IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
v. Case No.: SC05-947
[TFB Nos.: 2004-31,700(05B)
2004-
32,067(05B)
MARK F. GERMAIN,
Respondent. Case No.: SC05-1096
[TFB Nos.: 2004-31,218(05B)
_____/

RESPONDENT'S AMENDED INITIAL BRIEF

Respectfully submitted by:

MARK F. GERMAIN
Attorney at Law
2305 Hutchinson Avenue
Leesburg, Florida 34748
(352) 787-8833
Florida Bar No.: 051039

This ___ day of August, 2006

TABLE OF CONTENTS

ISSUES TO BE REVIEWED

1. **THE REFEREE ERRED IN CONCLUDING THAT THE PETITION FOR INJUNCTION FOR PROTECTION AGAINST REPEAT VIOLENCE WAS PROPERLY DISMISSED WITHOUT AN EVIDENTIARY HEARING FOR FAILURE TO STATE A CAUSE OF ACTION.** Final Report at p. 8.

2. **THE REFEREE ERRED IN CONCLUDING THAT BECAUSE RESPONDENT'S PETITION FOR INJUNCTION WAS FOUND TO BE DEVOID OF MERIT FOR FAILING TO ALLEGE ANY ACT OF *VIOLENCE*, IT WAS NECESSARILY A VIOLATION OF THE RULES REGULATING THE FLORIDA BAR.** Final Report at p. 19.

3. **THE REFEREE ERRED IN FINDING THAT THERE WAS "NO EVIDENCE" THAT ATTORNEY BUZZ BOWEN WAS JUDGE POPE'S CAMPAIGN MANAGER.** Final Report at p. 9.

4. **THE REFEREE ERRED IN CONCLUDING THAT RESPONDENT VIOLATED RULE 4-8.4(D) BY NOT ADVISING OFFICER POTTER THAT CARDONA HAD THE CONSENT OF NORVELL, THE 2/3 OWNER, TO COME ON THE PROPERTY.** Final Report at p. 13.

5. **THE REFEREE ERRED IN CONCLUDING THAT THE RESPONDENT'S 18 JUNE 2004 AFFIDAVIT UNDER OATH, (I.E., THAT NOVELL WAS NOT IN POSSESSION OF A GUN IN THE OFFICE,) CONTAINS FACTUAL STATEMENTS IN DIRECT CONFLICT WITH FACTUAL STATEMENTS MADE UNDER OATH IN THE PETITION FOR INJUNCTION AGAINST REPEAT VIOLENCE FILED 21 APRIL 2004 AGAINST MICHAEL C. NORVELL AND THE 23 JULY 2004 MOTION FOR RECONSIDERATION. (I.E., THAT NOVELL WAS IN POSSESSION OF A GUN IN THE OFFICE.)** Final Report at p. 14.

6. **THE REFEREE ERRED IN FINDING THAT NO REASONABLE PERSON WOULD HAVE FEARED THAT NORVELL WOULD KILL, THAT NO REASONABLE PERSON WOULD HAVE HAD A FEAR THAT WOULD JUSTIFY GIVING A FALSE STATEMENT UNDER OATH, AND THAT NORVELL'S VIOLENCE AGAINST THE RESPONDENT DECLINED OVER TIME.** Final Report at p. 14.

7. **THE REFEREE ERRED IN CONCLUDING THAT RESPONDENT WILLINGLY NEGOTIATED WITH NORVELL, THAT NORVELL'S DEATH THREATS AGAINST RESPONDENT WERE NOT CREDIBLE AND THAT RESPONDENT DID NOT SIGN THE 18 JUNE 2004 AGREEMENT UNDER DURESS OR FEAR OF DEATH.** Final Report at p. 15.

8. **THE REFEREE ERRED IN REFUSING TO ADMIT EVIDENCE OF NORVELL'S EXPLOITATION OF HIS ELDERLY CLIENT, VIRGINIA MARCHEGIANI, HIS PARTICIPATION IN HER REMOVAL FROM LIFE SUPPORT AND HIS ACQUISITION OF HER $400,000 ESTATE.** Final Report at p. 23.

9. **THE REFEREE ERRED IN FINDING THAT RESPONDENT MADE DISPARAGING REMARKS AGAINST NORVELL AND CARDONA.** Final Report at p. 11.

10. **THE REFEREE ERRED IN FINDING THAT THE FACTS WHICH RESPONDENT CITED IN THE MOTION TO DISQUALIFY JUDGE AND MOTION TO SET ASIDE AMENDED ORDER WERE DISPARAGING TO JUDGE POPE.** Final Report at p. 22.

11. **THE REFEREE ERRED IN FINDING THAT THE RECOMMENDATION OF A 91 DAY SUSPENSION IS CONSISTENT WITH FLORIDA BAR V. JOHN WESLEY ADAMS, 641 SO.2D 399 (FLA. 1994)**. Final report at p. 21.

12. **THE REFEREE ERRED IN CONSIDERING RESPONDENTS REFUSAL TO ACKNOWLEDGE WRONGFUL NATURE OF**

CONDUCT AS AN AGGRAVATING FACTOR. Final Report at p. 23.

13. **FINALLY, THE REFEREE ERRED IN CONCLUDING THAT THE RESPONDENT "BE REQUIRED TO UNDERGO AN EVALUATION BY A BAR-APPROVED MENTAL HEALTH PROFESSIONAL AND UNDERGO ANY RECOMMENDED TREATMENT AND/OR COUNSELING."** Final Report at p. 21.

14. **THE REFEREE ERRED IN CONCLUDING THAT RESPONDENT VIOLATED THE RULES FOR INTERRUPTING JUDGE MARK J. HILL.**

15. **THE REFEREE ERRED IN NOT CONSIDERING FACTS IN MITIGATION.**

TABLE OF CITATIONS..... i

STATEMENT OF THE CASE AND OF THE FACTS..... 1

SUMMARY OF ARGUMENT..... 8

ARGUMENT..... 12

CONCLUSION..... 39

RECORD APPENDIX

A. Stipulation as to Facts

TABLE OF CITATIONS

Barnes v. State, 588 So.2d 1076 (Fla. 4th DCA 1991) 35

Barnes v. State, 588 So.2d 1076 (Fla 4th DCA 1991) citing **Florida Ventilated Awning Co. v. Dickson**, 67 So.2d 218 (Fla.1953) 35

