IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SCO-1738

v.

TFB File No. 2003-00,

725(2B)

ANDREW JAMES O=CONNOR,

Respondent,

_____/

BRIEF IN SUPPORT OF PETITION FOR REVIEW

Andrew J. O=Connor
Respondent

612 Gomez, # 5
Santa Fe, NM 87505

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ANDREW JAMES O=CONNOR,

Respondent.

_____/

BRIEF IN SUPPORT OF PETITION FOR REVIEW

Respondent, ANDREW J. O=CONNOR, files this Brief In Support of

Petition for Review pursuant to Rule 3-7.7, Rules Regulating the Florida

Bar, and hereby requests oral argument in this case, as follows:

STATEMENT OF THE CASE AND FACTS

Respondent was admitted to The Florida Bar in 1990. On April 30, 1992 the

Respondent was severely injured by a drunk driver in an automobile accident

in Florida; was hospitalized for over nine (9) months, suffered multiple blunt

trauma injuries, underwent numerous surgeries which resulted in a permanent

disability rating by SSI. Sometime after April 30, 1992 while Respondent was

hospitalized an ex parte Emergency Suspension based upon false and

unsubstantiated allegations was entered against Respondent. On December 17,

1993, Respondent was placed on the inactive list for incapacity not related to

misconduct. Since December 17, 1993, Respondent has understood his Florida

Bar status to be inactive for medical incapacity not related to misconduct.

In 1994, Respondent permanently left Florida to reside in Boulder, Colorado

and rightly understood his Florida Bar status to be inactive for incapacity not

related to misconduct. The issue of whether Respondent was in Agood

standing@ did not arise until ten (10) years later; six months after Respondent

had been working as an Assistant Public Defender and Drug Court Attorney in

Santa Fe, New Mexico. Respondent never concealed the fact that he was an

inactive member of the Florida Bar from his employer and during

Respondent=s interviewing process he provided a copy of his Florida Bar card

that showed his inactive status to the New Mexico Public Defender=s Office.

In fact, Respondent was informed by his supervisor, the District Public

Defender, that his inactive status in Florida would not be a bar to his

employment with the New Mexico Public Defender=s upon Respondent=s hire

on July 31, 2002. On January 16, 2003, six (6) months after being hired ,

Respondent was instructed to make application for the limited license. Respondent attached a copy of his Florida Bar card to the application for

limited license which clearly showed his inactive status in Florida.

Respondent had, in good faith, equated his Florida Bar status of inactive for

incapacity **not related to misconduct** with being in good standing in Florida.

Respondent learned, after the fact, that for some reason an inactive Florida

Bar member is not in good standing in Florida.

On September 29, 2003 Complainant initiated this prosecution against

Respondent alleging that he made a Amaterial misrepresentation@ to The New

Mexico Supreme Court on January 16, 2003 because Respondent attached a

copy of his Florida Bar card that clearly showed his inactive status in Florida

to the application for a limited license in New Mexico. A final hearing was

held in this matter on November 1, 2004. The Referee=s Report dated April

29, 2005 found that Respondent violated Rules 4-3.3 (1), 4-8.1(a), 4-8.4(a)

and 4-8.4(c). The Referee recommended that Respondent be found guilty of

misconduct and that he be disciplined by disbarment from the practice of law

in Florida and pay Complainant=s costs. The Referee=s decision is erroneous,

unlawful and unjustified based upon the facts and evidence and the proposed

discipline is excessive in view of the circumstances of this case and existing

case law. Respondent files this Brief in Support of Petition for Review.

SUMMARY OF ARGUMENT

Respondent unintentionally committed a technical violation of The Rules Regulating The Florida Bar, which the Respondent is not subject to because of lack of jurisdiction and attestation. It was erroneous, unlawful and unjustified for the Referee to fail to consider the facts and evidence that demonstrated that at the time of his application for limited license, Respondent did not know that inactive for incapacity not related to misconduct meant that he was not in good standing in Florida. Respondent lacked the requisite mental state to have made a knowing material misrepresentation to the New Mexico Supreme Court.

The findings of fact do not comport with the facts and evidence and the proposed discipline is excessive in view of the circumstances of this case and existing case law. The Referee=s Report is erroneous, unlawful and unjustified as the findings of fact contained within the Report of the Referee do not comport with the facts and evidence presented at trial and contained in the pleadings.

