IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC04-859

v. TFB File No. 2004-00,743(2B)

WAYNE A. HAGENDORF,

Respondent

_____/

**INITIAL BRIEF OF RESPONDENT**

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## D. PRELIMINARY STATEMENT

The following designations will be used in this brief:

Respondent, Wayne A. Hagendorf, shall be referred to as Respondent.

The Florida Bar shall be referred to as the Bar.

The transcript of the final hearing held February 8, 2005, shall be referred to as Tr. and the appropriate page number.

Respondent's Composite Exhibit 1 shall be referred to as RCE and the appropriate exhibit and page number.

The report of the referee dated March 7, 2005, shall be referred to as RR and the appropriate page number.

## E. STATEMENT OF THE CASE

### 1. Course of the Proceedings and Dispositions Below

The Bar filed a one count complaint in this case on May 18, 2004. The complaint alleged Respondent violated Rules 4-3.3 (candor toward the tribunal); 4-3.4 (fairness to opposing party and counsel); 4-4.1(truthfulness in statements to others); and 4-8.4(d) (engaging in conduct prejudicial to the administration of justice), Rules Regulating The Florida Bar. The complaint was based upon the order approving conditional guilty plea in exchange for stated form of discipline in the case of *In re: Discipline of Wayne Hagendorf, Esq.*, Case No. 41417 in the Supreme Court of the State of Nevada.

On February 8, 2005, the referee held a final hearing in this matter. Initially, Respondent stated he did not contest the rule violations set forth in the complaint. (Tr. - 5). The Bar then orally moved to add Rule 4-8.4(c)(conduct involving dishonesty, fraud, deceit, or misrepresentation) to the list of rule violations. Respondent did not oppose this amendment. (Tr.- 6).

The referee recommended Respondent be suspended from the practice of law in the State of Florida for a period of two years. (RR-5). In making this recommendation, the referee found the following aggravating factors apply in this case:

1. Dishonest or selfish motive.

2. Bad faith obstruction of the Nevada Bar disciplinary proceeding.

3. Substantial experience in the practice of law.

4. Indifference to making restitution.

(RR- 9).

The referee then found the following mitigating factors applied:

1. Absence of a prior disciplinary record.

2. Full and free disclosure to the Florida Bar in the Florida disciplinary proceeding.

3. Imposition of other penalties and sanctions.

(RR- 9).

A petition for review was timely filed on April 18, 2005.

**2. Statement of the Facts**

**(The following is a verbatim recital from the order approving conditional guilty plea in exchange for stated form of discipline from the Supreme Court of Nevada - Exhibit A to complaint)**

It appears from the record that Hagendorf leased office space from Dennis Duban, who owned an office building in Las Vegas. A dispute arose, between Hagendorf and Duban over the terms of the lease, and Duban evicted Hagendorf. Hagendorf asserted several claims against Duban. During the litigation, Hagendorf

learned that the recorded title to the office building was in the name of Duban Professional Building, a California Limited Partnership, an entity that did not actually exist. Rather, Duban had registered the name Jenni Office Plaza, d/b/a Duban Professional Building, in California, and then had failed to renew the registration.

Hagendorf filed documents establishing a California limited partnership called Duban Professional Building, with himself as the general partner, and then filed a quiet title action in Nevada district court asserting that his newly created partnership owned the office building. By misleading the district court concerning where the defendants could be found, when he was aware that Duban was represented by counsel and knew counsel's address, he obtained an order for service by publication, and eventually, a default decree quieting title in the new limited partnership. Hagendorf then sent letters enclosing a copy of the judgment to all tenants in the building, instructing them to pay all future rent to him. No rents were actually paid to Hagendorf. When Duban discovered the default decree, he successfully moved to set it aside and asserted several counterclaims.

Duban also complained to the state bar, which opened a grievance file and later filed a formal disciplinary complaint. Hagendorf moved to stay the discipline proceeding pending adjudication of the civil litigation with Duban. The motion was denied.

Hagendorf then filed a federal complaint in California against the state bar. The complaint was eventually dismissed for lack of personal jurisdiction. In the meantime, a formal disciplinary hearing was continued at the state bar's request so that an amended complaint alleging additional charges could be filed. Another formal hearing was set. Hagendorf moved to continue the hearing, asserting that he had to be in trial in United States Tax Court. A continuation was granted, and another date set.

