IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

REID ALEXANDER COCALIS,

Respondent.
_____/

Supreme Court Case
No. SC05-1425

The Florida Bar File
No. 2003-50,454 (17B)

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellant, will be referred to as "the Bar" or "The Florida Bar." Reid A. Cocalis, Appellee, will be referred to as "Respondent." The symbol "RR" will be used to designate the report of referee and the symbol "RR2" will be used to designate the second and final report of referee. The symbol "TT" will be used to designate the transcript of the final hearing held in this matter on January 9, 2006. The transcript of the proceeding held on April 10, 2006, will be designated as "HT." Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

STATEMENT OF CASE AND FACTS

The statement of the case and facts set forth by the Bar in its initial brief is extremely argumentative and not supported by the record. Therefore, of necessity, the Respondent sets forth the following balanced recitation of the facts of this case.

The Florida Bar served its complaint on August 16, 2005. Shortly thereafter, on August 26, 2005, the Honorable Stephen A. Rapp was appointed to act as referee. The Respondent served his answer and affirmative defenses on September 6, 2005. The case proceeded to trial with proceedings being held on January 9, 2006 and April 10, 2006.

The referee in this case has rendered two reports. The first report dated February 7, 2006, contained the referee's factual rulings and found the Respondent not guilty of five of the rule violations alleged by the Bar in its complaint.[1] However, the referee reserved ruling on the remaining potential rule violation[2] and required further argument on same. That argument, as well as the presentation of character witnesses, was held on April 10, 2006. At the conclusion of this hearing the referee stated that, without passing on the guilt or innocence of the remaining disputed rule violation, he would be recommending that the Respondent, pursuant to R. Regulating Fla. Bar 3-5.3(h)(2), be diverted to "the Bar's Practice and

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[1] The Report contains a typographical error in identifying R. Regulating Fla. Bar 4-3.4(a) See footnote one from RR2.

[2] R. Regulating Fla. Bar 3-4.3.

Professionalism Enhancement Program and in particular that the Respondent be directed to attend the Bar's Ethics School at his expense." RR2 at 2. The Florida Bar now appeals the recommendation of diversion and the not guilty findings on the remaining portions of its complaint.

The facts of this case are relatively straight forward and ably set forth in the first report of referee at pages two through seven. As the record will indicate the parties were in basic agreement on the majority of the key facts of the case which begins on April 14, 2000, when the Respondent appears in a personal injury action on behalf of the defendant. RR2. The case was styled *Bradley v. Brotman* and at the time of the Respondent's appearance in the matter the case had been in litigation for some time and was set for trial before Judge Leonard Stafford. RR2. The lawsuit concerned the fact that the plaintiff, Kelly Bradley, a minor, had been bitten on the lip by defendant Michelle Brotman's dog. It was asserted by the plaintiff's counsel, Jon Krupnick, that this dog bite caused the onset of alopecia areata, a skin disease resulting in hair loss on the scalp. RR2. This claim was strongly contested by the defendant, who was represented by the Respondent and Susan Rodgers, Esquire. The case was ultimately tried and there was a verdict for the plaintiff in the amount $8,000.00 for her medical expenses for the actual dog bite, which was significantly less than the millions requested by plaintiff's counsel on the alopecia claim. RR2.

The Bar's complaint focuses on two distinct issues, both of which will be discussed in detail below. The first matter concerned a phone call between the Respondent and Dr. Mark Bernhardt, who was Kelly Bradley's treating physician and the second issue was a claim regarding the medical records of Dr. Mark Unis. RR2. Both of these issues were brought to the attention of the trial judge on several occasions (pre and post trial) with the trial judge denying the relief sought by plaintiff's counsel. RR2. The plaintiff took an appeal and the case was reversed by the Fourth District Court of Appeals. In its opinion the appellate court commented adversely on the Respondent's actions in regards to these two issues. RR2.

The referee in this case was able to conduct a thorough review of all the salient facts of this case inclusive of hearing directly from the Respondent, his co-counsel, Susan Rodgers, Jon Krupnick, counsel for the Bradley's, and the guardian ad litem for Kelly Bradley, Lawrence Kuvin. Most of this testimony was not included in the record on appeal before the Fourth District Court of Appeals. The referee was also able to consider the Fourth District's opinion, the sworn testimony of Dr. Bernhardt and the other pleadings and documents that were introduced at trial. Based upon all of this information the referee resolved the two allegations raised by the Bar.

