IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	**Supreme Court Case Nos. SC07-1369**
Complainant,	**SC08-256**
v.	**The Florida Bar File Nos. 2008-50,083(15C)(OSC)**
GERALD JOHN D'AMBROSIO,	**2007-50,946(15C)**
Respondent.	

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REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

In Supreme Court Case No. SC07-1369 (hereinafter "SC07-1369"), The Florida Bar filed its Petition for Contempt and Order to Show Cause on July 20, 2007. The Court entered a Show Cause Order, and respondent filed a response. The Florida Bar filed a reply to respondent's response, respondent answered that pleading and filed a motion to strike a bar exhibit. The Court denied respondent's motion to strike, and forwarded the matter to the Chief Judge of the Seventeenth Judicial Circuit (The Honorable Victor Tobin), directing him to appoint a referee to "hear, conduct, try and determine the matters presented. . . ." Judge Tobin appointed the undersigned on November 9, 2007. Pursuant to timely notice and the agreement of the parties, the final hearing in SC07-1369 was conducted and concluded on February 15, 2008. However, before the referee completed his report,

he was appointed to preside as referee in Supreme Court Case No. SC08-256 (hereinafter "SC08-256"). The Florida Bar filed its complaint in SC08-256 on February 14, 2008, and the undersigned was assigned as referee on February 27, 2008. Upon respondent's motion, and without objection from The Florida Bar, it was agreed that the referee would take testimony in the second case (SC08-256) as soon as possible, and thereafter render his report on both cases, in a consolidated report of referee. An Agreed Order, to this effect, was entered on March 14, 2008. Accordingly, SC08-256 was set for trial, and tried to conclusion, on May 9, 2008. In SC07-1369, The Florida Bar called respondent as a witness, and also presented the testimony of Mrs. Phyllis Folsom and Gary A. Kurtz, Esq. Respondent testified on his own behalf, but called no witnesses. In SC08-256, The Florida Bar called respondent as a witness, and also presented the testimony of John J. Pcolinski, Esq. Again, respondent testified on his own behalf, but called no witnesses. The pleadings, trial exhibits, and all other papers filed in both cases, which are forwarded to the Supreme Court of Florida with this report, constitute the entire record in this consolidated matter.

During the course of these proceedings, respondent initially appeared *pro se* but was represented by Kevin P. Tynan, Esquire, for the trial of both matters. The Florida Bar has been represented by Lorraine Christine Hoffmann, Bar Counsel.

II. **FINDINGS OF FACT**:

A. Jurisdictional Statement: Respondent is, and at all times mentioned during these investigations, was, a member of The Florida Bar, and subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary:

Supreme Court Case No. SC07-1369

1. On October 19, 2006, the Supreme Court of Florida entered an Order in Case No. SC04-922, suspending respondent from the practice of law for one year.

2. At that time, respondent was (and had been) practicing law in an office he maintained in Suite 111 at 370 Camino Gardens Boulevard, in Boca Raton, Florida.

3. The Court's October 19, 2006 suspension Order was based on the Court's finding that respondent "demonstrated a complete disrespect for the disciplinary process" by failing to give notice of his (prior) 90-day suspension to his clients, the courts and some opposing counsel.

4. The Court's Order mandated that respondent's suspension was to take effect thirty days after the Order was entered, and that such suspension was to continue for a minimum of one year, and thereafter, until

respondent complied with specific terms and conditions established by the Court, and demonstrated rehabilitation.

5. Pursuant to the Court Order of October 19, 2006, respondent's one-year suspension began on or about November 18, 2006.

6. Respondent continues to occupy his (former) law office, located in Suite 111 at 370 Camino Gardens Boulevard, in Boca Raton, Florida. He has also maintained his office telephone and fax numbers, and lists his office address and telephone number in the White Pages of the telephone book. This contact information remains on his business letterhead.

