IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GERALD JOHN D'AMBROSIO,

Respondent.
_____/

Supreme Court Case No. SC04-922

The Florida Bar File Nos. 2002-51,513(15A)
2002-51,610(15A)
2002-51,612(15A)
2003-50,817(15A)

THE FLORIDA BAR'S ANSWER BRIEF

(On Appeal from a Report of Referee)

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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 final hearing held on May 23, 2005, will be designated as TT ____ (indicating the referenced page number). The transcript of the hearing of June 3, 2005, will be designated as TT2 ____ (indicating the referenced page number). The Florida Bar will be referred to as "the bar." Gerald John D'Ambrosio will be referred to as "respondent."

STATEMENT OF THE CASE AND FACTS

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

In or about November 2000, Karl Bachert consulted respondent concerning a possible corporate bankruptcy for Reecie's Ristorante Italiano ("Reecie's"), a restaurant Mr. Bachert and his wife owned in Boca Raton, Florida (RR 2, TT 97). Mr. Bachert paid respondent $1,450 as a fee for his services (RR 2, TT 99). Respondent informed Mr. Bachert that he had other clients who would be interested in purchasing the restaurant (RR 2, TT 106-107). The sale of the restaurant never occurred (TT 107,118). Despite representing to Mr. Bachert that he had filed a bankruptcy proceeding on behalf of Reecie's, respondent never filed such a bankruptcy action (RR 2, TT 99,183). When he found this out, Mr. Bachert discharged respondent and retained successor counsel to file the Reecie's bankruptcy petition (RR 2, TT 99-100). Notwithstanding his representation of Reecie's, respondent assisted another of his clients, Kayk International Trading, Inc. ("Kayk"), in obtaining possession of the premises formerly known as Reecie's (RR 2, TT 106). Kayk was a Florida corporation doing business as Sopranos Restaurant. At one time, respondent had acted as Kayk's resident agent and had filed the corporation's annual reports (RR 2).

In December 2001, Randy Dennis hired respondent to represent him in a domestic violence/battery case (RR 2). Mr. Dennis paid respondent $3,000 for the representation (RR 2, TT 216). On January 17, 2002, the Supreme Court of Florida entered an order

suspending respondent from the practice of law for 90 days, effective February 22, 2002 (RR 2). On March 7, 2002, despite his suspension, respondent appeared on behalf of Mr. Dennis before The Honorable Richard J. Oftedal in the Circuit Court of Palm Beach County, Florida (RR 2). Before the hearing, respondent informed Mr. Dennis that he was withdrawing as attorney of record due to a heart condition, giving no indication that he was under suspension from the practice of law (TT 218-219). At no time did respondent advise the court or his client of his suspension (TT 216,218-219, 310-311). Instead, respondent told his client that Jay Salyer, Esq. would be handling the matter, at no additional cost to Mr. Dennis (TT 218). Mr. Dennis first learned that respondent was under suspension when he met with Mr. Salyer (who asked for additional legal fees) to discuss his case (TT 221). Mr. Dennis did not hire Mr. Salyer, but selected another attorney to whom he was obligated to pay additional legal fees (RR 2, TT 225). Respondent failed to return to Mr. Dennis the unearned portion of his legal fee. He also failed to provide him with an accounting (RR 2, TT 225).

On April 17, 2002, while respondent's suspension remained in effect, respondent appeared at a calendar call on behalf of a client (David Friedman) and before The Honorable James T. Carlisle in the Circuit Court of Palm Beach County, Florida (RR 2, TT 243-244). At the calendar call, respondent informed Judge Carlisle that he would be unavailable to try the case on the suggested date because of an obligation to one of his children (TT 245). Respondent did not inform the court or his client that he was under a suspension that had become effective on February 22, 2002 (TT 245-247,313).

Respondent also failed to furnish bar counsel with a sworn affidavit listing the names and addresses of all persons and entities to whom and to which he had submitted copies of his suspension order, within the mandatory 30 days of his receipt of same (TT 242, 286-294).