1. The phone call to Dr. Bernhardt.

On May 22, 2000, the Respondent and his co-counsel, Susan Rodgers, received a demand letter from Jon Krupnick. See Resp. Ex. D. This letter was sent after the discovery cutoff which prevented defense counsel from taking any further depositions absent a court order. Krupnick's letter claimed that he was going to call Dr. Bernhardt as a causation witness. See Resp. Ex. D. The Respondent and Rodgers conferred on what to do about this claim in that they were now unable to take the doctor's deposition absent a court order. TT109-110. Collectively they consulted Fla. Stat. §456.057(5)[3] and determined that a phone call with Dr. Bernhardt that did not discuss the treatment or care of Kelly Bradley and only inquired if the doctor had been retained to testify as a causation expert would not violate the statute. RR3. As the referee noted, Cocalis and Rodgers also agreed that the doctor should be specifically advised not to discuss Bradley's medical condition or treatment. RR3. With Rodgers present, the Respondent placed a phone call to Dr. Bernhardt. However, the doctor was not in and a message was left asking that the doctor return the Respondent's phone call.

The doctor did return the phone call and at the time of the call, Rodgers was no longer present. The referee made a specific finding that the Respondent ". . .

[3] This statute was previously numbered as Fla. Stat. §455.667(5). All references to this statute will be to the current number.

did tell Dr. Bernhardt he did not intend to ask him about the patient's care and treatment . . ." RR4. Further the referee noted that Dr. Bernhardt's sworn testimony indicated that "the conversation did not disclose confidential medical information covered by the statute." RR3. Also see Resp. Ex. C9. That said the referee still believed that the phone call was "unprofessional and inappropriate," as did the Fourth District. RR3. However, the referee did not find that this phone conversation violated the Rules Regulating The Florida Bar that were charged in the complaint.[4]

2. Dr. Unis' note.

At a pretrial conference held in the *Bradley* litigation, Krupnick did not stipulate to the admissibility of the medical records that both parties had secured from Dr. Unis' office during discovery. RR5. As such the Respondent served a subpoena duces tecum for the production of these medical records at the trial. See Resp. Ex. C-13.[5] Dr. Unis' office mistakenly forwarded the medical records to the Respondent's office prior to the trial. It was discovered at that time by the

[4] The referee never made a ruling on the last charge which was an alleged violation of R. Regulating Fla. Bar 3-4.3 as he decided to recommend diversion to ethics school.

[5] The Bar alleged that the Respondent should have provided notice to Krupnick that he had served such subpoena. However, the referee found that there was nothing improper about the service of such subpoena when the doctor and his records were listed on the pretrial witness and exhibit lists and where Bradley's lawyer could make objections related thereto at trial. RR5.

Respondent's paralegal that there was a new notation in the file. TT157. This new notation memorialized a phone call the doctor had with Krupnick after the discovery cut off. The referee found that this notation concerning this telephone conversation ". . . was not a record of diagnosis or treatment of the condition of the plaintiff." RR6. This note reads in toto as follows:

> TRANSCRIPTION OF TELEPHONE CONVERSATION WITH ATTORNEY JOHN (sic) KRUPNICK = Apparently he represents the plaintiff. I advised him that I did not think that the patient's persistent problem with alopecia areata at this point would be due to stress from a prior dog bite. See Resp. Ex. C-3.

The Respondent directed his staff to return all of the materials furnished by Dr. Unis's office to that office. TT157. However, the Respondent's office did retain a copy of this new notation to the file.

During the trial Dr. Unis' records custodian appeared to testify, was called as a witness and began such testimony. TT158. At this point in time, Krupnick stipulated to the admission of the records without examining same even though they were tendered to him by the Respondent. TT158. After he stipulated to the admission of these documents into evidence and before the case went to the jury, Krupnick discovered this note concerning his phone call with Dr. Unis which stated that the doctor had told Krupnick that he did not believe the dog bite caused the alopecia. He thereupon sought relief from the trial judge to have this notation

removed from the materials being submitted to the jury. TT165-167. The trial judge refused to do so.[6]

Once the telephone call notation was admitted into evidence, the Respondent caused same to be blown up and used it during his closing argument. TT 159.

