IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARK F. GERMAIN,

Respondent.
_____/

Case No. SC05-947
[TFB Nos. 2004-31,700(05B); and 2004-32,067(05B)]

Case No. SC05-1096
[TFB No. 2005-31,218(05B)]

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the Bar."

The transcript of the final hearing held on October 28, 2005, shall be referred to as "T-I" followed by the cited page number.

The transcript of the disciplinary hearing held on February 15, 2006, shall be referred to as "T-II" followed by the cited page number.

The Final Report of Referee dated February 24, 2006, will be referred to as "ROR" followed by the referenced page number(s) of the Appendix, attached (ROR-A____)

The Bar's exhibits will be referred to as "B-Ex." followed by the exhibit number.

STATEMENT OF THE CASE

On May 27, 2005, The Florida Bar filed a complaint against respondent, which was subsequently assigned Supreme Court Case No. SC05-947. The Honorable Peter K. Sieg was appointed as referee for Case No. SC05-947 on June 9, 2005. On June 17, 2005, the Bar filed a complaint against respondent, which was subsequently assigned Supreme Court Case No. SC05-1096. The Honorable Peter K. Sieg was appointed as referee for Case No. SC05-1096 on June 30, 2005. Thereafter, the referee consolidated Case Nos. SC05-947 and SC05-1096 for final hearing.

Judge Sieg entertained the final hearing on October 28, 2005, and conducted a disciplinary hearing on February 15, 2006. The referee entered his final report of referee on February 24, 2006, finding respondent guilty of the majority of the rule violations alleged in the Bar's complaint (ROR-A19-A21). The referee further recommended that this Court impose a 91-day suspension with required mental health evaluation with treatment and/or counseling if recommended, one year period of probation during which any recommended treatment and counseling shall continue upon reinstatement, and payment of costs (ROR-A21-A26).

Respondent filed his Petition for Review on or about April 21, 2006. On April 25, 2006, The Florida Bar filed a Motion to Strike Portions of Respondent's Petition for Review. The Bar's motion requested this Court to enter an order striking those portions of respondent's Petition for Review concerning a psychological evaluation

entered into post-filing of the report of referee, the entirety of Appendix B related to the psychological evaluation, and any mention of settlement negotiations between respondent and the Bar due to the fact that none of those matters were part of the record before the referee.

Respondent filed his Initial Brief on or about May 10, 2006. On May 12, 2006, The Florida Bar filed a Motion to Strike Portions of Respondent's Initial Brief repeating the same arguments contained in its previous Motion to Strike Portions of Respondent's Petition for Review.

STATEMENT OF THE FACTS

The Bar adopts the referee's findings of fact as set forth in his report. The following facts are taken from the report of referee contained in the appendix herein

and as otherwise noted.

Case No. SC05-947

Respondent and his former business partner, Michael C. Norvell, owned a building together (TR-I p. 18, l. 20-21; B-Ex. 1, 5, 6, 12). Mr. Norvell owned 2/3 of the building and respondent owned the remainder (TR-I p. 19 l. 1-3; TR-I p. 107, l. 20-21; B-Ex. 1, 5, 6, 12). The building was known as Lake Law Center, and respondent and Mr. Norvell operated separate law firms within that location (TR-1 p. 18 l. 6-21; TR-I p. 20-23; B-Ex. 1, 5, 6, 12). Respondent had employed James Cardona, who was seeking admission to The Florida Bar, as an independent contractor providing paralegal services (TR-I p. 28 l. 17-23; TR-I p. 198 l. 3-5; B-Ex. 1, 8, 9). In or around March 2004, respondent terminated Mr. Cardona's employment, and respondent's business partner, Mr. Norvell, hired Mr. Cardona to work for him at the Lake Law Center (TR-I p. 108 l. 22-25; TR-I p. 198 l. 3-5; B-Ex. 1, 8, 9, 10, 12, 14, 15). Thereafter, respondent and Mr. Norvell became involved in a dispute over the hiring of Mr. Cardona and other business related issues (TR-I p. 110 l. 1-10; B-Ex. 1, 5, 6, 7, 9, 12). On April 17, 2004, the dispute between respondent and Mr. Norvell escalated into a physical altercation (B-Ex. 1, 5, 6, 10, 12). Respondent filed a Petition for Injunction for Protection Against Repeat Violence Against Mr. Norvell and a report with the Leesburg Police Department indicating that Mr. Norvell had physically attacked him (TR-I p. 28 l. 3-16; TR-I p. 110 l. 11-13; B-

Ex. 1, 5, 10). Respondent and Mr. Norvell ultimately entered into a Stipulation and Agreement wherein respondent agreed, among other things, to withdraw his Petition for Injunction for Protection Against Repeat Violence Against Mr. Norvell and to file an Intent Not to Prosecute Mr. Norvell on aggravated assault charges (B-Ex. 1, 7).

Respondent, while under oath, made very serious allegations concerning his former business partner, Michael Norvell, and his possession or lack of possession of a gun (B-Ex. 1, 5, 6, 7, 13). Respondent's affidavit under oath contained factual statements in direct conflict with factual statements respondent made under oath in a Petition for Injunction Against Repeat Violence and in a Verified Motion for Reconsideration (B-Ex. 1, 5, 6, 7).

