IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DEWEY HOMER VARNER, JR.,

Respondent.
_____/

Supreme Court Case No. SC06-1919

The Florida Bar File No. 2005-51,022(15C)

THE FLORIDA BAR'S ANSWER BRIEF

ON APPEAL FROM A REPORT OF REFEREE

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PREFACE

Throughout this answer brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR. ____ (indicating the referenced page number). The transcript of the final hearing (transcribed in five volumes and consecutively numbered) will be designated as T. ____ (indicating the referenced page number). The transcript of the mitigation and sanctions hearing (conducted on September 10, 2007 and transcribed beginning with page 1) will be designated as Sanctions T. _____. The trial exhibits will be referred to as Bar Ex. ___ or Respondent Ex.___ (indicating the referenced exhibit number). Finally, The Florida Bar will be referred to as "the Bar" and the respondent, Dewey Homer Varner, Jr., will be referred to as "respondent."

STATEMENT OF THE CASE AND OF THE FACTS

In the interest of accuracy, and to ensure that the record is complete, The Florida Bar offers the following supplement to respondent's statement of the case and of the facts.

STATEMENT OF THE CASE

Jerry L. Lindale filed a sworn bar complaint, alleging that respondent took a voluntary dismissal of his workers' compensation claim, without his knowledge or consent. [Bar Exs. 1 and 2.] After a grievance committee finding of probable cause, The Florida Bar filed a formal complaint on October 3, 2006. The Supreme Court of Florida made a circuit appointment on October 12, 2006 and on October 17, 2006, the chief judge appointed a referee to hear the matter. After a timely case management conference, the referee set the matter for final hearing on February 21, 2007. Prior to the trial date, The Florida Bar sought and obtained a continuance because a necessary witness, The Honorable Amy Smith, was to be out of the country on that date, and unavailable for trial. Respondent advanced no objection, and the case was reset for final hearing on the next date available on the referee's docket: May 9, 2007. Before that trial date, however, the referee encountered a conflict in her calendar, and was forced continue the trial once again. The next available dates were June 20-21, 2007. The final hearing began on June 20, 2007,

continued through June 21, 2007, and concluded on August 15, 2007. [1] The Florida Bar presented the testimony of three witnesses, in addition to respondent: The Honorable Amy Smith, Charles Williams, Esq., and Patricia Thorne, Esq.[2] Respondent testified on his own behalf, and presented the testimony of two fact witnesses: Norma Almazan and Isis San Miguel. He also presented the testimony of three character witnesses during the sanctions and mitigation hearing. Both parties introduced documents into evidence, as delineated on the exhibit list filed with the record. After hearing closing arguments, the referee announced her findings of guilt on all counts, and set the matter for a separate sanctions and mitigation hearing, pursuant to respondent's request [T. 679-686, Sanctions T. 5-6.], on September 10, 2007.

Based on three days of trial testimony, another partial day of character and mitigation testimony, her observation of the witnesses' demeanor and her review of the exhibits in evidence, the referee entered her Report of Referee on September 19, 2007. In her report, the referee found that respondent's conduct was intentional, and that The Florida Bar had proven violation of all charged

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[1] The nearly one month delay in concluding the matter was due to respondent's conflicts, and those of his attorney. [T. 679-686, Sanctions T. 5-6.]

[2] The Florida Bar issued a trial subpoena for the complainant, Jerry L. Lindale, who has relocated to Delaware. Lindale was unable to travel to Fort Lauderdale for trial, and was precluded from offering telephonic testimony by respondent's objection. Respondent admitted that this objection was a means by which to "block" the complainant's trial testimony. [Sanctions T. 44.].

misconduct, by clear and convincing evidence. [RR. 6-8.] After hearing the argument of counsel and reviewing the case law as well as the *Florida Standards for Imposing Lawyer Sanctions*, and being cognizant of respondent's prior discipline for similar misconduct [T. 549, RR 12], the referee recommended that respondent be suspended for 91 days. [RR. 7-9.]

Respondent served a petition for review, seeking review of "the Referee's findings of guilt and her sanction recommendations, which Respondent believes is excessive under the circumstances of this case." Thereafter, respondent served his initial brief, in which he charged that the referee's findings of guilt are not supported by the trial record. Respondent also claimed that the referee improperly limited his cross-examination of respondent's former law partner, Patricia Thorne, Esq. Finally, respondent complained that his misconduct does not warrant the recommended 91-day suspension. Instead, respondent asks the Court "to find him not guilty of the Bar's complaint," or to impose a public reprimand for any findings of misconduct that it sustains. *See* Respondent's Initial Brief, at page 33.