7. Although respondent testified that he engaged in non-legal business (for an entity called Media International Group) on the premises of his former law office, after his suspension, respondent did not list that business name on his office letterhead, nor in the White Pages of the telephone directory.

8. On June 28, 2007, while respondent was under suspension from the Bar, he wrote a letter to Gary A. Kurtz, Esq., a member of the Illinois, Missouri and California Bars. Mr. Kurtz is currently engaged in the practice of law in Woodland Hills, California.

9. The first sentence of respondent's June 28, 2007 letter to Mr. Kurtz, reads: "I am counsel to Anglo BioTran" and although the letter states

that respondent "advised the parties to retain California counsel to defend this matter," the letter also states that respondent has provided legal opinions about the sufficiency of a complaint filed against that entity, and that he has discussed the legal course he would take or advise for his "client," in the extant or successive, contemplated litigation.

10. Upon receipt and review of respondent's June 28, 2007 letter, Mr. Kurtz believed respondent to be a Florida lawyer acting as in-house or general counsel for BioTran. Mr. Kurtz knew that BioTran had a Florida connection. [Trial transcript, pages 54-58, and 75.]

11. Based on respondent's letter to Kurtz, as well as the testimony presented at trial, I find that respondent is guilty of engaging in the practice of law in violation of the October 19, 2006, Supreme Court Order suspending him from practicing law for one year.

12. The Florida Bar's second claim that respondent was engaged in the unlicensed practice of law stemmed from a letter written by Phyllis Folsom to The Florida Bar, wherein she claimed that she had surreptitiously called respondent's law office and attempted to hire him to perform legal work for her. See Folsom July 30, 2007 letter to Bar Counsel.

13. It should be noted that in a prior disciplinary action against respondent, Folsom testified regarding Respondent's representation of her adult son. See The Florida Bar v. D'Ambrosio, 946 So. 2d 977 (Fla. 2006).

14. Folsom testified that in June or July, 2007 a friend had told her that despite respondent's suspension, he was "still in business."

15. Folsom stated that she remembered calling (BellSouth's information number) 411 and asking for "Mr. Gerald D'Ambrosio, attorney" to get respondent's telephone number. [Transcript, page 45.] The 411 operator gave Folsom respondent's former (and current) office telephone number.

16. Folsom testified that she made a telephone call to respondent's office and talked to an unknown woman. Folsom testified that she told the woman that she wanted to retain respondent for her (non-existent) personal injury case. After Folsom answered some basic questions about her "case" the woman asked her to hold, and then returned to ask her for contact information. Folsom stated that she left a false name and number; also, that she made some personal notes regarding the conversation, and later brought the matter to the attention of The Florida Bar in a letter dated July 30, 2008. [Bar Exhibit 8.].

17. There was no evidence presented that respondent talked to Folsom on that day or thereafter. The best Folsom can claim is that she talked to a woman who answered the phone on a date and time she can not recall and that she was advised that respondent was unable to come to the phone and would have to call her back, which he did not. Accordingly, I find that the Bar has not provided clear and convincing evidence that respondent was practicing law in relation to the matters raised by Ms. Folsom.

Supreme Court Case No. SC08-256

18. Despite his suspension in October 2006, respondent continues to maintain his office on the premises of his former law firm, as of the date of trial (May 9, 2008). Similarly, respondent has maintained the same telephone number as his former law firm, to the current date. Respondent has no non-legal business purpose for remaining in his former law office, or for maintaining his former law office telephone number there. [Transcript, page 11.] Further, respondent renewed the lease on his former law office in March 2007, well after the effective date of his suspension. [Transcript, page 85.]

19. In or about February 2005, while respondent will still a member in good standing with the Bar, Dr. Tom Bolera, respondent's friend and

client, contemplated a legal malpractice action against his former counsel, John J. Pcolinski, an Illinois lawyer.