The referee found that "(i)t was unprofessional and inappropriate and sharp practice to fail to" specifically advise Krupnick that there was a new entry in Dr. Unis' records concerning the phone call Krupnick had with him on the eve of trial. RR6. That said, the referee did not find the Respondent guilty of any rule violations concerning the failure to give a warning to Krupnick that he was about to stipulate into evidence a note that he may not have seen.[7] RR6.

The Bar in this appeal seeks to overturn the referee's not guilty findings and his recommendation of diversion to the Bar's Practice and Professionalism Enhancement Program.

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[6] The trial judge did offer Krupnick to declare a mistrial, but this offer was declined by Krupnick. TT171.

[7] However, Krupnick clearly had knowledge of the content of this phone call because he personally participated in same.

SUMMARY OF THE ARGUMENT

The referee in this case found that, in May and June of 2000, the Respondent engaged in unprofessional but not unethical conduct. As such, he believed that diversion to a Practice and Professionalism Enhancement Program, such as Ethics School, would be the appropriate remedy to resolve what he considered to be sharp practice. The Bar disagreed with this resolution and has appealed. However, they have failed to demonstrate that the referee's findings of fact and his not guilty findings were clearly erroneous and lacking in evidentiary support.

There were two distinct actions taken by the Respondent. One was a phone call to a doctor who had provided treatment to the plaintiff in a personal injury action and the second was a decision not to specifically warn opposing counsel that he needed to more closely examine another doctor's medical records before he stipulated to their admission into evidence, when those records now included reference to a phone call with opposing counsel that confirmed the doctor's belief that there was no causation. As to the phone call the referee found that the Respondent reacted to an action taken by opposing counsel, carefully considered the applicable statute concerning contact with treating physicians, conferred with his co-counsel about his proposed conduct, prior to making what he believed to be a very limited phone call that would not violate Florida Statutes. Further the referee specifically found that no confidential medical information was shared.

The second issue related to a note placed in a medical file, which note memorialized a phone conversation that doctor had with plaintiff's counsel wherein the doctor had advised that he did not agree that the dog bite in question caused a child to lose her hair. This note was accidentally provided to the Respondent prior to trial, when the doctor's office forwarded the doctor's file to him in response to a subpoena for the production of records at trial. While the Respondent returned the documents to the doctor, he now knew about the note and kept a copy of same, even though he made no effort to use this knowledge until the doctor's records were introduced at trial. The records custodian appeared at trial and authenticated the doctor's file. At this juncture, the Respondent offered the file to opposing counsel for his review prior to submission into evidence. However, opposing counsel declined to examine the records and stipulated as to their admissibility. It was the referee's belief that the Respondent should have cautioned opposing counsel to more carefully examine these records as he knew the telephone note was important and not in the records produced at the doctor's deposition. Of course the content of the call was known to opposing counsel because he was a participant in the conversation.

Both of these actions were carefully reviewed by Judge Leonard Stafford at the time they occurred and Judge Stafford did not believe they warranted further action by him or that they warranted any form of sanction on the Respondent based

upon all of the information available to him by virtue of his involvement with the case for several years. The Fourth District Court of Appeals disagreed with Judge Stafford and found the introduction of the telephone note reversible error and chastised the Respondent concerning his handling of the note and the phone call.[8] On remand the case settled so the trial judge did not get a chance to address the appellate court's concerns.

The Respondent's actions were reviewed a third time by the Referee. The Referee was able to consider more evidence than that which was submitted in the record on appeal, which "new" evidence included the Respondent's testimony and his co-counsel's testimony that explained the Respondent's actions.

The Bar now seeks a fourth review of the same facts and urges this Court to reverse a referee who carefully reviewed each document introduced into evidence, inclusive of the appellate decision, listened to each witness, judged their credibility and found that the Respondent engaged in unprofessional but not unethical activity. The referee proposed a very suitable remedy to fit his findings (diversion to ethics school) and this remedy should be upheld.

[8] The Fourth District Court of Appeals did not have the benefit of the Respondent's testimony on these matters and the Referee in this case did. Also of note was that the Court did not request the Bar to investigate the matter.

ARGUMENT

I. A REFEREE'S RECOMMENDATION OF DIVERSION TO A PRACTICE AND PROFESSIONALISM ENHANCEMENT PROGRAM SHOULD BE UPHELD AS HIS FINDINGS ARE FULLY SUPPORTED BY THE RECORD BELOW.