Baumgartner v. Baumgartner, 693 So.2d 84 (5th DCA 1997) 17

Brand v. J. Elliott, 610 So.2d 37 (5th DCA 1992) 12

Brown v. Pierce, 74 U.S. 205, (1868) 26

Bundrage v. State, 814 So.2d 1133 (Fla. 2nd DCA 2002) 20

Curry v. State, 811 So.2d 736 (4th DCA 2002**)** 16

Darrow v. Moschella, 805 So.2d 1068 (Fla. 4th DCA 2002) 16

Florida Bar v. Adams, 641 So. 2d 399 (Fla. 1994) 29, 32

Florida Bar v. Batista, 846 So.2d 479 at 484 19

Florida Bar v. Batman, 511 So.2d 558 (Fla.1987) 30

Florida Bar v. Carricarte, 733 So. 2d 975, 978 (Fla. 1999) 32

Florida Bar v. Centurion, 801 So.2d 858 (Fla. 2000) 33

Florida Bar v. Corbin, 701 So.2d 334 (1997) 10, 31

Florida Bar v. Fatolitis, 546 So.2d 1054 (Fla.1989) 30

Florida Bar v. Kaplan, 576 So.2d 1318 (Fla.1991) 31

Florida Bar v. Lipman, 497 So.2d 1165, 1168 (Fla.1986) 31

Florida Bar v. McLawhorn, 535 So.2d 602 (Fla.1988) 30

Florida Bar v. Morrison, 496 So.2d 820 (Fla.1986) 30

Florida Bar v. Oxner, 431 So.2d 983 (Fla.1983) 31

Florida Bar v. Poplack, 599 So. 2d 116 (Fla. 1992) 32

Florida Bar v. Riskin, 549 So.2d 178 (Fla.1989) 31

Florida Bar v. Sax, 530 So.2d 284 (Fla.1988) 30

Florida Bar v. Sayler, 721 So. 2d 1152 (Fla. 1998) 32

Florida Bar v. Shapiro, 456 So.2d 452 (Fla.1984) 30

Florida Bar v. Story, 529 So.2d 1114 (Fla.1988) 30

Florida Bar v. Wright, 520 So.2d 269 (Fla.1988) 30
Florida Statute 38.10 29
Florida Statute 57.105 7
Florida Statute 741.30 17
Florida Statute 784.011 24
Florida Statute 784.046 12-16
Florida Statute 784.048 15
Gregory v. Rice, 727 So.2d 251 (Fla. 1999) 35
Johnson v. State, 685 So.2d 1369 (Fla. 2nd DCA 1996) 21
Lewis v. Lewis, 689 So.2d 1271 (1st DCA 1997) 8, 16
Merrill Lynch Trust Co. V. Alzheimer's Lifeliners Ass'n, Inc., 832 So.2d 948 (Fla. 2nd DCA 2002) 34
Prior v. State, 562 So.2d 864 (Fla. 5th DCA 1990) 37
R. Regulating Fla. Bar 4-3.1 14
Ray v. State, 352 So.2d 110 (Fla. 1st DCA 1977) 35
Rowe v. Wille, 415 So.2d 79, 81 (Fla. 4th DCA 1982) 35
Segui v. Nester, 745 So.2d 591 (5th DCA 1999) 8, 12
Sewell v. State, 443 So.2d 164 (Fla. 5th DCA 1983) 35
Stalking the Problems with Stalking Laws: The Effectiveness of Florida Statute Section 784.048, 45 FLLR 609 at 614 (Sept. 1993) 15
Stevens v. State, 547 So.2d 279 (Fla. 5th DCA 1989) 11, 35
Tejada-Batista v. Fuentes-Agostini, 267 F. Supp.2d 156 (D. Puerto Rico 2003) quoting **Tang v. R.I. Dep't of Elderly Affairs,** 163 F.3d at 13 citing **Andrade v. Jamestown Hous. Auth.,** 82 F.3d 1179, 1192 (1st Cir. 1996) 21
United States v. Donofrio, 450 F.2d 1054 (5th Cir. 1972) 20
Utley v. Baez-Camacho, 743 So.2d 613 (5th DCA 1999) 12
Wilcox v. State, 522 So.2d 1062 (Fla. 3rd DCA 1988) 21

The Court's jurisdiction is based on article V, section 15, Florida Constitution.

The Respondent has the burden to demonstrate that the Final Report of Referee is erroneous, unlawful, or unjustified.

The standard of review is that the referee's findings of fact and conclusions concerning guilt must be supported by competent, substantial evidence in the record.

Implicit in this standard is the requirement that the referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt.

STATEMENT OF FACTS

Case No.: SC05-947

Respondent was the victim of violence, (three separate batteries), perpetrated by convicted felon / attorney Michael C. Norvell. These attacks took place in July 2002 and in March and April of 2004. Final Report at page 15. Respondent and NORVELL were co-owners and shared offices in a building known as the Lake Law Center. Stipulation as to Facts at paragraphs 4 and 6 at Appendix “A.”

NORVELL wanted to buy out the Respondent's interest in the Lake Law Center. Final Report at page 15 and Stip. at para. 38. Respondent renovated the building and property, investing hundreds of hours and thousands of dollars doing the electrical, carpentry, masonry, insulation, painting, curbing , parking lot resurfacing, and landscaping necessary to create Class "A" office space. Tr. at page 19, line 11 to page 20, line 13. The Lake Law Center was worth between $600,000 and $700,000 after the renovations. Tr. at page 276.

Respondent did not want to sell his interest in the Lake Law Center or buy NORVELL's interest. NORVELL was only offering Respondent what he paid for his interest, ie.: $100,000. Later, NORVELL offered $140,000. Respondent still did not want to sell. NORVELL then escalated the violence, assaulting and battering the Respondent with a weapon.

NORVELL is not unknown to the Supreme Court of Florida. He is a convicted felon who was sentenced to five (5) years in Federal prison for drug offenses. Moreover, NORVELL has been suspended from the practice of law twice for unethical conduct; once for nearly a decade and on another occasion for almost a year. See Stip. as to Facts at para. 9. On June 23, 2005, the Florida Supreme Court approved a guilty plea and consent judgment against NORVELL for "**offensive personality**" for the violent attacks on the Respondent and calling

the Respondent a “Chihuahua” in the local press.

The Referee’s findings that NORVELL battered the Respondent three times is based on the following undisputed record evidence: The first time, NORVELL entered Respondent’s office and suddenly began punching Respondent in the head, face and neck. At the hearing, NORVELL testified that he doesn’t remember how many times he punched the Respondent. Tr. of Hearing on October 28, 2005, at page 170. NORVELL weighs 260 pounds. Respondent weighs only 158. Tr. at page 27. The second time, NORVELL entered Respondent’s office, suddenly grabbed Respondent’s tie and pulled Respondent across the corner of his desk. The tie was so tight around Respondent’s neck that he had to cut it off with a scissor. Tr. at page 26, 27. (A picture of the tie is entered in evidence.) The third time NORVELL attacked Respondent, he pushed him down into an aircraft maintenance ladder in the warehouse area of the Lake Law Center injuring Respondent’s left arm. Tr. at page 27. Leesburg Police Officer Gabriel White wrote in his report that he “saw the large contusion on Mr. Germain’s arm along with several slight abrasions.” Stip. at para. 11. NORVELL then attacked Respondent with a four foot wooden mop handle while yelling, “I’m going to bash your head in.” At one point, NORVELL actually brought the stick up across Respondent’s throat as he tried to push Respondent into a wall. Tr. at page 27, 28.

Judge Pope found that "Norvell had assaulted Germain" and that Germain "had been battered previously by Mr. Norvell." Stip. at para. 38.

NORVELL, a convicted felon, admitted to having a gun in his office. Tr. at page 184, 185, 186 and 192.