20. Respondent is not, and has never been admitted to practice law in the State of Illinois.

21. Notwithstanding his inability to practice law in Illinois, respondent assisted Dr. Bolera in filing and amending a civil action against Mr. Pcolinski, in Illinois. Respondent testified that he researched Illinois law, for this purpose, on the internet.

22. Respondent also testified that he assisted Dr. Bolera in another civil action, in Oregon. Respondent admitted that he is not licensed to practice law in Oregon. [Transcript, page 21.]

23. Further, respondent knowingly allowed Dr. Bolera to use respondent's law office address, telephone number and fax number as Dr. Bolera's own residential address, for purposes of the Illinois civil action.

24. On February 15, 2005, respondent wrote a letter to Mr. Pcolinski, directed to his law office in Wheaton, Illinois. In this letter, written on respondent's Florida law office letterhead, respondent outlined his client's claim against Mr. Pcolinski, expressed legal opinions about such claim, and directed Mr. Pcolinski to contact his malpractice carrier, and call respondent to discuss the case.

25. On August 18, 2006, respondent wrote a second letter to Mr. Pcolinski. Again, respondent used his Florida law office letterhead. In this second letter, respondent again outlined the basis for his client's claim against Pcolinski, expressed legal opinions, and asserted accumulated damages. Respondent also advised that the "Illinois two (2) year statute will run on September 21, 2004." In closing, respondent again directed Mr. Pcolinski to contact his malpractice carrier.

26. Mr. Pcolinski has been a lawyer since 1986. He is admitted in Illinois and Arizona, and is a partner in his Illinois law firm. He is an adjunct faculty member at North Central College and is AV rated by Martindale-Hubbell. He is a member of the Illinois Supreme Court Committee on Character and Fitness, and is currently a judicial applicant in his home state. [Transcript, pages 45-46.]

27. I find that, having received these communications from respondent, Mr. Pcolinski (whose telephonic testimony at the bar disciplinary hearing was agreed to by both parties) reasonably believed that respondent was functioning as counsel to the entities on whose behalf he wrote to Mr. Pcolinski: Drs. Bolera, Leger and Trichardt.

28. After he was served with a summons and complaint (and then an amended complaint), filed by Dr. Bolera *pro se*, and noting that

Dr. Bolera's residential address was the same as respondent's office address, Mr. Pcolinski became concerned, and initiated an investigation into respondent's conduct in this case. This investigation resulted in Mr. Pcolinski's discovery that respondent is not admitted to practice law in Illinois.

29. On January 3, 2007, Mr. Pcolinski filed a complaint, regarding respondent's conduct, with The Florida Bar.

30. I have taken judicial notice of R. Regulating Fla. Bar 4-5.5 (Unlicensed Practice of Law), and the comparable Illinois law on the subject: ILCS S. Ct. Rules of Prof. Conduct, RPC Rule 5.5 (Unauthorized Practice of Law).

31. Based on these rules, the letters in evidence, as well as the testimony at trial, I find that respondent engaged in the unlicensed practice of law in Illinois, in violation of The Rules Regulating the Florida Bar.

III. RECOMMENDATION AS TO GUILT:

A. *Supreme Court Case No. SC07-1369*

As to the complaint issues that deal with respondent regarding the company BioTran, I find that The Florida Bar has proved, by clear and convincing evidence that respondent held himself out as a lawyer – and indeed, practiced law, after his

suspension in complete disregard of the Court's two prior Orders suspending him from such practice, and in contempt of the Supreme Court of Florida.

However, as to the complaint made by Mrs. Folsom, in Supreme Court Case No. SC07-1369, the evidence provided was not clear and convincing that respondent violated the terms and conditions of his prior suspension order regarding Ms. Folsom's telephone call to his office, and respondent should be found not guilty of contemptuous conduct related thereto.