Respondent filed a frivolous Petition for Injunction Against Repeat Violence against his former employee, James Cardona (TR-I p. 130 l. 7-25; TR-I p. 132 l. 9-14; B-Ex. 1, 8, 12). In his petition for injunction, respondent failed to allege any acts of violence by Mr. Cardona and merely stated his fear that Mr. Cardona could become physically violent (TR-I p. 130 l. 7-25; TR-I p. 132 l. 9-14; B-Ex. 1, 8, 12). The court ultimately granted an order dismissing respondent's petition for injunction, stating that respondent's claims were "clearly devoid of merit both on the facts and the law as to be completely untenable" (TR-I p. 130 l. 7-25; TR-I p. 132 l. 9-14; B-Ex. 1, 12).

Respondent also reported to an officer of the Leesburg Police Department that

he had issued a trespass warning to Mr. Cardona and that the warning had been served by a sheriff's deputy (B-Ex. 8, 10). Respondent did not advise the police officer that Mr. Cardona had the consent of Michael Norvell, the 2/3 owner, to come on the property (B-Ex. 8, 10). Respondent's omission led the Leesburg police officers to believe that Mr. Cardona would be guilty of trespass by coming on the law office property and that he could be lawfully arrested for that crime (B-Ex. 10).

Case No. SC05-1096

On September 22, 2004, respondent represented the defendant in a court proceeding titled State v. Guerreo, Case No. 2004-CF-2140, Fifth Judicial Circuit, in and for Lake County, Florida (TR-I p. 66 l. 16-19; B-Ex. 1, 2, 3, 4). In the court proceeding, which was scheduled to address procedural and docketing matters, respondent persisted in arguing factual issues regarding the innocence of his client in a criminal case (TR-I p. 67 l. 1-15; B-Ex. 2, 3, 4). After being warned by the judge to stop interrupting, respondent twice again interrupted the judge's attempts to address the matters before the court (TR-I p. 67 l. 1-15; B-Ex. 2, 3, 4).

After hearing the evidence and arguments of counsel, and after considering the Florida Standards for Imposing Lawyer Sanctions and the relevant case law, the referee recommended that respondent be suspended from the practice of law for 91 days, undergo a mental health evaluation, and pay costs associated with this disciplinary action.

SUMMARY OF THE ARGUMENT

The evidence shows that respondent made intentional misrepresentations, filed a frivolous pleading with the court, and failed to abide by the high standards expected of attorneys in this State. The record in this matter contains substantial, competent evidence that clearly and convincingly supports the referee's findings of facts and recommendations of guilt. The referee was in the best position to review the evidence and assess the credibility of the witnesses who testified. Therefore, consistent with its prior holdings, this Court should not reweigh the evidence or substitute its judgment for that of the referee, but should approve the referee's findings of fact and

recommendations of guilt.

The referee properly utilized his discretion to determine evidence concerning Michael Norvell's alleged exploitation of an elderly client was irrelevant to the rule allegations filed against respondent as well as to the disciplinary case in general. The referee also had adequate evidence before him to determine that respondent did not have a reasonable fear that Mr. Norvell would kill him. Furthermore, the referee properly concluded that respondent violated Rule 4-8.4(d) by providing misleading information to the Leesburg Police Department. Rule 4-8.4(d) was alleged in the Bar's complaint against respondent.

In addition, the referee's conclusions and recommendations as to discipline are supported by the facts, the record, and existing case law. A suspension of 91 days, as recommended by the referee, would sufficiently address respondent's serious misconduct.

Finally, the referee appropriately exercised his discretion in concluding that respondent be required to undergo an evaluation by a bar-approved mental health professional. The record contains numerous examples of respondent's unwillingness, or inability to accept, many of the realities he confronted in this proceeding as well as the events that led to this proceeding.

ARGUMENT

POINT I

THE REFEREE'S RECOMMENDATIONS AS TO FACTS AND FINDINGS OF GUILT ARE WELL SUPPORTED BY THE COMPETENT, SUBSTANTIAL RECORD EVIDENCE.

Respondent's burden on review is to demonstrate that there is no evidence in the record to support the referee's findings or that the record evidence clearly contradicts the conclusions. The Florida Bar v. Vining, 721 So.2d 1164, 1167 (Fla. 1998). Respondent cannot satisfy his burden of showing that the referee's findings are clearly erroneous "by simply pointing to the contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings."

The Florida Bar v. Vining, 761 So.2d 1044, 1048 (Fla. 2000). The standard of proof in a Bar disciplinary proceeding is clear and convincing evidence. The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994), citing The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). The Bar has met its burden of proof by clear and convincing evidence, while the respondent has failed to meet his burden of establishing that the record is wholly lacking in evidentiary support for the referee's findings. This Court has consistently held that where a referee's findings are supported by competent substantial evidence, it is precluded from reweighing the evidence and substituting its judgment for that of the referee. Vining 721 So.2d at 1167, quoting The Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992). The referee was in the best position to assess credibility and to determine guilt, and his findings and recommendations are clearly supported by the record.

The following is an analysis and discussion of the two consolidated complaints and a summary of the evidence which supports respondent's misconduct as alleged by the Bar.

