IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
v.

Case No.: SC05-947
[TFB Nos.: 2004-31,700(05B)

MARK F. GERMAIN,
Respondent.

Case No.: SC05-1096
[TFB Nos.: 2004-31,218(05B)

_____/

RESPONDENT'S AMENDED REPLY BRIEF

Respectfully submitted by:

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This ___ day of September, 2006

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STATEMENT OF FACTS

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The Florida Bar omitted the following facts from its Answer Brief:

1. Attorney Michael C. Norvell is a convicted felon and ex-con whois prohibited from owning or possessing a gun.

2. NORVELL kept a gun in his office, albeit in his paralegal's desk.

3. NORVELL violently attacked the Respondent in three separate assaults and batteries; punching him in the head, face and neck, choking him with a neck tie and attacking him with a four foot wooden mop handle.

4. NORVELL weighs 260 pounds. Respondent weighs only 158.

5. NORVELL is not unknown to the Florida Supreme Court. He 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.

REPLY TO POINT I

Even if the Referee believed that the gun belonged to NORVELL's paralegal, Florida law is clear that a convicted felon's possession of a firearm may be either actual or constructive. In the instant case, if NORVELL's employee had a gun in the 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. It was proven at the hearing that **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 the office was constructive possession, if not actual possession.

Considering NORVELL's propensity for violence, the Respondent acted responsibly by reporting NORVELL's possession of a gun in the office in his Petition for Injunction for Protection against Repeat Violence. The Legislature has prohibited felons from owning or possessing guns because felons have demonstrated a propensity to violate the law and their possession of a gun is threatening to law abiding citizens.

Moreover, the nature of the felon is to push the boundaries of the law. In this case, NORVELL sought to excuse his possession of the gun by claiming that the gun didn't belong to him; that his paralegal owned the gun. Such an argument is misguided naivete. The law against felons possessing guns is strictly construed and does not make exceptions for the felon's spouse, live-in girlfriend or employee. The law against felons possessing guns certainly does not make an exception for NORVELL merely because he is an attorney. The onus for the presence of the gun in the office is squarely on NORVELL, not the Respondent or even NORVELL's paralegal, and the Florida Bar should not try to blame the Respondent for NORVELL's violation of the law. But for NORVELL bringing the gun into the office, the Respondent would not have been required to disclose it in his Petition for Injunction for Protection against Repeat Violence or make excuses for him in a subsequent affidavit.

Furthermore, the Respondent had no obligation to prosecute a violent felon with a gun. The Respondent reported a felon's violation of the law and it was then the responsibility of the State Attorney and the Florida Bar to prosecute the offender. The Respondent's only obligation in such a dangerous situation was to try to protect himself by avoiding further violence and that is why the Respondent assuaged the felon's rage by signing the affidavit that the felon prepared.

NORVELL's possession of a gun, in conjunction with his violent attacks on the Respondent, was especially threatening to the Respondent and justified his signing the affidavit of June 18, 2004.

Finally, assault and battery are not "normal tactics in negotiations" as the Bar has argued. 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 June 18, 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.

With regard to the Petition for Injunction for Protection against Repeat Violence against James Cardona, the Florida Bar admits that the Respondent alleged "stalking" and was "speculating that future violence might occur" but denies that stalking is violence pursuant to the Injunction statute. Avoiding future violence is precisely what the Legislature contemplated when it defined stalking as

an act of violence and it granted a right to an Injunction for Protection to victims of stalking / violence.

The Respondent alleged sufficient facts against a fired ex-employee to entitle him to due process and the statutory right to an evidentiary hearing on the Injunction Petition. All Petitioners are entitled to an evidentiary hearing on their Petition for Injunction against Repeat Violence. It is a violation of the Petitioner's right of due process to dismiss the Petition without an evidentiary hearing. **Segui v. Nester**, 745 So.2d 591 (5th DCA 1999). 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.

The Bar argues that the Respondent "deliberately" filed a petition that failed to allege any acts of violence but such an argument makes no sense. Why would the Respondent deliberately file a frivolous petition when he is in fear of violence and seeks an order from the Court to keep the perpetrator away?

The Bar also argues that the Respondent should **not** be treated like any other petitioner seeking protection against repeat violence because he is an attorney. The Respondent sought protection from the Court and was not even given an opportunity to be heard. Is the Respondent any less of a person or any less of a victim merely because he is an attorney? Is he not entitled to the same protection against repeat violence as a non-attorney? Is he not entitled to the same due process of law; i.e.: an evidentiary hearing on his Petition for Protection against Repeat Violence? Is he not entitled to seek protection from the Court and expect that he will not be hit with a $30,390 attorney fee pursuant to F.S. 57.105 because

in the opinion of the judge his one and one half page Petition for Injunction for Protection against Repeat Violence failed to state a cause of action? Are non-attorney victims treated in the same manner?

Part of the problem is that in this case the system refuses to acknowledge that the perpetrators are attorneys. If these same allegations had been made against a non-attorney, the system would have been more protective of the victim. The Bar would prefer to accuse a law-abiding attorney of contradictory statements and frivolous pleadings than admit that there are criminals in its ranks.

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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."

Considering the defendant was facing a possible 30 year prison sentence, the Respondent would have been remiss in his obligation to zealously represent the defendant if he did not speak up regarding the State's "Motion" to Rely on Child Hearsay Statements. Moreover, there was no finding by Judge Hill that the Respondent's conduct at the hearing was a willful act *calculated* to hinder the orderly functions of the court.