The Referee=s Report and hostile attitude toward Respondent during the

course of this litigation reflect and demonstrate a bias and prejudice toward the Respondent so pronounced that Respondent was denied

due process and a fair hearing and renders the Referee=s Report and proposed

discipline invalid.

The Referee improperly allowed introduction of inadmissible evidence

evidence and wrongly based her decision and disciplined the Respondent

based upon the unproven allegations of that Respondent=s 1992 Emergency

Suspension, which was never adjudicated, rather than upon the facts and

evidence of the 2003 case, at hand.

Respondent was denied due process and a fair hearing during the grievance

procedure; because of Complainant=s prosecutorial misconduct during the

discovery phase and because of introduction and consideration by the Referee

of the inadmissible evidence of Respondent=s 1992 Emergency Suspension.

The Referee failed to properly consider the Standards for Imposing Lawyer

Sanctions and she confused mitigating factors with aggravating factors.

Finally, Respondent=s constitutional protections under the 5th and 6th

Amendments of the U.S. Constitution were violated in this case.

ARGUMENT

I. LACK OF JURISDICTION

The Court and the Complainant lack jurisdiction over the Respondent

because on September 29, 2003, Complainant wrongly initiated this

prosecution against the Respondent, a New Mexico resident not a Florida

resident, and more importantly not a member of the Florida Bar and not an

attorney according to Florida Bar records. This prosecution was based upon

false allegations of alleged violations the Rules Regulating the Florida Bar

by Respondent with all alleged acts occurring entirely within the State of

New Mexico. Respondent left Florida in 1994 has not been a resident or a

member of the Florida Bar nor an attorney since that time.

On April 30, 1992, Respondent suffered serious and life threatening injuries

in an automobile accident in Florida, caused by a drunk driver disabling the

Respondent and rendering him incapacitated.

On December 17, 1993, Scott Tozian, Respondent=s attorney, petitioned this

Court for an order to voluntarily place Respondent on the inactive list for

medical incapacity not related to misconduct which was granted
with the result that since December 17, 1993 Respondent has not been a

member of The Florida Bar and has not been an attorney according to

Florida Bar records. On numerous occasions since 1993, Respondent was

informed by Florida Bar employees and again in 2004 by Complainant=s

web designer that there was no record of Respondent as a member of the

Florida Bar and that he has not been listed as a member on the Florida Bar

website.

According to telephone conversations between Respondent and others and

employees of Complainant regarding Respondent=s Florida Bar status since

December 17, 1993, Respondent has not been considered an inactive

member of the Florida Bar; but, rather Complainant has labeled Respondent

Aincapacitated@ and not a member of The Florida Bar. As evidence of

Respondent=s non-attorney status, Complainant has not listed Respondent on

The Florida Bar website as a member in any category. The Court and the

Complainant lack jurisdiction to prosecute a nonmember of The Florida Bar

and a non lawyer under the Rules Regulating the Florida Bar because they

concern regulation of ***attorney conduct*** ; consequently, asserting jurisdiction

over Respondent is erroneous, unlawful and unjustified.

II. LACK OF ATTESTATION

The initial complaint contains fatal error because Rule 3-7.3 (c), Rules

Regulating the Florida Bar requires that the complainant, in this case the

Clerk of the New Mexico Supreme Court, submit in writing and under oath,

an attestation, under penalty of perjury, that the allegations contained in the

complaint are true and complete and which was not done in the this case;

thus failing to comply with the provisions of Rule 3-7.3 (c), Rules Regulating

the Florida Bar. The lack of the requisite attestation is erroneous,

unlawful and unjustified.

III. DENIAL OF RESPONDENT=S RIGHT TO DUE PROCESS AND FAIR HEARING DURING GRIEVANCE PROCEDURE

Respondent was denied procedural due process and a fair hearing during the

initial grievance committee proceedings in this case because under new Rule

3-7.4 (g) an accused lawyer no longer has a right to a hearing before probable

cause is found and that right, was specifically granted under the old Rules

Regulating the Florida Bar. The new Rule 3-7.4(g) denies Respondent and

all accused lawyers= procedural due process because it allows for a paper

review or a probable cause vote which is basically a decision by the grievance committee based upon documentation, which is inherently a due

process violation and unconstitutional under Federal and State law and

violates the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution

and their counterparts of the Florida Constitution contained in Article 1.