Hagendorf filed another federal complaint against the state bar, this time in Nevada. This case was eventually dismissed for lack of subject matter jurisidiction.

As the formal hearing date approached, Hagendorf filed motions seeking formal discovery, a more definite statement, and a preliminary injunction staying the proceedings. All motions were denied. The day before the formal hearing was to commence, Hagendorf's newly retained counsel appeared and asked for a continuance so that he could adequately prepare. The request was granted, and the hearing was continued again.

At the hearing, Hagendorf and the state bar presented a conditional guilty plea agreement in exchange for a stated form of discipline under SCR 113 for the panel's approval. The agreement was part of a global settlement entered on the record in the civil litigation, with participation by Duban, Hagendorf and the state bar. The global settlement provides that all litigation would be dismissed, with each side to bear its

own costs. In addition, Hagendorf would be suspended for five months. This suspension was to be stayed, and an actual suspension of 60 days served, on condition that Hagendorf pay $25,000 to Duban by September 11, 2003, Finally, Hagendorf was to dissolve the California limited partnership he had formed.

At the hearing, Hagendorf, Duban and the state bar all stated that the settlement was conditioned on approval of the plea agreement, and that if the plea agreement was not approved, the settlement would fall apart. Duban testified that he was satisfied with the agreement because it would end the entire matter and reimburse him, at least in part, for the expenses he incurred as a result of the litigation. The state bar professed itself satisfied with the agreement. In particular, the state bar noted Hagendorf has no prior discipline. Finally, the district judge who was the victim of Hagendorf's lack of candor stated he was hopeful the agreement would be approved, that he believed Hagendorf has learned a lesson, and that Hagendorf was welcome back in his court. Hagendorf's counsel argued in support of the agreement, stating that Hagendorf's conduct was not part of a pattern of unethical behavior, as demonstrated by the lack of any prior complaints about him. Rather, Hagendorf made the mistake of representing himself in an acrimonious, emotional dispute, and failed to maintain a sense of perspective. Hagendorf also presented testimony from a legal ethics professor

that the discipline called for in the agreement fell within the range imposed for similar conduct.

The plea agreement itself provides that Hagendorf pleads guilty to violating SCR 172 (candor toward the tribunal), SCR 175 (relations with opposing counsel), SCR 181 (truthfulness in statements to others), SCR 203(3) (conduct involving dishonesty, fraud, deceit or misrepresentation), and SCR 203(4) (conduct prejudicial to the administration of justice). The agreement further provides that for these violations, Hagendorf shall serve a five month suspension, stayed, with an actual suspension of 60 days, on the condition that Hagendorf pays restitution to Duban of $25,000 by September 11, 2003. Failure to pay the restitution shall result in imposition of the full five month suspension. Finally, Hagendorf shall pay the state bar's costs, not to exceed $1,000.

**(The following facts come from Respondent's Composite Exhibit 1)**

On March 11, 2003, Respondent, along with counsel for Mr. Duban and David A. Clark, Assistant Bar Counsel for the State Bar of Nevada, presented the terms of the settlement agreement set forth above to the Honorable Mark R. Denton, District Court Judge. In accepting the settlement agreement, Judge Denton stated his hope "that this resolution will go through." (RCE - #1, pg. 9).

Two days later, on March 13, 2003, the State Bar of Nevada, Southern Nevada Disciplinary Board, held a hearing to consider Respondent's conditional guilty plea. At the beginning of the hearing, Bar Counsel Clark called Mr. Duban as a witness. Mr. Duban stated he supported imposition of a five-month suspension stayed with two months of an actual suspension conditioned upon Respondent paying him $25,000 restitution. (RCE - #2, pp. 13-14).

Bar Counsel Clark then outlined for the disciplinary board several reasons why the Board should accept the recommended discipline. Among these reasons were:

"[f]irst you have no prior discipline. Mr. Hagendorf has only been admitted here since 1999, but I believe he's been licensed originally to practice in California since 1990, and I think also in Florida and the District of Columbia and there is no prior discipline. He has a clean record."

"The misconduct arose during the conduct of civil litigation. The civil litigation has been resolved. The State Bar is more willing to entertain and recommend a resolution of the case."