The Florida Bar seeks this Court's approval and ratification of the referee's factual findings, as well as an order approving her recommendation that respondent receive a 91-day suspension.

STATEMENT OF THE FACTS

Respondent and Patricia Thorne, Esq. became law partners in early 2000.

[T. 130.] The law firm was known as Varner and Thorne, P.A. [T. 130.] It was well understood by both partners, by their staff, and by others in the legal community, that this partnership had a purpose: [3] respondent (a sole practitioner) had already been through a bar disciplinary trial, he had been found guilty of charges involving misrepresentation and criminal conduct, and he expected to be suspended. [T. 135-136.] By gaining a law partner, respondent hoped to (and did) continue to work in his own law office during the term of his suspension. [T. 135-136, 652-653.] At the time that the partnership began in 2000, respondent's case was on appeal. The referee had recommended a 30-day suspension. [T. 130.] The Supreme Court of Florida entered its Order on February 15, 2001, upholding the referee's findings of guilt but suspending respondent for 90 days. Respondent was given 30 days to close down his practice, and his suspension ran from March through May of 2001. *See* The Florida Bar v. Varner, 780 So. 2d 1 (Fla. 2001). [T. 135, 139.]

Prior to the inception of the partnership between respondent and Patricia Thorne, they shared a long and complicated history. Respondent (who practiced in the personal injury area[4]) enjoyed a long and close friendship with Thorne's father, Roscoe Thorne, a celebrated Palm Beach orthopedic surgeon. [T. 131.] Respondent had been their family attorney, and had even represented Patricia Thorne from time

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[3] Testimony supporting this agreement was offered by respondent himself [T. 135 -136], by Judge Smith [T. 20], by Patricia Thorne, Esq. [T. 219] and by the partnership's support staff member Isis San Miguel [T. 398].

[4] [T. 134.]

to time. [T. 652.] After Thorne graduated from law school, but before she was admitted to The Florida Bar, respondent employed Thorne in his law office, at Dr. Thorne's express request. [T. 537.] Thorne, who had always suffered from low self-esteem, was so awed by and appreciative of respondent's acceptance of her, that she refused to accept her wages, allowing her paychecks to remain, uncashed, in respondent's desk drawer. [T. 329.]

This strange and complex relationship grew and festered over time, until Thorne's father was killed in a plane crash. When she learned of the crash and her father's death, respondent was the first person whom Thorne called. Based on Thorne's testimony, as well as respondent's own, the referee concluded that Thorne "adored" respondent, and didn't want to leave him or their law firm — even after serious problems developed, and her mental health became seriously compromised. [T. 645-646.] Respondent was well aware that he commanded Thorne's respect, admiration and affection. [T. 656.]

Thorne's mental health began to deteriorate almost immediately after respondent's suspension began, in March 2001. [T. 242.] During this time period, as she tried to handle all aspects of the partnership for her friend and law partner, Thorne suffered a "collapse." [T. 242.] In the Spring of 2001 (respondent had returned to his practice after his suspension, and no longer needed Thorne), Thorne began receiving regular mental health treatment. By July 2001, her treatment

became daily. [T. 226.] Shortly thereafter, Thorne was referred to The Pavilion at McLean Hospital, at Harvard University in Boston, Massachusetts, and was diagnosed as Bipolar, Type II. She was also found to be suffering from Attention Deficit Hyperactivity Disorder (ADHD) and Obsessive-Compulsive Disorder (OCD). In June and July of 2002, Thorne spent a six-week period at The Pavilion, having developed a reaction to one of her prescriptions. [T. 243.] During this period, respondent assured Thorne that he would take over her cases and clients, so that she could concentrate on her recovery. [T. 244.] Thorne's recovery took a long, long time. She was often out of the office, traveling to and from Boston for treatment. [T. 249, 262.] Respondent was well aware of Thorne's worsening mental health problems and the challenges of her treatment. [T. 564-566, 655-656.]

In May 2003, respondent and Thorne had a major disagreement over a false pleading filed in a certain case. Thorne testified that she drafted the pleading, knowing it contained a false allegation of record activity (where none existed), because respondent asked her to do it, because she wanted "to make him happy," and because she "wanted him to want [her] to be a part of his practice." [T. 521.] Although Thorne did not expect respondent to use the pleading, he did. [T. 522.] Thereafter, respondent accused Thorne of intentionally creating a false document for him to file, in order to "set him up." [T. 645-646.] Respondent reported the incident to Thorne's family members and to her doctors, telling them that her

career was over. [T. 523-524.] Two days later, respondent's long-term employee,[5] Isis San Miguel, filed a bar complaint against Thorne, charging her with creating a false document. San Miguel testified that she took this action because she felt Thorne was trying to "harm" respondent. [T. 398.] San Miguel admitted that she discussed the bar complaint with respondent, who encouraged her to file it. [T. 397.]