In order for The Florida Bar to prevail in this appeal it must do two things. First, it must convince this Court that the referee's factual findings and in particular his not guilty findings should be overturned. If the Bar is able to pass this test, a point not conceded by the Respondent, then The Florida Bar must still convince this Court that the referee's sanction recommendation should likewise be reversed. It is respectfully submitted, that the Bar will be unable to meet its burden in either regard.

1. The referee's factual findings are fully supported by the record.

It is well settled that a referee's findings of fact and guilt are presumed to be correct and the appealing party has the burden to demonstrate that these findings are "clearly erroneous and lacking in evidentiary support." The Florida Bar v. Canto, 668 So.2d 583 (Fla. 1996); The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996). It is evident that the Bar's Initial Brief has failed to meet this burden.

The Respondent in this case successfully defended a personal injury action, wherein a small verdict was rendered in favor of the plaintiff. This was not a surprising result as plaintiff's counsel, Jon Krupnick, even admitted that trying to

prove a dog bite[9] caused a minor to contract alopecia areata was "a tough plaintiff's case" that could have been lost notwithstanding the issues presented to the referee. TT p. 73, l.21-24. Nonetheless, Krupnick appealed this verdict and was able to convince the Fourth District Court of Appeals to reverse and remand the case for further proceedings. Resp. Ex. A.

The Bar takes issue with two distinct actions referenced in the Fourth District's opinion. Each will be discussed in detail below.

A. The call to Dr. Bernhardt.

On October 11, 1999, well prior to the discovery cut-off and well prior to the Respondent's appearance in the case, the trial judge had issued an order requiring the disclosure of all causation expert witnesses. Resp. Ex. C-7. As in most cases as the discovery cut off neared, discovery was completed and witness and exhibit lists were shared by the respective parties. Dr. Bernhardt, who had treated the plaintiff, Kelly Bradley, was not listed as an expert witness on causation. TT144.

The discovery cut-off passed and the parties were finishing their last minute trial preparation. It was at this moment in time that Krupnick forwarded a May 22, 2000, letter to the Respondent. Resp. Ex. D. In that letter Krupnick reveals for the first time that he allegedly planned on calling Dr. Bernhardt as a causation expert.

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[9] The dog in question was a small Maltese. TT102. The dispute was not that the dog had bitten the child. Rather, it was disputed whether this dog bite caused the alopecia.

Krupnick's letter created a dilemma for the defense counsel. Do they devote a significant amount of time to draft, file and have heard a motion with the Court to strike Dr. Bernhardt as a potential causation witness, when they needed to finish their trial preparations or was there a different avenue available to confirm whether Krupnick was telling the truth that Dr. Bernhard would now be testifying as a causation witness or if Krupnick was just puffing in his letter in order to extract a settlement.

At this point in time both defense counsel, the Respondent and Susan Rodgers, conferred on how to resolve this problem. They did not believe that Krupnick would be candid with them if they inquired directly of him regarding this issue. TT147. Therefore, they decided that perhaps a quick phone call with Dr. Bernhardt would resolve the issue without the necessity of further contentious motion practice.[10]

Prior to placing the call they were concerned about the requirements of Fla. Stat. §456.057(5) and the ban on discussing confidential medical treatment. The referee made a specific finding that the Respondent and Rodgers determined that a phone call with Dr. Bernhardt that did not discuss the treatment or care of Kelly

[10] Susan Rodger's testimony was that this was the "nastiest" case she had been involved in "terms of ad hominem attacks by counsel" and "multiple lies by the parents of Kelly Bradley." TT104. It was this tone and tenor that lead to the Respondent's unfortunate remark about "nailing" a litigator, when the better response should have been to explain that the Respondent wanted to prove that Krupnick was engaging in improper conduct. TT147-148.

Bradley and only inquired if the doctor had been retained to testify as a causation expert would not violate the aforementioned statute. RR3. Thereupon a phone call was placed for Dr. Bernhardt, but he was not in and a message was left to have him call the Respondent.