"[a]nother thing is that aside from this quantum of civil litigation between Mr. Hagendorf and Mr. Duban or his entities, there's no other alleged misconduct. It all seemed to arise out of the acrimony and the animosity between the two of them. There

are no other problems or indications of alleged misconduct on Mr. Hagendorf's part that are outside of this relationship.

That doesn't diminish the seriousness of what he's done here, but there are no other indicators outside of this litigation that indicate an unfitness to practice that one would normally see for an attorney who would be facing suspension or even worse." (RCE - #2, pp. 23-25).

After deliberations, the disciplinary board announced it would "reluctantly, and I underline reluctantly, accept the conditional guilty plea in exchange for a stated form of discipline.

Had this panel heard all the evidence in this matter, and based upon the information that we reviewed that has been submitted to us at this point, we probably would have recommended a harsher form of discipline relative to this matter." (RCE - #2, pg. 88). The decision of the panel was unanimous. (RCE - #4, pg. 3).

Subsequent to the discipline imposed in Nevada, Respondent entered into a stipulation with counsel for the State Bar of California. (RCE - #5). The stipulation provides, in part, that "[n]o aggravating circumstances are involved"; that Respondent shall receive a stayed suspension of 5 months, with an actual suspension of 60 days, and be placed on probation for 1 year; that Respondent shall attend a session of Ethics School and pass the exam given at the end of the session; and that Respondent

shall pass the Multistate Professional Responsibility Examination. (RCE - #5). The stipulation was accepted by the Supreme Court of California in an order filed September 10, 2004. (RCE - #6).

Respondent also submitted a motion and affirmation to the Supreme Court of New York, Appellate Division: First Judicial Department on December 23, 2004. (RCE - #11). Raymond Vallejo, Principal Attorney in the Office of the Chief Counsel to the Departmental Disciplinary Committee for the Appellate Division, First Judicial Department, filed a reply affirmation dated January 4, 2005. The reply requests the court "order that respondent be disciplined in New York in accordance with the discipline administered by Nevada in lieu of having a Referee conduct a hearing in a matter where both respondent and the Committee agree on the sanction to be imposed upon respondent." (RCE - #12).

On June 23, 2005, the Board of Professional Responsibility for the District of Columbia Court of Appeals filed its' report and recommendation with the District of Columbia Court of Appeals. (Supplemental Record). The report recommends that the District of Columbia Court of Appeals impose identical reciprocal discipline to that imposed by the Supreme Court of Nevada.

## F. SUMMARY OF ARGUMENT

**1. This Court should impose reciprocal discipline consistent with the discipline imposed by every other jurisdiction in which Respondent is licensed to practice law.**

Respondent lives in Nevada and practices law in Nevada. The State Bar of Nevada was actively involved in settling the civil litigation which lead to the disciplinary charges and recommended the sanctions imposed by the Supreme Court of Nevada. All of the other jurisdictions in which Respondent is licensed to practice law have imposed either substantially the same sanctions as Nevada or are in the process of doing so. This Court should do the same.

The existing case law of this Court and the Florida Standards for Imposing Lawyer Sanctions support a non-rehabilitative suspension in this case. The Bar argued for a two year suspension by primarily relying upon disbarment cases. All of these cases are distinguishable.

Finally, the referee relied upon two aggravating factors which are not supported by the record. Respondent did not obstruct the Nevada Bar disciplinary proceeding and did not show indifference to making restitution.

## G. ARGUMENT AND CITATIONS

### 1. This Court should impose reciprocal discipline consistent with the discipline imposed by every other jurisdiction in which Respondent is licensed to practice law.

Respondent is a member of the bar in five separate jurisdictions (Nevada, California, New York, the District of Columbia, and Florida). To date, all of the jurisdictions which have imposed discipline for the misconduct at issue have imposed a non-rehabilitative suspension. The decisions of the other jurisdictions have all been unanimous. This Court should likewise impose a suspension of ninety days or less.

This case arose out of litigation Respondent commenced in the state courts of Nevada. Respondent lives in and practices law in Nevada. Bar counsel for the State Bar of Nevada was actively involved in the negotiations which lead to settlement of the civil litigation between Respondent and Mr. Duban. Bar counsel for the State Bar of Nevada recommended the five month suspension (stayed after 60 days) be accepted by the Nevada disciplinary board. As stated in the case of *Matter of Yagman*, 263 A.D.2d 151 (S.Ct. N.Y.1999), "the State where an attorney lives and has actively practiced law when the offenses were committed has the greatest interest" in the sanction to be imposed. *Id.* at 153.

