IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DONALD ALAN TOBKIN,

Respondent.
_____/

Supreme Court Case No. SC04-1493

The Florida Bar File Nos. 2000-50,372(17H) 2003-50,715(17H)

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Throughout this Answer Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR ____ (indicating the referenced page number). The transcript of the Hearing held on October 1, 2004, will be designated as TT ____, (indicating the referenced page number). The transcript of the Hearing held on October29, 2004, will be designated as TT1 ____, (indicating the referenced page number). The transcript of the Hearing held on November 11, 2004, will be designated as TT2 ____, (indicating the referenced page number). The transcript of the Final Hearing held on February 8, 2005, will be designated as TT3 ____, (indicating the referenced page number). The transcript of the Final Hearing held on February 9, 2005, will be designated as TT4 ____, (indicating the referenced page number). The Appendix attached to this brief will be designated as A ___ (indicating the referenced page number). The Florida Bar will be refereed to as "the Bar." Donald Alan Tobkin will be referred to as "respondent".

STATEMENT OF THE CASE AND FACTS

In the interest of accuracy, and to ensure the record is complete, The Florida Bar offers the following supplement to respondent's statement of the case and facts.

On July 30, 2003, The Fourth District Court of Appeal of Florida issued an opinion in *Rose v. Fiedler, et. a.l.*, 855 So.2d 122 (Fla. 4th DCA 2003) (RR 2). Respondent was Beatrice Rose's counsel in the matter and the Court found respondent's actions before the circuit judge in Indian River County were contumacious, willfully disobedient, and had caused prejudice to the defense (RR 2). The trial court had sanctioned respondent for his conduct on a number of occasions throughout the proceeding for conduct, which included discovery abuses and failure to follow the case management order (RR 2). When the trial began, respondent disregarded the court's instruction not to discuss any matter before the jury that was the subject of a pending motion (RR 2). Defense counsel sought a mistrial because of respondent's statement regarding the captain of the ship doctrine, which was the subject of a pending motion in limine (RR 2). On August 30, 1999, Judge Scott Kenney ultimately granted a directed verdict in favor of the defendants in open court after respondent continued to violate the court's orders. On June 25, 2001, the court filed its written judgment on the directed verdict, which was granted due to respondent's continual violation of the court's orders (RR 2).

On July 3, 2000, respondent filed action on behalf of Ms. Rose against the defendants who were subject of the case still pending before Judge Kenney (RR 2). On November 14, 2001, Judge Robert Hawley entered an order striking the complaint as a

sham as result of learning the initial case was still pending (RR 2-3).

On May 7, 2002, respondent appeared at Aventura Comprehensive Cancer Center with counsel for the defendants in the Bronfman matter (RR 3). Respondent was upset at the defense counsel's refusal to agree that his motion for protective order prevented them from obtaining records pursuant to a subpoena (RR 3). Respondent confronted the hospital personnel and snatched records, yelled at them and created a disturbance at the hospital (RR 3). At one point respondent grabbed the records from opposing counsel in such a manner that she sought a restraining order (RR 3). Ultimately, the hospital personnel called security to calm the situation (RR 3).

SUMMARY OF THE ARGUMENT

The Bar did not commit any discovery violations which resulted in a denial of respondent's due process rights. The Bar's refusal to answer the discovery requests propounded by respondent was due to respondent's failure in propounding amended discovery requests after the referee issued an Order requiring respondent to do so. In addition, the respondent filed a Writ of Prohibition with this Court, which stayed the proceedings before the referee. The Bar did not in bad faith fail to answer the discovery requests and respondent was not harmed by the Bar's refusal to answer his discovery requests.

The Florida Bar provided competent substantial evidence to support the referee's finding of respondent's violation of R. Regulating Fla. Bar 4-3.1, 4-3.4(a), 4-3.4(c), 4-3.4(d) and 4-8.4(d). The Bar provided the referee with testimony from witnesses of respondent's misconduct, the original complaint filed against respondent with supporting affidavits, an opinion issued by the Fourth District Court of Appeals, which outlined respondent's misconduct, and other documentary evidence. The testimony of the witnesses and the other documentary evidence presented by the Bar established respondent's misconduct. The referee accurately found respondent guilty of violating the R. Regulating Fla. Bar 4-3.1, 4-3.4(a), 4-3.4(c), 4-3.4(d) and 4-8.4(d).