On March 17, 2004, Respondent fired James Cardona, a Colombian and paralegal seeking admission to the Florida Bar. Stip. at para. 13 and 14. For approximately 16 years, CARDONA had outstanding warrants for his arrest in Alabama for failing to appear in court after being criminally cited for Driving Under the Influence in 1986. Despite the warrants for his arrest, CARDONA fled Alabama and took up residence in Florida. CARDONA was arrested for a third Driving Under the Influence with property damage / personal injury. Stip. at paras. 13 and 15. CARDONA had continuing legal problems in Alabama and engaged in misconduct during the very short time that he worked for Respondent.

On April 17, 2004, Respondent filed a report with the Leesburg Police Department indicating that NORVELL had physically attacked him. Leesburg Police Officer Gabriel White stated in his reports that he saw the Respondent's injuries. Stip. at paragraphs 10 and 11.

On April 19, 2004, NORVELL "hired" CARDONA and entered into Respondent's office, removing Respondent's files from the office. NORVELL

wanted Respondent to sell him the furniture in that office. NORVELL sat in Respondent's chair behind Respondent's desk in front of Respondent's computer. Stip. at para. 12. CARDONA reported to work at the Lake Law Center and entered into the office because he had been "hired" by NORVELL. An argument ensued between Respondent and CARDONA. The Respondent physically escorted CARDONA off the property. Stip. at para. 16.

On April 20, 2004, Respondent delivered a "NO TRESPASS WARNING" to CARDONA's residence. CARDONA ignored the warning since he had been "hired" by NORVELL. Stip. at para. 17.

On April 21, 2004, Respondent filed Petitions for Injunction for Protection against NORVELL and CARDONA. That same day CARDONA filed a Petition for Injunction for Protection against Respondent. All three Petitions for Injunction (Germain v. Norvell, Germain v. Cardona and Cardona v. Germain) were **consolidated** for hearing and set before Judge Willard Ira Pope. The hearing was originally set for May 3, 2004, however, it was postponed until June 23, 2004.

The Petition for Injunction for Protection against NORVELL alleged the three violent attacks and that NORVELL had a "hand gun with ammunition in our office." Stip. at para. 20 and the Bar's Composite "A."

The Petition for Injunction for Protection against CARDONA alleged

that CARDONA was stalking Respondent, among other things. Stip. at para. 22 and the Bar's Composite "E.".

On June 18, 2004, pursuant to a Stipulation and Agreement to settle all matters between Respondent and NORVELL, Respondent executed a sworn affidavit wherein he stated that "after some thought," he recalled that the pistol was actually in possession of NORVELL's paralegal and that the paralegal had the small hand gun at her desk for protection. Stip. at paragraphs 29 and 30.

Despite being a convicted felon prohibited from owning or possessing a firearm, NORVELL confessed under oath that he gave his paralegal permission to bring the gun into his office, that he saw the gun, that he knew where it was kept, that it was not under lock and key and that he had the ability to reduce the gun to his actual possession. See Tr. at page 184, 185, 186 and 192.

On June 21, 2004, CARDONA, through an attorney, filed an Amended Motion to Dismiss the Petition for Injunction for Protection against him and filed an Amended Motion for Sanctions seeking $30,390 in attorney's fees. Stip. at para. 31.

At the hearing on June 23, 2004, Judge Pope did not let the Respondent present witnesses or evidence and did not let the Respondent testify. Judge Pope declined to enter an Injunction for Protection against CARDONA. Judge Pope

reserved ruling on CARDONA's motion for attorney's fees. Stip. at paragraphs 32, 33, 34 and 35, and Bar's Exhibit "G."

While CARDONA worked for Respondent, Judge Pope's campaign Host Committeeman, attorney Lennon E. BOWEN assisted CARDONA and accompanied CARDONA to a hearing before the Florida Board of Bar Examiners that was inquiring about CARDONA's past criminal records in Alabama and Florida. Stip. at paragraphs 40 and 42.

On July 2, 2004, while Judge Pope was considering the Respondent's Petition for Injunction for Protection and CARDONA's motion for $30,390 in attorney fees from Respondent, campaign material approved by Judge Pope was sent to Respondent soliciting a campaign contribution. Stip. at para. 41. Respondent was invited to a "Funraiser" for Judge Pope on July 13, 2004. Because of the appearance of impropriety, Respondent did not attend.

The next day, on July 14, 2004, shortly before the election in August, in an Amended Order, Judge Pope granted CARDONA's motion for attorney fees, based upon the provisions of Fla. Stat. 57.105. Stip. at para. 37.

SUMMARY OF THE ARGUMENT

In case no.: SC05-947, the Respondent was a victim of violence and stalking perpetrated by a convicted felon, NORVELL, and a fugitive from justice, CARDONA. An injunction for protection was issued against NORVELL but not CARDONA.

It is a violation of the Petitioner's constitutional and statutory right of due process to dismiss a Petition for Injunction for Protection against Repeat Violence without an evidentiary hearing. **Segui v. Nester**, 745 So.2d 591 (5th DCA 1999).

The Referee did not acknowledge that according to the statute, " 'violence' means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, *stalking*, aggravated *stalking*..." F.S. 784.046(1)(a) and that " 'repeat violence' means two incidents of violence or '*stalking*'... " F.S. 784.046(1)(b). The Referee did not recognize that *stalking* constitutes grounds for the issuance of an Injunction for Protection Against Repeat Violence.

Moreover, the statute does not require that the Petitioner be represented by an attorney and the statute does not permit an award of attorney fees to the Respondent of the Petition for Injunction for Protection if the Petition is dismissed. **Lewis v. Lewis**, 689 So.2d 1271 (1st DCA 1997). In the instant case, Judge Pope

awarded attorney fees to the respondent of the Petition for Injunction knowing the respondent, CARDONA, was asking for $30,390 in attorney's fees. Awarding attorney fees to respondents will have a chilling effect on victims of violence who seek protection from the Court. Filing a Petition for Injunction for Protection that fails to state a cause of action in *not* a sanctionable act.

Attorney NORVELL's possession of the gun in the office was constructive possession, if not actual possession. Florida law is clear that a convicted felon's possession of a firearm may be either actual or constructive.

The only relevant and material factual statement of any import in the Respondent's three statements is that NORVELL had a gun in the office and Respondent proved that at the hearing. NORVELL confessed to having a gun in the office. Therefore, the Respondent did not make a false statement under oath.

Considering that NORVELL is a convicted felon, that he had a gun in the office, that he assaulted and battered the Respondent on three separate occasions and that he threatened to kill the Respondent three times, it was reasonable for the Respondent to be in fear of his life or bodily harm.

The Respondent did not make disparaging remarks against NORVELL and CARDONA because felons and fugitives are not a protected class and their criminal records are relevant when a victim is seeking protection from them in the

Court. People are naturally afraid of felons and fugitives because they have demonstrated a propensity to violate the law.

The Respondent did not make disparaging remarks against Judge Pope because the statute *requires* that the affidavit attached to the motion "shall state the facts and the reasons for the belief that such bias or prejudice exists..." Fla. Stat. 38.10.

The recommendation of a 91 day suspension is not justified nor consistent with previous disciplinary cases. The instant case is distinguishable because the Respondent was the victim of violence.