In this case, both the Nevada disciplinary board and the Supreme Court of Nevada "reluctantly", yet unanimously, accepted Respondent's guilty plea and the

recommended discipline. The Supreme Court of Nevada noted the discipline is "rather lenient in light of the wilful and deliberate actions taken by Hagendorf" and that Respondent's actions "could sustain a lengthier suspension even without the additional violations." (Exhibit A to Complaint, page 5). Nevertheless, the Supreme Court of Nevada, despite having both the authority and the opportunity to impose greater discipline, approved the plea agreement in full.

While this court has apparently not adopted the exact standard found in *Yagman*, it has generally afforded full faith and credit to the disciplinary decisions of foreign jurisdictions. In *The Florida Bar v. Friedman*, 646 So. 2d 188 (Fla. 1994), for example, this court imposed "a similar suspension" to the one imposed in New York. (*Id.* at 190). (See also *The Florida Bar v. Shinnick*, 731 So. 2d 1265, 1266 (Fla. 1999)("the Bar argues the referee's intention was to recommend the identical discipline imposed by the out-of-state court")(This court approved the referee's recommendation. *Id.* at 1267).

The referee below, while acknowledging the finding by the Supreme Court of Nevada that the discipline is "exceptionally lenient" and "extraordinarily lenient", recommended that Florida should not "view such outrageous conduct in the same manner." (RR, p. 6). The referee's personal offense at Respondent's conduct should

not cause this court to fail to afford respect to the decision of its' sister supreme courts.

In reviewing a referee's recommended discipline, this court's scope of review is broader than that afforded to the referee's findings of fact because it is ultimately this court's responsibility to order the appropriate sanction. *The Florida Bar v. Batista,* 846 So. 2d 479, 484 (Fla. 2003)(citing *Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989)). The recommended discipline must have a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Cueto*, 834 So. 2d 152, 156 (Fla. 2002)(reh. denied Dec. 30, 2002).

A review of several cases will show that a non-rehabilitative suspension has more than a reasonable basis in existing case law. In *The Florida Bar v. Corbin,* 701 So. 2d 334 (Fla. 1997), for example, the respondent prepared and filed a motion for summary judgment in which he misrepresented to the court whether an issue of material fact existed in a case. In addition, Mr. Corbin prepared an affidavit for his client's mother containing information he knew was untrue. *Id.* at 335. Despite three prior disciplinary offenses and only one mitigating factor (remoteness of prior offenses), this court reduced the referee's recommended discipline of a six (6) month suspension to a ninety day suspension. *Id.* at 336-337. This court has also imposed no more than a ninety day suspension in numerous cases for making a false statement

to a court and/or deliberate lack of candor. (*See The Florida Bar v. McLawhorn)*, 535 So. 2d 602 (Fla. 1988)(public reprimand); *The Florida Bar v. Sax*, 530 So. 2d 284 (Fla. 1988)(public reprimand); *The Florida Bar v. Fatolitis*, 546 So. 2d 1054 (Fla. 1989)(public reprimand for forging wife's name as a witness); *The Florida Bar v. Story*, 529 So. 2d 1114 (Fla. 1988)(thirty-day suspension for improperly notarizing a will); *The Florida Bar v. Morrison*, 496 So. 2d 820 (Fla. 1986)(ten-day suspension); *The Florida Bar v. Wright*, 520 So. 2d 269 (Fla. 1988)(public reprimand for lying during discovery); *The Florida Bar v. Batman*, 511 So. 2d 558 (Fla. 1987)(public reprimand for testifying falsely); *The Florida Bar v. Shapiro*, 456 So. 2d 452 (Fla. 1984)(ninety-day suspension for filing false motion to dismiss with forged signature); and *The Florida Bar v. Oxner*, 431 So. 2d 983 (Fla. 1983)(sixty-day suspension for twice lying to judge to obtain a continuance)).