This Court has held a bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must sufficiently deter other attorneys from similar misconduct. Furthermore, the discipline must have a

reasonable basis in existing case law or The Florida Standards for Imposing Lawyer Sanctions. The recommendation by the referee in this case adheres to the purposes of lawyer discipline because it is fair to society, it is fair to respondent, and would deter other attorneys from engaging in similar conduct. Moreover, existing case law dictates that an attorney who engages in conduct prejudicial to the administration of justice, files a frivolous suit, engages in unfair conduct with regards to an opposing party, and whose misconduct is cumulative in nature, be suspended for a period less than 90 days. The single mitigating factor found by the referee does not overcome the presumption of a short-term suspension as the appropriate discipline. Given this respondent's misconduct, the discipline given in similar cases, and The Florida Standards for Imposing Lawyer Sanctions, the referee in this case appropriately recommended a 10-day suspension and attendance at The Florida Bar's Ethics Workshop.

ARGUMENT

I. WHETHER THE FLORIDA BAR COMMITTED ANY DISCOVERY VIOLATIONS RESULTING IN THE DENIAL OF RESPONDENT'S DUE PROCESS.

Respondent in these proceedings propounded interrogatories and requests for admissions upon the Bar. The Bar objected to both the interrogatories and the requests for admission because they exceeded the allowable amount per the Florida Rules of Civil Procedure. At about the same time, respondent filed a motion to dismiss the proceedings. The referee conducted a hearing on November 11, 2004 to rule on the Bar's objections to respondent's discovery requests and respondent's motion to dismiss. Respondent stated during the hearing that he was going to file a Writ of Prohibition if the referee found in the Bar's favor regarding the motion to dismiss and the objections to the interrogatories and the requests for admissions. The referee asked for proposed orders from the Bar and respondent. On November 15, 2004, the Bar sent its proposed order to respondent and asked respondent to provide his feedback on the proposed order (A 1-4). Respondent did not respond to the Bar's request to agree to its proposed order or submit an order of his own (A-5-8). Since the Bar did not receive any objections to its proposed order, the Bar forwarded its proposed order to referee on December 7, 2004 (A-5-8) and the referee signed the order on December 10, 2004. The Order held the discovery requests filed by respondent exceeded the number permitted by the Florida Rules of Civil Procedure and respondent needed to amend the requests and the Bar had 15 days to

answer the requests. In addition, the referee denied respondent's motion to dismiss. On December 20, 2004, respondent filed a Writ of Prohibition with this Court.

Essentially, when respondent filed the Writ of Prohibition, all action was suspended in this case until this Court ruled on the writ. Therefore, the referee and the Bar took no further action on the case. The Bar did not complete the discovery requests because this Court had not ruled upon respondent's Writ of Prohibition. Respondent filed his Writ of Prohibition in December 2004 when he knew the final hearing was set for February 8, 2005. This Court finally denied respondent's Writ of Prohibition on February 1, 2005, which was 7 days before the date of the final hearing. Respondent did not serve amended discovery requests on the Bar after the referee's December 10, 2004 order. Therefore, the Bar's inability to answer respondent's discovery requests was not intended to cause harm to respondent and actually did not cause harm to respondent. In fact, the Bar invited respondent to come to the Bar's offices to view the entire contents of the public portion of the file against him. Respondent did come to the Bar's offices to view the file and made copies of documents contained within the file (TT3 14). All of the discovery requests propounded by respondent were answered by the contents of the public portion of his file. The only portion of the file respondent was not allowed to view was the confidential portion of the file, which contained the attorney's work product and other confidential documents.

The reason for the Bar's refusal to answer respondent's discovery requests was respondent's failure to file amended discovery requests and instead filing the Writ of

Prohibition, which blocked the progression of the case. Furthermore, since respondent had viewed the public portions of his file, his case was not harmed and the evidence presented by the Bar did not surprise respondent. The Bar did not engage in any discovery violations that interfered with respondent's due process. From the beginning of the case, respondent knew the identity of the individuals that filed the complaint against him and the evidence on which the Bar relied to substantiate the allegations against respondent. Respondent's due process rights were not in any way violated by the Bar's inability to answer respondent's discovery requests.

II. WHETHER THE FLORIDA BAR PRESENTED COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF RESPONDENT'S VIOLATIONS OF THE RULES REGULATING THE FLORIDA BAR.

