificate of membership in good

standing was attached. This was not the case. Respondent attached a copy of his Florida Bar card, which is not akin to a certificate of membership in good standing.

The referee determined that disbarment was appropriate because Respondent willfully and intentionally misrepresented his status as a member in good standing to the Supreme Court of New Mexico for his personal gain, in order to keep his job as an assistant public defender. RR at p. 4.

The referee noted that the nature of Respondent's violation warranted disbarment. Dishonesty, especially in a Bar admission proceeding before a state supreme court cannot be tolerated. The referee stated:

> "Respondent's dishonesty reflects poorly on the profession as a whole. Lying is one of the most serious charges that may be brought against a lawyer. The Florida Bar v. Graham, 605 So.2d 53, 55 (Fla. 1992) ("Dishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members.")" RR p. 5.

As previously stated, Respondent bears the burden of proving that the referee's recommended discipline is unsupported by the record and is clearly erroneous. The Florida Bar v. Cox, 718 So.2d 788, 792 (Fla. 1998); The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1983). Respondent has not met the burden. Therefore, the application of the Standards for Imposing Lawyer Sanctions, case law, and the nature of the misconduct clearly establish that disbarment is the appropriate sanction.

ISSUE X

RESPONDENT HAS BEEN AFFORDED ALL DUE PROCESS RIGHTS TO WHICH HE IS ENTITLED IN THE DISCIPLINARY PROCEEDINGS.

Respondent has no property or liberty interest in pursuing the profession. The Florida Bar v. Glant, 684 So.2d 723-725 (Fla.1996). Rule 3-1.1, Rules Regulating The Florida Bar provides: "A license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause." The practice of law is a privilege, not a right. Debock v. State, 512 So.2d 164, 168 (Fla. 1987).

Respondent has been afforded all rights provided to Florida attorneys by this honorable Court. Reasonable notice and an opportunity to submit a written statement is all that is required to afford due process. The Florida Bar v. Daniel, 626 So.2d 178, 183 (Fla. 1993). As previously stated, Respondent was given sufficient notice at every stage in this disciplinary matter and an opportunity to be heard. Respondent has not been deprived of due process at any stage of the proceedings.

CONCLUSION

For the foregoing reasons, The Florida Bar would respectfully request that the Court approve the report of referee as to the findings of fact and determination of guilt in violation of specific Rules and grant costs to The Florida Bar.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. SC03-1738, TFB File No. 2003-00.725(2B) has been mailed by certified mail #7004 1160 0004 5672 7295, return receipt requested, to Andrew James O'Connor, Respondent, whose record Bar address is 612 E. Gomez, #5, Santa Fe, New Mexico 87505, on this _____ day of _____, 2005.

_____

Tiffany R. Collins, Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5845
Florida Bar No. 152218

Copy provided to:
John Anthony Boggs, Staff Counsel

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

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

_____

Tiffany R. Collins, Bar Counsel