Case No. SC05-947

In Case No. SC05-947, respondent and the Bar stipulated to most of the allegations contained in the Bar's complaint. The key issues not stipulated to concerned whether respondent threatened violence against Mr. Cardona if he arrived at the Lake Law Center to begin his employment with Mr. Norvell, whether

respondent filed a frivolous pleading as determined by Judge Pope, and whether respondent's contradictory statements to the tribunal regarding Mr. Norvell's possession or lack of possession of a gun constituted false statements of material fact.

Respondent, while under oath, made very serious allegations concerning Mr. Norvell and his possession or lack of possession of a gun (B-Ex. 1, 5, 6, 7, 13). Respondent failed to show that any of his sworn statements were a result of coercion, threat of death and/or violence, or intimidation. It is the Bar's contention that the statements were made for the specific purpose of permitting the respondent to get what he wanted – the office building located at 1410 Emerson Street, Leesburg, Florida.

When respondent wanted an injunction for protection issued and wanted Mr. Norvell out of the picture, he swore Mr. Norvell had a gun (B-Ex. 5). Respondent also wanted to ensure that the court granted his Verified Emergency Motion to Enjoin Plaintiff from Taking Prejudicial, Retaliatory Action against him. Therefore, respondent continued to rehash all of wrongs he believed Mr. Norvell had perpetrated against him and informed the court that "Norvell is also a convicted felon and Germain has personally observed Norvell handle a loaded pistol in the office" (B-Ex. 6). But, when respondent wanted to settle with Mr. Norvell and get Mr. Norvell's Partition action behind him, he swore, in his June 18, 2004 affidavit, "[t]hat after some thought, [he] recall[ed] that the pistol was actually in possession of the office paralegal,

Rebecca S. Skipper and not Michael C. Norvell" (B-Ex. 7).

Had the respondent left it at that, the evidence might not have been sufficient to prove that respondent knowingly made a false statement of material fact to a tribunal. Instead, respondent went on to make two further statements. The additional statements were not qualified. The statements were unequivocal. First, "[t]hat Rebecca S. Skipper, Norvell's paralegal, had a small hand gun at her desk for protection as she was often in the office alone. At no time, was the gun ever in Norvell's office or in Norvell's possession" (B-Ex. 7). Second, "[t]hat sometime in 2001, Rebecca S. Skipper removed the gun from the office" (B-Ex. 7).

After Judge Pope issued the Amended Order Dismissing Petition for Protection Against Repeat Violence – Final Order on Petitioner's Motion for Reconsideration, and Order on Respondent's Amended Motion for Sanctions (B-Ex. 12), respondent made another unequivocal statement completely opposite from the statements contained in his June 18, 2004 affidavit. In respondent's Verified Motion for Reconsideration of Amended Order Dismissing Petition for Protection Against Repeat Violence (B-Ex. 13), respondent swore that ". . . convicted felon Michael C. Norvell's possession of a gun gun (sic) in the office is not frivolous . . . ."

Respondent simply cannot have it both ways. Either Mr. Norvell possessed and handled the gun or he did not. Either the gun was in the office in April 2004 when the respondent filed the Petition for Injunction for Protection Against Repeat

Violence swearing Mr. Norvell had a hand gun with ammunition in the office, or the gun was removed sometime in 2001 as sworn to by the respondent in his June 18, 2004 affidavit and testified to by Rebecca S. Skipper (T-I p. 92 l. 12-17). Ms. Skipper further testified that the gun was never taken back to the office after it had been removed in 2001 (T-I p. 92 l. 18-20). If the gun was removed in 2001, it was not in the office in 2004. Consequently, respondent filed a petition with the court that he knew contained an intentional misrepresentation of fact. If, on the other hand, the sworn statement contained in the Petition for Injunction for Protection Against Repeat Violence filed by the respondent on April 21, 2004 was true, then the sworn statements he made in his June 18, 2004 affidavit were not. Both statements cannot be true. Both of those documents were filed with and considered by the courts in Lake County, Florida.

Respondent testified during the final hearing that he signed the June 18, 2004 affidavit under threat of violence, coercion, and intimidation. If that was the case, respondent should have informed the courts. Respondent is a licensed attorney and an officer of the court. As an officer of the court, he had an obligation to inform the court of the untruthfulness of his affidavit and to provide an explanation to the court for its contents. Respondent failed to do so, and he failed to present any competent, substantial evidence that a gun was in the office any time after it was removed in 2001. Respondent failed to present any competent, substantial evidence that Mr.

Norvell ever threatened him with a gun. He also failed to present any competent, substantial evidence that Mr. Norvell ever possessed the gun. Likewise, he failed to present any competent, substantial evidence that Mr. Norvell ever handled the gun. Finally, respondent failed to present any competent, substantial evidence to support a finding that Mr. Norvell coerced, intimidated, or threatened him with bodily harm if he failed to sign the Stipulation and Agreement and the June 18, 2004 Affidavit which resolved the Partition action filed by Mr. Norvell.

