IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

REID ALEXANDER COCALIS,

Respondent.

_____/

Supreme Court Case No. SC05-1425

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

THE FLORIDA BAR'S AMENDED INITIAL BRIEF

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PRELIMINARY STATEMENT

Throughout this Initial Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee dated February 7, 2006, will be designated as RR ___ (indicating the referenced page number). The transcript of the final hearing held on January 9, 2006, will be designated as TT1 ____ (indicating the referenced page number). The transcript of the continuation of the final hearing held on April 10, 2006, will be designated as TT2____ (indicating the referenced page number). The Florida Bar will be referred to as "the Bar." Reid Alexander Cocalis will be referred to as "respondent." Appendix will be designated as A ____.

STATEMENT OF THE CASE AND FACTS

On September 18, 2002, the Fourth District Court of Appeal filed its initial opinion in *Bradley v. Brotman*. The Fourth District Court revised and withdrew its first opinion and filed a revised opinion on February 19, 2003. *Bradley v. Brotman*, 386 So.2d 1129 (4th DCA 2003). (A 1). The respondent represented GEICO Insurance Company on behalf of the appellee/defendant Brotman at the trial court level. Jon Krupnick represented the Bradley family. The district court reversed and remanded the final judgment at the trial court level due to defense counsel's misconduct. *Id*. The district court found two specific incidents that involved ethical misconduct by respondent. *Id*.

The case involved a two year old child, Kelly Bradley, who was bitten on the lip by a dog belonging to appellee/defendant Brotman in September 1996. Weeks after the dog bite, the child's hair began falling out. The child received a diagnosis of alopecia areata on the child's scalp, a skin disease resulting in a loss of hair. Bradley's parents brought suit against the appellee/defendant Brotman. The main issue in the case consisted of whether the stress of the dog bite caused the alopecia.

The discovery cut off for both sides in the civil case was May 22, 2000. On May 22, 2000, Jon Krupnick sent a letter to respondent indicating that Dr. Bernhardt, a treating dermatologist, would have evidence to support the civil

claim. Respondent sought to speak to this doctor whom he had not deposed. (A 2). On May 23, 2000, just a few days prior to trial, respondent called Dr. Bernhardt without notice to Krupnick. He advised the doctor that he had treated him in the past, and asked the doctor, "off the record," the substance of his testimony. Respondent also told the doctor not to trust Krupnick; the doctor immediately ended the call with respondent and called Krupnick. Krupnick filed a motion to strike the pleadings based on the improper phone call. *Id.*

The Fourth District found that respondent's attempt to elicit patient information from Dr. Bernhard was in violation of Florida Statute 455.667(5) (Renumbered 456.057(5)) which prevented any *ex parte* communication with a physician regarding a patient's condition. Krupnick argued that sanctions were appropriate due to the actions of the respondent. The trial court authorized Lawrence P. Kuvin, Kelly Bradley's guardian ad litem, to investigate the circumstances surrounding the respondent's contact with the doctor. The guardian ad litem reported that the phone contact was willful and tainted the testimony of Dr. Bernhardt. The trial court did not grant Krupnick's motion to strike the pleadings. The Fourth District Court of Appeal found that this phone contact was both "unlawful and unprofessional;" however, this contact was not the basis for a reversal of the final judgment.

The Fourth District addressed the circumstances surrounding the introduction of a new notation in the medical records of Dr. Unis, another treating dermatologist in the case, at trial. This note, reflecting a telephone conversation between Krupnick and the doctor, stated "I advised him that I do not think that the patient's persistent problem with alopecia areata at this point would be due to the stress from a prior dog bite." (A 3). Another notation indicated that he sent this record to respondent on May 24, 2000. Krupnick never received these notes prior to trial. Respondent sent two subpoenas duces tecum on May 23 and 25, 2000, to the records custodians with Drs. Unis' and Bernhardt's offices and to Dr. Unis personally relating to the treatment of Kelly Bradley. Contrary to the directives of the subpoena, Dr. Unis mistakenly sent his medical records to the respondent. Instead of immediately returning the records unopened and advising opposing counsel of the error, the respondent opened and reviewed all the records and discovered the new notation. Review of these records by the respondent was in violation of Florida Statute 455.667(5) (Renumbered 456.057(5)). Furthermore, respondent only copied the medical record containing the new damaging notation and returned them to Dr. Unis' office without notifying Krupnick. Prior to the start of the jury trial, the respondent never responded to inquiries from Krupnick whether respondent had any other *ex parte* contacts with other experts. Respondent

intentionally omitted disclosure of the receipt of the medical records prior to trial and sought to catch Krupnick by surprise at trial. (A 4).

