IN THE SUPREME COURT
OF FLORIDA

Case No. SC04-1493

THE FLORIDA BAR

v.

DONALD ALAN TOBKIN

TOBKIN'S REPLY BRIEF

DONALD A. TOBKIN, M.D., ESQ.
FBN: 742953
P.O. Box 220990
Hollywood, Florida 33022
(954)258-6030

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PRELIMINARY STATEMENT

Florida Bar's Answer Brief fails to refute (expressly or implicity) all facts and premises advanced in Tobkin's Amended Initial Brief beginning with pages 1-18 in important parts as follows:

1. Tobkin has a career-long discipline and malpractice free record.
2. Tobkin caused no harm to any client.
3. Bar grievances here were initiated by Tobkin's litigation adversaries, not by any harmed clients.
4. These Bar grievances were a fraud/ruse. The evidence used by a probable prosecution was based on intentional and knowingly false cause committee and Bar for facts in Complainants' affidavits.
5. Florida Bar can not distinguish, The Florida Bar v. Catalano, 651 So.2d 91 (Fla. 1985), or prove by competent record evidence that the complaint against Tobkin should not have been dismissed by the Referee.
6. Rose v. Fiedler, 855 So.2d 122 (Fla. 4th D.C.A. 2003) rev. granted (Fla. 2003), vacated and invalidated Trial Judge Scott M. Kenney's final judgment.

7. Rose v. Fiedler, 855 So.2d 122 (Fla. 4th D.C.A. 2003) rev. granted (Fla. 2003), Trial Judge Kenney was charged by the Florida Judicial Qualifications Commission with advanced alcoholism, mixed chemical dependency, alcohol withdrawal syndrome, and lack of sobriety on the job, entered a rehabilitative facility, and failed to maintain sobriety (thus "J.W.I. or J.U.I.") at all times relevant to Judge Kenney's misconceptions of Tobkin's complained of conduct in the Rose case. …… (A-8) After Rose, Judge Kenney entered into private agreement with J.Q.C. to life long substance abuse and alcoholism treatment.

8. The Bar's Count I-III relied on unauthenticated, invalid, erroneous, objected to double/triple layered hearsay in final order by Judge Kenney which was referenced in another hearsay document used by the Fla. Bar, Rose v. Fiedler, 855 So.2d 122 (Fla. 4th D.C.A. 2003). Oppositely, the record before the Referee uncontrovertedly showed only one remote ex parte "sanction" against Tobkin, when predecessor Trial Judge Smith, who was Defendant Hussamy's

patient, granted a motion for protective order on 2/19/98. …… (T313-315) (T353-354)

9. Florida Bar's Counsel fraudulently submitted and had signed a 12/10/04 order, over Tobkin's repeated objections. The true order was that on 11/10/04, Bar's Counsel was ordered to answer Tobkin's 9/06/04 eleven (11) interrogatories by 11/25/04.
10. Tobkin correctly stated de novo is the standard of review for this case.
11. The Florida Bar and its Counsel intentionally violated the Referee's 11/10/04 order to answer, by 11/25/04, Tobkin's eleven (11) interrogatories, which went to the heart of the factual bases for Bar's claims and Tobkin's defenses, witnesses, and evidence for every allegation in the Bar's complaint against Tobkin. …… (A-11,12)
12. The Florida Bar's Counsel frivolously continues to defend, in this appeal, a patently erroneous 12/10/04 Referee's order regarding the Bar's obligation to answer Tobkin's eleven (11) interrogatories within fifteen (15) days of the Referee's 11/10/04 ruling at hearing.

SUMMARY OF ARGUMENT

Florida Bar's Counsel committed a fraud on the Tribunal by knowingly and intentionally submitting a patently false order over repeated objections by Tobkin, both before and after the Referee signed said order on 12/10/04. Bar Counsel's conduct was clear and convincing evidence intended to obfuscate the truth and hamper Tobkin's ability to defend against this Florida Bar complaint. Piunno v. R.F. Concrete Construction, Inc., 30 Fla. L.W. D1628 (Fla. 4th D.C.A. 6/29/05). On 11/10/04, at hearing, the Referee verbally ordered Bar Counsel to answer Tobkin's eleven (11) interrogatories within fifteen (15) days (11/25/04). The Bar intentionally refused to answer any of said interrogatories as ordered, which prejudiced and hampered Tobkin's ability to defend every allegation in the Florida Bar's complaint against Tobkin. In reality, Tobkin repeatedly objected and protested about said false order to Bar's Counsel both before and after the Referee blindly signed, on 12/10/04, the Florida Bar's prepared patently false and erroneous order regarding answering Tobkin's interrogatories. Bar Counsel's prejudicial misconduct caused Tobkin to file a 12/20/04 Extraordinary Petition and Motion for Stay in this Supreme

Court, endure days of Bar trial ambushing at a February 2005 Disciplinary Hearing, and now this Appeal/Petition.

The Referee made no adverse record findings of fact, credibility, or weight of the evidence against Tobkin at the February 2005 Final Disciplinary Hearing.