Dr. Bernhardt returned the Respondent's phone call but Rodgers was no longer with him at his office when the call was received. TT110. The Respondent identified himself, his relationship to the Bradley litigation, advised the doctor not to reveal any confidential information and inquired if the doctor was being called as causation witness. RR3. The doctor did not answer the question about causation and directed the Respondent to discuss the matter with Krupnick. RR3. It is important to note that the "doctor's sworn testimony (Exhibit C9) indicates that the conversation did not disclose confidential medical information covered by the statute." RR3.

The referee in his ruling found that it was "unprofessional and inappropriate" to make this phone call. RR3. However, he did not find that the conversation violated the rules asserted by The Florida Bar. The Bar's protestation to the contrary should not be considered that the referee's findings are "clearly erroneous and lacking in evidentiary support."

The Bar argues that there was ample evidence to support its position in this case. The Respondent disagrees. There were four witnesses that testified in person

regarding this phone call and only one of these witnesses actually participated in that phone call. While the transcript of the sworn testimony from Dr. Bernhardt was also introduced into evidence, this transcript supports the position that no confidential medial information was sought or secured. See RR4 and Resp. Ex. C-9).

The Bar called two witnesses. The first Lawrence Kuvin, who was the court appointed guardian ad litem for the minor child, Kelly Bradley, could not even remember how he got involved in the case or how he first came to know about the problem with the phone call. See 31-33. However, he did remember sending a letter to Judge Stafford about the problem based upon information provided to him by Krupnick. See Resp. C-10. He wrote this letter without discussing Krupnick's claim of impropriety with the Respondent. TT34. Kuvin further admits that in rendering his ultimate report to the Court he did not interview the Respondent for his side of the story. TT39.

Krupnick testified at length regarding all matters in this case, with the bulk of the testimony coming in narrative form over the objection of Respondent's counsel. However, Krupnick was not present for the phone call and the doctor's own testimony refuted most of Krupnick's view of the facts, especially the claim of shared confidential medical information. The Bar, in its brief, also argues that the Respondent sought to secure confidential information from the doctor "off the

record." However, the Respondent denied that he made such remark. The referee had an opportunity to weigh the Respondent's overall credibility and the only direct reference to the "off the record" information is contained in Dr. Bernhardt's sworn testimony where the doctor also admitted that the Respondent specifically advised him not to share confidential patient information.

The Florida Bar also took issue with the impeachment of Krupnick. In their brief the Bar complains that the "referee was tainted and prejudiced by allowing irrelevant, uncorroborated, and inflammatory evidence" concerning Krupnick's conduct during the Bradley litigation. See for example Initial Brief at p. 19. However, the Bar does not explain which impeachment evidence was "irrelevant, uncorroborated or inflammatory." Certainly, there was unflattering testimony presented by both the Respondent and Rodgers concerning actions taken by Krupnick during the Bradley litigation, but it was not "irrelevant, uncorroborated or inflammatory." The referee sustained several objections in the impeachment of Mr. Krupnick. See for example TT141. In any event the referee made a specific finding that he did not believe that Krupnick had engaged in any misconduct. RR7.

The Bar also relies upon the comments made by the Fourth District in its opinion in the Bradley case. Resp. Ex. A. While this court has routinely found these type of court opinions are admissible as evidence in Bar disciplinary matters,

the evidentiary value of same does not establish the Bar's case in *toto* but it can be considered as some evidence. See for example *The Florida Bar v. Calvo,* 630 So. 2d 548 (Fla. 1993). In fact these opinions create no presumptions and only go to the weight of the evidence. *Id.* In the case at hand significant evidence was presented that was not presented to the appellate court, inclusive of the Respondent's testimony and that of his co-counsel, Susan Rodgers.

On page twenty six of its brief, the Bar lists the rule violations that it seeks the Court to find. However, the Bar never explains or attempts to explain how the facts of this case trigger a violation of a particular rule.[11] The reason for this is the facts of this case do not warrant a finding of violation of the rules referenced by the Bar. For example there was nothing false, dishonest or deceitful in this phone call that would constitute a violation of R. Regulating Fla. Bar 4-8.4(c) or R. Regulating Fla. Bar 4-3.3(a)(1). Further, this very short telephone conversation did not "unlawfully obstruct another party's access to evidence" or otherwise conceal or destroy evidence in any manner that could be considered a violation of R. Regulating Fla. Bar 4-3.4(a). Perhaps one could make a generalized argument that the phone call was somehow prejudicial to the administration of justice in violation of R. Regulating Fla. Bar 4-8.4(d). However, the referee did not find this violation and the Bar's brief fails to demonstrate what facts support such a finding. Further,

[11] In fact, the Bar doesn't even try to break down the rule violations in relationship to the two events that cause this grievance.

the referee recognized that Dr. Bernhardt did not testify at the trial but he did not believe the claim that he did not so testify because "he was too traumatized by Attorney Cocalis's conduct that he became hostile to his patient (as suggested by Attorney Krupnick) but rather because his testimony would not have been helpful to the plaintiff." RR5.