A referee's finding of fact regarding guilt carries a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *The Florida Bar v. Vining*, 761 So.2d 1044 (Fla. 2000). This Court has the authority to review the record to determine whether "competent substantial evidence supports the referee's finings of fact and conclusions concerning guilt." *The Florida Bar v. Cueto*, 834 So.2d 152 (Fla. 2002), *citing The Florida Bar v. Jordan*, 705 So.2d 1387 (Fla. 1998). When that occurs, the party contesting the referee's findings of fact and conclusions as to guilt must demonstrate either a lack of record evidence to support such findings and conclusions or establish that the record clearly contradicts such findings and conclusions. *The Florida Bar v. Feinberg*, 760 So.2d 933 (Fla. 2000), *quoting The Florida Bar v.*

Sweeney, 730 So.2d 1269, 1271 (Fla. 1998). In this case, the Bar presented competent substantial evidence to support the referee's findings of fact through affidavits, testimony, and an opinion issued by the Fourth District Court of Appeals, which outlined respondent's misconduct. Moreover, respondent failed to demonstrate that there was a lack of record evidence to support the referee's findings or establish that the record clearly contradicts the referee's findings.

Respondent states the Bar did not present enough evidence to prove by clear and convincing evidence his conduct violated the Rules Regulating The Florida Bar. Respondent relies on his assertion that most of the evidence was hearsay evidence, which is legally insufficient to prove the Bar's allegations. However, this Court has held that in disciplinary proceedings the referee is not bound by the technical rules of evidence. *The Florida Bar v. Dawson*, 111 So.2d 427 (Fla. 1959); *The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986). In Bar discipline cases, hearsay is admissible. *The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986).

Regarding respondent's misconduct in the Bronfman case, the Bar presented the original complaint filed against respondent and the supporting affidavits given by the staff at Aventura Comprehensive Cancer Center. In addition, the Bar presented testimony regarding respondent's misconduct at the Aventura Comprehensive Cancer Center (TT3 26-36, 92-96, 103-115, 135-137). Moreover, the attorney from which respondent grabbed certain x-rays, filed an application for a restraining order against respondent and the Bar presented the application as evidence against respondent (TT3 160-162). The

referee listened to the testimony of the Bar's witnesses and respondent's testimony, but the referee chose to agree with the Bar. The referee is in the best position to judge the credibility of a witness, so this Court defers to the referee's assessment and the referee's resolution of the conflicting testimony. *The Florida Bar v. Batista*, 846 So.2d 479 (Fla. 2003); *The Florida Bar v. Fredericks*, 731 So.2d 1249 (Fla. 1999). This Court has held that the referee is in a unique position to assess the credibility of witnesses, and the referee's judgment regarding credibility should not be overturned absent clear and convincing evidence that the referee's judgment is incorrect. *The Florida Bar v. Barley*, 831 So.2d 163 (Fla. 2002), *quoting, The Florida Bar v. Carricarte*, 733 So.2d 975 (Fla. 1999). This respondent did not prove the referee's judgment is incorrect. Respondent merely relies on the fact that the evidence and testimony were hearsay evidence, but that alone does not prove the referee's judgment was incorrect. Respondent provided little evidence to contradict the evidence and testimony presented by the Bar. Respondent merely asserts he did not commit the alleged misconduct and he was simply a zealous advocate for his client. However, the referee is responsible for findings of fact and resolving conflicts in the evidence. *The Florida Bar v. Vining*, 644 So.2d 504 (Fla. 1994). The referee considered respondent's testimony and his evidence and chose to agree with the Bar. Respondent's mere assertions are not enough to prove the referee's judgments are incorrect.

In regards to the Rose case, the Bar presented into evidence a copy of the opinion in *Rose v. Fiedler, et al*, 855 So.2d 122 (Fla. 4th DCA 2003), which addressed

respondent's misconduct in that case. The opinion found respondent's actions before the circuit judge in Indian River County to be contumacious, willfully disobedient, and had caused prejudice to the defense (RR 2). The trial court had sanctioned respondent for his conduct on a number of occassions throughout the proceeding, which conduct included discovery abuses and failure to follow the case management order (RR 2). When the trial began, respondent disregarded the court's instruction not to discuss any matter before the jury that was the subject of a pending motion (RR 2). On August 30, 1999, the trial court ultimately granted a directed verdict in favor of the defendants in open court after respondent continued to violate the court's orders. June 25, 2001, the court filed its written judgment on the directed verdict. On June 3, 2000, respondent filed an action exactly like the one he filed in Indian River County in St. Lucie County. The judge in St. Lucie County took judicial notice of the decision in Indian River County and struck the complaint without prejudice as a sham pleading.