This denial of due process is erroneous, unlawful and unjustified.

IV. DENIAL OF RESPONDENT=S RIGHT TO DUE PROCESS AND FAIR HEARING THROUGH COMPLAINANT=S PROSECUTORIAL MISCONDUCT

During the course of litigation in this case, Respondent was denied due

process and a fair hearing because Complainant failed to comply with 3-

7.6(e), Rules Regulating the Florida Bar. The Referee committed

reversible error because of her pattern of failure by failing to enforce

discovery rules because she wrongly allowed Complainant to conduct

discovery in bad faith and to embark upon a pattern of prosecutorial misconduct by suppression of material evidence and the deliberate concealment of exculpatory evidence.

On November 5, 2003, Respondent filed Respondent=s Request to Produce

and requested that Complainant provide Respondent with a copy of any letter, document or memorandum prepared by or on behalf of the Complainant and provided to any third party explaining or describing the meaning, effect or limitations associated with a Florida Bar member being Ain-active@ or in Agood standing@. On November 26, 2003 Complainant filed Complainant=s Response to Respondent=s Request to Produce refusing to provide the requested documents stating that Respondent=s request was over broad and protected under the work product doctrine.

On March 2, 2004, Respondent filed Respondent=s Motion to Compel Production of Documents and on March 31, 2004, a hearing was held. On April 29, 2004, the Referee granted Respondent=s Motion to Compel Production of Documents pertaining to letters, documents or memoranda generated by Complainant between January 1, 2000 and January 16, 2003

that were provided to third parties and that explain or describe the meaning,

effect or limitations associated with a member being inactive or in

good standing.

However, on April 27, 2004,in bad faith thereby proving the existence of

exculpatory documents, Complainant filed a Motion for Clarification

refusing to produce the requested documents and continuing a pattern

of obstruction and misconduct attempting to re-argue relevancy and burden.

On May 20, 2004, a Hearing on Complainant=s Motion for Clarification was

held and the Motion for Clarification was denied with the Referee

again ordering Complainant to provided Respondent with the requested

documents which Complainant refused to disclose. Respondent never

received the outstanding exculpatory discovery which was necessary

and essential for Respondent to prepare his defense to this action. This

suppression of material evidence by Complainant prevented Respondent

from safely proceeding to trial. Without this crucial discovery Respondent=s

trial preparation and defense was severely compromised. This misconduct by

Complainant constitutes a denial of due process and prevented Respondent

from receiving a fair hearing due to Complaint=s suppression of material

evidence and her deliberate concealment of exculpatory evidence.

Complainant=s misconduct is unfortunately typical, standard and routine

prosecutorial misconduct and is the subject of a pending disciplinary

complaint against Complainant=s prosecutor, Tiffany Collins as well as the

subject of a pending complaint with Judicial Qualifications Commission

against Referee, Kathleen Dekker. The misconduct by the prosecutor and

Referee resulted in the denial of Respondent=s rights to due process and a fair

hearing and is erroneous, unlawful and unjustified.

V. DENIAL OF RESPONDENT=S RIGHT TO DUE PROCESS AND FAIR HEARING BY WRONGFUL INTRODUCTION OF INADMISSIBLE UNPROVEN ALLEGATIONS OF RESPONDENT=S 1992 EMERGENCY SUSPENSION

The Referee committed reversible error by her inclusion of an aggravating

factor in her Referee=s Report of inadmissible and irrelevant evidence in

which the probative value greatly was outweighed by its prejudicial impact.

This inadmissible evidence should never have been considered; to wit, false

and unsubstantiated allegations of Respondent=s 1992 Emergency

Suspension, which the Complainant failed to file a complaint in violation of

this Court=s Order. The Referee failed to correctly analyze the evidence and

failed to exclude the inadmissible, irrelevant, immaterial and unfairly

prejudicial evidence thus denying Respondent the right to due process and a

fair hearing.

The Referee=s Report wrongly lists the 1992 Emergency Suspension as an

aggravating factor and she refers to it throughout the report. Clearly this

inadmissible evidence was improperly used by the Referee to form the basis

of her decision and to increase the penalty. The Referee=s use of the 1992

Emergency Suspension was erroneous, unlawful and unjustified because

Respondent was disciplined based upon the false and unproven allegations
of 1992 rather than upon the facts and evidence of the 2003 case, at hand.