Rather, the evidence presented supports a finding that the gun belonged to Mr. Norvell's paralegal, Rebecca Skipper, that Mr. Norvell permitted her to bring it to the office for her protection, that Mr. Norvell never possessed the gun, that Mr. Norvell never handled the gun, that Mr. Norvell never threatened the respondent with a gun, and that the gun was removed from the office in 2001 (TR-I p. 90 l. 3-12; TR-I p. 92 l. 1-20; TR-I p. 115 l. 10-13; T-I p. 117 l. 16-23). Testimony was presented that Mr. Norvell told respondent, if an agreement was not reached and if respondent did not clear up the gun issue, then Mr. Norvell would proceed with the partition litigation (TR-I p. 119 l. 12-14). That is not coercion and/or intimidation. In 2004, respondent had been an attorney admitted to practice law in Florida for approximately 9 years. He had handled both civil and criminal cases and had also been involved in negotiations. He understood the give and take associated with negotiation. Respondent clearly must have had an appreciation for the fact that one party to the

litigation may indicate litigation will continue if certain issues are not satisfied. The evidence presented in this case failed to establish that the discussions regarding the Stipulation and Agreement and Affidavit were anything other than normal tactics in negotiations. Rather, the evidence clearly and convincingly supports a finding that respondent entered into the Stipulation and Agreement, which included his sworn Affidavit, knowingly and voluntarily.

The evidence presented clearly and convincingly supports a finding that the respondent knowingly made false statements of material fact to the tribunal in the pleadings. First, the respondent swore Mr. Norvell possessed a gun in the office, then he swore he had personally observed Mr. Norvell handle a loaded pistol, then he swore that that the gun was never in Mr. Norvell's office or in his possession, and that the gun had been removed from the office by someone other than Mr. Norvell. And finally, he swore that Mr. Norvell possessed a gun in the office. These statements are obviously contradictory, and if you believe one set of statements, then the other simply cannot be true.

Respondent also has not conformed to the profession's standard of filing pleadings supportable in law and in fact. While the respondent stipulated that the court had found his Petition for Injunction for Protection Against Repeat Violence against Mr. Cardona to be ". . . so clearly devoid of merit both on the fact and the law as to be completely untenable," and that ". . . Mr. Germain knew, or reasonably

should have known, that his petition against Mr. Cardona was not supported by the material facts necessary to establish a claim for an injunction for protection against repeat violence, or that it would not be support by the application of the current law to those material facts" and that "[a] claim under s. 57.105 was filed on June 3, 2004. Cardona's motion for sanctions upon the provisions of Fla. Stat. s.57.105 is GRANTED" (B-Ex. 1, 12). Respondent, however, did not stipulate that the pleading he filed was frivolous.

Respondent has argued that he should be treated like any other petitioner seeking protection against repeat violence. But, he is not like any other petitioner seeking protection against repeat violence. He is a trained, skilled attorney. Nevertheless, respondent has tried, at least in this instance, to divorce himself from his profession and the higher standards expected of officers of the court. Such disregard for the higher standards expected of an attorney should not and cannot be tolerated.

Respondent had been a practicing attorney for approximately 9 years when he filed the Petition for Injunction for Protection Against Repeat Violence against Mr. Cardona. Notwithstanding that fact, respondent deliberately filed a petition that failed to allege any acts of violence as defined by the law. He stated that:

> ". . . I had to fire [Cardona] and when I asked him to leave the office he became belligent (sic) and initially refused. It **appeared** from his demeanor that he was **about** to become violent. (Emphasis added.) He did finally leave and I asked him <u>not</u> to return." (Emphasis in the original.)

> ". . . I had to physically remove him from the premises. Cardona vows to return and enter into my building dispite (sic) several subsequent conversations and a No Trespass Warning which he received and ignored."
>
> "Cardona shows no respect for private property and has indicated that he intends to re-enter my building and office with force, if necessary. I cannot afford to jeopardize my law practice by physically having to remove him from the premises each time he decides to show up. He claims my office is a public pla
>
> "I believe there will be imminent physical violence the next time Cardona shows up at the Lake Law Center. I also believe that I may be gravely hurt when he does show up. Cardona is stalking me and is trying to sabotage my law practice." (Bar-Ex. 8)

As Judge Pope found, none of the cited sworn allegations show that Mr. Cardona directed at least two incidents of violence against respondent and that one of the acts had occurred within 6 months of the filing of the petition. The moment respondent filed the petition, he filed a frivolous pleading. As the sworn statements reflect and as found by Judge Pope, respondent was merely speculating that future violence might occur.

Further, the testimony established that respondent did not fear Mr. Cardona. Respondent had reached an agreement to rehire Mr. Cardona and had spoken with Mr. Cardona about working out their issues (TR-I p. 112 l. 14-19; TR-I p. 200 l. 1-5). The evidence also established that Mr. Cardona did not wish to be reemployed by the respondent (TR-I p. 200 l. 6). Immediately after that fact became known to the respondent, the evidence shows that respondent filed a Petition for Injunction for Protection Against Repeat Violence against Mr. Cardona (TR-I p. 202 l. 8-11; B-Ex.

8). The evidence supports a finding that respondent was unhappy that Mr. Cardona had been hired by Mr. Norvell and because Mr. Cardona refused to come back to work for him (T-I p. 110 l. 1-10). A failed business dealing is not a proper purpose for filing a Petition for Injunction for Protection Against Repeat Violence.

More importantly, it is clear, based on the testimony of Judge Pope and the transcript of the Excerpt of Proceedings conducted before Judge Pope on June 23, 2004 wherein the respondent testified, (B-Ex. 15), and the Amended Order issued by Judge Pope on July 14, 2004 (B-Ex. 12), that respondent was provided with ample opportunity to prove that the filing of the petition was not frivolous. During the proceeding before Judge Pope, despite being repeatedly questioned, respondent was unable to substantiate any acts of violence, as defined by the law, that were perpetrated upon him by Mr. Cardona.