Krupnick had knowledge that Dr. Unis had only examined Kelly once in 1996. Dr. Unis had diagnosed the child's alopecia areata. The doctor was deposed in 1999. Krupnick read Dr. Unis' deposition into evidence at trial, and reasonably relied on the belief that the medical records sought to be introduced were the same ones identified by the doctor during his deposition. Krupnick was completely unaware that respondent introduced the medical records containing the new notation which were sent to his office in error. (TT1 69-74). Krupnick objected to the introduction of the new notation in the medical records upon discovering its existence, but the trial court refused to redact the new damaging notation. The respondent, in turn, blew up a posterboard-size version of Dr. Unis' medical note on the telephone conversation with Krupnick and made it the focus of his closing argument. (TT1 72-74). Respondent also argued that Krupnick had called all but one treating physician, Dr. Unis, because his opinion did not support Kelly's condition as being related to the stress from the dog bite. (TT1 159-160). The jury returned a defense verdict awarding Bradley's past medical expenses but not any future damages.

The Fourth District Court of Appeal reversed " … and ordered a new trial on the basis of admission of Dr. Unis' medical records, but we condemn the actions of

defense counsel as to the contact with Dr. Bernhardt and the strategic concealment of Dr. Unis' records." *Id.*

In October 2002, respondent's appellate counsels, William R. Scherer, Esq., and Nancy W. Gregoire, Esq., sought a revision of the September 2002 opinion of the district court. The pleading was placed into evidence by respondent's counsels at the final hearing. Specifically, these attorneys proffered that "Mr. Cocalis agrees that the two incidents cited by the Court were below the standards expected by this Court and others." (A 5). The respondent's appellate attorneys also conceded respondent's misconduct as two lapses in judgment. (A 5).

On March 29, 2005, The Florida Bar concluded its investigation of the respondent's actions and Seventeenth Judicial Circuit Grievance Committee "B" found probable cause consistent with the findings of the district court and found violations of the following R. Regulating Fla. Bar 3-4.3, 4-3.3(a)(1), 4-3.4(a) and 4-8.4 (a)(c)& (d).

The Florida Bar filed its complaint on August 15, 2005. The Honorable Stephen A. Rapp was appointed referee on August 25, 2005, by the Honorable Edward Fine, Acting Chief Judge of the Fifteenth Judicial Circuit to handle the disciplinary case. The case went to final hearing on January 9, 2006. The Florida Bar and respondent presented the findings of ethical misconduct within the revised opinion of the Fourth District Court of Appeal. (TT1 7; A 1). The respondent

argued that the findings of the Fourth District Court of Appeal should be provided less weight and were only supported by the "cold record." (TT1 19) However, the Fourth District Court of Appeal based its findings on all of the same documents, pleadings, and depositions relied on by the trial court. The respondent entered selected portions of the trial record in his composite exhibit (TT1 5) introduced into evidence at the final hearing.

The trial court authorized Kelly Bradley's guardian ad litem, Lawrence P. Kuvin, to investigate the circumstances surrounding the telephone contact with Dr. Bernhardt just before the trial date. Lawrence P. Kuvin, Esq., a 48-year practicing attorney handling mostly personal injury cases, testified about his investigation of the respondent's conduct concerning the telephone call. (TT1 24-30). Mr. Kuvin explained his understanding of the Florida Statute 455.667(5) (Renumbered 456.057(5)) which was the subject of his investigation. The court took judicial notice of Florida Statute 455.667(5) (Renumbered 456.057(5)). Mr. Kuvin testified that this statute prohibited respondent's contact with Dr. Bernhardt without court authorization and notice to the patient or patient's legal representative. As part of investigation, Mr. Kuvin took the sworn testimony of Dr. Bernhardt. (TT1 24-27). This sworn statement was introduced into evidence for the referee's consideration. (A 6). The respondent attempted to impeach Mr. Kuvin's testimony on irrelevant issues. (TT1 30-47). However, both the sworn statement of Dr. Bernhardt, along

with Mr. Kuvin's testimony, corroborated the intentional misconduct of the respondent. The respondent attempted to induce the doctor to reveal illegal and privileged patient information by improperly calling the physician and asking about information on the pending case "off the record." The sworn statement of the doctor clearly showed how the respondent made intentional contact with an improper motive. (A 6). The respondent first identified himself as a patient, along with other family members, then finally identified himself as counsel for the appellee. Respondent then specifically sought information about the doctor's testimony at trial concerning causation. (TT1 47-49). The only reason that the respondent was unsuccessful in obtaining improper information was due to the doctor's action of ending phone call. (A 6).