It was improper for the referee to consider in aggravation the fact that the Respondent refused to acknowledge the wrongful nature of his conduct. The Respondent's claim of innocence cannot be used against him. **Florida Bar v. Corbin**, 701 So.2d 334 (1997).

The Bar did not give proper written notice to the Respondent that the Respondent's mental health was at issue or that it would be seeking a mental health evaluation and the Respondent was not given an opportunity to present evidence at the sanctions hearing to refute that recommendation by the Referee. The facts of the case were not such that the Respondent would be on notice that mental health was an issue.

In case no.: SC05-1096, the Respondent did not intentionally disrupt a tribunal because there was no finding in Judge Hill's Order that Respondent's conduct was a willful act *calculated* to hinder the orderly functions of the court and Judge Hill *did* enter an Order of Dismissal upon reconsideration. **Stevens v. State**, 547 So.2d 279 (Fla. 5th DCA 1989). The Respondent was merely trying to protect his client's rights. When Respondent did interject, he did so professionally and respectfully saying, "Your Honor, before we start if I may?" and "Your Honor, if I may say..." Finally, unintentionally interrupting the Judge is *not* a sanctionable act.

In mitigation the Referee did not consider that the Respondent paid $15,000 to CARDONA to settle the matter of Judge Pope's award of attorney fees nor the immediate letters of apology to Judge Hill for interrupting the court. The referee did not give sufficient weight to the mitigating factors that were cited in the Final Report, especially *absence of a dishonest or self motive* and the *personal or emotional problems* experienced by the Respondent as the result of being the victim of violence.

ARGUMENT

1. The Protective Injunction against Repeat Violence statute at F.S. 784.046(5) states that, "Upon the filing of the petition, the court shall set a hearing to be held at the earliest possible time." The "hearing" required in the statute has been interpreted by the courts to mean an evidentiary hearing.

In **Segui v. Nester**, 745 So.2d 591 (5th DCA 1999), Segui appealed the dismissal of her Petition for Injunction. The Fifth DCA reversed "because the trial court dismissed the petition without providing an evidentiary hearing." In **Brand v. J. Elliott**, 610 So.2d 37 (5th DCA 1992), the trial court erred by failing to afford the parties a full hearing as required by statute providing for protective injunction. In **Utley v. Baez-Camacho**, 743 So.2d 613 (5th DCA 1999), the Fifth DCA reversed a Final Judgment of Injunction for Protection Against Repeat Violence because Appellant was denied a due process hearing on the merits.

> **"The witnesses should be sworn, each party should be permitted to call witnesses with relevant information, and cross-examination should be permitted. The court cannot determine whether the "fear is reasonable" unless it first determines the facts. Unless the facts are stipulated to, they must be determined the old fashioned way. They were not in this case. REVERSED." Utley v. Baez-Camacho,** 743 So.2d 613 (5th DCA 1999).

The Order setting the Petitions for a hearing signed by the Honorable Mark J. Hill on April 21, 2004, specifically stated that the "Petitioner and the Respondent are ordered to **appear and testify** at the hearing **on the Petition for Injunction** for Protection against Domestic, Repeat or Dating Violence..." The Order went on to say that "Petitioner may amend or supplement the Petition at any time to state further reasons why a *Temporary* Injunction should be ordered which would be in effect until the hearing scheduled below." Therefore, the Respondent, as the Petitioner in the Injunction case, was only required to amend the Petition if he sought a *Temporary* Injunction against CARDONA until the hearing. See first page of Exhibit B of Respondent's Motion to Dismiss.

Finally, our society and system of justice makes a distinction between a "plaintiff" seeking monetary damages and a "petitioner" seeking protection from the Courts. The Injunction statute at F.S. 784.046 does not require that a petitioner be represented by an attorney, it does not allow attorney fees to the respondent if the Petition is denied or dismissed and it requires a full evidentiary hearing "at the earliest possible time."

A Petition for Injunction for Protection Against Repeat Violence is NOT susceptible to a Motion to Dismiss. **THE PETITIONER HAS THE RIGHT TO A FULL EVIDENTIARY HEARING** *before* the petition can be denied. To

dismiss without an evidentiary hearing, as in this case, is a violation of the Petitioner's constitutional and statutory right of due process.

2. The Petition was not frivolous. According to the comments at rule 4-3.1, meritorious claims and contentions,

> **"The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law."**

The Referee did not find that the Respondent filed the Petition primarily for the purpose of harassing or maliciously injuring a person or that Respondent was unable to make a good faith argument on the merits.

Moreover, the Referee did not acknowledge that according to the statute, " 'violence' means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, *stalking*, aggravated *stalking*..." F.S. 784.046(1)(a) and that " 'repeat violence' means two incidents of violence or '*stalking*'... " F.S. 784.046(1)(b). The Referee did not recognize that

stalking constitutes grounds for the issuance of an Injunction for Protection Against Repeat Violence.

The Petition against CARDONA laid out in paragraphs 4 and 5 facts which constituted stalking. For instance, Respondent stated that CARDONA was "sneaking into my office at night and early morning, pilfering office resources and engaging in the unauthorized practice of law from my facility," "He downloaded my files for his own use. He improperly used my computer and printer for his own profit," "when I asked him to leave he became belligerent...," "I asked him not to return," "I found him (CARDONA) in his old office tampering with my computer and attorney files," "CARDONA vows to return and enter into my building despite several subsequent conversations and a NO TRESPASS WARNING which he received and ignored," and "CARDONA is stalking me and is trying to sabotage my law practice." Stip. at para. 22 and the Bar's Composite "E.".

None of these acts had any legitimate purpose and caused Respondent substantial emotional distress. CARDONA engaged in a course of conduct which the Respondent considered "Stalking" pursuant to the definitions at Florida Statutes 784.046(1) and 784.048(1). CARDONA was an ex-employee who refused to stay away, trespassed into Respondent's office and tampered with Respondent's computer and attorney files.

According to **Stalking the Problems with Stalking Laws: The Effectiveness of Florida Statute Section 784.048**, 45 FLLR 609 at 614 (Sept. 1993),

> "One study has shown that 38% of stalking victims are ordinary citizens, 13% are *former employers* or other professionals..."

The stalking statute was intended to fill gaps in the law by criminalizing contact that fell short of assault and battery. **Curry v. State**, 811 So.2d 736 (4th DCA 2002).

Moreover, Judge Pope testified that he was not aware that chest bumping, such as CARDONA did to the Respondent, is considered an "incident" of violence pursuant to **Darrow v. Moschella,** 805 So.2d 1068 (Fla. 4th DCA 2002). Tr. at p. 138, line 23 - p.140, line 8.

Respondent sought relief that was offered by the Legislature to protect victims from stalking. The Petition stated a cause of action for an Injunction and at the very least, entitled Respondent to the evidentiary hearing required by the statute at 784.046(5).

The statute does not require that the Petitioner be represented by an attorney and the statute does not permit an award of attorney fees to the respondent of the Petition for Injunction for Protection.