Instead, the Referee blindly signed, verbatim, the proposed order, submitted by the Florida Bar, to the Referee, without making any corrections, additions, or deletions. This Supreme Court recently held that this generally constitutes reversible error. Perlow v. Berg-Perlow, 875 So.2d 383 (Fla. 2004). …… (A-1,2)

ARGUMENT

The Florida Bar's answer brief tries to divert this Honorable Supreme Court's attention from the compelling record facts and controlling law for this Court to reject the Referee's report, exonerate Tobkin, and impose harsh punishment and sanctions against the Florida Bar and/or its disciplinary and appellate counsel.

First, The Florida Bar and/or its appellate counsel, frivolously defends a patently erroneous 12/10/04 written order regarding Tobkin's right to answers to eleven (11)

interrogatories, which at 11/10/04 hearing, Referee ordered (verbally) that Bar answer all eleven (11) interrogatories within fifteen (15) days (11/25/04).

This Supreme Court recently held that frivolous appellate defense of a patently erroneous order can warrant appellate imposition of sanctions against Appellee or Appellee's Counsel. Boca Burger, Inc. v. Forum, 30 Fla. L.W. S540,542,543 (Fla. 7/15/05). Considering this transgression is both a fraud on the Tribunal and committed by the Watchdogs of the Legal Profession, then any reticence of this Supreme Court to dismiss this case, exonerate Tobkin, and impose sanctions of forfeiture of two (2) years from both Appellate and Staff of Bar Counsel's respective salaries, and at least one (1) year of suspension imposed upon both Appellate and Staff Counsel, makes a strong case against self regulation of lawyers and judges in Florida. Piunno v. R.F. Concrete Construction, Inc., 30 Fla. L.W. D1628 (Fla. 4th D.C.A. 6/29/05) (Plaintiff's complaint was properly dismissed for fraud on the court, where Plaintiff obfuscated the truth and hampered defendant's ability to defend.); National Mutual Fire Ins. Co. v. Robinson, 30 Fla. L.W. D1628 (Fla. 4th D.C.A. 7/29/05) (Party willfully employed delaying tactics, where that record fully supported deliberate and contumacious disregard of

that party's discovery obligation, justified severe sanctions.); Boca Burger, Inc. v. Forum, 30 Fla. L.W. S535 (Fla. 7/07/05). (When it becomes apparent that counsel misrepresented this information, counsel can not later hide behind the presumption of correctness to avoid sanctions.); Rules Reg. Fla. Bar 4-3.3(a)(1) (A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.)

Further, in answer brief, Bar Counsel disingenuously and frivolously defended these intentional and egregious court ordered violations to answer Tobkin's interrogatories and the submission of fraudulent 12/10/04 order with two (2) impotent and dysfunctional counter attacks:

a) Tobkin's 12/20/04 Petition for Extraordinary Writ and Accompanying Motion to this Supreme Court stayed the Florida Bar already delinquent 11/25/04 answers to interrogatories.

b) The Florida Bar's misconduct and failure to answer any of Tobkin's interrogatories, caused no prejudice to Tobkin at the February 2005 Final Disciplinary Bar Hearing.

Second, the Referee's Final Disciplinary Report should be reversed, where Referee's verbatim adoption of Florida Bar's

proposed final order without any corrections, additions, or deletions and where Referee made no hearing record or prior record adverse findings of facts, credibility, or weight of evidence against Tobkin in connection with the February 2005 Final Disciplinary Hearing. Perlow v. Berg-Perlow, 875 So.2d 383 (Fla. 2004).

Last, Florida Bar may be correct that (in general) hearsay may be admissible in Bar Proceedings. But here, the Florida Bar failed to properly authenticate non-objectionable weight of hearsay evidence to sustain its burden of proof. Hearsay does not mean Double hearsay, Non-trustworthy hearsay, or admissible for the truth of the hearsay documents. Hearsay evidence is insufficient to prove a case by the mere preponderance of evidence burden. Ford v. State, 678 So.2d 432 (Fla. 4th D.C.A. 1996). Certainly, hearsay evidence is insufficient to meet the clear and convincing burden of proof in Bar Disciplinary Proceedings. Williams v. Department of Rehabilitative Serv., 589 So.2d 359 (Fla. 1st D.C.A. 1991).

CONCLUSION

The Florida Bar complaint against Tobkin should be dismissed. The Referee's report should be quashed. The Florida

Bar and/or its Counsel should be harshly sanctioned for committing a fraud on the Court, frivolously defending a patently erroneous 12/10/04 interrogatory order and the Referee's verbatim adoption of the Florida Bar proposed final order, on the facts in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via mail/facsimile/hand delivery on this ____ day of August, 2005, to: **Eric Montel Turner, Esquire**, 5900 N. Andrews Ave., Suite 900, Ft. Lauderdale, FL 33309; and **John Anthony Boggs, Esquire**, The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32301-2546.

DONALD ALAN TOBKIN, M.D.
FBN: 742953
P.O. Box 220990
Hollywood, FL 33022
(954)258-6030

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Appellate papers comply with the font requirements in Rule 9.100(l) Fla. R. App. P.

DONALD ALAN TOBKIN, M.D.
FBN: 742953

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