In May 1998, Richard Appelman hired respondent to defend him and his wife in a mortgage foreclosure action against their home (RR 3, TT 38). After consulting with Mr. Appelman, respondent determined that the foreclosure was fraudulent and urged his clients to seek substantial damages arising out of the suit (TT 278-283,317-318). Mr. Appelman and respondent entered into a contingent fee agreement, but respondent failed to prepare and execute a written contingency fee agreement. (RR 3, TT 38,50,313).

In October 2000, respondent agreed to represent Mr. Appelman in a claim against Harriet Frank for personal injuries sustained in an automobile collision caused by her negligence (RR 3, TT 41,42). Mr. Appelman and respondent agreed on a contingent fee, but respondent again failed to prepare and execute a written fee agreement (RR 3, TT 50,269,313). While respondent represented him, Mr. Appelman gave respondent a check in the amount of $70,000. This check was drawn on the account of one of Mr. Appleman's business associates. Respondent deposited the check into his bank account and gave Mr. Appelman his own check in the amount of $10,000. The check Mr. Appelman gave to respondent did not clear. As a result, Mr. Appelman became indebted to respondent for $10,000 (RR 3, TT 46, 274-278). This incident caused the relationship between Mr. Appelman and respondent to deteriorate to the point that Mr. Appelman

terminated respondent's services. Thereafter, respondent failed and refused to surrender documents from Mr. Appelman's file, which were essential to the preparation and advancement of his claim (TT 47-48,53,271-273). Mr. Appelman settled his claim for an unspecified amount, after he terminated respondent (RR 3).

SUMMARY OF THE ARGUMENT

The Florida Bar provided competent substantial evidence to support the referee's findings that respondent violated R. Regulating Fla. Bar 3-5.1(g), 4-1.1, 4-1.5(a), 4-1.5(f)(1), 4-1.16(d), 4-3.4(c), and 4-8.4(a). The bar presented testimony from respondent's clients and introduced documents that proved the allegations set forth in its complaint. Respondent did not advance sufficient evidence to rebut the bar's competent substantial evidence. Accordingly, the referee's findings, as set forth in his report, are well supported in the record and should be affirmed on appeal.

Respondent's due process was not violated by the fact that the referee did not hold a separate hearing specifically and expressly styled as a "sanctions hearing." Respondent had many, many opportunities throughout the referee proceedings to explain and expound upon the circumstances surrounding his misconduct, and any mitigation of same. Indeed, the referee held a full day final hearing, followed by a status conference during which respondent was given a full and fair opportunity to address the referee. Finally, the report of referee in this case is not deficient as the form of the report follows the referee manual distributed by The Supreme Court of Florida.

This Court has held, repeatedly, that bar discipline must serve three purposes: the sanction imposed must be fair to society, it must be fair to the disciplined attorney, and it be must sufficiently harsh as to deter and dissuade other attorneys from similar misconduct. Further, the sanction must have a reasonable basis in existing case law and should be supported by The Florida Standards for Imposing Lawyer Sanctions. The

recommendation by the referee in the instant case adheres to the each of these oft-repeated requirements. Moreover, extant case law presents a rebuttable presumption that an attorney who practices law while suspended acts in contempt of The Supreme Court of Florida, and should be disbarred. As the referee found nothing to mitigate respondent's conduct in the instant case, the presumption of disbarment stands unchallenged.

Given respondent's grave misconduct in the instant case, viewed within the context of his prior discipline, the case law, and The Florida Standards for Imposing Lawyer Sanctions, respondent should be disbarred.

ARGUMENT

I. THE FLORIDA BAR PRESENTED COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE REFEREE'S FINDINGS OF FACT REGARDING GUILT.

A referee's findings of fact regarding guilt carry 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 findings 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 this Court reviews the record, 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 evidence 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 the instant case, The Florida Bar presented competent substantial evidence to support all of the referee's findings of guilt.