A lesser sanction of a thirty-day suspension was imposed in *The Florida Bar v. Kravitz*, 694 So. 2d 725 (Fla. 1997), for numerous acts of misrepresentation. Among other acts, Mr. Kravitz was found in contempt of court for intentionally misrepresenting to the court the name of an individual who was responsible for not obeying an injunction and for misrepresenting to the court the position of opposing counsel on proposed orders. *Id.* at 726. In addition to violating Rules 4-8.4(c) and (d), Mr. Kravitz was found guilty of violating Rule 4-8.4(b)(a lawyer shall not commit a

***criminal*** act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer)(emphasis added). *Id.* at 726. Due to Mr. Kravitz's lack of a prior record, this court imposed a thirty-day suspension. *Id.* at 728.

Finally, *The Florida Bar v. Varner*, 780 So. 2d 1 (Fla. 2001), also supports imposition of a non-rehabilitative suspension in this case. Mr. Varner was found to have knowingly made a false statement of material fact by submitting a fictitious notice of voluntary dismissal to a representative of his client's insurer; to have committed a criminal act by violating section 817.234(1)(a)2, Florida Statutes; and to have "invoked the power and prestige of the court in order to further the deception." *Id.* at 3-4.

As in the present case (see Tr. - pp. 47-48), The Bar in *Varner* relied upon disbarment cases in seeking a rehabilitative suspension. *Id.* at 5. This court noted Mr. Varner had no intent to defraud and, thus, a ninety day suspension was appropriate. *Id.* at 5-6. Likewise, there has been no finding in any of Respondent's various disciplinary proceedings of an intent to defraud.

The Florida Standards for Imposing Lawyer Sanctions (Standards) also support a non-rehabilitative suspension. Standard 6.12 provides that suspension is appropriate "when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action." Here, Respondent did take the remedial action of dissolving the California

limited partnership he formed, dismissing all actions he filed against Mr. Duban, and paying $25,000 to Mr. Duban.

Standard 7.2 also supports a non-rehabilitative suspension. The standard applies "when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system."

Finally, Respondent submits two of the aggravating factors found by the referee are not supported by the record. The referee applied the aggravating factor of bad faith obstruction "of the Nevada Bar disciplinary proceeding". (RR - 9)(see Standard 9.22(e)). The referee appears to have adopted the argument of Bar counsel that the federal actions filed by Respondent against the State Bar of Nevada in California and Nevada provide evidence to support this aggravating factor. (See Tr. - 53).

The findings made by the Supreme Court of Nevada and the plain language of Standard 9.22(e) show this standard does not apply. The Supreme Court of Nevada made no finding whatsoever that the federal actions Respondent filed constituted obstruction of their disciplinary proceedings. Also, the standard requires there be evidence of "intentionally failing to comply ***with rules or orders of the disciplinary agency***". (Emphasis added). There is simply no evidence Respondent failed to comply with any Nevada Bar rules or orders of the State Bar of Nevada. Instead, Respondent

has been in full compliance with all orders of not just the Nevada Bar, but California, New York and the District of Columbia as well.

The referee also applied the aggravating factor of indifference to making restitution. (RR - 9)(see Standard 9.22(j)). Again, the referee appears to have adopted the argument of Bar counsel that Respondent "grudgingly paid the $25,000, and he did so as a means of avoiding the potential liability of upwards of $150,000." (Tr - 53). The evidence does not support this aggravating factor.

One definition of indifference is "lack of interest or concern"; "lack of importance". The American Heritage Dictionary of the English Language, (1970), page 669. Respondent clearly was concerned about reaching an agreement with Mr. Duban and the State Bar of Nevada as to both the amount of money to be paid and the time period for paying it. Perhaps most importantly, Mr. Duban stated the $25,000 paid by Respondent represented "a reasonable amount based on the amount that would be enforceable and collectible given everybody's situation, and it puts an end to everything." (RCE - #2, p. 16).

## H. CONCLUSION

For the reasons stated above, this Court should impose a non-rehabilitative suspension as imposed by the Supreme Courts of Nevada and California and recommended in New York and the District of Columbia.

## I. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Respondent has been forwarded by regular U.S. Mail to:

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this _____ day of July, 2005.

_____
RICHARD A. GREENBERG

xc: Wayne A. Hagendorf

## J. CERTIFICATE OF COMPLIANCE

Undersigned counsel does hereby certify the Initial Brief of Respondent is reproduced in the following point size and font: 14 point Times New Roman.