IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SCO3-1738

v.

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

ANDREW JAMES O'CONNOR

Respondent,

_____/

REPLY BRIEF

Andrew J. O'Connor, Esquire
Respondent
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Florida Bar No. 869430

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REPLY BRIEF

ARGUMENT

On April 30, 1992, Complainant caused an ex parte emergency suspension to be entered against Respondent, based upon false and unsubstantiated allegations without due process. On December 17, 1993, Respondent filed Petition for Inactive status with this Court. On January 27, 1994, this Court granted Respondent's Petition which dissolved the emergency suspension placing Respondent back in good standing and on inactive status for medical incapacity not related to misconduct. (see attached Order marked as Exhibit A). Despite this Court's order of January 27, 1994,

Complainant has maintained, in bad faith, the material misrepresentation that Respondent is not in good standing because and under emergency suspension since April 30, 1992.

Because of ongoing, bad faith, prosecutorial misconduct by Complainant the Respondent has been effectively disbarred since April 30, 1992, with this present case filed in bad faith by Complainant.

On September 29, 2003, this frivolous, bad faith prosecution was initiated against the Respondent by complaint from the Clerk of the New Mexico Supreme Court alleging that Respondent had made a "material misrepresentation" by attaching a copy of his Florida Bar card, which put the clerk on notice that Respondent was inactive in Florida.

It must be brought to the Court's attention that the Clerk of the New Mexico Supreme Court acted with extreme malice and bad faith toward the Respondent because on November 26, 2002, she had received a copy of a defamatory disciplinary complaint filed against Respondent's by Respondent's opposing counsel, three female assistant district attorneys, which they copied to the New Mexico Women's Bar Association. (see

attached complaint marked as Exhibit B). Respondent answered the complaint. (see attached answer marked as Exhibit C). The complaint was dismissed by the New Mexico Bar as frivolous. (see attached dismissal marked as Exhibit D).

Respondent's opposing counsel could not beat Respondent in Court, so, the female Assistant District Attorneys played the gender card and attempted to remove Respondent by the disciplinary complaint route. When the disciplinary complaint was dismissed by the New Mexico Supreme Court they then successfully had Respondent terminated from his job as an Assistant Public Defender and Drug Court Attorney and their opposing counsel in Children's Court by way of this bogus limited license issue. Complainant exploited the opportunity of the limited license issue in New Mexico to bring this bad faith, frivolous prosecution against Respondent in Florida.

Because of Complainant's ongoing violation of Respondent's due process and civil rights, Respondent was forced to file a Civil Rights Complaint, pursuant to 42 U.S. C . § 1983, against The Florida Bar. On September 21,

2005, a Default Judgment was entered against Complainant. (see attached Clerk's Entry of Default marked as Exhibit E).

THE PROPOSED DISCIPLINE IS EXCESSIVE IN VIEW OF THE CIRCUMSTANCES OF THIS CASE AND EXISTING CASE LAW AND GENDER BIAS 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 and is not based on the facts, circumstances and evidence in this case and is contrary to great weight of case law authority contained in disciplinary cases and in light of Complainant's bad faith prosecutorial misconduct toward Respondent since April 30, 1992, and continuing to date because o**n January 16, 2003, Respondent did not make a material misrepresentation in his application for a limited license in New Mexico when he attached a copy of his Florida Bar card which showed him to be inactive in Florida. Respondent was inactive for medical incapacity not related to misconduct and in good standing on January 16, 2003, because he was not under emergency suspension pursuant to this Court's Order of January 27, 1994.**

The cases cited by the Complainant are neither applicable nor relevant to Respondent's particular set of circumstances and those cases are clearly distinguishable from the facts of the present case. The referee ignored all applicable case law summaries submitted by Respondent's attorney, and instead used irrelevant and inapplicable cases submitted by Complainant in the Referee's Report in order to make the evidence fit her preconceived bad faith determination to disbar Respondent.

The applicable relevant cases to Respondent's circumstances cited by Respondent's attorney that resulted in a reprimand 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 "knowingly and willfully" gave false grand jury testimony regarding incident of bribery during attorney's campaign for state senate. The conduct of the attorneys in these cases was far more egregious that Respondent's alleged one material misrepresentation; yet all

these cases resulted in a reprimand.

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 Respondent's alleged one material misrepresentation; yet, the discipline imposed was suspension of 90 days or less.

Last, but not least, is the recent case of The Florida Bar V. Shankman, 908 So.2d 379 (Fla. 2005), in which this Court declined to disbar Shankman for numerous material misrepresentations and theft and, instead, imposed a 90 day suspension.

Based upon the foregoing case law and the facts and circumstances of Respondent's case the referee's proposed discipline is clearly excessive and demonstrates a gender bias and prejudice against the Respondent so pronounced that the referee's impartiality and fitness as a Judge must be seriously questioned. The referee's misconduct denied Respondent's right to due process and a fair and impartial trial and effectively invalidated the Referee's Report and proposed discipline.

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

This inadmissible evidence of Respondent's ex parte 1992 emergency suspension based upon false and unsubstantiated allegations and entered without due process should never have been considered in this case. The referee failed to exclude the inadmissible, irrelevant, immaterial and unfairly prejudicial evidence thus denying Respondent the right to due process and a fair hearing. In its Response Brief, Complainant, cites Rule 3-5-2, Rules Regulating the Florida Bar attempting to disguise the denial of Respondent's due process rights and the reversible error of the referee regarding the

inadmissible emergency suspension as follows:

" ...supported by 1 or more affidavits demonstrating facts personally known to the affiants that, **if unrebutted**,..." (emphasis added).