From May 2003 forward, respondent considered his partnership with Patricia Thorne to be over. [T. 618.] Respondent asked Thorne to stay out of the office; she complied and spent May in treatment, in Boston. [T. 349.] From May 2003 forward, respondent stopped all social contact with Thorne [T. 657] and refused to communicate with her, as he had done in the past when he wanted her to leave his law firm. [T. 282, 330.] When she telephoned to speak with him, he would leave her on hold indefinitely, and leave the building. [T. 281.] Respondent began to call Thorne derogatory and disrespectful names [T. 205, 515], and he hid files and client information from her. [T. 276.] The situation grew so desperate that the police were called, and it became necessary to utilize security guards within the law firm. [T. 278-279, 635.] Respondent desperately wanted to end his partnership and his relationship with Thorne. [T. 618, 635.] Thorne didn't want to leave, ever.

[5] Ms. San Miguel testified that she has known respondent for 22 years, and was privy to conversations between Thorne and respondent, sitting in on their partnership meetings. [T. 388-389.]

[T. 521.]

During this time period, one of the law firm's workers' compensation cases was scheduled for merit hearing. Jerry L. Lindale had hired the law firm in February 2000, to represent him in litigation against the Palm Beach County School District. [T. 236-237.] Thorne had moved into Varner's office the month before, at the beginning of their new partnership. [T. 236.] Thorne met with Lindale, and filed the initial claims on his behalf, but advised Lindale that respondent would have primary responsibility for his case. [T. 235.]

The Palm Beach County School District was represented by The Honorable Amy Smith, who was then an attorney in private practice. [T. 17-18.] Although Thorne was the "default attorney" whose name appeared for the firm on most if not all pleadings filed in the matter, Judge Smith never dealt with Thorne on the Lindale case. All of her contact was with respondent. [T. 18-20, 22.] Judge Smith knew that Thorne was ill during the pendency of the Lindale case. [T. 20.]

As the August 25, 2003 date of the Lindale merit hearing approached, Judge Smith sought to conclude discovery. She took Dr. Katzell's deposition on August 11, 2003, after business hours. [T. 25.] Respondent attended the deposition, but advanced "no typical participation," and did not pay attention. Instead, he was reading what "might have been a magazine." [T. 26.] After the Katzell deposition, Judge Smith set the depositions of other doctors, in advance of the merit hearing.

[T. 27.] Specifically, the deposition of Dr. Zemlin had been scheduled for the next day, August 12, 2003. It was rescheduled by "Deb" in respondent's office, for a later date. [T. 306-309.] Before the deposition of Dr. Zemlin, respondent called opposing counsel (Judge Smith), and asked her to cancel the discovery. [T. 27.] Judge Smith told respondent that she would cancel the discovery only if the case were voluntarily dismissed. Respondent instantly agreed to the voluntary dismissal. [T. 28.] On August 14, 2003, Judge Smith received another telephone call from respondent's office, asking for confirmation that Dr. Zemlin's deposition had been cancelled. Judge Smith reiterated that she would only cancel the deposition if and when she had a notice of voluntary dismissal in hand. [T. 29.] Twenty minutes later, Judge Smith received a notice of voluntary dismissal in the Jerry Lindale case. [T. 29.] Although respondent's wife had tried to complete the notice twice on August 13, 2003, she was unable to do so. [T. 315-320.] The final draft of the notice of voluntary dismissal, which respondent signed and served at or about 9:40 a.m. on August 14, 2003, was created and faxed to Judge Smith by Sally Brannon, a Varner and Thorne secretary who worked part-time, on certain days, including August 14, 2003. [T. 200-201.] The Notice was signed by respondent [Bar Exhibit 1], and functioned to dismiss Lindale's case with prejudice, as the statue of limitations had run. [T. 45.] Jerry L. Lindale did not authorize respondent to dismiss his case and respondent did not tell him that he had done so. [Bar Ex. 2, T,

283.] Respondent did not know that the statute of limitations had run on Lindale's claim, before he dismissed it, and did not think to check this aspect of Lindale's case. [T. 194.] Respondent did not discuss the dismissal with Thorne, who has very ill during this time period, and in Boston obtaining treatment at The Pavilion at McLean Hospital. [T. 302, 372, 657-658, RR. 5.] Lindale did not learn of the voluntary dismissal until a law firm secretary, Norma Almazan, took pity on his many unanswered phone inquiries and told him what respondent had done. [T. 74, 100, 325.] Lindale confirmed Almazan's confidential notice to him by calling the court himself. [Bar Ex. 1.] When he learned what respondent had done, Lindale filed a bar complaint against him.