The Bar then called Jon Krupnick, Esq., counsel for the Bradleys, to testify before the referee. (TT1 49-70). Krupnick testified that he has been a practicing attorney for approximately 40 years. Krupnick testified to the improper introduction of new medical records that were introduced at trial. He recounted his discovery of the improper phone call to Dr. Bernhardt after the discovery cut-off period, and just prior to trial, and his motion to strike the pleadings which was ultimately denied by the trial court. Krupnick also testified about the fact that contact with experts became the topic of court hearings prior to trial. (A 4). Again, the respondent intentionally, through his willful omissions, failed to advise

Krupnick or the court about the improper receipt of Dr. Unis' medical records. Krupnick's question surrounding expert contacts beyond those discovered prior to trial, clearly provided an opportunity for respondent to disclose the mistaken receipt of Dr. Unis' medical records to opposing counsel. The respondent introduced an excerpt from the court hearing, focusing on the questions of Krupnick concerning expert contacts. (A 6). While seeking to justify the non-disclosure of the medical records by proffering that Krupnick was only talking about the *discovered* impermissible contacts with Dr. Bernhardt and his office, the respondent intentionally failed to disclose the willful omission of the mistaken receipt of these records to opposing counsel and the trial court. Krupnick also testified that the surprise introduction of the new notation was extremely damaging to his case. (TT1 93).

The referee then took testimony from Susan Rogers, Esq., co-counsel. (TT1 91-131). On direct examination, Ms. Rogers provided little relevant testimony concerning the allegations of ethical misconduct. Instead, this witness attempted to bring out extraneous facts about opposing counsel, Krupnick, and the merits of the civil case. First, she testified that it was her belief that the Florida Statute 455.667(5) (Renumbered 456.057(5)) was not violated by respondent calling Dr. Bernhardt; however, Ms. Rogers admitted that she was not present during the respondent's phone call to Dr. Bernhardt. (TT1 109-110). Her testimony

was later contradicted by respondent's testimony that she was actually present during this telephone call. (TT1 149). Also, her testimony about Dr. Unis' records was limited to her belief that it was not improper to subpoena these records without notice to opposing counsel, Krupnick. (TT1 118). On cross examination, Ms. Rogers became evasive about whether she provided notice to opposing counsel Krupnick concerning the mistaken receipt of the medical records from Dr. Unis. (TT1 123-127). Ultimately, Ms. Rogers admitted that neither respondent nor herself ever advised Krupnick of their receipt of Dr. Unis' medical records. (TT1 127). The witness also agreed that other lawful remedies were available to challenge the testimony of Dr. Bernhardt in the trial court, as opposed to calling the doctor directly.

The respondent testified before the referee. (TT1 132-183). His testimony included the mentioning that his mother was a senior judge. (TT 132). The respondent was admitted to The Florida Bar in November 1987. (TT1 133 -134). The referee, over bar counsel's objections, allowed irrelevant, highly inflammatory, and unsubstantiated testimony about Krupnick's character. (TT1 138-141). Specifically, on direct examination before the referee, the respondent stated his motivation and his intentions for calling Dr. Bernhardt without notice to opposing counsel and in violation of Florida Statutes:

> Q: (Mr. Tynan): Okay. Let's talk about what you did prior to the phone call. Who did you talk to, what did you decide to do before you made the phone call?
>
> A: Well, I'm going to discuss the situation with Susan Bernhard [sic Rogers]. I mean, I was concerned, a couple of things, trial by ambush and**, quite frankly, I thought this was an opportunity to nail a litigator** [emphasis added] who's been dishonest throughout the litigation once and for all. (TT1 - 147).

The respondent claimed that Ms. Rogers was present, contrary to Ms. Rogers' testimony, during the call to Dr. Bernhardt. (TT1 149). Respondent believed that he was not violating the statute because he was only going to ask the doctor about whether or not he was going to testify to causation. (TT1 149-150). However, given the opportunity to deny using the term "off the record," he could not recall whether he stated that this phone call was "off the record" or not. (TT1 150). The respondent also stated that in 19 years of practice, he has not sent notices of trial subpoenas to opposing counsel. (TT1 154). Respondent attempted to explain away the receipt of the medical records containing the new damaging notation.

Respondent provided an affidavit from his paralegal, Carol Florence. (A 7). Ms. Florence advised that the medical records were received in error; yet, her affidavit failed to disclose the respondent's actions with these records after receipt. The medical records were not immediately returned unopened with notice to Krupnick. Instead, respondent admitted that he intentionally opened, reviewed and

returned the records to Dr. Unis. Respondent testified, "I sent it all back. … I do believe I made a copy of the – that very last note." (TT1 157). The respondent concluded his testimony by answering self-serving questions that he did not violate any ethical rules alleged in the Bar's complaint. He also concluded his direct examination by again improperly mentioning that his mother was a retired judge, and that he was motivated to try to catch the opposing counsel in unethical behavior. (TT1 183).