In the original complaint in this matter and during the entire course of this

litigation, Complainant improperly and continually referred to and

introduced evidence of the Respondent=s 1992 Emergency Suspension in

which Complainant failed to file a complaint and which was never

adjudicated. The inclusion of the unproven allegations of the 1992

Emergency Suspension in the initial complaint and the constant reference to

these unproven allegations by the Complainant during the course of this

litigation was done deliberately by Complainant in order to unfairly

prejudice the Referee against the Respondent by introducing these unproven

allegations into evidence by this back door and devious method thereby

insuring that Respondent would be disciplined based upon the unproven

allegations of the 1992 Emergency Suspension rather than based upon the

facts of the 2003 case, at hand.

The unproven allegations of Respondent=s 1992 Emergency

Suspension are not relevant to the present case and are unfairly prejudicial

with the probative value clearly outweighed by the prejudicial impact. This inadmissible evidence confused, rather than clarified issues before the
Referee. The allegations were never proven by Complainant and because

Respondent was not afforded a hearing in the 1992 matter and the

introduction and continual reference by Complainant to the 1992

Emergency Suspension was improper and a violation of Respondent=s

rights to due process and a fair hearing.

On June 24, 1992, this Court ordered the Complainant, to file a complaint

in The Florida Bar v. Andrew J. O'Connor, Case No. 79, 713, within sixty

days after notification that Respondent was sufficiently recovered to

participate in disciplinary proceedings. On October 14, 1993, Respondent,

through his attorney, Scott Tozian, filed Notification of Ability to

Participate in Disciplinary Proceedings with the Supreme Court of Florida.

Complainant, pursuant to the June 24, 1992 Order, had until December 14,

1993, to file a complaint against the Respondent in accordance with the Florida Supreme Court Order dated June 24, 1992. The Complainant failed to file a complaint before December 14, 1993 before the sixty day deadline expired. Complainant never filed a complaint against the Respondent in that
case .

On December 14, 1993, Respondent, through his attorney, Scott Tozian, filed a Petition For Placement On Inactive List For Incapacity Not Related to Misconduct the day of the expiration of the sixty-day period for filing of the formal Complaint.

The case of The Florida Bar v. Andrew J. O'Connor, Case No.79, 713, was
closed by the Complainant:s above- referenced failure to comply with this Court:s Order; consequently, Complainant is estopped from referring to the 1992 Emergency Suspension and it is inadmissible. Similarly, the Referee is
likewise estopped from using the 1992 Emergency Suspension as an aggravating factor and for the basis of her decision. It is error for the

Referee to include or reference the 1992 Emergency Suspension in the

Report of the Referee because Respondent was disciplined based upon the

unproven allegations of 1992 Emergency Suspension rather than on the facts

of the 2003 case, at hand.

VI. REFEREE=S FAILURE TO CONSIDER STANDARDS FOR IMPOSING LAWYER SANCTIONS

The Referee is in error because she failed to consider that The Board of

Governors of The Florida Bar adopted Standards for Imposing Lawyer

Sanctions in order to provide a format for referees, Bar counsel and the

Supreme Court of Florida to consider each of the following questions before

recommending or imposing appropriate discipline:

(1) duties violated;
(2) the lawyer=s mental state

(3) the potential or actual injury caused by the lawyer=s misconduct;
(4) the existence of aggravating or mitigating circumstances.

The Referee failed to consider the lack of any evidence whatsoever of potential or actual injury and she also failed to consider mitigating circumstances as absolutely no potential or actual injury was caused by the Respondent=s alleged misconduct.

The facts and evidence show that neither potential nor actual injury occurred in the present case when on January 16, 2003, the Respondent was granted a limited license to practice law in New Mexico. The facts and evidence show that within thirty (30) minutes of being issued the limited license, the Clerk of the New Mexico revoked the limited license. The limited license was restricted to employment with the New Public Defender=s Office and could not have been used in any other capacity.