SUMMARY OF THE ARGUMENT

The Standard of Review

It is well settled that a referee's findings of fact enjoy the presumption of correctness and may not be disturbed until and unless the appellant demonstrates clear error or a lack of evidentiary support. Absent such a showing, this Court will not reweigh the evidence and substitute its judgment for that of the referee. The Florida Bar v. Rose, 823 So. 2d 727, 729 (Fla. 2002). Similarly, as a general rule, this Court will not second-guess a referee's recommendation of discipline, unless it has no reasonable basis in the case law or in *The Florida Standards for Imposing Lawyer Sanctions*. The Florida Bar v. Mason, 826 So. 2d 985, 987 (Fla. 2002).

In the instant case, respondent's law firm, Varner and Thorne, P.A. represented Jerry L. Lindale in a workers' compensation case against the Palm Beach County School District. Although respondent's partner, Patricia Thorne, had met with the client and accepted Lindale's case, the law firm was attorney of record and opposing counsel, (now) Judge Amy Smith, testified that she *never* dealt with Thorne on the Lindale case. All of her contact, discussion, negotiation and discovery was with respondent or his subordinates. Judge Smith also testified that she knew Thorne personally, and knew that she was experiencing a mental health crisis as the Lindale case approached its merit hearing. Other witnesses,

including law firm secretary Norma Almazan and paralegal Isis San Miguel, testified that Thorne was "sick" during this particular time period, and that she was unable to work and often out of the office, receiving treatment at The Pavilion at McLean Hospital, at Harvard University in Boston. Judge Smith testified that she knew that Thorne was ill, and Lindale himself shared this information with Lindale's successor counsel, Charles Williams. [T. 75]. Respondent himself agreed [T. 154], and testified about the troubling manifestations of Thorne's diagnosis, including her manic mood swings, her problems with medication [T. 157, 207-208, 564-567], and her sense of isolation. [T. 567.] Yet, respondent still maintains the nonsensical position that Thorne was "in charge" of the Lindale case, and that she made all of the decisions relating to its progress — even as she muddled through her fog of mental illness — shuttling between Palm Beach County and Boston.

In August 2003, as the Lindale case neared merit hearing, opposing counsel scheduled a doctor's deposition. Respondent appeared on behalf of Lindale, but paid little attention. He asked few questions, allowed opposing counsel free reign with the witness, and read what appeared to be a magazine during the deposition. Not wanting to spend more time or any attention on the Lindale case, respondent called opposing counsel the next day or the day after that, and asked her to discontinue further discovery. When she refused, absent a notice of voluntary dismissal, respondent instantly agreed to dismiss the case. Respondent did not tell

Judge Smith that he needed to check with Thorne or the client. [T. 55-56.] He did not tell her that he needed to check the statute of limitations (which had run), and he did not tell her that he would have to consider the matter. Instead, during the very same telephone call during which he asked to continue the discovery, respondent agreed to voluntarily dismiss Lindale's case. As respondent stated in the summary of his argument, in his initial brief, it has been his "consistent *position*" (emphasis added), that he "discussed with his partner the need to take a dismissal of Mr. Lindale's case as there was surveillance videotape showing Mr. Lindale engaging in physical activity." However, respondent was unable to demonstrate, at trial, that he ever had such a conversation with Thorne or that the surveillance tapes were dispositive of anything.[6] The referee considered respondent's testimony regarding his alleged conversation with Thorne, and expressly rejected it as less than credible, given the record evidence to the contrary. [RR. 4.] This dearth of trial evidence, as to respondent's alleged conversation with the mentally-ill Thorne, cannot become more convincing on appeal.

Equally, and perhaps more troubling, is the manner in which and purpose for which respondent took an unauthorized dismissal of Lindale's claim. The record evidence demonstrates that respondent took the dismissal in order to avoid the

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[6] Indeed, the evidence demonstrated that the surveillance tapes were of no consequence in the case, as successor counsel was able to revive the case, despite the expiration of the statute of limitations and the existence of the surveillance tapes, and obtain an excellent award for Jerry L. Lindale. [T. 97.]

bother of prosecuting the case for a client whom respondent considered to be "crazy" [T. 159-160] and therefore insignificant, and/or to create a scenario that would place the blame for the dismissal upon his law partner, Patricia Thorne. Respondent had invited Thorne into his law practice while his own bar disciplinary case was on appeal, so that he could continue to work as a paralegal in his own law office during his expected suspension. After respondent completed his 90-day suspension, Thorne was no longer useful to him. Indeed, due to her mental health problems, she had become loathsome and bothersome to him, and respondent wanted to be rid of her. Thorne, who admired and respected respondent (he had been her deceased father's good friend and lawyer), did not want to leave the partnership. Respondent had been unsuccessful in shoving her out, even after he caused or assisted his paralegal, Isis San Miguel, to file a bar complaint against her in May of 2003 — just two days after the false pleading at issue was filed. [T. 635, 668.]