B. Dr. Unis's note

The Respondent's conduct regarding his handling of Dr. Unis's note regarding the doctor's telephone call with Krupnick is also not violative of the Rules Regulating The Florida Bar. During the pre trial conference Krupnick refused to stipulate to the authenticity and admissibility of Dr. Unis' medical records.[12] TT153. Accordingly a subpoena duces tecum for the records custodian to appear at trial was served. RR5. For reasons unknown, the records were mailed to the Respondent's office prior to the trial. TT156. The records were sent back and the custodian instructed to appear at trial. TT 156. Also see Resp. Ex. C-1.

Prior to returning the records back to Dr. Unis' office it was discovered that there was a new note to the file written by Dr. Unis concerning a telephone conversation he had with Krupnick. The gist of the phone conversation was that Dr. Unis did not believe the dog bite caused the alopecia areata and that he advised Krupnick of that fact during the phone conversation.

[12] Both parties already had a full copy of Dr. Unis' records that were secured during the discovery process.

During the trial the records custodian appeared, waited for several hours to get called as a witness, came in to testify, and testified as to the authenticity of the medical records that she had brought. TT158. The Respondent offered the records to Krupnick for his review prior to their submission as evidence. TT158. Krupnick declined to review same and stipulated to the admission of these records into evidence. TT158.[13]

Prior to the case going to the jury, Krupnick discovered the notation concerning his telephone call with Dr. Unis, immediately lodged an objection with the Court and sought to have this notation removed from evidence. TT166. However, his request was denied by the trial judge. TT166. Closing arguments were held that day and the Respondent used Dr. Unis' note in his closing argument. TT166.[14]

Krupnick also filed a post trial motion directed to the use of this note at trial and this motion was likewise denied by Judge Stafford. TT166-167. However, Judge Stafford did offer Krupnick a mistrial which he declined. TT171.

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[13] An excerpt of the Bradley trial transcript for the introduction of Dr. Unis' records was introduced during the final hearing as Resp. Ex. C-2.

[14] The Respondent only used this note because Krupnick had made a claim, in his opening statement, that all of the doctors supported his theory on causation, when in fact this was not true and Krupnick new it was not true as to Dr. Unis. TT193.

The referee did not believe that the receipt, introduction and later use of Dr. Unis' note violated the Rules of Professional Conduct. However, he did state that it was "unprofessional and inappropriate and sharp practice to fail to call to the plaintiff's attorney's attention" that there was a new note concerning a telephone conversation had with Krupnick. RR6. The referee goes further in his report to explain his view of a more professional manner in which the introduction of this note should have been handled. RR.

The Bar attempts to discredit the referee's findings by calling his discussion regarding his view of what a professional lawyer would have done under the circumstances, as well as comments made by the referee during the trial regarding his view of what should have happened regarding the phone call and Dr. Unis' note, an "incomprehensible narrative." Initial brief at 13. However, these comments truly explain the referee's view that the actions taken by the Respondent, while not unethical in violation of the Rules plead by the Bar, were less than the standards we should espouse to as a member of the Bar.

The referee specifically found that the Respondent's actions regarding Dr. Unis' note did not violate five of the six rules plead by the Bar. RR6. However, he did not rule on the sixth rule plead by the Bar by virtue of his decision to recommend diversion.

The Bar's argument on the actual potential rule violation is difficult to understand. The Bar's argument in this regards appears to be the same listing of potential rule violations set forth on page twenty six of its Initial Brief. Once again the Bar does not try to relate any particular fact to a potential rule violation, so we must examine each of the rules.