The facts and evidence show that Respondent caused no injury to his clients but, in fact, helped his juvenile clients as an Assistant Public Defender and Drug Court Attorney in Santa Fe, New Mexico. The

reference

letter from the Honorable Daniel A. Sanchez, District Judge, Santa Fe, New

Mexico, in the record testifies to the fact that Respondent did no

harm and did a Afine@ and Avery good job on behalf of his clients taking their

needs and other important issues into consideration@. Other letters of

reference in the record, including, but not limited to the mother of one of

Respondent=s clients all attest to the fact that the Respondent caused no

harm but instead helped his clients.

Numerous mitigating circumstances exist in the present case and the

failure of the Referee to consider them is erroneous, unlawful and

unjustified. The Respondent was never provided with any writing from the
Florida Bar plainly stating that because he was inactive for incapacity not

related to misconduct that he was not in good standing. Rule 1-3.2. (a), of

the Rules Regulating The Florida Bar defines what it means to be in good

standing under membership classifications as follows:

A Members of The Florida Bar in good standing shall mean only those

persons who are admitted by the Supreme Court of Florida 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

member.@

How does the above definition put Respondent on notice that he is not in

good standing when his status for twelve years (12) years has been

inactive for incapacity not related to misconduct? Does the term inactive

include inactive for medical incapacity not related to misconduct as in

Respondent=s particular case? Does the term inactive encompass and

include all categories of inactive? Who can tell from this misleading and

confusing definition?

The definition of good standing is unclear, confusing and ambiguous to

Respondent and seems to be subject to different interpretations.

Rule 1-3.2 (c), Rules Regulating The Florida Bar defines inactive members

as:

AInactive members of The Florida Bar shall mean only those members who

have properly elected to be classified as inactive in the manner elsewhere

provided.@

The above definition presents a problem for Complainant because

Respondent did not personally make the election to be classified as inactive

for medical incapacity not related to misconduct. Respondent=s attorney,

Scott Tozian made the election while Respondent was incapacitated. An

extremely crucial mitigating circumstance which the Referee failed to

consider is that on December 17, 1983 Respondent was incompetent,

permanently disabled and attempting to recover from life threatening and

severe injuries that he sustained in the April 30, 1992 automobile accident;

consequently, Respondent was unable and could not have made a proper,

intelligent and knowing election to be classified as inactive. At that time,

Respondent was unable to comprehend the ramifications of what inactive

status meant. Again, it was Respondent=s attorney, Scott Tozian, not the

Respondent, who filed the petition for placement on the Inactive List for

Incapacity Not Related to Misconduct with this Court. Respondent has no

memory of this petition being filed.

The last sentence of Rule 1-3.1 (c) of the Rules Regulating the Florida Bar

states:

A An inactive member may, at any time, apply for reinstatement to

membership in good standing in the manner provided in rule 1-3.7.@

How does this definition put Respondent on notice that because he was

inactive for incapacity not related to misconduct that he was not in good

standing? Again, the language is unclear and ambiguous to Respondent and

is subject to varying interpretations; this section has been amended

numerous times after December 17,1993. This unclear and ambiguous

language generates confusion especially when the definitions of Amembers

in good standing@ and Ainactive@ are read together.

Respondent was obviously confused by the definitions of good standing and

inactive when he tried to apply them to his particular circumstances of inactive for medical incapacity not related to misconduct to standing.

Nowhere, in Rule 1-3.2 does it state that a member who is inactive for

medical incapacity not related to misconduct is not in good standing; it is

only implied.

The implication that an inactive member may not be in good standing was

not sufficient to put Respondent on notice regarding his Florida Bar

standing; especially, when a technical mistake in this regard subjected

Respondent to the severest discipline.

The confusion of Respondent because of the unclear language

contained in

the definitions of good standing and inactive must be considered as a

mitigating factor and the failure by the referee to consider it is erroneous,

unlawful and unjustified.

VII. THE REFEREE IS IN ERROR BECAUSE SHE FAILED TO CORRECTLY ANALYZE AND CONSIDER THE FACTS AND EVIDENCE IN REGARD TO RESPONDENT=S MISUNDERSTANDING OF THE DEFINITIONS OF GOOD STANDING AND INACTIVE

The Referee committed reversible error because her decision states:

A because I cannot believe in the face of documentary evidence that Mr.