In **Lewis v. Lewis**, 689 So.2d 1271 (1st DCA 1997), the appellate court denied the request for attorney fees because there was no statutory authorization to grant such fees as part of a proceeding brought pursuant to the domestic violence Injunction statute at Florida Statute 741.30.

In **Baumgartner v. Baumgartner**, 693 So.2d 84 (5th DCA 1997), our District Court of Appeals held that,

> "the cause of action created in section 741.30 does not provide for an award of attorneys' fees. Moreover, **the statute clearly contemplates a streamlined *pro se* proceeding**."

The Court went on to say that,

> "the general rule is that an award of attorneys' fees is in derogation of the common law and is allowed only when provided for by contract or statute...," and that;
>
> "We cannot imply a right to attorneys' fees under this statute, especially given the legislature's efforts to minimize the involvement of attorneys in its enforcement...," and that;
>
> "Nevertheless, the power to amend this statutory cause of action belongs to the legislature."

The same logic applies to the repeat violence Injunction statute.

3. Two of BOWEN's assistants, Marsha Arnold and Elaine Pratt, believed that BOWEN was Judge Pope's campaign manager. Arnold testified that Pratt told her that BOWEN was Judge Pope's campaign manager. She also testified that she "could have" told the Respondent that BOWEN was Judge

Pope's campaign manager and that BOWEN could receive campaign contributions on Judge Pope's behalf. Tr. at page 232, lines 2- 22.

Finally, does it really matter if BOWEN held the title of "campaign manager" or "host committeeman?" The relevant points are that BOWEN was intimately involved in Judge Pope's campaign, that BOWEN could receive campaign contributions on Judge Pope's behalf, that Judge Pope's campaign solicited the Respondent for a contribution while the Respondent's Petition for Protection was being considered by Judge Pope, that BOWEN was intimately involved in CARDONA's defense in front of the Florida Board of Bar Examiners, having accompanied CARDONA to the Bar hearing, and that CARDONA was asking Judge Pope for $30,390 in attorney fees from the Respondent. Stip. at paragraphs 31, 39, 40, 41, and 42.

These facts established sufficient grounds for the Respondent to ask, in good faith, for Judge Pope's disqualification.

4. Respondent was present when NORVELL told Officer Potter that he invited CARDONA to work for him. Officer Potter's report indicates that "Mr. Norvell stated that he owns 2/3 of the business and that Mr. Cardona is now an employee of his and has the right to be on the premises." Last pages of Bar's Composite "F." There was no need for Respondent to reiterate NORVELL's

argument to Officer Potter as all three were present at the same time.

Moreover, this was not an allegation made by the Bar in the complaint and the Referee cannot find the Respondent guilty of a violation of a rule that was not alleged by the Bar. "A rule violation cannot be prosecuted during the same trial unless it is within the allegations of the Bar's complaint." **The Florida Bar v. Batista**, 846 So.2d 479 at 484. The Respondent was not given an opportunity to refute that conclusion because it was never brought up as an issue.

Finally, the Respondent did seek to address the issue of Officer Potter at the sanction hearing on February 15, 2006, but the Referee would not allow it saying that the Respondent was found not guilty of that allegation. Sanctions hearing Tr. at page 50, line 7.

5. The only relevant and material factual statement of any import in the documents at issue is that NORVELL had a gun in his office and Respondent proved that NORVELL had a gun in his office at the hearing. NORVELL confessed to having a gun in his office. See Tr. at page 184, 185, 186 and 192. Therefore, the Respondent did not make any false statement under oath.

The fact that Respondent stated in the 18 June 2004 affidavit "[t]hat after some thought, I recall that the pistol was actually in possession of the office paralegal, Rebecca S. Skipper and not Michael C. Norvell," is really of no

significance because as a convicted felon, if NORVELL's employee had a gun in his office with his knowledge and consent and he was able to reduce the gun to his actual possession then NORVELL had possession of the gun in the office.

The Respondent stating under duress and the threat of death by NORVELL that the gun was not in NORVELL's possession but his paralegal's possession means nothing and is not contradictory or false. NORVELL trying to blame the paralegal for the presence of the gun in his office was naive, cowardly and actually a confession to the crime of possession of a firearm by a convicted felon.

THERE WAS A GUN IN THE OFFICE WITH THE KNOWLEDGE AND CONSENT OF A CONVICTED FELON WHO COULD REDUCE THE GUN TO HIS ACTUAL POSSESSION AT ANY TIME.

NORVELL's possession of the gun in his office was constructive possession, if not actual possession. Florida law is clear that a convicted felon's possession of a firearm may be either actual or constructive.

"A possessive offense may be proved by evidence of *actual or constructive possession.*" "Thus, evidence of past conduct, even prior to the passage of the statute, was relevant to show that appellant had knowledge of the presence of the firearms at the bar and the *ability to reduce them to actual possession*." **United States v. Donofrio,** 450 F.2d 1054 (5th Cir. 1972). (Emphasis mine.)

"Possession of a firearm by a convicted felon can be proven either by an actual or a constructive possession theory." **Bundrage v. State,** 814 So.2d 1133 (Fla. 2nd DCA 2002).

"Possession may be either actual or constructive." "'Constructive possession' of firearm exists where *accused knows of presence of prohibited object on or about premises and has ability to maintain control."* **Wilcox v. State,** 522 So.2d 1062 (Fla. 3rd DCA 1988). (Emphasis mine).

"*Proof of ownership is not essential to establish constructive possession* under statute making it unlawful for any person who has been convicted of a felony to possess a firearm." **Johnson v. State,** 685 So.2d 1369 (Fla. 2nd DCA 1996).

Moreover, pursuant to **Tejada-Batista v. Fuentes-Agostini,** 267 F. Supp.2d 156 (D. Puerto Rico 2003) quoting **Tang v. R.I. Dep't of Elderly Affairs,** 163 F.3d at 13 (citing **Andrade v. Jamestown Hous. Auth.,** 82 F.3d 1179, 1192 (1st Cir. 1996), in determining whether a claim is frivolous, "**the court must assess the claim at the time it was filed**, avoiding an after-the-fact reasoning that because the plaintiff did not ultimately prevail the claim it must have been frivolous."

At the time Respondent filed the Petitions for Protection, he knew that there was a gun in the office and that is what was presented to Judge Pope who was

subsequently disqualified. Therefore, it was entirely appropriate to mention NORVELL's possession of the gun in the Motion for Reconsideration after the Petition was dismissed without an evidentiary hearing by Judge Pope and the case was reassigned to Judge Briggs. "T**he court must assess the claim at the time it was filed**..."

NORVELL's paralegal testified that both she and NORVELL were present when the gun was shown to the Respondent. Tr. at page 103. Both NORVELL and the paralegal admitted at the hearing that neither informed the Respondent that the gun was removed from the office in 2001. Tr. at pages 104 and 116. Therefore, the Respondent's frame of mind at the time of filing the Petition for Injunction against NORVELL was that there was still a gun in the office.

It should also be noted that an independent witness, Tiffany Bartholome, testified that she overheard NORVELL and his paralegal arguing about the gun in April 2004, and his paralegal "just taking the gun home." Tr. at page 243. Bartholome also testified that NORVELL said that "he would like to knock Mr. Germain's head off and watch it roll down the street." Tr. at page 244.