The Bar did claim that there was a misrepresentation made in reference to a question posed to the Respondent concerning ex parte contacts with experts. The referee, after reviewing the transcript of the proceedings found in Resp. Ex. C, did not agree with the Bar and the Bar has presented no other evidence or argument to support this claim. RR6. This finding resolves the potential claim of violation of R. Regulating Fla. Bar 4-3.4(a) and R. Regulating Fla. Bar 4-.8.4(c). The Bar also tries to argue that by not telling Krupnick about the new note that the Respondent engaged in some form of dishonesty. This is not the case as the records were offered to Krupnick and he refused to look at them. Rule Regulating Fla. Bar 4-3.4(a) was also not violated as the Respondent did not alter, destroy or conceal any evidence. Further, the Respondent did not engage in conduct prejudicial to the administration of justice in that he offered the records to Krupnick so he could examine same and he chose not to look at them. Any later claim of surprise by Krupnick is a bit disingenuous as he clearly knew he had a conversation with Dr.

Unis and that Dr. Unis had told him that he did not support Krupnick's causation theory.

2. The referee's recommendation of diversion should be upheld.

A recommendation of diversion to the Bar's Practice and Professionalism Enhancement Program is not a disciplinary sanction. See R. Regulating Fla. Bar 3-5.3(i). However, it is respectfully contended that this recommendation bears the same presumption of correctness that is attributable to a sanction recommendation. This Court has consistently held that it has broader discretion when reviewing a sanction recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997). However, the Court does not second-guess a referee's recommended discipline as long as it has a reasonable basis in existing case law and The Florida Standards for Imposing Lawyer Sanctions. See for example *The Florida Bar v. Temmer*, 753 So. 2d 555,558 (Fla. 1999).

The Florida Bar starts its discussion of diversion by making reference to the requirement of R. Regulating Fla. Bar 3-5.3(b) which explains that diversion is available for those cases that "otherwise would have been disposed of by a finding of minor misconduct or a finding of no probable cause with a letter of advice." It is also important to note that a referee is empowered to make a recommendation of diversion "after submission of evidence, but before a finding of guilt" when the

referee makes a determination that the conduct at issue is "not more serious than minor misconduct." R. Regulating Fla. Bar 3-5.3(h)(2). The referee made such a ruling. HT101. His comments in his Final Report of Referee are more telling. In this report he states that he did ". . . not believe that the two actions at issue that happened approximately six years ago warrant the imposition of a disciplinary sanction." RR2 at 3. It therefore appears that from the Referee's point of view that this case was clearly less than minor misconduct and in particular he had already found the Respondent not guilty of all but one rule violation.

The Bar argues that diversion is an improper remedy for this case as it was not minor misconduct as the Bar's view of the case is different than that of the referee. The Bar refers to the criterion that excludes a case from being considered minor misconduct. R. Regulating Fla. Bar 3-5.1(b)(1). The only exception that arguably applies is found in R. Regulating Fla. Bar 3-5.1(b)(1)(E) which states that misconduct involving fraud or misrepresentation is not eligible for an admonishment for minor misconduct. While this is a true recitation of the rule, there is no finding in this case that the Respondent has engaged in any conduct involving fraud or misrepresentation.

The Bar has asserted that the facts of this case, if proven, warrant the imposition of a suspension. Without conceding the predicate of a guilty finding, a

comparison of the cases set forth by the Bar clearly indicate that a suspension is not warranted under any circumstance based upon the facts of this case.

Prior to addressing the case law advanced by the Bar it is important to look at the mitigation that is present on the record.[15] It is the Respondent's position that the following mitigation would have been found by the referee (all references are to the Florida Standards for Imposing Lawyer Sanctions):

1. Standard 9.32(a) – absence of a prior disciplinary record;
2. Standard 9.32(b) – absence of a dishonest or selfish motive;
3. Standard 9.32(e) – full cooperation with the Bar;
4. Standard 9.32(g) –otherwise good character and reputation;[16]
5. Standard 9.32(i) – unreasonable delay in disciplinary proceedings;[17]
6. Standard 9.32(k) – imposition of other penalties;[18]
7. Standard 9.32(l) – remorse.

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[15] As the Referee recommended diversion, he did not make findings on mitigation or aggravation.

[16] See the testimony of Jeff Abers, Esquire, Rhonda Hollander, Esquire and Gary Genovese, Esquire. HT 49-64.

[17] The conduct in this case is from 2000. The Bar opened its file in October of 2002 . Probable cause was found on March 29, 2005 but the Bar did not file its complaint until almost six months later - August 15, 2005.