Whether respondent's action in dismissing Lindale's case was motivated by disinterest or malice, the record evidence clearly demonstrates that it was not motivated by any direction that respondent took from his law partner, Patricia Thorne. The referee expressly rejected respondent's defense, and upon the weight of the clear and convincing evidence before her, found respondent guilty of all charges set forth in The Florida Bar's complaint.

Because respondent had already been suspended for 90 days in another case (also involving his ongoing dispute with Thorne) involving similar misconduct (dishonesty and misrepresentation), the referee recommended that respondent receive a 91-day suspension, and that he be compelled to pay The Florida Bar's costs in this proceeding. As this discipline is within the guidelines established by both the case law and the *Florida Standards for Imposing Lawyer Sanctions*, it should be approved.

ARGUMENT

I. THE REFEREE'S FINDINGS ARE WELL SUPPORTED BY COMPETENT, SUBSTANTIAL RECORD EVIDENCE, AND SHOULD BE UPHELD.

This Court's standard of review for evaluating a referee's findings of fact and recommendations as to guilt is limited, and "if a referee's findings of fact and conclusions concerning guilt are supported by competent, substantial evidence in the record," the Court will not "reweigh the evidence and substitute its judgment for that of the referee." The Florida Bar v. Shoureas, 892 So. 2d 1002, 1005 (Fla. 2004) *quoting* The Florida Bar v. Rose, 823 So. 2d 727, 729 (Fla. 2002). The Court's standard of review for evaluating a referee's disciplinary recommendation is broader: "[a]s a general rule, the Court will not second-guess a referee's recommended discipline as long as it is (1) authorized under the Florida Standards for Imposing Lawyer Sanctions and (2) has a reasonable basis in existing case law." Shoureas, at 1005 and 1006.

In the instant case, respondent has asked this Court to review the referee's findings, upon his charge that she "overlooked certain key evidence and ignored uncontroverted testimony that would have exonerated Respondent in this case." Respondent's Initial Brief, p. 10. However, respondent has failed to advance "key evidence" and "uncontroverted testimony" sufficient to meet his burden of proving that the referee's findings are unsupported by the record on appeal. The Florida Bar

demonstrates that herein, using respondent's headings, as set forth in his Initial Brief.

A. Lindale's Retention of the Law Firm and Processing of Claims

Respondent is correct in his assertion that Thorne (and not Varner) met with Lindale in February 2000, when Lindale hired the newly-formed law firm of Varner and Thorne, P.A. to represent him in his workers' compensation action. However, respondent's argument that Thorne was well and able to work and bill on the Lindale file, in 2003, is both misplaced and devoid of record support.

Beginning with respondent himself, *all* of the trial (fact) witnesses testified about respondent's compromised mental health in 2003. Respondent knew that Thorne was suffering bouts of mental illness in 2003, and testified to this knowledge, at great length, at trial. [T. 154, 564-566, 655-656.] Judge Smith testified that Lindale and his subordinate lawyers (and *not* Thorne) handled all aspects of the Lindale case, because Thorne was too ill to do so. [T. 18-20, 22, 55-56.] She also testified that Thorne's name appeared for the firm, on many of the Lindale pleadings, as the default attorney, and conceded that that fact was dispositive of nothing regarding Thorne's actual involvement in the case. [T. 21-22.] Lindale's successor counsel, Charles Williams, testified that Lindale told him that respondent had been handling Lindale's case because Thorne "had been away and whatever." [T. 75.] Thorne herself testified, at length, about her

escalating struggle with her bipolarity and other mental illnesses, and her long treatment sessions at The Pavilion, at McLean Hospital, in Boston. [T. 226, 242-244, 262-264, 275.] And, contrary to respondent's claim in his initial brief at page 11, Thorne did *not* testify that her mental condition "was improving in 2003." To the contrary, Thorne testified (at page 233 of the trial transcript) that her mental condition in February 2000 was "much better" than her condition in 2003. [T. 233, lines 16-22.] Additional, competent evidence regarding Thorne's illness, and her inability to function as a lawyer, was offered by the law firm's secretary, Norma Almazan, who testified that Thorne was unable to handle her case load, which had been taken over by respondent. [T. 302-303.] Even Isis San Miguel, respondent's long-term paralegal who was "loyal to Mr. Varner" [T. 392], conceded that Thorne had mental problems "for which she was being treated" [T. 384-385], and that even when she came into the office, she wasn't working. [T. 387.]