Under no circumstances should the Respondent, a law-abiding citizen, be punished for reporting that a convicted felon has a gun in his office, no matter how contradictory subsequent statements may seem. If there actually is a gun in the

office with the convicted felon's knowledge and consent then the law-abiding citizen cannot be blamed. It isn't fair and it doesn't make sense. The Bar cannot argue that the convicted felon suffered harm or potential harm because the Respondent subsequently stated the it was the paralegal and not the convicted felon that had possession of the gun in the office.

6. NORVELL's violence against the Respondent did not decline over time. On the contrary, competent, substantial evidence shows that the violent attacks by NORVELL against the Respondent increased in frequency and intensity over time, there being attacks in March and April of 2004 shortly before the 18 June 2004 affidavit. The attacks escalated from NORVELL punching the Respondent in the head, face and neck to choking the Respondent with a neck tie to actually attacking the Respondent with a weapon. The Referee acknowledges NORVELL's three separate batteries on the Respondent but does not recognize the Respondent as a victim. Final Report at page 15.

Judge Pope found that "Norvell had assaulted Germain" and that Germain "had been battered previously by Mr. Norvell." Stip. at para. 38.

The fact that NORVELL is a convicted felon who had a gun in the office and who assaulted and battered the Respondent on three separate occasions would lead the Respondent to reasonably be in fear of death or bodily harm if he

did not sign the affidavit relieving NORVELL of possession of the gun.

Finally, assault and battery are not just words on a page. They indicate a perpetrator and a victim. The victim suffers well-founded *fear.*

> "An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a *well-founded fear* in such other person that such violence is imminent." F.S. 784.011(1).

Assault and battery are not considered acceptable negotiating tactics to settle disputes in our society. The fact that NORVELL created a "*well-founded fear"* in the Respondent is *res judicata* pursuant to Judge Pope's finding that "Norvell had assaulted Germain" and that Germain "had been battered previously by Mr. Norvell." How many times does a victim have to be assaulted and battered by a convicted felon with a gun in the office before the fear is reasonable?

7. There was no competent, substantial evidence that Respondent willingly negotiated with NORVELL, that NORVELL's death threats against Respondent were not credible and that Respondent did not sign the 18 June 2004 agreement under duress or fear of death. NORVELL prepared the Stipulation and Agreement, and the 18 June 2004 Affidavit, and whereas the Respondent made significant concessions to NORVELL, the only concession NORVELL made to the Respondent is that he would write a letter to the Bar regarding his Bar complaint

and inform the Bar that he did not desire to pursue his complaint because all matters between the parties had been settled. Bar's Composite "D." There was no motivation or consideration for the Respondent to sign those documents except fear and to get away from NORVELL as quickly as possible. Respondent lost tens of thousands of dollars in the transaction. This situation was not two kids fighting over baseball cards in the schoolyard. The Respondent was trying to protect himself from a violent convicted felon who sought control of Respondent's interest in a $700,000 piece of property.

Moreover, Respondent gave NORVELL everything that he was demanding, including dropping the Injunction and aggravated assault charges against NORVELL, waiving debt that NORVELL owed Respondent and leaving almost all office equipment and furniture as part of NORVELL's purchase of Respondent's interest in the Lake Law Center. Stip. at para. 29.

Furthermore, Respondent was in no way trying to deceive the Court and the Referee did not make a finding to that effect. Considering that NORVELL is a convicted felon, that he had a gun in the office, that he assaulted and battered the Respondent on three separate occasions and that he threatened to kill the Respondent three times, it was reasonable for the Respondent to be in fear of his life or bodily harm. The Referee did not include in the report that NORVELL

battered and assaulted the Respondent with a 4 foot wooden mop handle while yelling, "I'm going to bash your head in," (Tr. At page 27, line 23) or that he told witness, Tiffany Bartholome, that he "would like to knock Mr. Germain's head off and watch it roll down the street." (Tr. At page 244, line 19). When a convicted felon and ex-con threatens to kill you and couples the threat with violent attacks in furtherance of the threat, then the threat must be taken seriously.

NORVELL committed at least four (4) crimes during the time in question: Possession of a Firearm by a Convicted Felon, Assault, three (3) Batteries and Trespass into Respondent's office. Respondent did not commit any crime. NORVELL is a convicted felon. Respondent has no criminal record. NORVELL has been previously suspended from the Bar, once for ten (10) years and once for a year. Respondent has never been suspended. NORVELL had a gun in his office. Respondent did not. NORVELL's conduct was pro-active and motivated by financial and material gain. Respondent's conduct was reactive and motivated by genuine fear for his health, safety and welfare.

In **Brown v. Pierce**, 74 U.S. 205, (1868), the Supreme Court of the United States ruled that,

> "Argument to show that a deed or other written obligation or contract, procured by means of duress, is inoperative and void, is hardly required, as the proposition is not denied by the respondent.

> **Actual violence is not necessary to constitute duress**, even at common law, as understood in the parent country, because consent is the very essence of a contract, and, **if there be compulsion, there is no actual consent**, and **moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency**, without which there can be no contract, because, in that state of the case, there is no consent."

Respondent acted prudently and honorably by placating NORVELL's anger to avoid further violence, making a police report, posting a No Trespass Warning and filing Petitions for Injunction for Protection. What more could the Respondent have done?

8. It is well settled that an attorney cannot ethically write himself into his client's will or trust as a beneficiary. NORVELL did exactly that. (Respondent's Answer at Exhibits U and V.) NORVELL was sued by the legitimate heirs of his client in Lake County case number: 2003-CA-3899.

Moreover, NORVELL improperly influenced the decision to remove Virginia Marchegiani from life support thereby expediting his acquisition of her $400,000 estate. NORVELL conspicuously placed her ashes atop a filing cabinet in the office with the express intent to intimidate and threaten the Respondent.

This evidence was necessary to prove:

A. NORVELL's disregard for human life vis a vis his financial gain,

B. the source of NORVELL's sudden financial gain which enabled him to force the Respondent out of the Lake Law Center,

C. that the Respondent had a reasonable fear for his own well-being if he did not sign the affidavit and relinquish his interest in the Lake Law Center to NORVELL.

9. The Respondent did not make disparaging remarks. True statements are not disparaging. The Bar stipulated to the fact that NORVELL was a convicted felon and that CARDONA was a fugitive with a 16 year old warrant for his arrest from Alabama. The Respondent is obligated to bring the criminal record of NORVELL and CARDONA to the attention of the Court when he is being victimized by them.

Furthermore, these facts were integral to the Respondent's Petitions for Injunctions for Protection and claims that he was in fear of NORVELL and that he was stalked by CARDONA. People are naturally afraid of felons and fugitives because they have demonstrated a propensity to violate the law. Moreover, the statements of fact should not be considered disparaging because felons and fugitives are not a protected class and a criminal's record is relevant when a victim is seeking protection from one in the Court.