Respondent, in his initial brief, bases his argument (that the referee's findings are clearly erroneous and lacking in evidentiary support) on his own testimony and documentary evidence, as presented at the final hearing. This argument is ineffective in that an appellant cannot meet his burden of proving clearly erroneous findings by demonstrating that the record contains other evidence. The Florida Bar v. Senton, 882

So. 2d 997 (Fla. 2004); The Florida Bar v. Vining, 761 So. 2d 1044 (Fla. 2000). That is because, in bar disciplinary cases, the referee is charged with the responsibility of assessing the credibility of witnesses based on their demeanor and other factors. The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999); The Florida Bar v. Hayden, 583 So. 2d 1016 (Fla. 1991). In the case at bar, the referee listened carefully to the testimony presented, and scrutinized the documents offered into and entered into evidence. Utilizing the discretion reserved unto him, the referee found the bar's evidence to be the more credible. Respondent may not vitiate the referee's determination, as to the weight and substance of the evidence, by arguing, simply, that other evidence exists.

The bar presented testimony from Karl Bachert regarding the corporate bankruptcy that respondent failed to file (TT 97-212). Mr. Bachert stated that respondent told him that he had filed the bankruptcy (TT 106-107,118,99,183). Respondent admitted that he never filed the subject bankruptcy (TT 262), but testified that he did not do so because there were inconsistencies in the schedules (TT 256-265). Mr. Bachert testified as to the accuracy of the subject schedules (TT 102-106). Simply stated, Mr. Bachert paid respondent $1,450 to file a corporate bankruptcy petition for his restaurant, and respondent failed to do so (TT 98-99,115). Furthermore, respondent refused to return to Mr. Bachert the legal fee he received (TT 100). Respondent testified that he completed some work on the bankruptcy, but provided no evidence to support his claim. As a result, the referee rejected respondent's evidence as lacking in credibility and found that the bar provided competent substantial evidence that respondent did not file the corporate

bankruptcy as he was hired to do. This competent, substantial evidence supports the referee's finding that respondent violated R. Regulating Fla. Bar 4-1.1, 4-1.5(a), and 4-8.4(a).

Concerning Randy Dennis' complaint, the bar presented the testimony of Phyllis Folsom, the complainant's mother. Ms. Folsom accompanied her son to all of his meetings with respondent, and to all court hearings (TT 216). Ms. Folsom testified that respondent never informed her son that he was suspended from the practice of law (TT 216). Moreover, Ms. Folsom testified that respondent appeared in court before The Honorable Richard Oftedal in Palm Beach County, and that the judge (who learned of respondent's suspension) told respondent to leave his courtroom (TT 216-219,239). Mr. Dennis had paid respondent $3,000 for legal representation (TT 216). After respondent's suspension, respondent arranged for substitute counsel at no additional cost to Mr. Dennis (TT 218). However, when respondent contacted the substitute counsel, Jay Salyer, Mr. Salyer asked for additional legal fees (TT 221,224). Ultimately, Mr. Dennis hired another attorney, to whom he paid additional legal fees (TT 224-225). Respondent refused to return the $3,000 fee Mr. Dennis paid for representation (TT 225). At the final hearing, respondent presented no evidence to support his claim that he gave notice of his suspension to either his client or the court (TT 216,247-248).