Finally, while the law firm's billing records referenced Thorne's presence and work in the office during time period when she was not there, both respondent and Thorne testified that the law firm's electronic case management system (Client Profiles[7]) was inaccurate as to the author of the entry, as well as the staff member or attorney assigned to the task or entry. Respondent testified that the software program entries were inaccurate [T. 171-174], and that entries could be (and were)

[7] [T. 285.]

affected if one user accessed another's computer — which occurred with some frequency in the law firm. [T. 651.] Thorne testified to these inaccuracies as well, but was able to use the system, at trial, to demonstrate which computer generated which pleading, and when. [T. 305-321.]

Accordingly, these flawed and inconsistent records cannot create "key evidence." Indeed, as the testimony offered by these witnesses is wholly *consistent* with the referee's findings, respondent has neither advanced nor exposed "uncontroverted testimony" sufficient to meet his burden of proving that the referee's findings are unsupported by the record on appeal.

B. The Notice of Voluntary Dismissal

Respondent seeks to present his own controverted and unsupported testimony, to demonstrate that the referee erred in her reliance on other, more credible evidence. This argument is ineffective and insufficient, in that an appellant cannot meet his burden of proving clearly erroneous findings by demonstrating that the record contains other evidence as well. The Florida Bar v. Senton, 882 So. 2d 997 (Fla. 2004); The Florida Bar v. Vining, 761 So. 2d 1044 (Fla. 2000). In bar disciplinary cases, the referee is charged with the responsibility of assessing the creditability of witnesses, based on their demeanor and other factors. The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999); The Florida Bar v. Hayden, 583 So. 2d 1016 (Fla. 1991). In the case at bar, the referee listened carefully to the

testimony presented, and scrutinized the documents introduced into evidence. She asked her own questions, where necessary. Utilizing the discretion reserved unto her alone, the referee found the bar's evidence to be the more credible. Respondent may not vitiate the referee's determination, as to the weight and sufficiency of that evidence, by arguing that other evidence (however unsupported) exists.

In reaching her conclusions of guilt, the referee relied on Judge Smith's testimony that respondent called her, on a date between August 12th and August 13th, 2003, and asked her to continue or cancel the discovery in the Lindale case. Judge Smith testified that she refused, and that, *in the very same telephone conversation*, respondent agreed to take a voluntary dismissal of Lindale's case. The referee correctly rejected all of respondent's testimony about prior conversations with Thorne (about whether to take the dismissal, as well as the value and projected effect of the standard surveillance tapes at issue). Finding that respondent had no prior conversation with Thorne, the referee correctly reasoned that if respondent intended and was authorized to dismiss Lindale's case, there would have been no reason for his call to opposing counsel seeking to continue the discovery in that case. The referee also recognized that if respondent sought and obtained actual approval from Lindale and Thorne prior to agreeing to the voluntary dismissal, he could not have done so in the space of a single, brief telephone conversation with Judge Smith.

1. Count I

Respondent has failed to demonstrate a lack of record evidence to support the referee's findings of guilt as to Count I of The Florida Bar's complaint. Conversely, there is ample record support for the referee's finding that respondent was incompetent in his representation of Jerry L. Lindale. Respondent demonstrated incompetence by failing to prepare Lindale's case for merit hearing, as scheduled on August 25, 2003. He demonstrated incompetence during the School District's deposition of Lindale's treating physician, Dr. Katzell, on August 11, 2003. Based on the testimony of both Judge Smith and Charles Williams, Esq., respondent allowed opposing counsel to ask objectionable questions, without objection. He asked few questions of his own. He allowed the witness to play "fast and loose" [T. 81], and instead of paying attention, he read a magazine. Additionally, respondent allowed opposing counsel direct communication with Lindale [T. 51], as if he had no lawyer. And, when he tired of Lindale's representation (because he had other things to do or because he wanted to use this "crazy" client's case to push his law partner out of his practice), respondent knowingly filed a false, unauthorized voluntary dismissal, without even knowing when (or if) the statute of limitations would run.