On cross examination, (TT1 183-206), the respondent testified that this litigation was highly adversarial and emotional between himself and Krupnick. (TT1 188-189). Respondent conceded to lapses in good judgment, yet he would not acknowledge that he violated any ethical rules. (TT1 187-188). Respondent "absolutely" disagreed with the Fourth District Court of Appeal findings of misconduct related to R. Regulating Fla. Bar 4-3.4(a). (TT1 186). Furthermore, he admitted, for a second time during his testimony, that his primary intent in calling Dr. Bernhardt was to "nail" Krupnick (TT1 189-190). He also could not recall whether he used the comment "off the record" or not. The respondent finally conceded, in hindsight, that when questioned at the trial level about contacts with Dr. Unis' office, that an appropriate opportunity was provided to disclose the receipt of the medical records in error. (TT1 195-196).

Bar counsel and respondent's counsel presented their arguments for the referee to determine findings of guilt as to ethical rule violations. (TT1 210-240). Bar counsel argued that all rule violations were proven by clear and convincing evidence. The referee began to interject comments during respondent's closing argument, evidencing that he found respondent's actions consistent with ethical misconduct. Also, it appeared that the referee erred by allowing into evidence, over bar counsel's objection, improper, uncorroborated, and inflammatory evidence that Krupnick had somehow engaged in ethical misconduct. At the end of the hearing, the referee engaged in an incomprehensive narrative, and at one point, sought to impermissibly identify himself with the respondent, without making findings of fact or conclusions of guilt. (TT1 233-239).

Specifically, the referee acknowledged:

> "He [referring to respondent] just gets it. And he sees it and says, I like it, I made a copy of it, and anybody would do that. Up until that point, I don't think that anybody misbehaved. … How about sometime do I ever say I do have these? And it seems to me your client might have said that. Why he didn't, I mean, I can understand why he didn't. It's kind of a, you know, back at you kind of a … here's the problem I see in lawyers, and I'm going to go. Thank you for your argument and your presentation. Here is the problem I see. And I see it because, you know, I'm not nearly as old as Mr. Krupnick, but, you know, I have been a lawyer for 35 years or something like that. And when you're sure that the other side is bad, and we have people in the business who are sure that the other side is bad or sort of immoral and always cheating, then that justifies a, you know, you can either be … a son of a gun about it, or take it on, or I can fight back and win and be competitive, but that sometimes causes you to behave in a way that you don't want to. That's not the way my

> daddy mentioned to me and you say to yourself what's a nice guy like me doing in a business like this, and each side thinks their [sic] angels of God and the other side is not really on their side. God is doing more important things, I hope. And but that onset of righteousness leads one to behave all sorts of little way. … So I mean, people do things they really shouldn't do, and I don't think that they would do it if they had the ability to look at the situation from the other person's perspective. And then again to really behave properly, you have to say, well, you have to be willing to be a bit of a sap, look, even though this fellow might be engaging in shady practice against me, I'm not going to engage in it. I'm not going to fight backing that way. That's if you don't do that, then you don't get yourself in trouble. … And **when I was a lawyer, believe me, I wasn't that way. I was quick to take a shot if you took a shot at me, which I was too quick, way too quick**. … [emphasis provided]."

The referee concluded the final hearing after his lengthy comments without making any findings of fact or conclusions of guilt. (TT1 234-238).

On February 7, 2006, the referee filed his first report of referee. The referee used language consistent with findings of fact which supported conclusions of guilt for ethical violations:

> "It was unprofessional and inappropriate to ask a treating physician if he is going to testify about causation … by asking the doctor, 'are you going to testify about causation?' he in effect is soliciting information about the doctor's opinion of the medical condition of the patient. … Attorney Cocalis clearly overstepped the line when he asked Dr. Bernhardt whether he would testify about causation. It seems clear that in both these instances Attorney Cocalis let his emotions and competitiveness interfere with the exercise of his good judgment." (RR 6).

The referee continued that:

> "I have concluded that Attorney Cocalis did not violate most [emphasis provided] of the Rules of Professional Conduct set forth in

> The Florida Bar Complaint i.e. 4-3.3(a)(1), 4-3.8(a), 4-8.4(a)(c)(d). However, Respondent acted in an unprofessional and inappropriate manner. The Rules of Professional Conduct are not intended to be an exhaustive list of the do's and don'ts of our profession.
>
> It was unprofessional and inappropriate sharp practice to fail to call to the plaintiff's attorney's attention that the exhibits subpoenaed from Dr Unis' office contained a new entry which was not on the copy of the records attached to Dr. Unis's deposition … [P]roper practice would have required Attorney Cocalis to have affirmatively brought this to the attention of Attorney Krupnick and the Court. Attorney Cocalis seems to be of the belief that the other lawyers' misconduct **somehow justifies his misconduct**. [emphasis provided] … This position is absurd. Even if there was other lawyer's misconduct (and this Referee does not find any) it would not justify Attorney Cocalis' sharp practice." (RR 6-7).