Given the evidence provided by the bar, the referee correctly found respondent guilty of violating R. Regulating Fla. Bar 3-5.1(g), 4-3.4(c), and 4-8.4(a). Respondent admitted he appeared in court in Palm Beach County, before Judge Carlisle, at a calendar

call for his client David Friedman (TT 243-244). Respondent testified that he had informed the court and his client that he was under suspension (TT 245-247). However, the bar presented clear and convincing evidence to the contrary (TT 244). Respondent testified that Jay Salyer had taken over the case, but failed to appear at the hearing (TT 241,246). Mr. Dennis presented testimony to the contrary. In both the Dennis and the Friedman cases, respondent could not explain his presence in court on the dates at issue, during his suspension (TT 241-244). Respondent's testimony, which the referee rejected, was that Mr. Salyer had taken over both cases, but had failed to appear on the dates at issue, so respondent was forced to appear instead (TT 241-244). Respondent's misconduct, as determined by the referee, is also demonstrated by his own mandatory Rule 3-5.1(g) affidavit, listing the names and addresses of all persons and entities to whom and to which he had sent copies of his suspension order. Respondent's affidavit was sent *a year* after the it was due (TT 242-243). Respondent also admitted that he did not send the suspension order to some of his clients and opposing counsel, but also stated that he advised them of his suspension just the same. (TT 240-244,247-248). Notwithstanding the foregoing, the bar introduced into evidence a letter respondent sent to the bar during his suspension, demonstrating that respondent was still practicing law at that time. (TT 250-251). The subject letter referenced respondent's law office address and identified him as an attorney (TT 250-252). A suspended Florida attorney is obligated to remove from his office and letterhead any reference to his ability or availability to practice law. Again, the referee heard testimony and considered evidence

provided by both sides and decided that the bar's testimony and evidence was the more credible. Thus, the referee correctly found respondent guilty of violating R. Regulating Fla. Bar 3-5.1(g), 4-3.4(c), and 4-8.4(a).

The bar also presented the testimony of Richard Appelman. Mr. Appelman testified that he and respondent had been friends and that respondent had represented him in three separate cases (TT 38-39). One case was a mortgage foreclosure and the remaining two cases were personal injury cases (TT 38-39). Respondent represented Mr. Appelman on a contingency fee basis in all three cases, but failed to prepare or execute a written contingency fee agreement, as required, in any of them (TT 39,42). Mr. Appelman testified there were no written contingency fee agreements and respondent admitted there were no written contingency fee agreements (TT 85-90,269,271). Respondent testified that the mortgage foreclosure case was billed on an hourly basis and was not a contingency fee case (TT 283-284). To support this claim, respondent presented an affidavit submitted in the case, outlining a $200 per hour fee (TT 283). However, respondent did not keep hourly records and did not charge Mr. Appelman any money during the representation (TT 284-286). Furthermore, respondent did not have a signed retainer agreement of any kind. Mr. Appelman testified that he never paid respondent on an hourly basis (TT 50,88,284). Consequently, the referee rejected respondent's argument and testimony and correctly found that respondent violated R. Regulating Fla. Bar 4-1.5(f)(1).

Finally, there is respondent's claim of a retaining lien against Mr. Appelman's client files. Mr. Appelman was indebted to respondent for the $10,000 respondent gave him against a dishonored third party check. (TT 46, 58-63). This transaction was unrelated to Mr. Appelman's other cases with respondent. Since Mr. Appelman owed respondent $10,000, respondent would not give Mr. Appelman his client file on his personal injury case, preventing Mr. Appelman from hiring new counsel (TT 52-53). In the end, Mr. Appelman settled the personal injury case himself (TT 53). Respondent testified that he had a binding retaining lien on Mr. Appelman's file due to the $10,000 debt (TT 271-274). In his initial brief, respondent relies on Daniel Mones, P.A. v. Smith, 486 So. 2d (Fla. 1986) and Wintter v. Fabber, 618 So. 2d 375 (Fla. 4th DCA 1993), to demonstrate that he correctly could claim a retaining lien against Mr. Appelman's file. However, both of the aforementioned cases hold that an attorney may exercise a retaining lien on a client's property when the client owes the attorney money for unpaid legal fees. Smith, 486 So. 2d at 561; Wintter, 618 So. 2d at 376. While Mr. Appelman owed respondent $10,000, it was not for legal fees. Mr. Appleman owed respondent $10,000 because respondent had advanced him funds against what proved to be a bad check. Although Mr. Appelman did owe respondent money, according to Smith and Wintter, respondent did not have a right to a retaining lien on Mr. Appelman's file because Mr. Appelman did not owe respondent money for legal fees. At the time, respondent was representing Mr. Appelman on a contingency basis. He did not settle Mr. Appelman's last personal injury case because their relationship had deteriorated as a result of the aforementioned $10,000