B. ***Supreme Court Case No. SC08-256***

Because respondent practiced law in the State of Illinois, without admission or permission to practice in that jurisdiction, in violation of the rules of professional conduct in both states, I find respondent guilty of violating R. Regulating Fla. Bar **4-5.5(a)** [A lawyer shall not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so.]. Because of the foregoing misconduct, and because respondent knowingly and intentionally permitted (and indeed assisted) Dr. Bolera in filing a false pleading in Illinois (by allowing him to use his own law office address as Dr. Bolera's residential address in a civil action), I find respondent guilty of violating R. Regulating Fla. Bar **4-8.4(c)** [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or

misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.] and **4-8.4(d)** [A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.]. Finally, because all of the foregoing misconduct was willful and intentional, I find respondent guilty of violating R. Regulating Fla. Bar **3-4.2** [Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline.], **3-4.3** [The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall

the failure to specify any particular act of misconduct be construed as tolerance thereof. The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.], and **4-8.4(a)** [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.].

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

This Court considers cumulative misconduct as a relevant factor when determining the appropriate penalty in a disciplinary matter. Florida Bar v. Adler, 589 So.2d 899, 900 (Fla.1991). Cumulative misconduct may be found when the misconduct occurs near in time to the other offenses. Florida Bar v. Golden, 566 So.2d 1286 (Fla.1990). This Court generally imposes a greater sanction for cumulative misconduct than for isolated misconduct. Florida Bar v. Lawless, 640 So.2d 1098, 1101 (Fla.1994). I recommend that respondent be disbarred. I also recommend that The Florida Bar’s costs should be assessed against respondent, with statutory interest accruing until paid, pursuant to the requirements of R. Regulating Fla. Bar 1-3.6.

In The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), the Supreme Court of Florida stated that certain precepts should be followed in choosing bar discipline. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time, not depriving the public of the services of a qualified attorney due to undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent: sufficient to punish a breach of ethics and, at the same time, encouraging reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone, or become tempted, to become involved in like violations. Pahules, at 132.

In the instant case, respondent has already been prosecuted, and indeed disciplined, for improper conduct during suspension. Because he was warned and punished before, and still engaged in the same or worse misconduct again, I am forced to focus on the third prong of the Pahules analysis: deterrence. Because of his repeated misconduct during his (now enhanced) suspension, respondent has demonstrated an intractable contempt for the Court's suspension orders. He has spurned and rejected all invitations to achieve rehabilitation.

My recommendation of disbarment is supported by both the case law and The Florida Standards for Imposing Lawyer Discipline. Turning first to the case law, the Supreme Court of Florida has repeatedly held that clear violation of any order or disciplinary status that denies an attorney the license to practice law is

generally punishable by disbarment, absent strong extenuating circumstances. *See* The Florida Bar v. Forrester, 916 So. 2d 647 (Fla. 2005) [Disbarred for continued practice after suspension]; The Florida Bar v. Heptner, 887 So. 2d 1036 (Fla. 2004) [Disbarred for continued practice after suspension and R. Regulating Fla. Bar 3-5.1(g) violations, despite claims of inability to control behavior due to cocaine addiction and depression]; The Florida Bar v. Weisser, 721 So. 2d 1142 (Fla. 1998) [Disbarred for intentional and continuous practice of law after disciplinary resignation. The Court found that this misconduct caused injury to the legal system and profession]; The Florida Bar v. Rood, 678 So. 2d 1277 (Fla. 1996) [Disbarred for practicing while suspended from the practice of law]; The Florida Bar v. McAtee, 674 So. 2d 734 (Fla. 1996) [Disbarred for practicing while suspended from the practice of law]; The Florida Bar v. Brown, 635 So. 2d 13 (Fla. 1994) [Enhanced disbarment, for 6 years, for continuing to practice law after disciplinary resignation]; The Florida Bar v. Greene, 589 So. 2d 281 (Fla. 1991) [Disbarred for practicing law on 4 occasions after suspension, even though it was for a personal friend, and without compensation]; The Florida Bar v. Jones, 571 So. 2d 426 (Fla. 1990) [Disbarred for practicing law after suspension, despite referee's recommendation that extant 91 day suspension be extended for additional 2 years]; and The Florida Bar v. Bauman, 558 So. 2d 994 (Fla. 1990) [Disbarred

for 5 acts constituting the practice of law after suspension, rejecting the referee's recommendation of a 3 year suspension].