Respondent was never allowed the opportunity to rebut or contest the false allegations of the emergency suspension because on April 30, 1992, he was hospitalized in critical condition when Complainant filed the emergency suspension with the purpose of denying Respondent due process. In its Response Brief, Complainant admits that the emergency suspension was never litigated or adjudicated, which is tantamount to admitting that Complainant intentionally denied Respondent due process. Despite Complainant's bad faith assertions to the contrary, this Court's granting of Respondent's Petition for Inactive Status on January 27, 1994, operated to dissolve the emergency suspension and placed Respondent back in good standing.

Respondent has not been under emergency suspension in Florida since January 27, 1994, and Complainant is well aware of that fact. Although the rules of evidence may be relaxed in disciplinary proceedings this does not allow for the inclusion of patently inadmissible evidence, such as, the

emergency suspension.

CONSTITUTIONAL PROTECTIONS UNDER THE 5TH, 6TH and 14th AMENDMENTS APPLY TO RESPONDENT IN FLORIDA BAR DISCIPLINARY CASES AND RESPONDENT WAS DENIED DUE PROCESS

Respondent has been deprived of due process at every stage of these proceedings by Complainant's frivolous, gender biased, bad faith prosecutorial misconduct.

From the initial grievance procedure to the final hearing this disciplinary constituted the unlawful taking of Respondent's property interest in practicing law in Florida, without due process in violation of his Fifth, Sixth and Fourteenth Amendment protections which continues to date. On November 30, 2005, Respondent received the a letter from The Disciplinary Board, An Agency of the Supreme Court of the State of New Mexico in which the following is stated:

" **On an unrelated matter, this office contacted the Florida Bar to determine if you were considered a member in good standing. We were informed that they do not have you listed as a member of the Florida**

Bar." emphasis added. (see attached letter marked as Exhibit F).

It is well established that due process has a procedural aspect in which it is guaranteed that each person shall be accorded a certain "process" if they are deprived of life, liberty or property. It is equally well established that the practice of law is a property interest and cannot be revoked without cause, fair hearing and due process. When the power of the government, in this case the Complainant, is to be used against an individual, there is a right to a fair procedure to determine the basis for, and legality of, such action. U.S. Const. Amend. V, Frazier v. Garrison, 980 F. 2d 1514 (5th Cir. 1993), State v. Patterson, 236 Conn. 561 (Conn. 1996). Federal law is always paramount over Florida State law regarding issues of due process and constitutional law.

REFEREE'S FAILURE TO PROPERLY CONSIDER STANDARDS FOR IMPOSING LAWYER SANCTIONS

Despite Complainant's assertion in its Response Brief to the contrary the referee failed to properly consider and apply the Standards for Imposing

Lawyer Sanctions. Just because the referee reprinted the standards in her report that does mean that she properly considered or properly applied them which she clearly failed to do in the present case.

An important mitigating factor that the Referee failed to consider is that Complainant failed to provide Respondent with any writing from the Florida Bar stating that was not in good standing. No such writing exists **because Respondent is inactive for medical incapacity not related to misconduct and in good standing because Respondent has not been under emergency suspension since January 27, 1994, by Order of this Court, and Complainant knows it.** The present case is frivolous and is a bad faith continuation of Complainant's prosecutorial misconduct against Respondent, since April 30, 1992, and continuing to present.

The Court must re-weigh the evidence and substitute its judgment for the referee's because there is not competent substantial evidence to support the referee's findings in this case. The Florida Bar v Smith, 866 So. 2d 41 (Fla. 2004). In this case there is no presumption of correctness because the referee's findings of fact are clearly not supported by the evidence in the

record and they are obviously erroneous. The Florida Bar v. McKenzie, 442 So. 2d 934 (Fla. 1983).

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 Respondent's inexperience in the practice of law which is a mitigating factor with an aggravating factor. Respondent was admitted to practice of law in Florida in 1990 and Respondent's car accident occurred on April 30, 1992. Respondent has less than one year total of practice as an attorney when his work as an Assistant Public Defender in Florida is combined with his work as an Assistant Public Defender in New Mexico.

In a continuation of Complainant's pattern of gender biased, bad faith prosecutorial misconduct in this case Complainant attempts to divert and mislead this Court by her dishonest mischaracterization of several

e-mail communications. Respondent has been a zealous advocate in this case and apologizes for any intemperate e-mails; however, Respondent categorically denies sending any vicious, racially offensive or derogatory e-mails to opposing counsel or the referee.

It was 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 and Respondent respectfully requests that this Court dismiss this action with prejudice.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests that this Court reject the Report of the Referee and findings of fact as erroneous, unlawful and unjustified, and find the referee's recommended discipline to be excessive and not based upon the facts and circumstances of this case nor on existing case law and deny costs to the Complainant and dismiss this case with prejudice.

Personal jurisdiction over Respondent and proper attestation are lacking. The referee demonstrated gender bias and extreme 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, Sixth and Fourteenth Amendments were violated by the Florida Bar disciplinary process and by Complainant's ongoing, bad faith prosecutorial misconduct in falsely maintaining that Respondent is under emergency suspension and not in good standing since April 30, 1992, and continuing to present.

Respectfully Submitted,

Andrew J. O'Connor, Esquire
Respondent
645 E. Palace Ave., ½ A
Santa Fe, NM 87501
Florida Bar No. 869430

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by Regular U.S. Mail to opposing counsel on December 15, 2005.

_____
Andrew J. O'Connor, Esq.

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

I HEREBY CERTIFY, that the Reply 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 free of viruses, by Norton Anti-Virus for Windows.

Andrew J. O’Connor, Esq.