O=Connor was put on clear notice before 2003, that Mr. O=Connor was

unaware of implications of being in inactive status relative to good standing

and unaware that he would be required to file a petition for reinstatement to

good standing.@

What documentary evidence? No documentary exists in this regard. This

conclusion is incorrect and erroneous based upon the facts and the evidence.

The Referee=s use of the word Aimplications@ is exactly the point made in

the preceding paragraph about how the language of the Rules

Regulating The Florida Bar that define good standing and inactive are

unclear and ambiguous because they only imply that a member is not in

good standing when inactive in Florida. The Referee then, inexplicably cites

an October 31, 2001 letter to Respondent from Complainant, that was in response to Respondent=s APetition for Removal of Inactive Status@ with

Complainant=s return to Respondent of a check for Respondent=s back dues.

The Referee incorrectly interperted this transaction as some sort of evidence

that Respondent was on notice that he was not in good standing. This

incorrect conclusion by the Referee is not based on any evidence and is

erroneous, unlawful and unjustified.

The Referee makes errors in logic and analysis not based on any evidence

because, in no way, was Respondent=s filing of a APetition for Removal of

Inactive Status@ show or prove that Respondent knew, at that time, that

inactive for medical incapacity not related to misconduct meant not in good

standing in Florida.

On October 31, 2001, the Respondent wanted to return to the active

practice of law in the State of Florida. Just because Respondent was on

notice that he had to go through a reinstatement process is not evidence that

he was on notice that inactive for medical incapacity not related to

misconduct meant that he was not in good standing in Florida. The

reinstatement process requirement was a necessary step for Respondent to

take before he could return to active practice of law in Florida. The

reinstatement process does not indicate or put the Respondent on notice that

because he is inactive for medical incapacity not related to misconduct that

he is not in good standing in Florida.

Again, the facts and evidence clearly show that the Respondent did not know

that he was not in good standing in Florida when he applied for a

limited license in New Mexico on January 16, 2003. Respondent did not and

could not and did not knowingly make a false statement of material fact to a

tribunal. Respondent did not violate any of the Rules Regulating The

Florida Bar.

The Respondent unintentionally committed a technical violation when he

attached a copy of his Florida Bar card to the application for limited license

notice; because he, in good faith, equated inactive for medical incapacity ***not related to misconduct*** with being in good standing. As a result, the

Referee=s decision is erroneous, unlawful and unjustified and was not based

upon the facts and evidence.

VIII. THE REFEREE ERRONEOUSLY CONFUSED MITIGATING FACTORS WITH AGGRAVATING FACTORS

The Referee=s decision is erroneous, unlawful and unjustified because she

confused aggravating factors with mitigating factors. The Referee

confused inexperience in the practice of law which is a mitigating factor

with an aggravating factor. The facts are that Respondent was admitted to

practice of law in Florida in 1990. His nearly fatal car accident occurred on

April 30, 1992 which means that Respondent has less than one (1) year

total of practice as an attorney from his work as an Assistant Public

Defender for Hillsborough County Public Defender=s Office even when

combined with his work at The New Mexico Public Defender=s Office.

Thus, it is erroneous, unlawful and unjustified for the Referee to fail to include Respondent=s inexperience in the practice of law as a mitigating factor and to confuse this mitigating factor with an aggravating factor.

The Referee also incorrectly questions the applicability of Respondent=s physical and mental impairment due to a closed head injury suffered in the car accident as a mitigating factor. Respondent produced evidence attesting to the seriousness of his injuries which the Referee ignored; consequently, it is erroneous, unlawful and unjustified for the Referee to fail to include Respondent=s injuries that resulted in impairment and disability as a mitigating factor. Similarly, it is erroneous, unlawful and justified for Referee to fail to consider Respondent=s inexperience in the practice of law as a mitigating factor and for the Referee to confuse mitigating factors with aggravating factors.

IX. THE PROPOSED DISCIPLINE IS EXCESSIVE IN

VIEW OF THE CIRCUMSTANCES OF THIS CASE AND EXISTING CASE LAW AND BIAS BY THE REFEREE AGAINST RESPONDENT INVALIDATES REPORT AND RECOMMENDATION

The Referee=s decision is erroneous, unlawful and unjustified because her

recommendation to disbar the Respondent from the practice of law in

Florida in light of the facts, circumstances and evidence in this case is

contrary to great weight of case law authority contained in disciplinary

cases. The proposed discipline is excessive in view of the circumstances in

this case and existing case law. Respondent=s mistake in unintentionally

committing a technical violation of the Rules Regulating the Florida Bar when he equated his status as inactive for medical incapacity not related

to misconduct with being in good standing in his application for a limited

license in New Mexico warrants a public reprimand or suspension for 90

days or less, at most.