Respondent ultimately appealed the decision from Indian River County where the Fourth DCA issued the opinion mentioned above. The appellate court did reverse the trial court's ruling. However, it was not because respondent did not engage in the misconduct cited by the trial court. The court overturned the trial court ruling because respondent's client had not personally participated in the misconduct in which respondent had participated. The Fourth DCA certified a question to this Court asking whether a client's case could be dismissed due to the misconduct of the attorney when it is clear that the client was not personally involved in the act of disobedience. Certainly, an opinion by an

appellate court is sufficient evidence to prove respondent's misconduct. Respondent relies on the fact the Fourth DCA overturned the trial court's ruling to demonstrate his conduct was not improper. However, the Fourth DCA did not find respondent did not commit the misconduct, but rather respondent's client should not be penalized for her attorney's misconduct when she did not participate in the misconduct. The Bar presented competent substantial evidence to support the referee's findings of fact so this Court should approve the referee's recommendations.

III. WHETHER RESPONDENT'S VIOLATIONS OF R. REGULATING FLA. BAR 4-3.1, 4-3.4(A), 4-3.4(C), 4-3.4(D), AND 4-8.4(D) WARRANT THE 10-DAY SUSPENSION RECOMMENDED BY THE REFEREE.

While a referee's findings of fact should be upheld unless clearly erroneous, or without support in the record, this Court is not bound by the referee's recommendations in determining the appropriate level of discipline. *The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986); *The Florida Bar v. Rue*, 643 So.2d 1080 (Fla. 1994). Furthermore, this Court has stated the review of the discipline recommendation does not receive the same deference as the guilt recommendation because this Court has the ultimate authority to determine the appropriate sanction. *The Florida Bar v. Grief*, 701 So.2d 555 (Fla. 1997); *The Florida Bar v. Wilson*, 643 So.2d 1063 (Fla. 1994). In *The Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1970), this Court held 3 purposes must be in mind when

deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter others attorneys from similar conduct. This Court has further stated a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. *The Florida Bar v. Sweeney*, 730 So.2d 1269 (Fla. 1998); *The Florida Bar v. Lecznar*, 690 So.2d 1284 (Fla. 1997). In addition, this Court has held, cumulative misconduct must be treated more severely than isolated misconduct. *The Florida Bar v. Klein*, 774 So.2d 685 (Fla. 2000); *The Florida Bar v. Laing*, 695 So.2d 299 (Fla. 1997). In the instant case, the referee's recommendation of a 10-day suspension is supported by existing case law and the Florida Standards for Imposing Lawyer Sanctions while conforming to the purposes of lawyer discipline.

This Court has held the appropriate sanction for failing to comply with a legally proper discovery request and engaging in conduct prejudicial to the administration of justice is a suspension. *The Florida Bar v. Bloom*, 632 So.2d 1016 (Fla. 1994). Additionally, this Court has held the appropriate discipline for referring to items in contravention of the court's order warrants a public reprimand. *The Florida Bar v. Kelner*, 670 So.2d 62 (Fla. 1996). In *The Florida Bar v. Bloom*, 632 So.2d 1016 (Fla. 1994), an attorney was involved in personal litigation involving the mismanagement of a real estate deal. In the litigation, the attorney failed to timely answer interrogatories and failed to pay costs imposed upon him as a sanction for failing to answer the

interrogatories. The attorney then failed to answer the trial court's Order to Show Cause. As a result, the trial court struck the attorney's responsive pleadings and entered a judgment against him. Then, the attorney failed to answer interrogatories or attend depositions set in the aid of execution of the judgment. The attorney was eventually found guilty of indirect criminal contempt. The referee recommended a 91-day suspension as the appropriate sanction for the attorney's violation of R. Regulating Fla. Bar 4-3.5(d) and 4-8.4(d). This Court found that the attorney's flagrant disregard for the judicial process, as reflected by the facts of that case, warranted a suspension requiring proof of rehabilitation. This Court upheld the referee's recommended sanction.