The referee, despite his findings of fact, was unsure whether the facts involved ethical misconduct. A separate hearing was ordered to consider the matter of sanctions.

On April 10, 2006, the referee reconvened the disciplinary case to determine the appropriate rule violations. Bar counsel attempted to obtain a ruling as to the actual rule violations prior to considering sanctions. Respondent's counsel presented an option to divert the respondent without ruling on the ethical misconduct. (TT2 31).

> MR PASCAL: Your Honor—I'm sorry to interrupt, Mr. Tynan. But I just think this argument right now, until your honor determines what rule violations have or have not occurred, I don't think [this] is relevant or proper at this point, until the judge has ruled, obviously, what rules if any, he finds in violation.
>
> The Court: I'd like to hear the whole argument.

Respondent's counsel advised the referee that diversion was only possible before a finding of guilt:

> MR. TYNAN: I'm sorry, Your Honor. But I wanted you to know that that existed. That once you found guilt, you couldn't go back, all right. (TT2 32).

Bar counsel argued both the relevant case law and Florida Standards for Imposing Lawyer Sanctions and recommended that a short term suspension was appropriate based on the intentional violations of ethical rules by the respondent. (TT2 33-48).

The referee allowed testimony of character witnesses and the respondent to testify at this second hearing without first ruling on ethical rules violations based on his findings of fact. (TT2 48-74). The referee, despite his findings of fact which substantiated ethical rule violations greater than minor misconduct, impermissibly diverted the respondent to a practice and professionalism enhancement program. (TT2 96).

Despite all the evidence, including respondent's own admissions and the referee's findings of fact from his first report of referee, the referee found no ethical violations and diverted the respondent to a practice and professionalism enhancement course.

SUMMARY OF THE ARGUMENT

The referee erred in failing to find respondent guilty of charges found within the Bar's complaint; and he erred in failing to recommend an appropriate sanction against him. The Bar presented clear and convincing evidence of ethical rule violations at the final hearing of January 9, 2006. The initial findings of fact by the referee substantiated that the Bar proved all charges within its complaint. The referee became biased against the Bar's witness, Jon Krupnick, by erroneously, and over Bar counsel's objections, allowing introduction of irrelevant, highly inflammatory, uncorroborated evidence about Krupnick's character. The respondent, not Krupnick, was sanctioned by the appellate court for his ethical misconduct. The referee lost his objectivity during the case. The referee interjected inappropriate comments evidencing a bias against the Bar. Respondent also testified twice during the final hearing that his mother was a retired judge. Again, the referee erred by allowing in this extraneous evidence which ultimately led him to an improper diversion of the respondent to a practice and professionalism enhancement program. The referee's finding that respondent was not guilty on all the rule violations was contrary to the substantial and competent evidence introduced at trial, and in direct conflict with the appellate court's findings of misconduct. In the end, the referee clearly erred by improperly diverting the

respondent to a one-day practice and professionalism enhancement program for serious ethical misconduct.

The following ethical violations were proven through clear and convincing evidence: R. Regulating Fla. Bar **3-4.3** (… The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.); **4-3.3(a)(1)** (A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.); **4-3.4(a)** (A lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.); **4-8.4(a)** (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.); **4-8.4(c)** (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.); and **4-8.4(d)** (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice …). The referee completely discounted the findings and the revised opinion of the Fourth District Court of Appeal in

Bradley v. Brotman, 836 So.2d 1129 (4th DCA 2003), which found the two actions of the respondent as grounds for ethical misconduct and warranted reversal of the final judgment: 1) respondent's telephone call to Dr. Bernhardt attempting to induce him to violate Florida Statute 455.667(5) (Renumbered 456.057(5)) by revealing patient information and causation information "off the record" without notice to the patient or opposing counsel; and 2) by respondent willfully and intentionally concealing his receipt, review, and copying of medical records that he had received in error, and by concealing or failing to provide notice to the court and opposing counsel of the new notation prior to its introduction into evidence at trial.

Instead, the respondent chose to conceal the discovery of the new damaging notation for the purpose of surprising opposing counsel in court. This intentional and willful omission by the respondent was proven by clear and convincing evidence. Respondent, on more than one occasion during his testimony, admitted that his telephone call to Dr. Bernhardt was specifically intended to "nail" opposing counsel. While the referee made these findings of fact in his first report of referee, he found no rule violations and improperly diverted the respondent to a one-day professionalism enhancement course. The referee was tainted and prejudiced by allowing irrelevant, uncorroborated, and inflammatory evidence of opposing counsel into the evidence. The referee lost his impartiality and attempted

to identify or empathize with the respondent and the circumstances surrounding his misconduct.