All the cases cited by the Referee are neither applicable to nor relevant to the

Respondent=s particular set of circumstances and those cases are

clearly

distinguishable from the facts of Respondent=s case. The Referee wrongly

cites The Florida Bar v. Webster, 662 So. 2d 1238(Fla 1995) whose facts

and circumstances are not remotely relevant to the facts and circumstances

of Respondent=s case because unlike the attorney in Webster, Respondent

was not suspended and on probation from the practice of law in Florida in

2003 when he made application for the limited license in New Mexico.

Further distinguishing facts in Webster from Respondent=s case are: that

Webster, unlike the Respondent, made numerous applications to various

jurisdictions while suspended and on probation for that same conduct; that

Webster used his admission in the District of Columbia in his applications

for licenses; and that Webster was disbarred in Palua. The facts in Webster

could not be more different and dissimilar to the facts of Respondent=s case.

The facts and circumstances in Florida Bar v. Budnitz, 690 So 2d 1239 (Fla.

1997) also cannot be more dissimilar and distinguishable from Respondents

case because a petition for disbarment in New Hampshire was filed against

Budnitz alleging that he had made false statements of material fact to a

grand jury and a disciplinary committee which resulted in Budnitz being

disbarred in New Hampshire. Budnitz was disbarred in New Hampshire and

then he was disbarred in Florida for violating the same rules. Respondent

was not disbarred in New Mexico and the facts are clearly dissimilar and

distinguishable from Respondent=s case.

The last case that the Referee cites which is very different and

distinguishable from Respondent=s case is The Florida Bar v. Graham, 605

So. 2d 53 (Fla. 1992) where the attorney was accused of misappropriating

client funds and had previously been suspended because of the theft of client

funds. The Referee in Graham recommended his conditional reinstatement

to the practice of law in Florida and Complainant then petitioned for review

and the cases were consolidated. Both cases involved allegations of theft of

client funds, false representations to The Florida Bar and trust account

procedures violations.

Thus, Graham could not be more dissimilar to Respondents facts because

are no allegations of client funds, or of misrepresentations to The Florida

Bar or trust account procedures violations were made against Respondent.

All cases cited by the Referee are completely irrelevant and dissimilar to the

facts and circumstances of Respondent=s case and they do not apply to

Respondent.

The Referee apparently ignored all applicable case law summaries that were

submitted by Respondent=s attorney, Alan Wagner and instead chose to put

these irrelevant and inapplicable cases in her Referee=s Report.

A reading of The Findings of Fact and Narrative Summary of Case clearly

shows a very strong bias and animus against the Respondent by the Referee

so pronounced that it disqualifies the Referee from impartially hearing the

case and violated Respondent=s right to due process and a fair hearing

thereby effectively invalidating the Referee=s Report and proposed

discipline.

The applicable relevant cases to Respondent=s circumstances cited by

Respondent=s attorney all resulted in a reprimand. The cases most similar

are: Florida Bar v. Feinberg, 760 So 2d 933 (Fla 2000) in which a prosecutor

made false statements to defense attorney and had ex-parte communications

with defendant; Florida Bar v. Hagguland, 372 So. 2d 76 (Fla. 1979) where

lawyer knew or should have known of false affidavit in suit against former

client; Florida Bar In re Brooks, 336 So 2d 359 (Fla. 1976) attorney gave

false testimony in a coroner=s inquest; and Florida Bar v. King, 174 So. 2d

398 (Fla. 1965) where attorney Aknowingly and willfully@ gave false grand

jury testimony regarding incident of bribery during attorney=s campaign for

state senate. Arguably, the conduct of the attorneys in these cases was much

more egregious that anything Respondent allegedly did and yet all these

cases resulted in the attorneys being reprimanded.

Cases that resulted in suspension for 90 days or less submitted by

Respondent=s counsel that most closely resemble the facts and circumstances

of Respondent=s case are: Florida Bar v. Varner, 780 So. 2d 1(Fla 2001) in

which an attorney prepared and served a fictitious voluntary dismissal on

insurance company; Florida Bar v. Burkich-Burrel, 663 So. 2d 1082 (Fla.