There are no extenuating circumstances in the instant case. Respondent has continued to ignore the authority of the Supreme Court of Florida by continuing to practice, even after being suspended for the *same kind* of misconduct. The Court has determined that disbarment is appropriate where there is a pattern of misconduct and a history of prior discipline. *See* The Florida Bar v. Catalano, 685 So. 2d 1299 (Fla. 1996) and The Florida Bar v. Spann, 682 So. 2d 1070 (Fla. 1996). Further, the Court has, historically, dealt more harshly with cumulative misconduct than with isolated instances of misconduct — especially if the repeated misconduct is of a similar nature, as in the instant case. The Florida Bar v. Temmer, 753 So. 2d 555 (Fla. 1999).

The Florida Standards for Imposing Lawyer Sanctions also support disbarment. Standard 8.1 states that disbarment is appropriate when a lawyer:

> (a) intentionally violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system or the profession, or
>
> (b) has been suspended for the same or similar misconduct, and intentionally engaged in further similar acts of misconduct.

V. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS:

Prior to recommending discipline, and pursuant to R. Regulating Fla. Bar 3-7.6(k)(1), I considered the following:

A. Personal History of Respondent:

Age: 69

Date admitted to The Florida Bar: December 8, 1987

B. Aggravating and Mitigating Factors:

Based on Standard 9 of The Florida Standards for Imposing Lawyer Sanctions, I find the following:

1. Standard 9.2 Aggravation

(a) 9.22(a) prior disciplinary offenses - Respondent received an admonishment for incompetence, by Court order dated April 21, 1994; respondent received a public reprimand for neglect and technical trust accounting violations, by Court order dated July 1, 1999; respondent was suspended for 90 days for misrepresentation, by Court order dated January 17, 2002; respondent was suspended for 1 year, by Court order dated October 19, 2006, for contempt of court and violation of requirements of his (previous) 90 day suspension.

(b) 9.22(b) dishonest or selfish motive

(c) 9.22(c) a pattern of misconduct

(d) 9.22(d) multiple offenses

(e) 9.22(i) substantial experience in the practice of law

2. Standard 9.3 Mitigation - None

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED:

Because I have found that The Florida Bar has incurred reasonable costs, and that such costs should be assessed against respondent, I recommend that the following specific costs be assessed against respondent:

A.	Grievance Committee Level Costs:	
	1. Court Reporter Costs	$ 410.80
	2. Bar Counsel Travel Costs	$ - 0 -
B.	Referee Level Costs:	
	1. Court Reporter Costs	$2,812.08
	2. Bar Counsel Travel Costs	$ 98.16
C.	Administrative Costs	$1,250.00
D.	Auditor Costs	$ - 0 -
E.	Miscellaneous Costs:	
	1. Investigator Costs	$ 400.25
	2. Witness Fees	$ 5.00
	3. Copy Costs	$ 9.00
	4. Telephone Charges	$ - 0 -
	5. Witness Travel Costs	$ 32.98
TOTAL COSTS		**$5,018.27**

As stated above, I recommended such costs be charged to respondent and that statutory interest should accrue until paid. This cost assessment is subject to the mandates of R. Regulating Fla. Bar 1-3.6.

Dated this _____ day of June, 2008.

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HONORABLE JOHN J. MURPHY III
REFEREE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927, and that copies were mailed by regular U.S. mail to the following: STAFF COUNSEL, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; and LORRAINE CHRISTINE HOFFMANN, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309-2366; and to KEVIN P. TYNAN, counsel for respondent, 8142 North University Drive, Tamarac, FL 33321, on this _____ day of June, 2008.

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HONORABLE JOHN J. MURPHY III
REFEREE