debt. Respondent never asked Mr. Appelman to pay him (in the personal injury case) on a quantum meruit basis, but he did ask for the return of his $10,000 (TT 271-274). As respondent did not keep track of the hours he expended on the case (which he claimed was generating hourly fees), and did not provide any evidence as to the amount of money Mr. Appelman may have owed him on a quantum meruit basis (TT 271-274), the referee correctly concluded that respondent exercised the retaining lien to force the repayment of the $10,000, and not the payment of any legitimately owed legal fees. Accordingly, the referee correctly found respondent guilty of violating R. Regulating Fla. Bar 4-1.16(d).

Respondent's final claim of error also fails for lack of evidence. Respondent charged that the report of referee is deficient because the referee did not discuss the facts of the case in sufficient detail and because he did not explain which violation goes with each distinct count of the bar's complaint. This specificity is not required, under any interpretation of the Rules Regulating The Florida Bar. The report of referee in this case correctly follows the format provided in the referee manual distributed by The Supreme Court of Florida. This manual requires a narrative summary of the case, and a listing of the rules violated. The referee complied with both requirements. Therefore, respondent's assertion that the report of referee is deficient is misplaced.

II. DISBARMENT IS THE APPROPRIATE SANCTION FOR AN ATTORNEY WHO FAILS TO PROVIDE NOTICE OF HIS SUSPENSION TO HIS CLIENTS AND THE COURT, FAILS TO EXECUTE WRITTEN CONTINGENCY FEE AGREEMENTS WITH HIS CLIENTS IN CONTINGENCY FEE CASES, FAILS TO PROVIDE COMPETENT REPRESENTATION, CHARGES AN EXCESSIVE FEE, AND

APPEARS IN COURT WHILE SUSPENDED FROM THE PRACTICE OF LAW.

While a referee's findings of fact should be upheld unless clearly erroneous,[1] the Court has complete discretion on the subject of sanctions. The Florida Bar v. Rue, 643 So. 2d 1080 (Fla. 1994). This is because the 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 that three purposes must be served by bar discipline: the judgment must be fair to society; the judgment must be fair to the attorney; and the judgment must be severe enough to deter others attorneys from similar misconduct. This Court has further stated that a referee's recommended discipline must have a reasonable basis in existing case law or the Florida 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 the instant case, the referee's recommendation of disbarment is supported by existing case law as well as by the Standards for Imposing Lawyer Sanctions. Finally, it conforms exactly to the Court's stated purpose for lawyer discipline.

DUE PROCESS ISSUES

Respondent has complained that he did not receive the benefit of a separate sanctions hearing. Such a separate, designated sanctions hearing is not required under the

[1] The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986)

Rules Regulating The Florida Bar. In the instant case, respondent was allotted almost an entire day for his final hearing. This Court has held that a respondent is not necessarily entitled to a separate hearing regarding disciplinary sanctions if the respondent was (otherwise) afforded opportunities to explain the circumstances involving his alleged misconduct and to offer mitigation regarding potential sanctions. The Florida Bar v. Baker, 810 So. 2d 876 (Fla. 2002). In Baker, the attorney was not given a separate discipline hearing. This Court stated that the attorney had numerous opportunities to explain fully the circumstances of the alleged offenses and to offer testimony in mitigation. At the final hearing, the referee asked to hear arguments from both sides regarding discipline. Respondent made no objection or indication to the referee that he needed more time to present additional evidence. Accordingly, this Court held that separate hearings regarding disciplinary sanctions are not required as long as an accused attorney receives fair notice of the charges faced. Furthermore, this Court held that the attorney was on notice before the final hearing of a possible disbarment sanction because the complaint served upon him clearly specified the charges against him. In addition, the Florida Standards for Imposing Lawyer Sanctions clearly authorized disbarment for the misconduct charged.