Although Judge Hill granted the Respondent's Motion for Reconsideration and dismissed the Order of Contempt, the Bar argues that "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." This argument is ill-conceived. Judges are human. They make mistakes just like everyone else. That is why our system of justice contains provisions for reconsideration, appeal and review by the Supreme Court. The Respondent made legal arguments in the Motion for Reconsideration which were accepted by Judge Hill. He reconsidered and he dismissed the Order of Contempt. The Judge is not required to admit that he "made an error."

The Respondent asks the Supreme Court to consider that when the Respondent did interject at the hearing, 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, 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.

REPLY TO POINT II

The Bar never alleged that the Respondent provided misleading information to the Leesburg Police Department in order to have CARDONA arrested for trespassing and the Bar acknowledges that the Referee "could not find that the respondent intentionally misrepresented facts to Officer Potter."

In the absence of evidence that Officer Potter believed that it was the Respondent's intention to have CARDONA arrested, it was error for the Referee to conclude that the Respondent's communication to Officer Potter had the "obvious effect" of advising the officer that CARDONA had been lawfully warned and, therefore, could be arrested for trespassing. What is "obvious" is that NORVELL "hired" CARDONA two days after he attacked the Respondent to further intimidate and threaten the Respondent.

Respondent was present when NORVELL told Officer Potter that he hired 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 that CARDONA was an invitee as all three were present at the same time.

Moreover, the Respondent was not given an opportunity to refute this conclusion by the Referee because it was never brought up as an issue.

Finally, the Respondent did seek to clarify his communication with 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.

REPLY TO POINT III

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 Virginia Marchegiani in Lake County case number: 2003-CA-3899. This is another instance where the nature of the felon is to push the boundaries of the law.

Moreover, NORVELL improperly influenced the decision to remove 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.

The Respondent respectfully argues NORVELL's conduct in the Marchegiani case was relevant because it showed the lengths that NORVELL would go to acquire the Respondent's interest in the Lake Law Center. NORVELL's participation in Marchegiani's removal from life support and his acquisition of her estate went to the very heart of the Respondent's reasonable fear that NORVELL had no regard for human life and that he was not only willing to violently attack the Respondent on three separate occasions but that he was also willing to kill the Respondent as he had threatened.

REPLY TO POINT IV

As Bar counsel well knows, the Respondent was NOT previously disciplined for making disparaging remarks about a judge.

With regard to the discipline recommended by the Referee, (91-day suspension), all of the cases cited by the Bar are distinguishable in that none of those respondents were victims of violence, (three separate batteries and an assault). The Respondent respectfully urges the Supreme Court to consider that the Respondent was punched, choked, pushed down and attacked with a wooden stick by a convicted felon and ex-con with a gun in his office who fiercely sought the Respondent's interest in the Lake Law Center.

Moreover, the Respondent asks that the Supreme Court give appropriate weight to the Referee's conclusion that there was an absence of a dishonest or selfish motive and that the Respondent suffered personal or emotional problems due to his victimization. The purpose of the Rules is to protect the public from unethical attorneys. In this case, the Respondent was seeking to protect himself from further harm and the allegations do not relate to the Respondent's work on behalf of a client.

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 Respondent relies on the following cases where the Supreme Court has imposed lesser discipline: 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).

REPLY TO POINT V

The Bar argues that the Respondent was placed on notice that mental health was an issue but fails to point to even one reference in the record that the Respondent's mental health was called into question. A person does not have mental health issues merely because he reports being assaulted and battered by an attorney and that the perpetrator is also a convicted felon with a gun in his office. Neither does a person have mental health issues merely because he insists on due process, his right to be heard and his rights as a victim of violence.

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).

The Bar cites two cases, **Florida Bar v. Adams**, 641 So.2d 399 (Fla. 1994) and **Florida Bar v. Saylor**, 721 So.2d 1152 (Fla. 1998), in support of a mental health evaluation. Neither of theses cases is clear as to whether the Respondent was put on notice that mental health was an issue. One thing is clear though, both cases are years before the Supreme Court's rulings in **Florida Bar v. Carricarte**,

733 So. 2d 975, 978 (Fla. 1999) and **Florida Bar v. Centurion**, 801 So.2d 858 (Fla. 2000) which declared that the attorney must have prior notice and an opportunity to refute the allegation of mental illness before the stigma of a mental health evaluation may be imposed.

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. 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 that a reasonable person could be afraid when attacked by a larger, violent felon.

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).

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. The Respondent was punched, choked, pushed down and attacked with a wooden stick. His life was threatened by a felon with a gun. The Respondent was stalked by an ex-employee. Stalking is violence pursuant to the Injunction statute.

The Respondent acted prudently, honorably and non-violently. 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. He sought to avoid embarrassment to the profession. Loss of a person's livelihood is an extremely severe sanction which the Respondent does not deserve.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: Original and seven (7) copies to the Clerk of the Supreme Court, Bar Counsel JoAnn Stalcup, 1200 Edgewater Drive, Orlando, Florida 32804-6314 (407) 425-5424 and Staff Counsel John Anthony Boggs, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 (850) 561-5600 by U.S. Mail / Hand this ___ day of _____, 2006.

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CERTIFICATE

I hereby certify that this Amended Reply Brief is typed in Times New Roman, 14 point type.

MARK F. GERMAIN
Respondent