Based upon the foregoing, the evidence presented to the referee during the final hearing and to Judge Pope on June 23, 2004 clearly and convincingly established a finding that respondent brought a frivolous proceeding before the court when he filed the Petition for Injunction for Protection Against Repeat Violence as it related to Mr. Cardona on April 21, 2004.

Not only has respondent made material misrepresentations to the court and filed a frivolous proceeding, he misled the Leesburg Police Department to believe that Mr. Cardona had been issued a valid No Trespass Warning by the court which was served

upon him by a deputy. The evidence clearly established that respondent generated the "No Trespass Warning" on his own letterhead and that he served it upon Mr. Cardona's mother as well as posting it at several locations in the building located at 1410 Emerson Street, Leesburg, Florida (TR-I p. 113 l. 9-18; TR-I p. 201 l. 5-23). Based upon Officer Potter's report, (B-Ex. 9, 10), and Mr. Cardona's testimony during the final hearing, a trespass warning had not actually been issued by the court and served on him by law enforcement (TR-I p. 201 l. 5-23). Mr. Cardona testified that no deputy instructed him not to return to the building located at 1410 Emerson Street, Leesburg, Florida or the ramifications if a violation of the warning occurred (TR-I p. 202 l. 20-24).

Respondent's overall conduct in this matter displays his lack of respect for the law, the court, and the public. Respondent filed whatever pleading he deemed necessary and said whatever he deemed necessary to achieve the objective he wanted to achieve – no matter the cost. Such conduct fails to comport with the high ethical conduct expected of attorneys practicing in Florida.

Case No. SC05-1096

In Case No. SC05-1096, respondent and the Bar stipulated to all of the allegations contained in the Bar's complaint except for paragraphs 5 and 6 wherein the Bar alleged that "[d]uring the course of the proceeding, respondent repeatedly interrupted the Court," and "[a]fter the Court warned the respondent not to interrupt, respondent

interrupted the Court on two further occasions."

Judge Hill testified about the circumstances surrounding the hearing in State v. Guerreo, Case No. 04 CF 2140A-02, during which Judge Hill determined that respondent should be held in direct criminal contempt. Judge Hill testified (TR-I p. 65-69), and the transcript and Order of Judgment issued by Judge Hill on October 24, 2004, (B-Ex. 2, 3), clearly and convincingly established that respondent was warned not to interrupt the court and that he knowingly and intentionally interrupted the court on two separate occasions after being warned. Furthermore, respondent admitted to the conduct (B-Ex. 1). Finally, and most importantly, the court found no valid reason for respondent's conduct.

The evidence established that Judge Hill issued an Order of Dismissal of Criminal Contempt on March 10, 2005, some six months after the finding of contempt and some five months after the Order of Judgment was issued (B-Ex. 4). That does not, however, negate the fact that the court found the respondent to be in direct criminal contempt due to his conduct on September 22, 2004 (TR-I p. 65-69); B-Ex. 3). Judge Hill's explanation regarding the issuance of the order of dismissal did not reflect that the Judge believed he had made an error in finding the respondent in direct criminal contempt (TR-I p. 68 l. 20-25; TR-I p. 69 l. 1-2). Likewise, his explanation did not reflect that he believed he had made an error in his determination that the respondent had violated the court's order (TR-I p. 65-69). Rather, the court simply ".

. . decline[ed] to hold [the respondent] in direct criminal contempt" (B-Ex. 4). Consequently, the subsequent order issued by Judge Hill does not eliminate the findings contained the initial order, and the subsequent order does not establish a finding by Judge Hill that the respondent lacked intent or knowledge.

The evidence presented clearly and convincingly established that respondent engaged in conduct intended to disrupt the tribunal. As evidenced by the transcript and Judge Hill's testimony during the final hearing, Judge Hill made it clear to respondent that he expected an orderly proceeding to be conducted in his courtroom on September 22, 2004. It is also clear Judge Hill provided respondent with warnings regarding respondent's failure to comply with the requirements clearly established by Judge Hill. Nevertheless, respondent chose, on two separate occasions, to violate the court's order and disrupt the court, causing Judge Hill to conduct a contempt proceeding. Respondent failed to present any competent, substantial evidence to support a determination that he did not intend to disrupt the proceedings to get his point across to the Judge.

Finally, the testimony and evidence submitted clearly and convincingly established that respondent engaged in conduct in connection with the practice of law that was prejudicial to the administration of justice. Respondent, in his role as attorney for Mr. Guerreo, after being warned twice not to interrupt, continued to knowingly and deliberately interrupt the judge in the matter of State v. Guerreo, Case

No. 2004 CF 2140A-02. There can be no question that respondent's conduct undermined the authority of the court and required Judge Hill to take immediate action.

As a result of the substantial, competent record evidence presented in Case Nos. SC05-947 and SC05-1096, the referee properly recommended that respondent be found guilty of the following Rules Regulating The Florida Bar: Oath of Admission to The Florida Bar for failing to abstain from all offensive personality; 4-3.1 for bringing a frivolous proceeding, or asserting or controverting a frivolous issue therein; 4-3.3(a)(1) for knowingly making a false statement of material fact or law to a tribunal; 4-3.4(c) for knowingly disobeying an obligation under the rules of a tribunal; 4-3.5(c) for engaging in conduct intended to disrupt a tribunal; and 4-8.4(d) for engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice.