> All of the remarks were true and went to the very essence of the Respondent's fear of NORVELL and CARDONA. 10. The litigant's fear that he or she will not receive a fair trial in the

court on account of the prejudice of the judge against the applicant *or in favor of the adverse party* constitutes statutory grounds for the motion to disqualify judge and the motion to set aside amended order. Moreover, the statute *requires* that the affidavit attached to the motion "shall state the facts and the reasons for the belief that such bias or prejudice exists..." Fla. Stat. 38.10.

Therefore, to disqualify judge or set aside the order, the Respondent was *required* by statute to state the fact that Judge Pope's campaign had solicited the Respondent for a campaign contribution while the Respondent's Petition for Injunction against Repeat Violence was pending before Judge Pope. There was nothing disparaging about that fact. Nor was it disparaging to state that Judge Pope's campaign host committeeman was also CARDONA's attorney.

Finally, Respondent was never previously given a public reprimand for making disparaging remarks against a judge. The case was dropped by the Bar "in light of this referee's ruling that the telephone conversation was illegally intercepted, the granting of the motion to suppress, and the officer's failed memory as to the conversation." Conditional Plea for Consent Judgment at page 2.

11. A 91 day suspension is not consistent with **Florida Bar v. John Wesley Adams**, 641 So.2d 399 (Fla. 1994). Adams received a 90 day suspension. Moreover, the facts of the two cases are distinguishable in that Adams was not the victim of three separate batteries and an assault by a convicted felon.

In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Supreme Court's responsibility to order the appropriate sanction.

The Court has imposed lesser discipline where an attorney has made a false statement to a court. See, e.g.**,** **Florida Bar v. McLawhorn**, 535 So.2d 602 (Fla.1988) (imposing public reprimand); **Florida Bar v. Sax**, 530 So.2d 284 (Fla.1988) (imposing public reprimand). **Florida Bar v. Fatolitis**, 546 So.2d 1054 (Fla.1989) (imposing public reprimand for forging wife's name as a witness); **Florida Bar v. Story**, 529 So.2d 1114 (Fla.1988) (imposing thirty-day suspension for improperly notarizing will)**;** **Florida Bar v. Morrison**, 496 So.2d 820 (Fla.1986) (imposing ten-day suspension for discrepancy in testimony before grievance committee). Deliberate lack of candor has resulted in lesser discipline. See, e.g.**,** **Florida Bar v. Wright**, 520 So.2d 269 (Fla.1988) (imposing public

reprimand for lying during discovery); **Florida Bar v. Batman**, 511 So.2d 558 (Fla.1987) (imposing public reprimand for testifying falsely)**;** **Florida Bar v. Shapiro**, 456 So.2d 452 (Fla.1984) (imposing ninety-day suspension for filing false motion to dismiss with forged signature)**;** **Florida Bar v. Oxner**, 431 So.2d 983 (Fla.1983) (imposing sixty-day suspension for twice lying to judge to obtain a continuance). The existence of a prior disciplinary record is not dispositive. See, e.g., **Florida Bar v. Kaplan**, 576 So.2d 1318 (Fla.1991) (imposing public reprimand where the attorney had three prior private reprimands); **Florida Bar v. Riskin**, 549 So.2d 178 (Fla.1989) (imposing public reprimand where the attorney had a prior private reprimand).

In light of the facts and the above-cited case-law, a 91 day suspension is not a fair sanction. If the Supreme Court finds that a sanction is appropriate then it should be consistent with previously decided cases.

12. It was improper for the referee to consider in aggravation the fact that the Respondent refused to acknowledge the wrongful nature of his conduct. The Respondent's claim of innocence cannot be used against him. **Florida Bar v. Corbin**, 701 So.2d 334 (1997). ("We agree ... that it is improper for a referee to base the severity of a recommended punishment on an attorney's refusal to admit alleged misconduct or on 'lack of remorse' presumed from such refusal."). **Florida**

Bar v. Lipman, 497 So.2d 1165, 1168 (Fla.1986).

13. The Bar did not give proper written notice to the Respondent that the Respondent's mental health was at issue or that it would be seeking a mental health evaluation and the Respondent was not given an opportunity to present evidence at the sanctions hearing to refute that recommendation by the Referee. The facts of the case were not such that the Respondent would be on notice that mental health was an issue. Moreover, the Referee did not even mention that mental health might be an issue in the non-final Report of the Referee dated February 1, 2006, *before* the sanctions hearing on February 15, 2006.

As to the discipline imposed, due process requires that the attorney be allowed to explain the circumstance of the alleged offense and to offer testimony in mitigation of any penalty to be imposed. **Florida Bar v. Carricarte**, 733 So. 2d 975, 978 (Fla. 1999).

In cases where the Supreme Court has upheld a recommendation that an attorney undergo a mental health evaluation, the attorney had either not challenged the requirement, **Florida Bar v. Poplack**, 599 So. 2d 116 (Fla. 1992), or the evidence was such that the attorney would have been put on notice that mental health was an issue and supported the recommendation of an evaluation. See **Carricarte**, 733 So. 2d at 975**;** **Florida Bar v. Sayler**, 721 So. 2d 1152 (Fla.

1998), cert. denied, 120 S. Ct. 213 (1999); See **Florida Bar v. Adams**, 641 So. 2d 399 (Fla. 1994). Here, none of these circumstances existed.

No evidence was presented that the Respondent abuses drugs or alcohol. No evidence was presented that the Respondent has a criminal record or has engaged in any bizarre or questionable behavior. No evidence was presented that the Respondent has a prior history of mental illness and no evidence was presented that the Respondent acted in any way different from any other victim of violence.

The fact that the "Respondent has passionately asserted the rightness of his position," Final Report at p. 23, or even that "Respondent continued to repeat his evidence and argue that his conduct was justified," Final Report at p. 24, does not indicate that the Respondent has mental health issues, only that the Referee failed to understand the depth of the fear the Respondent felt when repeatedly attacked by NORVELL.

Thus, the Respondent respectfully argues that the Court should conclude that the Respondent did not have sufficient notice to allow him to offer testimony in mitigation of this penalty, and the penalty is not reasonably supported by the facts or existing case law. **Florida Bar v. Centurion**, 801 So.2d 858 (Fla. 2000). In light of the facts and the above-cited case law, the Respondent respectfully requests that the Supreme Court find that a mental health evaluation is *not*

indicated.

STATEMENT OF FACTS
Case No.: SC05-1096

On September 22, 2004, while attending a Pre-trial hearing in **State v. Omar Guerrero**, Lake County case number: 2004-CF-2140, attorney for the defendant, the Respondent, was found guilty of two (2) counts of Direct Criminal Contempt of Court. Bar's Exhibit "M."

Respondent's conduct did *not* constitute contempt of court as the Judge *did* subsequently reconsider and enter an Order of Dismissal of Contempt. Bar's Exhibit "N."

14. The best evidence that the Respondent did *not* intentionally disrupt the tribunal but was merely trying to participate in the hearing and diligently represent his client, is the hearing transcript itself. Hearing Tr. at Bar's Exhibit "L."

An essential finding to support contempt is the party's *intent* to violate the court order at issue. **Merrill Lynch Trust Co. V. Alzheimer's Lifeliners Ass'n, Inc.**, 832 So.2d 948 (Fla. 2nd DCA 2002). No such finding was made in Judge Hill's Order or the Referee's Final Report.