An attorney was representing the plaintiff in a loss of consortium suit in *The Florida Bar v. Kelner*, 670 So.2d 62 (Fla. 1996). The defendant in the action filed a motion in limine regarding recoverable damages. The defendant requested the evidence before the jury be limited to recoverable damages and that reference to improper damages be prohibited. The court granted the defendant's motion in limine. In contravention of the court's order, the attorney made repeated references to the personal injuries of his client. The court advised the attorney to cease the conduct, which was in violation of the order. The court gave the jury curative instructions concerning recoverable damages in an attempt to cure any possible damage caused by the attorney. After the court gave the curative instructions, the attorney continued to violate the court's order by repeatedly asking questions which violated the court's order. In the end, the court declared a mistrial due to respondent's violation of the court's order in limine. The referee found the

attorney guilty of violating the R. Regulating Fla. Bar 4-3.1 and 4-3.4(e) and recommended a public reprimand as the appropriate sanction. This Court approved the referee's recommended discipline.

The respondent in the case at bar, like the attorney in *Bloom*, engaged in conduct that interfered with the opposing parties discovery. In *Bloom*, the attorney refused to answer interrogatories, attend depositions, and pay costs after the court ordered the attorney to do so. This respondent engaged in deposition abuses, failed to allow the defense time to prepare for witnesses, and failed to provide the defense with necessary information despite repeated warnings from the court. The attorney in *Bloom* was found to be in indirect criminal contempt while this respondent was not found in contempt. However, this respondent's actions led to the court granting a directed verdict in favor of the opposing party. Furthermore, this respondent filed the same action in a different county after the judge in the first case granted a directed verdict in favor of the the opposing party. This respondent did not demonstrate as flagrant a disregard for the judicial process as the attorney in *Bloom*; however, given the cumulative nature of this respondent's misconduct, a suspension is still the appropriate sanction. The differences in the facts of the 2 cases is noted in the fact the referee in this case recommended a short term suspension as opposed to the rehabilitative suspension imposed in *Bloom*.

The attorney in *Kelner* continued to refer to testimony the court ruled should not have been presented to the jury. In the instant case, respondent presented an issue during his opening statement, which was the subject of a motion in limine. The court had ruled

the attorneys were not permitted to discuss any issue that was the subject of a pending motion. This respondent, similar to the attorney in *Kelner*, disobeyed a court order and presented an issue that should not have been presented. The attorney in *Kelner* received a public reprimand for his misconduct. However, this respondent engaged in cumulative misconduct so the appropriate sanction for his misconduct should be more severe than the sanction given in *Kelner*. A short-term suspension would be the next level of discipline after a public reprimand. Therefore, this Court should approve the referee's recommended sanction of a 10-day suspension and attendance at The Florida Bar's Ethics Workshop.

The Florida Standards for Imposing Lawyer Sanctions Standard 6.2 deals with the proper sanctions for cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. Here, respondent engaged failed to bring a meritorious claim when he filed the second Rose case in a different county because the judge in the original county granted a directed verdict in favor of the defendants. Standard 6.22 suggests suspension is the appropriate discipline when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. Moreover, Standard 7.0 deals with the proper sanctions for cases involving violations of duties owed as a professional. In the case at bar, respondent owes a duty to the legal profession to refrain from engaging discovery abuses, to follow case management orders,

treat deposition witnesses respectfully, and behave in an appropriate manner when advocating his client's position. Respondent violated his duties as a professional. Standard 7.2 recommends a suspension when a lawyer knowingly engages in conduct that violates his professional duty and causes injury to the legal system.

When considering the discipline delineated in The Florida Standards for Imposing Lawyer Sanctions, any applicable mitigating or aggravating factor must be considered. The referee in the instant case found in mitigation the absence of a prior disciplinary record. In aggravation, the referee found a pattern of misconduct, multiple offenses, and respondent's substantial experience in the practice of law. The single mitigating factor in this case does not overcome the presumption of a short-term suspension as the appropriate discipline. Furthermore, the referee can use the aggravating factors to justify an increase in the degree of discipline to be imposed. The referee found this case needed an increase in the degree of discipline due to the aggravating factors present and the cumulative nature of respondent's conduct.

CONCLUSION

This Court should approve the referee's report in this case and suspend respondent for 10 days with required attendance at The Florida Bar's Ethics Workshop because the referee's recommendation of guilt is supported by competent substantial evidence and the discipline is consistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions while adhering to the purposes of attorney discipline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY true and correct copies of The Florida Bar's Answer Brief have been furnished by regular U.S. mail to Donald Alan Tobkin, respondent, Post Office Box 220990, Hollywood, Florida 33022-0990 and to Staff Counsel, 651 East Jefferson Street, Tallahassee, FL 32399-2300 on this _____ day of _____, 2005.

_____
ERIC MONTEL TURNER

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

Undersigned counsel hereby certifies The Florida Bar's Answer Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

_____
ERIC MONTEL TURNER