This ample, record evidence cannot be compromised by any misstatements or confused testimony by Patricia Thorne, even if same existed, as respondent has

charged. But Thorne made no misstatements in her testimony. She was not confused. While she did state that she learned of the voluntary dismissal of Thorne's case from Judge Smith, she also (accurately) testified that she did not know that respondent had taken an *unauthorized* voluntary dismissal until she received the bar complaint. The two statements which respondent holds up as evidence of misrepresentation or inconsistency are anything but inconsistent. Thorne told no "stories," as respondent has charged. The referee understood this, and made appropriate findings, which are well-supported by the trial record.

2. Count II

Respondent takes issue with the referee's findings that respondent did not tell Lindale that respondent had dismissed his case, and failed to protect Lindale's interests after the termination of his cause of action.

In support of this argument, respondent relies on his own testimony: that he had discussed the voluntary dismissal with Thorne, and that he believed that Thorne had obtained Lindale's authority before she authorized respondent to take the voluntary dismissal. Because the referee rejected respondent's testimony as lacking all credibility, and because respondent advanced no evidence of having done anything to protect Lindale's interests after he caused his case to be dismissed, respondent's argument is without record support and is insufficient to overcome the competent, substantial evidence upon which the referee relied. This

evidence includes Thorne's testimony (that because she never received the entire Lindale file from respondent, she was unable to produce the entire Lindale file to Charles Williams, Esq. [T. 78]), as well as Lindale's sworn complaint [Bar Ex. 2], in which he stated that he received no return calls from respondent, or anyone in respondent's law office.

3. <u>Count III</u>

Respondent correctly noted that a violation of R. Regulating Fla. Bar 4-8.4(c) requires a specific finding of intent. The referee made such a finding, as set forth in paragraphs 11, 12, 13, and 14 of her Report of Referee. [RR. 3-4.] Respondent has advanced no evidence, beyond his own discounted testimony, to support his argument that the referee improperly relied upon other, more credible evidence in the trial record, to support her findings of guilt on this count.

C. The Referee Allowed Full and Free Cross-Examination of all Witnesses

Respondent charged the referee with interfering with his cross-examination on three separate occasions. The first occurs on page 327 of the trial transcript, during respondent's cross-examination of Patricia Thorne. When respondent's counsel began to re-ask questions about how respondent met Thorne, the referee questioned counsel's direction. However, the record reveals no evidence of interference of any kind. Respondent's counsel continued his questioning, unfettered, and said, on page 328, at lines 10 and 11: "I'm not going to explore it

any further, Judge. Hopefully not." Clearly, respondent's counsel did not suffer any judicial restriction and/or interference at this juncture. The next referee interference about which respondent complains occurred on page 339 of the trial transcript. Still cross-examining Thorne, respondent's counsel asked again about her mental health diagnosis. The referee commented that the testimony sought was already in the record, and respondent's counsel responded: "Judge, if you have it, we'll move on." [T. 339-340.] Again, this exchange demonstrates neither obstruction nor interference of any kind.

Upon examination, it is clear that respondent's final complaint is not about restriction of his cross-examination at all, but about the admission of a particular piece of evidence, and the referee's ruling on a relevance objection advanced by The Florida Bar. As these issues are clearly within the referee's discretion, they cannot support a finding of error on appeal, couched as a due process violation. The Florida Bar v. Germain, 957 So. 2d 613 (Fla. 2007).

II. AS THE REFEREE'S RECOMMENDATION OF A 91-DAY SUSPENSION HAS A REASONABLE BASIS IN EXISTING CASE LAW AND IN THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS, IT SHOULD BE APPROVED.

This Court has a wider scope of review over disciplinary recommendations than it does over findings of fact. This is because it falls to this Court to order appropriate punishment, when necessary. The Florida Bar v. Anderson, 538 So.2d

852, 854 (Fla. 1989). Notwithstanding this broader overview authority, a referee's recommendation of discipline is also afforded a presumption of correctness unless the recommendation is clearly erroneous or without record support. The Florida Bar v. Barcus, 697 So.2d 71 (Fla. 1997), *quoting* The Florida Bar v. Niles, 644 So. 2d 504, 506 (Fla. 1994). As a general rule, "when evaluating a referee's recommended discipline in an attorney disciplinary proceeding," this Court has determined that it "will not second-guess a referee's recommended discipline as long as that discipline (1) is authorized under the Florida Standards for Imposing Lawyers Sanctions and (2) has a reasonable basis in existing case law." The Florida Bar v. Spear, 887 So. 2d 1242, 1246 (Fla. 2004).

A. THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

In the instant case, the referee's disciplinary recommendation of a 91-day suspension, and payment of the bar's costs, is authorized under the *Florida Standards for Imposing Lawyer Sanctions.* Standards 4.42 (Lack of Diligence), 4.52 (Lack of Competence), 6.12 (False Statements, Fraud, and Misrepresentation), and 7.2 (Violation of Other Duties Owed as a Professional) expressly authorize a rehabilitative suspension of 91 days in the instant case.

B. THE EXISTING CASE LAW

The referee's recommendation of a 91-day suspension has a reasonable basis in existing case law, especially given respondent's prior 90-day suspension for

similar misconduct. This is because bar discipline is cumulative. The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1982). And, it is because respondent's prior disciplinary case is factually similar, and relevant, to the instant one. These similarities are both troubling and alarming. In The Florida Bar v. Varner, 780 So. 2d 1, (Fla. 2001), the Court found that Varner had knowingly made a false statement of material fact in creating a fictitious notice of voluntary dismissal. In imposing a 90-day suspension against him, this Court chastised respondent for having "hatched a scheme" to conceal an error he had committed, and stated that it "cannot countenance a short-term suspension" where respondent's conduct was "so contrary to the most basic requirement of candor." Varner, at 5-6.

While The Florida Bar has found no reported case directly on point, given the unique facts of this case, it takes guidance from this Court's decision in The Florida Bar v. Lathe, 774 So. 2d 675, 677 (Fla. 2000). Although that case did not involve an involuntary dismissal, it did involve intentional misrepresentations to a tribunal regarding extant litigation. In finding respondent's misconduct to be "destructive to the legal system as a whole," as well as wasteful of his adversary's time and resources, the Court imposed a 91-day suspension — even though Lathe had no prior disciplinary history. In The Florida Bar v. Burton, 396 So. So. 2d 705 (Fla. 1980), a respondent settled his client's insurance claim without authority, forged the client's name on a release, kept the settlement funds for himself, and

then lied to the client about the status of his case. Respondent was disbarred. While Burton's misconduct was far more egregious than was respondent's, in the case at bar (due, in no small part, to the lawyer's misappropriation of his client's funds), it is clear that Burton's disbarment hinged, at least in part, on his surrender of his client's cause of action, without authority.

Paramount in the referee's consideration, as she recommended a 91-day suspension in the instant case, was this Court's ruling regarding the purpose of lawyer discipline, as set forth in The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970), and its progeny. [RR. 9.] The referee concluded that respondent's conduct, measured by the yardstick of his own past misconduct, compelled the imposition of a rehabilitative suspension of 91 days.

As respondent has failed to demonstrate that the referee's recommendation of discipline has no reasonable basis in existing case law, or that it is not authorized under the *Florida Standards for Imposing Lawyer Sanctions*, this Court should not second-guess her recommendation, and should enter an Order suspending respondent from the practice of law for 91 days, and compelling him to pay The Florida Bar's reasonable costs.

CONCLUSION

In the instant case, after an expert deposition during which he read a magazine, respondent prepared, signed and filed a fraudulent notice of voluntary dismissal on behalf of his client, Jerry L. Lindale. This functioned as a dismissal with prejudice, as the statute of limitations had run on Lindale's claim. Respondent took this action either because he no longer wanted to bother with Lindale's case or because he wished to use this "crazy" client's case to "hatch a scheme" by which he could shove his discarded law partner out of his office. Either way, in causing the dismissal of Lindale's case without his knowledge or approval, respondent engaged in litany of misrepresentations and dishonest acts. He sought to blame the dismissal on his law partner, who was suffering a mental health crisis at the time. He caused or encouraged a firm paralegal to file a bar complaint against his partner. He induced a law firm secretary (who is also his wife) to create the fraudulent notice of voluntary dismissal, using his law partner's legal forms, and he caused billings and file notes in the Lindale matter to reference his partner's name (instead of his own) in the law firm's case management software, to implicate her in the Lindale matter. Finally, respondent offered false testimony about his conduct at the referee hearing. Because the respondent has failed to demonstrate a lack of record support, the referee's findings of guilt, as to all charges, should be approved, and her recommendation of a 91-day suspension, together with payment of the bar's costs, should be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY the original of The Florida Bar's Amended Answer Brief has been furnished by regular U.S. mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; true and correct copies have been furnished by regular U.S. mail to Kevin P. Tynan, Counsel for Respondent, at 8142 N. University Drive, Tamarac, Florida 33321, and to Staff Counsel, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this ____ th day of March, 2008.

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LORRAINE CHRISTINE HOFFMANN

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

Undersigned counsel hereby certifies The Florida Bar's Answer Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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LORRAINE CHRISTINE HOFFMANN

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