[18] On can consider the 4th DCA's opinion as a very effective public reprimand.

The Respondent would concede that Standard 9.22 (i) [substantial experience in the practice of law] would apply as a potential aggravating factor, but disagrees with the other factors urged by the Bar.

We now turn to the cases advanced by the Bar to support its claim of an undefined suspension from the practice of law. The first case mentioned by the Bar is *The Florida Bar v. Burkich-Burell*, 659 So. 2d 1082 (Fla. 1995). In *Burkich-Burrell* the lawyer was suspended for thirty days for allowing discovery answers which contained false information to be sent to opposing counsel in a case wherein the lawyer represented her husband and had personal knowledge that the answers were false and incomplete. Further, there is a finding that Burkich tried to blame the misconduct on a nonlawyer employee, was evasive at the hearing and tried to minimize her role in the misconduct. *Id*. at 1083. In the case at hand the Respondent hid nothing from opposing counsel and certainly did not present fraudulent information to the court or to opposing counsel. Further, the Respondent has accepted responsibility for each of his actions, even though he does not believe they were unethical or in violation of the Rules of Professional Conduct.

The Bar next presents *The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002). Forrester received a 60 day suspension because she "knowingly and intentionally removed and concealed evidence" during a deposition. *Id.* at 480.

The court also noted that Forrester had an extensive disciplinary history in that she had been disciplined three times prior to the incident at hand. *Id*. 481. The Respondent in this case has never been disciplined and took no action to hide any evidence from opposing counsel as he purposefully tendered Dr. Unis' records to Krupnick prior to its introduction into evidence.

Lastly, the Bar amazingly tries to draw a comparison to this case and *The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997). In *Hmielewski* the lawyer was charged with repeatedly making misrepresentations regarding the location of his client's medical records. Again in the case at hand there is no evidence of any misrepresentation.

In reaching a proper disciplinary sanction the Supreme Court of Florida, has been consistently guided by the following precepts:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. *The Florida Bar v. Pahules*, 233 So. 2d 130 (Fla. 1970).

Applying these standards to the case at hand it is evident that the suspension urged by the Bar is inappropriate and that the referee's recommendation of diversion follows these precepts.

3. Costs should not be imposed.

The Respondent takes no issue with the amount of costs incurred by the Bar in the prosecution of this case and previously entered into a stipulation regarding same as the referee had made no ruling concerning whether or not costs would be imposed against the Respondent. In the spirit of compromise and in the belief that the Bar was not taking an appeal, the Respondent agreed to pay the Bar's costs. Now that the Bar has taken such an appeal, the Respondent seeks to be relieved from his prior agreement based upon the belief that he would not be defending an appeal.

One could argue that the findings of no guilt on the majority of the Bar's case and diversion on the lone remaining rule violation makes the Respondent the prevailing party and able to request that his costs be paid by the Bar. See *The Florida Bar v. Bosse*, 609 So. 2d 1320 (Fla. 1992). However, the Respondent does not seek his costs to be reimbursed and is willing to accept the referee's recommendation of diversion to Bar's Practice and Professionalism Enhancement Program.

CONCLUSION

The Florida Bar seeks to overturn a Report of Referee that finds the Respondent not guilty of all but one charge, with no ruling on guilt as to the remaining charge because the referee in evaluating the remaining issues that

needed to be determined resolved that these remaining issues were no more serious than minor misconduct and that diversion to ethics school would be the appropriate resolution for this case. In this appeal the Bar fails to show that the referee's findings were clearly erroneous or lacking in evidentiary support. Therefore the Bar is unable to meet its burden on appeal, just as the Bar was unable to meet its burden of proof at trial. Accordingly, the referee's findings of fact and a lack of guilt should be upheld and his recommendation that the Respondent be diverted to a Practice and Professionalism Enhancement Program should likewise be upheld.

WHEREFORE the Respondent, Reid Alexander Cocalis, respectfully requests that the Court approve the referee's recommendation of diversion to the Bar's Practice and Professionalism Enhancement Program at the Respondent's expense, impose no other costs and grant any other relief that this Court deems reasonable and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail on this 16th day of October, 2006 to Alan Pascal, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and to Kenneth Marvin, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by McAfee.

By: _____
KEVIN P. TYNAN, ESQ.