In the instant case, as in Baker, the respondent was on clear notice that the bar could or would seek disbarment as an appropriate sanction for respondent's misconduct. In the instant case, respondent was afforded a final hearing and a subsequent hearing, called a status conference. At either or both hearings, respondent was free to present

any and all evidence available to him to explain the circumstances involving his alleged misconduct and to offer evidence in mitigation of such misconduct. The attorney in Baker was afforded the same opportunities and this Court held that Baker received due process in full measure. At the final hearing or the status conference in the instant case, respondent was free to present testimony regarding mitigation and an appropriate sanction, and did so (TT2 8-11,13-14). He also objected to the bar's cost affidavit (TT2 7-8). Given the full and fair opportunities the referee gave to respondent, permitting him ample time to explain the circumstances surrounding his conduct and any mitigating factors involved, respondent's due process rights were not violated because the referee did not have a separate, specifically named hearing to determine sanction (TT 322-328, TT2 8-11,13-14). Moreover, if respondent had concerns about his ability to argue sanctions and mitigation the proper time to advance his concerns about the referee's failure to hold a separate hearing would have been at the status conference or immediately after the referee issued his report. Respondent could have filed a motion for rehearing or a motion to set a hearing on sanctions at any time before the referee's report was submitted to this Court. Respondent was given numerous opportunities to address his conduct, his mitigation, and the appropriate sanction for his misconduct. He elected not to do so and instead sought to preserve his claim of error to advance on appeal. This Court should discount and reject respondent's argument on this subject. Respondent received due process – in full measure.

DISBARMENT AS APPROPRIATE SANCTION

This Court has held that engaging in the practice of law while suspended or disbarred (generally) warrants disbarment. The Florida Bar v. Rood, 678 So. 2d 1277 (Fla. 1996); The Florida Bar v. Brown, 635 So. 2d 13 (Fla. 1994); The Florida Bar v. Greene, 589 So. 2d 281 (Fla. 1991); The Florida Bar v. Jones, 571 So. 2d 426 (Fla. 1990). The instant respondent is also guilty of significant additional misconduct: failing to provide competent representation, failing to have written contingency fee agreements, failing to provide notice of his suspension as required, and charging an excessive fee -- all of which, *individually*, would warrant the sanction respondent urges for himself: a public reprimand. *See* The Florida Bar v. Kavanaugh, 30 Fla. L. Weekly 630 (Fla. 2005) [attorney publicly reprimanded for charging excessive fee and made to pay restitution]; The Florida Bar v. Rubin, 709 So. 2d 1361 (Fla. 1998) [attorney publicly reprimanded for failing to have written contingency fee agreements]; The Florida Bar v. Littman, 612 So. 2d 582 (Fla. 1993) [attorney publicly reprimanded for providing incompetent representation]. Here, because respondent was found guilty of multiple rule violations involving various clients, the most egregious being practicing law while suspended, it is impossible to understand the basis for respondent's belief that he is deserving of only a public reprimand. Disbarment is the appropriate sanction in this case because this Court deals more harshly with cumulative misconduct than with isolated misconduct. The Florida Bar v. Temmer, 753 So.2d 555 (Fla. 1999). Given the egregious and cumulative nature of respondent's misconduct, in the context of his prior discipline, the referee correctly recommended respondent's disbarment.