As set forth above and in detail in the report of referee, the record contains substantial, competent evidence that clearly and convincingly supports the referee's findings of facts and recommendations of guilt. The referee was in the best position to review the evidence and assess the credibility of the witnesses who testified. Therefore, consistent with its prior holdings, this Court should not reweigh the evidence or substitute its judgment for that of the referee, but should approve the referee's findings of fact and recommendations of guilt.

POINT II

THE REFEREE APPROPRIATELY CONCLUDED THAT RESPONDENT VIOLATED RULE 4-8.4(d) IN REGARD TO PROVIDING MISLEADING INFORMATION TO THE LEESBURG POLICE DEPARTMENT.

In his Initial Brief, respondent claims that the referee erred in finding him guilty of Rule 4-8.4(d) in relation to his conduct with the Leesburg Police Department. Respondent claims that this was not an allegation made by the Bar in its complaint and that the referee cannot find respondent guilty of a rule that was not alleged by the Bar. Despite respondent's statements to the contrary, paragraph 23 of the Bar's complaint clearly states that pursuant to his alleged misconduct respondent is accused of violating Rule 4-8.4(d). This Court has held that "[a]ttorneys must be given reasonable notice of the charges they face before the referee's hearings on those charges." The Florida Bar v. Batista, 846 So.2d 479, 484 (Fla. 2003).

Furthermore, the referee only recommended that respondent be found guilty of Rule 4-8.4(d) after carefully considering all of the relevant evidence presented in this matter. For example, the referee considered the following excerpt from Officer Potter's report dated April 22, 2004:

> Mr. Germain stated that he had recently fired an employee, James E. Cardona, for stealing from him and downloading unauthorized files from his computer. Mr. Germain stated that he issued a trespass warning to Mr. Cardona through the court house and that the Sheriff's office had served Mr. Cardona with the warning. Mr. Germain stated that Mr. Cardona has entered the business at least two times since the trespass warning

was issued (B-Ex. 10).

Based on the foregoing, the Bar's complaint alleged that "respondent falsely informed the Leesburg Police Department that he had issued a trespass warning to Mr. Cardona through the courthouse and that the sheriff's office had served Mr. Cardona with the warning." After reviewing the evidence, the referee determined that he could not find that respondent intentionally misrepresented facts to Officer Potter by use of the terms "through the courthouse" and "the Sheriff's office had served Mr. Cardona with the warning" (ROR-A-12-A-13). The referee, however, did find that respondent's communications to Officer Potter had the obvious effect of advising the officer that Mr. Cardona had been lawfully warned and, therefore, could be arrested for trespassing onto the Lake Law Center property as stated in the April 20, 2004 warning letter (ROR-A-13). The referee determined that respondent failed to clarify that Mr. Cardona had the permission from the 2/3 owner of the Lake Law Center Property, Michael Norvell, to enter onto the property (B-Ex. 10; ROR-A-13). Consequently, the referee determined that by such omission, respondent violated Rule 4-8.4(d). Respondent has not presented any evidence to indicate that this was a new rule violation that was considered without adequate notice.

POINT III

THE REFEREE APPROPRIATELY EXERCISED HIS DISCRETION TO EXCLUDE EVIDENCE CONCERNING RESPONDENT'S ALLEGATIONS THAT MR. NORVELL EXPLOITED HIS ELDERLY CLIENT, VIRGINIA

MARCHEGIANI.

In his Initial Brief, respondent argues that the referee erred in refusing to admit respondent's evidence that Mr. Norvell exploited an elderly client, participated in her removal from life support, and acquired her estate. The referee in this matter properly utilized his discretion to determine that this evidence was irrelevant to the rule allegations filed against respondent, as well as to the disciplinary case in general. In his report, the referee stated that "after having been told that evidence of Norvell's alleged killing of a client was irrelevant and inadmissible at the hearing, Respondent continued to argue that subject matter in his closing argument" (ROR-A-23).

Even if the referee erred in excluding testimony concerning Mr. Norvell's dealings with Ms. Marchegiani, the record evidence is unequivocal. After thorough review and consideration of the final hearing transcript, the exhibits, the stipulated facts, respondent's unsworn communications on the merits, and written closing arguments, the referee found that no reasonable person would have feared that Mr. Norvell would kill, and that no reasonable person would have had a fear that would justify giving a false statement under oath (ROR-A-14-A-15).

In The Florida Bar v. Clement, 662 So.2d 690 (Fla. 1995), the Court held that the referee's exclusion of an attorney's wife's opinion about the attorney's sanity was harmless error. Although the testimony would have been relevant, the referee in Clement heard testimony that Clement's emotional state was not severe enough to

warrant involuntary hospitalization and that Clement was able to practice law. The referee further admitted a psychiatrist's notes and records and heard Janet Clement's lengthy testimony about her husband's behavior. The Court determined that "the referee thus had adequate evidence before him to determine Clement's competency." Id. at 697. The referee in this matter also had adequate evidence before him to determine that respondent did not have a reasonable fear that Mr. Norvell would kill him.