It is well settled in Florida that in order to be held in direct criminal contempt there must be proof that the individual *intended* to disobey the court, which must be proven beyond a reasonable doubt. **Rowe v. Wille**, 415 So.2d 79, 81 (Fla. 4th DCA 1982). **Barnes v. State**, 588 So.2d 1076 (Fla 4th DCA 1991) citing **Florida Ventilated Awning Co. v. Dickson**, 67 So.2d 218 (Fla.1953).

Moreover, in order to constitute contempt, the failure to follow a court directive must be willful, **Gregory v. Rice**, 727 So.2d 251 (Fla. 1999), and the absence of contumacious intent may be shown as an affirmative defense. **Barnes v. State**, 588 So.2d 1076 (Fla. 4th DCA 1991). Evidence establishing mere negligence, as opposed to intent, is thus insufficient to establish contempt.

For purposes of a criminal contempt conviction, a "willful" violation is a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of the order. **Stevens v. State**, 547 So.2d 279 (Fla. 5th DCA 1989).

Furthermore, the courts of this state have consistently held that criminal contempt requires some willful act or omission *calculated* to hinder the orderly functions of the court. **Ray v. State**, 352 So.2d 110 (Fla. 1st DCA 1977), **Stevens v. State,** 547 So.2d 279 (Fla. 5th DCA 1989) and **Sewell v. State**, 443 So.2d 164 (Fla. 5th DCA 1983).

There was no finding in Judge Hill's Order that Respondent's conduct was a willful act *calculated* to hinder the orderly functions of the court. On the contrary, Respondent merely sought to be heard on what the court characterized as the State's "Motion for Intent to Rely on Child Hearsay Statements." Hearing Tr. at page 8, lines 3-5 at Bar's Exhibit "L."

A.S.A. Julie Greenberg also characterized the Notice of Intent to Rely on Child Hearsay Statements as a motion and proceeded to argue it as such. Hearing Tr. at page 8, lines 22-23 at Bar's Exhibit "L."

If the court was accepting argument from the State on a Motion to Rely on Child Hearsay Statements, then the Respondent, defendant's attorney, had a right to be heard and to point out that before the State could present hearsay evidence, the Court must find at a hearing "that the time, content and circumstances of the statement provide sufficient safeguards of reliability" pursuant to Fla. Stat. 90.803(23)(a)(1). Judge Hill acknowledged that it would have been appropriate for the Respondent, defendant's attorney, to raise the issue of setting a hearing at that time. Tr. at page 71, line 7 - page 72, line 2.

Considering the defendant was facing a possible 30 year prison sentence, Respondent would have been remiss in his obligation to zealously represent the defendant if he did not speak up.

When Respondent did interject, he did so professionally and respectfully saying, "Your Honor, before we start if I may?" Hearing Tr. at page 8, line 8 and "Your Honor, if I may say..." Hearing Tr. at page 9, line 23. Respondent was also polite and conciliatory during the hearing to show cause. Hearing Tr. at page 11, lines 15-20 at Bar's Exhibit "L."

Finally, Respondent would respectfully argue that although A.S.A. Greenberg incorrectly stated that Respondent appeared to be "Mickey Mousing around" with his demand for speedy trial and that "he filed it by his own admission in bad faith," Hearing Tr. at page 6, lines 9-10 at Bar's Exhibit "L," the State was compelled to reduce the charges against the defendant from Capital Sexual Battery to Lewd and Lascivious to Felony Battery and finally, to Simple Battery. The State could not prove a felony was committed. The Respondent successfully avoided a miscarriage of justice by diligently protecting the rights of a disadvantaged, non-English speaking defendant.

In **Prior v. State**, 562 So.2d 864 (Fla. 5th DCA 1990), the Court reversed the judgment of contempt stating,

> "**The evidence is insufficient to establish that appellant engaged in willful conduct or acted in a manner calculated to hinder the orderly process of the court. The evidence is insufficient to establish that appellant intentionally violated any rule or order of the court or conducted himself in such a manner as to display**

contempt for the court."

The same standard applies with regard to an alleged violation of the Rules Regulating the Florida Bar. Judge Hill testified that he did not know what the Respondent's intention was at the hearing. Tr. at page 82. As a matter of law, interrupting the Judge, especially unintentionally, does not translate into intentionally disrupting a tribunal, knowingly disobeying an obligation under the rules of the tribunal or engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice.

15. **THE REFEREE ERRED IN NOT CONSIDERING THE FOLLOWING FACTS IN MITIGATION:**

a. Imposition of other penalties or sanctions: Respondent paid $15,000 to CARDONA to settle the matter of Judge Pope's award of attorney fees pursuant to F.S. 57.105 for failure to state a cause of action in a Petition for Injunction against Repeat Violence. (Standard 9.32(k). Tr. at page 286 and Sanctions Tr. at page 10, line 18.

b. Imposition of other penalties or sanctions: Respondent paid $100 to the Clerk even though Judge Hill issued an Order of Dismissal of Criminal Contempt. (Standard 9.32(k).

c. Remorse: Respondent immediately apologized to Judge Hill verbally and in a letter to the Judge the same day as the hearing. (Standard 9.32(l).

d. Remoteness of prior offenses: Respondent's prior discipline occurred as a result of conduct alleged during Respondent's first years practicing law in 1997.

Finally, the referee did not give sufficient weight to the mitigating factors that were cited in the Final Report, especially *absence of a dishonest or self motive* and the *personal or emotional problems* experienced by the Respondent as the result of being the victim of violence.

CONCLUSION

The Respondent respectfully submits that he has shouldered the burden of demonstrating that the Final Report of Referee is in some regards erroneous, unlawful, or unjustified. The referee's factual findings were not sufficient under the applicable rules to support the recommendations as to guilt or discipline.

Many of the referee's findings of fact and conclusions concerning guilt were not supported by competent, substantial evidence in the record. Stalking is violence. A victim has a right to an evidentiary hearing on a Petition for Injunction for Protection. The Injunction statute does not permit an award of attorney fees and $30,390 cannot be awarded as attorney fees to a respondent even if the Petition for

Injunction fails to state a cause of action. Filing a Petition for Injunction for Protection that fails to state a cause of action in *not* sanctionable.

The Respondent was punched, choked, pushed down and attacked with a wooden stick. The Respondent was stalked by an ex-employee. The Respondent acted prudently, honorably and non-violently throughout these very difficult and perplexing times. He committed no crime. He was conciliatory. He relied on the law to protect him from violence. He made a police report, filed a Petition for Protection and posted a No Trespass Warning. The Respondent acted responsibly.

With regard to SC05-1096, unintentionally interrupting the Judge is *not* a sanctionable act.

Based on the foregoing a suspension requiring proof of rehabilitation, i.e., more than 90 days, is NOT warranted. The Respondent was a victim not a culprit. The Respondent respectfully requests that he be found NOT GUILTY of the violations, or in the alternative, that a sanction NOT requiring proof of rehabilitation be imposed in this case. Finally, the Supreme Court should find that a psychological evaluation is *not* warranted under the law.