While the Bar recognizes that, under normal circumstances, factual problems may be remedied by remand, in light of a referee's inability to find conclusions of guilt based on the overwhelming evidence of misconduct his own findings of fact, The Florida Bar respectfully urges this Court to enter findings of fact and conclusions of guilt consistent with the substantial, competent evidence found in the record for your review.

The Bar also provided the referee with case law and the appropriate Florida Standards for Imposing Lawyer Sanctions warranting at least a short term suspension based on the ethical misconduct of the respondent. Again, the Bar would respectfully request that this Court enter the appropriate discipline based on the referee's inability to find ethical misconduct despite the overwhelming evidence presented to him as found in the record for your review. The Bar recommends this Court find the respondent guilty of all rule violations, and suspend the respondent based on the Florida Standards for Imposing Lawyer Sanctions and relevant case law.

ARGUMENT

I. THE REFEREE ERRED IN FAILING TO FIND RESPONDENT GUILTY OF ETHICAL MISCONDUCT BASED ON THE CLEAR AND CONVINCING EVIDENCE PRESENTED BY THE BAR AT THE FINAL HEARING.

A referee's finding of fact regarding guilt carries a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *The Florida Bar v. Vining*, 761 So.2d 1044 (Fla. 2000). Furthermore, 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). The party contesting the referee's findings of fact and conclusions of guilt must demonstrate either a lack of record evidence to support such findings and conclusions, or evidence to establish that the record clearly contradicts such findings and conclusions. *The Florida Bar v. Feinberg*, 760 So.2d 933 (Fla. 2000), quoting *The Florida Bar v. Sweeney*, 730 So.2d 1269, 1271 (Fla. 1998). In the instant case, as the referee made findings of fact yet failed to find ethical misconduct, this Court must now review the record on appeal, coupled with the actual findings of fact expressed by the referee in his first report, to find the respondent guilty of the ethical misconduct charged by the Bar.

An examination of the record reveals that the Bar presented competent substantial evidence which supported a recommendation of guilt for all ethical violations found within the Bar's complaint. The findings of the Fourth District Court of Appeal, along with the testimony of the Bar's witnesses, and the respondent's admissions during his testimony that he intended to "nail" opposing counsel through his actions, provided clear and convincing proof that The Florida Bar met its burden of proof.

The weight of the evidence was sufficient to establish findings of fact that respondent intentionally called Dr. Bernhardt, without notice to opposing counsel and with the impermissible intent to induce the doctor to violate Florida Statute 455.667(5) (Renumbered 456.057(5)), in an admitted attempt by the respondent to "nail" Krupnick. The Bar also demonstrated as further evidence of respondent's intentional misconduct unrefuted proof that respondent approached the doctor and asked that his phone call would be considered "off the record." The referee, rejecting the findings of the Fourth District Court of Appeal and the substantial evidence presented by the Bar, erred in diverting the respondent to a one-day professionalism enhancement program.

The Bar also demonstrated that respondent intentionally concealed the mistaken receipt of medical records to the court and opposing counsel, again in violation of Florida Statute 455.667(5) (Renumbered 456.057(5)). Respondent's

actions of opening the medical records received in error; reviewing all the medical records; discovering a highly damaging new notation to the opposing side; copying only that one page with the new notation; failing to advise opposing counsel of the mistaken receipt of the medical records just prior to trial; respondent's willful and intentional omission about the mistaken receipt of these records during pretrial motions for sanctions; and his intentional failure to advise opposing counsel of the new notation at the time the medical records were introduced provided the basis for ethical misconduct. This compelling evidence substantiated that respondent's intentional actions furthered his goal to "nail" opposing counsel. Again, the referee, by rejecting the findings of the Fourth District Court of Appeal and the substantial evidence presented by the Bar, erred in diverting the respondent to a one-day professional enhancement course for ethical misconduct not eligible for diversion.

R. Regulating Fla. Bar 3-5.3 (h)(2) provides for diversion at the trial level after submission of evidence if, after submission of evidence, but before a finding of guilt, the referee determines that, if proven, the conduct alleged to have been committed by the respondent is not more serious than minor misconduct. R. Regulating Fla. Bar 3-5.3 (i) provides that the effect of diversion shall not constitute a disciplinary sanction.

The referee erred in not finding respondent guilty of ethical misconduct charged by the Bar that would have made his diversion of the respondent inappropriate. R. Regulating Florida Bar 3-5.1 (b)(1)(a-f) establishes the criteria for defining minor misconduct: In the absence of unusual circumstances misconduct shall not be regarded as minor if any of the following conditions exist:

A) the misconduct involves misappropriation of a client's funds or property;
B) the misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights, or valuable property rights) to a client or other person;
C) the respondent has been publicly disciplined in the past 3 years;
D) the misconduct involved is of the same nature as misconduct for which the respondent has been disciplined in the past 5 years;
E) the misconduct includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent; or
F) the misconduct constitutes the commission of a felony under applicable law.