Disbarment is also supported by the applicable case law. In The Florida Bar v. Rood, 678 So. 2d 1277 (Fla. 1996), an attorney failed to notify all of his clients of his suspension and he continued to meet with, represent, and advise clients, and disburse client funds from his bank. The referee recommended the attorney be disbarred. This Court held disbarment was the appropriate sanction for the attorney's misconduct. In The Florida Bar v. Greene, 589 So. 2d 281 (Fla. 1991), respondent engaged in the practice of law on four occasions while he was under suspension. The referee recommended the attorney's suspension be extended for an additional 2 years. This Court disagreed and held that the attorney's conduct warranted disbarment because of his disciplinary history under the existing case law.

In this case, respondent engaged in the practice of law during his suspension, as did the attorneys in Rood and Greene. While respondent attempted to minimize the scope and nature of his court appearances, the bar proved, by clear and convincing evidence, that respondent failed to inform his clients that he was suspended and that he appeared in court to protect his clients' interests as well as his own reputation. It is axiomatic that these court appearances constitute the practice of law. Respondent asserted that the judges, opposing counsel, and his clients knew he was suspended. However, respondent presented nothing to rebut the bar's clear and convincing evidence of his failure to provide notice of his suspension – to anyone. Indeed, respondent's clients testified that he lied to them about the reasons for his withdrawal from their cases. At trial, the bar introduced into evidence respondent's Rule 3-5.1(g) affidavit, which should have

contained the names of every person and entity notified of respondent's suspension. In truth, the affidavit did not even contain the names of many of the people respondent claimed he provided with a copy of his suspension order. Finally, the bar proved that respondent continued to use his law office address and "Esq." after his name, during his suspension. As did the attorneys in Rood and Greene, respondent engaged in the practice of law during his suspension and failed to inform his clients, opposing counsel, and the court that he was suspended. In addition, this respondent was found guilty of a multitude of additional rule violations, and has a prior disciplinary history including a public reprimand in 1999 and a 90-day suspension in 2002. [The attorney in Greene also had prior discipline, which this Court considered in determining the appropriate sanction.] Apparently, the imposition of lesser discipline in the past was not sufficient to deter this respondent from continued misconduct. Indeed, respondent engaged in additional misconduct while he was serving his suspension (by engaging in the practice of law). Given respondent's cumulative misconduct, his prior discipline, and his continued and contemptuous practice of law during his suspension, the only appropriate sanction is disbarment.

When deciding the appropriate discipline, The Florida Standards for Imposing Lawyer Sanctions offer excellent guidance. Standard 8.0 deals with the proper sanctions for cases involving prior discipline. Here, respondent engaged in the practice of law during his suspension and failed to provide his clients, the court, and opposing counsel with a copy of his suspension order. Standard 8.1 suggests disbarment is the appropriate

discipline when a lawyer intentionally violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system, or the profession. Thus, the disbarment recommended by the referee in this case is the appropriate discipline for respondent's misconduct because respondent intentionally violated the terms of his extant suspension order, causing injury to the legal system and to the profession.

When applying The Florida Standards for Imposing Lawyer Sanctions, any and all applicable mitigation and/or aggravation should be considered. The referee in the instant case found no mitigating factors present. In aggravation, the referee found prior discipline, a pattern of misconduct, multiple offenses, and respondent's refusal to acknowledge the wrongful nature of his conduct. Since the referee found no mitigating factors present, respondent did not overcome the presumption of disbarment as an appropriate discipline. Due to the multiple acts of misconduct in the instance case and respondent's prior discipline, the existing case law and The Florida Standards for Imposing Lawyer Sanctions support the referee's well-reasoned and well supported recommendation of disbarment.

CONCLUSION

The referee's findings of guilt are well supported by competent substantial evidence and the recommended discipline is consistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions. This Court should approve the referee's report in this case and disbar respondent.

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 Kevin P. Tynan, counsel for respondent, 8142 North University Drive, Tamarac, Florida 33321 and to Staff Counsel, 651 East Jefferson Street, Tallahassee, FL 32399-2300 on this _____ day of _____, 2005.

_____
LORRAINE CHRISTINE HOFFMANN

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.

_____
LORRAINE CHRISTINE HOFFMANN

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