POINT IV

THE REFEREE'S RECOMMENDED DISCIPLINE OF A 91-DAY SUSPENSION IS APPROPRIATE GIVEN THE FACTS, CASE LAW, AND STANDARDS FOR IMPOSING LAWYER SANCTIONS.

The Bar submits that based on the available case law and the Florida Standards for Imposing Lawyer Sanctions, the appropriate level of discipline is a 91-day suspension from the practice of law. The referee recommended this discipline after considering the evidence, relevant case law, and aggravating and mitigating factors. As a general rule, the Court will not second-guess a referee's recommendation of discipline as long as the discipline is authorized under the Florida Standards for Imposing Lawyer Sanctions and has a reasonable basis in existing case law. The Florida Bar v. Spear, 887 So.2d 1242, 1246 (Fla. 2004).

In The Florida Bar v. Cibula, 725 So.2d 360 (Fla. 1999), an attorney was suspended for 91 days for misconduct, which included making misrepresentations to

the court. Cibula made misrepresentations about his income while testifying in a dissolution of marriage modification proceeding. The Court found that Cibula made intentional misrepresentations under oath and further stated, "[n]ot only does the law demand truthfulness under oath, but the obligations of our profession demand it." Id. at 365. The referee in this matter found that respondent engaged in misconduct similar to that of Cibula by making conflicting factual statements while under oath (ROR-A20).

Likewise, in The Florida Bar v. Lathe, 774 So.2d 675 (Fla. 2000), an attorney received a 91-day suspension for making an intentional misrepresentation to a judge on two separate occasions that he was unable to attend a deposition because another judge had ordered him to attend a pretrial conference. The referee found that Lathe's misrepresentations to the judge were "destructive to the legal system as a whole" and that his actions "also resulted in extraordinary time and expense to his adversary." Id. at 677.

In The Florida Bar v. Broida, 574 So.2d 83 (Fla. 1991), an attorney was suspended for one year for misconduct, which included misrepresenting facts to the court, personally attacking the integrity of multiple lawyers and judges with whom the attorney had come in contact, and unnecessarily delaying court proceedings by filing frivolous pleadings. The referee similarly found that respondent violated his Oath of Admission to The Florida Bar for failing to abstain from all offensive personality, that

he brought a frivolous pleading, that he knowingly made a false statement of material fact to a tribunal, and that he engaged in conduct in connection with the practice of law that was prejudicial to the administration of justice (ROR-A20-A21).

In recommending a 91-day suspension, the referee also considered respondent's prior discipline. Respondent received a public reprimand by court order dated November 13, 1997 for making disparaging remarks about opposing counsel and a judge and for failing to follow the rulings of a trial judge. Respondent's prior discipline involved the same type of misconduct that he committed in this disciplinary proceeding. This Court considers the attorney's previous disciplinary history and increases the discipline where appropriate for cumulative misconduct. The Florida Bar v. Heptner, 887 So. 1036, 1045 (Fla. 2004).

A 91-day suspension is also supported by the Florida Standards for Imposing Lawyer Sanctions, as outlined in the referee's report. Suspension is appropriate pursuant to Standard 6.12 when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being held, and takes no remedial action. Suspension is appropriate pursuant to Standard 6.22 when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. Finally, suspension is appropriate pursuant to Standard 8.2 when a lawyer has been publicly reprimanded for the same or similar conduct and engages in further

similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

In mitigation, the referee considered the absence of a dishonest or selfish motive relating to respondent's representation of his client in State v. Guerreo, respondent's personal or emotional problems, and his physical or mental disability or impairment. See Fla. Stds. Imposing Law. Sancs. 9.32(b), 9.32(c), and 9.32(h), respectively.

Aggravating factors found by the referee outweighed the degree of mitigation presented by respondent. As previously discussed, respondent engaged in cumulative misconduct involving multiple rule violations. This Court has held that multiple offenses are one factor that may justify an increase in the degree of discipline imposed. The Florida Bar v. Vining, 761 So.2d 1044, 1048 (Fla. 2000). The referee also found that respondent refused to acknowledge the wrongful nature of his conduct, quoting the following example from respondent's opening statement:

> And it's disgraceful that the Bar would take up with a convicted felon who had possession of a gun, who had obviously attacked a fellow attorney on numerous occasions, intimidating him and threatening him into selling him his interest – his interest. It's disgraceful that the Bar would take up with a person like that against Bar (TR-I p. 54 l. 1-8).

As a result of the foregoing, the referee considered respondent's prior discipline, respondent's pattern of misconduct, the existence of multiple offenses, and

respondent's refusal to acknowledge the wrongful nature of his conduct. See Fla. Stds. Imposing Law. Sancs. 9.22(a), 9.22(c), 9.22(d), and 9.22(g), respectively. It is also important to note that respondent is an experienced attorney who has been a member of The Florida Bar since May 31, 1995.

A judgment must be fair to society, fair to the respondent, and severe enough to deter others who may be tempted to become involved in like violations. Spear 887 So.2d at 1246, citing The Florida Bar v. Lord, 433 So.2d. 983, 986 (Fla. 1983). Respondent's misconduct in this matter should not be taken lightly. "This Court considers a lawyer who intentionally lies under oath to have committed an extremely serious offense." Cibula 725 So.2d at 364. A suspension of 91 days, as recommended by the referee, would sufficiently address respondent's misconduct and act as an effective deterrent.