The referee specifically determined findings of fact in his first report of referee that substantiated ethical misconduct not eligible for diversion. On February 7, 2006, the referee filed a report of referee containing findings of fact which supported conclusions of guilt. The referee used language and made findings of fact which supported conclusions of guilt for ethical violations:

> "It was unprofessional and inappropriate to ask a treating physician if he is going to testify about causation … by asking the doctor, 'are you going to testify about causation?' he in effect is soliciting information about the doctor's opinion of the medical condition of the patient. … Attorney Cocalis clearly overstepped the line when he asked Dr. Bernhardt whether he would testify about causation. It seems clear

> that in both these instances Attorney Cocalis let his emotions and competitiveness interfere with the exercise of his good judgment." (RR1- 6).
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> The referee continued that:
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> "I have concluded that Attorney Cocalis did not violate most [emphasis provided] of the Rules of Professional Conduct set forth in The Florida Bar Complaint i.e. 4-3.3(a)(1), 4-3.8(a), 4-8.4(a)(c)(d). However, Respondent acted in an unprofessional and inappropriate manner. The Rules of Professional Conduct are not intended to be an exhaustive list of the do's and don'ts of our profession.
>
> It was unprofessional and inappropriate sharp practice to fail to call to the plaintiff's attorney's attention that the exhibits subpoenaed from Dr Unis' office contained a new entry which was not on the copy of the records attached to Dr. Unis's deposition … [P]roper practice would have required Attorney Cocalis to have affirmatively brought this to the attention of Attorney Krupnick and the Court. Attorney Cocalis seems to be of the belief that the other lawyers' misconduct **somehow justifies his misconduct**. [emphasis provided] … This position is absurd. Even if there was other lawyer's misconduct (and this Referee does not find any) it would not justify Attorney Cocalis' sharp practice." (RR 6-7).

The referee, despite his findings of fact and the ample record that clearly supported ethical rule violations, and a record that clearly contradicts the referee's determinations that respondent was not guilty of ethical violations, the Bar must ask this Court to determine whether the record and the referee's initial findings of fact substantiates ethical violations by the respondent.

The Florida Bar, having met its burden of proof on all charges of ethical misconduct, the referee should have made unbiased determinations of guilt based on his findings of fact consistent with the findings of the Fourth District Court of

Appeal, along with the testimony and exhibits introduced at the final hearing. The respondent was guilty of all rule violations charged within the Bar's complaint: R. Regulating Fla. Bar **3-4.3** (…The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.); **4-3.3(a)(1)** (A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.); **4-3.4(a)** (A lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.); **4-8.4(a)** (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.); **4-8.4(c)** (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.); and **4-8.4(d**) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice …). The Court must determine what sanction is appropriate.

II. THE REFEREE ERRED BY FAILING TO MAKE A RECOMMENDATION OF DISCIPLINE TO THE COURT FOR SERIOUS ETHICAL VIOLATIONS. THE REFEREE SHOULD HAVE SUSPENDED THE RESPONDENT BASED ON FLORIDA STANDARDS IMPOSING LAWYER SANCTIONS AND FLORIDA CASE LAW.

While a referee's findings of fact should be upheld unless clearly erroneous, this Court is not bound by the referee's recommendations in determining the appropriate level of discipline. *The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986); *The Florida Bar v. Rue*, 643 So.2d 1080 (Fla. 1994). Furthermore, this Court has stated the review of the discipline recommendation does not receive the same deference as the guilt recommendation because this Court has the ultimate authority to determine the appropriate sanction. *The Florida Bar v. Grief*, 701 So.2d 555 (Fla. 1997); *The Florida Bar v. Wilson*, 643 So.2d 1063 (Fla. 1994). In *The Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1970), this Court held three purposes must be held in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter others attorneys from similar conduct. This Court has further stated a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. *The Florida Bar v. Sweeney*, 730 So.2d 1269 (Fla. 1998); *The Florida Bar v. Lecznar*, 690 So.2d 1284 (Fla. 1997). The

Court will not second guess a referee's recommended discipline "as long as that discipline has a reasonable basis in existing case law." *The Florida Bar v. Laing,* 695 So.2d 299, 304 (Fla. 1997). A referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support. *The Florida Bar v. Forrester,* 656 So.2d 1273 (Fla. 1995), quoting *The Florida Bar v. Marable,* 645 So.2d 438 (Fla. 1994). This standard applies in reviewing a referee's finding of mitigation and aggravation. *The Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003).

This Court has ruled suspension was the appropriate discipline in cases involving similar ethical misconduct. In *The Florida Bar v. Burkich-Burrell,* 659 So. 2d 1082 (Fla. 1995), respondent received a 30 day suspension. Respondent's husband was injured in an automobile accident. He then had a 2nd auto accident in which he was represented by respondent. In responding to interrogatories, the husband failed to disclose the earlier accident and injuries to opposing counsel. Respondent notarized the fraudulent interrogatories. Upon deposition, the husband testified to lack of recall about being in the prior accident. Respondent was present and said nothing.