1994) attorney knowingly assisted client/husband in making false statement

in interrogatories resulting in a 30 day suspension; and Florida Bar v.

Anderson, 538 So. 2d 852 (Fla. 1989) 30 day suspension for attorney failing

to correct a factual misrepresentations in appellate brief.

Again, the conduct of these attorneys was far more egregious than anything

Respondent was accused of; yet, they received suspensions of 90 days or

less.

Based upon the foregoing case law and the facts and circumstances of

Respondent=s case the Referee=s proposed discipline is excessive and

demonstrates a bias and prejudice against the Respondent by the Referee

that is so pronounced that impartiality was impossible, resulting in the

denial of Respondent=s right to due process and a fair and impartial trial

effectively invalidating the Referee=s Report and proposed discipline.

X. CONSTITUTIONAL PROTECTIONS UNDER THE 5TH AMENDMENT AND 6TH AMENDMENT APPLY TO RESPONDENT IN FLORIDA BAR DISCIPLINARY CASES AND RESPONDENT WAS DENIED DUE PROCESS

It was erroneous, unlawful, unjustified and unconstitutional that on

November 1, 2004 during the final hearing that Respondent was compelled

to testify as a witness against himself in violation of the Fifth Amendment=s

prohibition against self-incrimination. The final hearing was erroneous,

unlawful, unjustified and unconstitutional because it constituted the

unlawful taking of Respondent=s property interest in practicing law in

Florida without due process in violation of his Fifth Amendment protections.

Federal law is paramount over Florida State law in Florida Bar disciplinary

proceedings. The Fifth Amendment of the U.S. Constitution provides, in part:

A...nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...@ Fifth Amendment protections have been extended, applied and invoked in noncriminal proceedings; e.g., during testimony in front of Senate committees and the Fifth Amendment clearly applies to Florida Bar disciplinary cases which are quasi -criminal proceedings in nature.

No waiver occurs when testimony is compelled. Respondent was unconstitutionally denied his Fifth Amendment protections because he was compelled to be a witness against himself when he was called to the stand as the one and only witness by the Complainant=s prosecutor during the final hearing in this case.

The Sixth Amendment provides, in part: A ...the accused shall enjoy the

right

to a speedy and public trial, by an impartial jury of the State and district

wherein the crime shall have been committed... and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses

against him...@

Sixth Amendment protections have been extended, applied and invoked in

noncriminal proceedings and the Sixth Amendment clearly applies to Florida

Bar disciplinary cases. Respondent was denied the opportunity to confront

and to cross- examine the one witness against him in violation of his Sixth

Amendment protections .Respondent was also denied the right to trial in

New Mexico the situs and district of his alleged violations of the Rules

Regulating The Florida Bar in violation of his Sixth Amendment protections

under the U.S. Constitution.

Respondent=s due process rights under the 5th and 6th Amendments of

the

U.S. Constitution were violated in this proceeding.

CONCLUSION

Jurisdiction over Respondent and a proper attestation are lacking. The

Referee demonstrated extreme bias and prejudice against the Respondent

to the extent that Respondents due process rights and right to a fair impartial

trial were compromised and the Referee=s Report and recommended

discipline are effectively invalidated. Respondent=s due process rights and

constitutional protections under the Fifth and Sixth Amendment were

violated by the Florida Bar disciplinary process. The proposed discipline is

excessive based upon the facts and evidence in this case and existing

case law. The Respondent should be subject to either a public reprimand or
a suspension of less than 90 days, at most.
WHEREFORE, Respondent, ANDREW J. O=CONNOR, based upon the

foregoing files this Brief in Support of the Petition for Review pursuant to

Rule 3-7-7, Rules Regulating the Florida Bar and respectfully requests oral

argument in this case.

Respectfully Submitted

_____

Andrew J. O=Connor
Respondent
612 Gomez, # 5
Santa Fe, NM 87505
(505) 490-0090

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided via email to opposing counsel on May 26, 2005.

_____

Andrew J. O'Connor

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the requirements of Rule 9.210, Rules Of Appellate Procedure.

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Andrew J. O'Connor

TABLE OF CITATIONS

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