POINT V

THE REFEREE APPROPRIATELY EXERCISED HIS DISCRETION IN CONCLUDING THAT RESPONDENT BE REQUIRED TO UNDERGO AN EVALUATION BY A BAR-APPROVED MENTAL HEALTH PROFESSIONAL AND UNDERGO ANY RECOMMENDED TREATMENT AND/OR COUNSELING.

In cases where this Court has upheld a recommendation that an attorney undergo a mental health evaluation, the attorney had either not challenged the requirement, or the evidence was such that the attorney would have been placed on notice that mental health was an issue and supported the recommendation of an

evaluation. The Florida Bar v. Centurion, 801 So.2d 858, 863 (Fla. 2000). The Bar maintains that the evidence in this proceeding was such that respondent was placed on notice that mental health was an issue and supported the recommendation of an evaluation.

Respondent received ample notice that the Bar was seeking to discipline him for misconduct that included failing to abstain from offensive personality. The Bar's complaint clearly alleged that probable cause was found against respondent for engaging in contentious personal disputes with a former business partner and a former employee. The rule allegations brought against respondent primarily focused on his personal behavior rather than client neglect. Even though respondent was on notice of this type of misconduct, he continued the same pattern of disruptive and unethical behavior throughout the course of this disciplinary proceeding. During the sanction hearing, the referee noted that his recommendation for a mental health evaluation was "based not only on what I observed of [respondent] today and before today, but on the specific things that the Bar has alleged that he did" (TR-II p. 58 l. 23-25).

The referee, who was in the best position to assess respondent's demeanor and credibility, made the following statements in his final report:

> The evidence in this matter, together with the manner in which Respondent conducted himself during these proceedings, has convinced me that Respondent has mental health issues that affect his ability to remain objective and to accurately perceive simple events that are not consistent with his beliefs.

> For example, on several occasions, I sustained the Bar's objections to Respondent's testimony as irrelevant. He immediately returned to the excluded subject matter. Also, after I entered the interim report finding that no "reasonable person would have a fear that would justify giving a false statement under oath," Respondent continued to repeat his evidence and to argue that his conduct was justified (ROR-A24).

As the referee noted, "[t]he record contains numerous other examples of respondent's unwillingness or inability to accept – and conform his conduct to – many of the realities he confronted in this proceeding as well as the events that led to this proceeding" (ROR-A25).

In The Florida Bar v. Adams, 641 So.2d 399 (Fla. 1994), the Court upheld the referee's recommendation that an attorney undergo a mental health evaluation after he falsely accused other attorneys of suborning perjury. The referee in Adams found that there was absolutely no evidence from which Adams could have reasonably suspected that the attorneys suborned perjury. Similarly, the referee in this proceeding found that no reasonable person would have feared that Mr. Norvell would kill, and that no reasonable person would have had a fear that would justify giving a false statement under oath.

In The Florida Bar v. Sayler, 721 So.2d 1152 (Fla. 1998), the referee recommended that an attorney undergo a mental health evaluation after he sent a threatening letter to opposing counsel. Sayler petitioned for review as to each of the referee's findings as to guilt, discipline, and the assessment of costs. The Court

ultimately approved the referee's recommendation that Sayler be placed on six months' probation with the additional condition that he must, at his own expense, undergo a psychological evaluation through Florida Lawyers Assistance, Inc. and obtain any recommended treatment. Id. at 1155.

Based on the foregoing, the Bar maintains that the referee appropriately exercised his discretion in concluding that respondent be required to undergo an evaluation by a bar-approved mental health professional and undergo any recommended treatment and/or counseling.

CONCLUSION

Respondent displayed unethical, unprofessional and offensive conduct during his encounters with Mr. Norvell and Mr. Cardona. Likewise, his conduct before the court related to those matters was clearly unethical, unprofessional, and offensive. It cannot be said strongly enough that respondent has violated rules that go to the very heart of our judicial process. He made intentional misrepresentations, filed a frivolous pleading with the court, and failed to abide by the high standards expected of attorneys in this State. In each instance, the costs to our legal system and to the public have been great. Respondent's conduct must be addressed in order to prevent similar

conduct by respondent in the future.

WHEREFORE, The Florida Bar submits that this Court should affirm the referee's recommendations of a 91-day suspension with required mental health evaluation with treatment and/or counseling if recommended, one year period of probation during which any recommended treatment and counseling shall continue upon reinstatement, and payment of costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by First Class Mail to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by electronic filing to the Clerk of the Court; a copy of the foregoing has been furnished by First Class Mail to Mark F. Germain, Respondent, 2305 Hutchinson Avenue, Leesburg, Florida 34748; and a copy of the foregoing has been furnished by First Class Mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this ____day of _____, 2006.

Respectfully submitted,

_____
JoAnn Marie Stalcup
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE

Undersigned counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font.

_____

JoAnn Marie Stalcup
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARK F. GERMAIN,

Respondent.
_____/

Case No. SC05-947
[TFB Nos. 2004-31,700(05B); and 2004-32,067(05B)]

Case No. SC05-1096
[TFB No. 2005-31,218(05B)]

APPENDIX TO COMPLAINANT'S ANSWER BRIEF

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