Also, in *The Florida Bar v. Forrester,* 818 So.2d 477 (Fla. 2002**),** respondent received a 60 day suspension. Respondent was attending a deposition with her client. The client took an exhibit from the table and handed it to respondent who put it under the table. When opposing counsel asked about the

exhibit, respondent failed to admit that she knew where it was. She failed to return it until directly confronted. The Court found that she was misleading because she knew where the document was and failed to reveal it. The court further found that her disciplinary history made the suspension necessary.

Finally, in *The Florida Bar v. Hmielewski*, 702 So.2d 218 (Fla. 1997), respondent received a 3 year suspension. Respondent made material misrepresentations to a court and to opposing counsel and obstructed counsel's access to evidence. Respondent knew his client had stolen certain medical records and had the same in his possession. Respondent stated that all records in his client's possession had been provided to opposing counsel, that one of the issues in the case was the defendants' failure to maintain the medical records, and submitted an expert report that opined that the hospital had tampered with the medical records. This Court has consistently held suspension is appropriate when confronted with similar ethical misconduct.

In addition, The Florida Standards for Imposing Lawyer Sanctions provide a reasonable basis for this Court to impose recommendation of a suspension for the respondent. Florida Standards for Imposing Lawyer Sanctions 6.0 addresses violations of duties owed to the legal system. 6.1 False Statements, Fraud and Misrepresentation provides guidance when suspension is appropriate. Florida Standards 6.12 states "Suspension is appropriate when a lawyer knows that false

statements of documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action." The respondent's intentional concealment of his receipt of medical records in evidence by his willful omission to the trial court and opposing counsel, coupled with his improper phone call to Dr. Bernhardt which was "off the record," and in furtherance of his self admitted goal to "nail" opposing counsel, is misconduct that warrants a suspension.

Florida Standards for Imposing Lawyer Sanctions 7.0 addresses violations of duties owed as a professional. Standard 7.2 provides suspension is appropriate 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. Clearly, the respondent's ethical misconduct resulting in a defense verdict and a reversal of the final judgment by the appellate court due to respondent's ethical misconduct warrants respondent's suspension from the practice of law. A recommendation of discipline encompassing a suspension is appropriate and has a reasonable basis in The Florida Standards for Imposing Disciplinary Sanctions and case law.

Finally, the referee should have found aggravating factors in determining the appropriate discipline. Florida Standards for Imposing Sanctions 9.22 enumerates aggravating factors that may increase the degree of discipline

imposed. The aggravating factors that should have been found by the referee were the following:

(b) dishonest and selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(i) substantial experience in the practice of law (respondent was admitted to the practice of law in November 1987).

Based on the foregoing, the Bar respectfully requests that this Honorable Court corrects the referee's erroneous diversion to a one-day practice and professionalism enhancement course and suspends the respondent for at least a short term suspension based on the egregious ethical misconduct of the respondent. A suspension is warranted given the ethical misconduct involved in this case; and a suspension from the practice of law is supported by The Standards for Imposing Lawyer Sanctions and has a reasonable basis in similar cases brought before the Court.

CONCLUSION

The referee was impermissibly tainted and prejudiced by irrelevant, uncorroborated, and inflammatory evidence concerning opposing counsel. The referee lost impartiality and attempted to identify or empathize with the respondent and the circumstances surrounding his misconduct.

The referee erred in failing to find respondent guilty of all the Bar's charges found within its complaint. The Bar provided the referee with relevant case law and the appropriate Florida Standards for Imposing Lawyer Sanctions recommending at least a short term suspension as appropriate discipline based on the ethical misconduct of the respondent. Again, the Bar would respectfully request that this Court enters the appropriate discipline based on the referee's inability even to find the respondent guilty of ethical misconduct despite the overwhelming evidence presented to him as found in the record. The Bar recommends this Court find the respondent guilty of all rules violations; and suspends him from the practice of law based on the Florida Standards for Imposing Lawyer Sanctions and relevant case law. The Respondent has stipulated to pay $1,775.00 to the Bar for its costs.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of The Florida Bar's Amended Initial Brief has been furnished via regular U.S. mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; true and correct copies have been furnished by regular U.S. mail to Kevin P. Tynan, attorney for respondent, 8142 N. University Drive, Tamarac, FL 33321, and to Staff Counsel, The Florida Bar 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this _____ day of _____, 2006.

ALAN ANTHONY PASCAL

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

Undersigned counsel hereby certifies The Florida Bar's Amended Initial 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.

ALAN ANTHONY PASCAL