IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GERALD JOHN D'AMBROSIO,

Respondent.
_____/

Supreme Court Case Nos. SC07-1369 & SC08-256

The Florida Bar File Nos. 2008-50,083(15C)(OSC) And 2007-50,946(15C)

THE FLORIDA BAR'S ANSWER BRIEF

ON APPEAL FROM A REPORT OF REFEREE

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page No.

Florida Bar Cases

Other Authorities Cited

PRELIMINARY STATEMENT

The respondent, Gerald John D'Ambrosio, is seeking review of a referee report recommending disbarment. Respondent challenges the referee's factual findings, his findings of guilt and his sanction recommendation.

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). All references to the two trial transcripts will be designated as (transcript of hearing of February 15, 2008) T1. _____ and (transcript of hearing of May 9, 2008) T2. _____, with the blanks indicating the referenced page numbers. As all trial exhibits referenced herein are Florida Bar Exhibits, these will be referred to as T1 Exhibit ____ and T2 Exhibit _____ (with the blanks indicating the referenced page number). The Florida Bar will be referred to, throughout this answer brief, as "the Bar." Respondent, Gerald John D'Ambrosio, will be referred to as "respondent."

STATEMENT OF THE CASE AND THE FACTS

Because respondent's statement of the case and facts, in his initial brief, is incomplete and lacking full record citations, The Florida Bar offers the following supplement.

A. Statement of the Case

The referee received this cause in the form of two separate cases that were, with respondent's express agreement, consolidated for purposes of a sanction recommendation. T2. 96. *See* "Agreed Order Consolidating Cases for Disciplinary Recommendation and/or Report of Referee," entered by the referee on March 14, 2008. *See also* "The Florida Bar's Response to Respondent's Motion to Dismiss," as served on May 1, 2008. The first (based on chronological filing date) of these two cases was a contempt action predicated by a complaint filed by a California lawyer. This out-of-state practitioner complained to The Florida Bar that respondent continued to practice law (in June 2007) after the November 2006 effective date of his Bar suspension [for failing to notify his clients of a prior suspension.] T1. 55-60, RR 3. The second case was predicated by a complaint filed by another out-of-state lawyer. In that case, an Illinois lawyer complained that respondent had, on a friend's behalf, engaged in the unlicensed practice of law in Illinois. T2. 44-65.

B. Statement of the Facts

The contempt action (Supreme Court Case No. SC07-1369) was tried on February 15, 2008, and has been transcribed in what is referenced herein as transcript 1, or T1. At all times relevant to that contempt action, respondent was a suspended member of The Florida Bar. [He was suspended by Court Order entered on October 19, 2006, effective 30 days thereafter.] T1 Exhibits 1 and 2.

The contempt case began when Gary Kurtz, Esq., a California lawyer, filed a Florida Bar complaint because respondent had continued to practice law after his suspension. In support of his complaint, Kurtz attached a copy of respondent's letter to him, dated June 28, 2007. In this June 2007 letter to Kurtz, respondent identified himself as "counsel to Bio-Tran." Respondent also wrote the subject letter on stationary which bore respondent's (former) law office address, telephone, and fax numbers. T1. 59, T1 Exhibits 5 and 6. Further, respondent's letter to Kurtz expressed legal opinion, presented legal analysis, and reflected legal advice that respondent had rendered to his "client" — all while he was suspended from the practice of law. T1. 56-60. After receiving and reading respondent's June 28, 2007, Kurtz reasonably believed respondent to be general or in-house counsel for Bio-Tran. T1. 58, 65, RR 5. Kurtz did not learn that respondent was a suspended member of The Florida Bar until he initiated an internet search and found "a host of derogatory articles including the suspension from The Florida Bar." T1. 59. At trial, respondent denied that he had held

himself out as a lawyer. Instead, respondent testified, his letter to Kurtz was written and sent only "as an owner and as a potential defendant in this case." T1. 24-25. The referee found respondent's trial testimony to be contrary to the weight of the evidence, and found that respondent had practiced law after his October 19, 2006 suspension. RR 5. [1]

The second case against respondent (Supreme Court Case No. SC08-256) was tried on May 9, 2008, and has been transcribed in what is referenced herein as transcript 2, or T2. This case was predicated upon a complaint The Florida Bar received from an Illinois attorney, John J. Pcolinski, Jr. This second out-of-state lawyer/Bar complainant notified The Florida Bar that respondent had engaged in the unlicensed practice of law in Illinois. Pcolinski is a lawyer of more than 20 years' experience, licensed to practice law in Illinois and Arizona. In addition to being a partner in his Wheaton, Illinois law firm, Pcolinski is an adjunct member of the faculty of North Central College in Naperville, teaching an MBA course in law. He

[1] The Florida Bar's prosecution of the contempt case (SC07-1369) also included testimony and evidence offered by one of respondent's former clients, Phyllis Folsom. At trial, Ms. Folsom testified about her contact with respondent's law office after the effective date of his suspension. T1. 29-46. However, as the referee's report did not include findings of guilt regarding Ms. Folsom, and because The Florida Bar does not challenge this point on appeal, The Florida Bar will not respond to respondent's argument, as set forth in his initial brief, ***supporting*** the referee's finding on this point.

also sits on the Illinois Supreme Court Committee on Character and Fitness. T2. 45-46.

Pcolinski filed his Bar complaint against respondent because respondent sent him two letters, one in February 2005 (T2 Exhibit 4) and the other in August 2006 (T2 Exhibit 5). Both of these letters were written on respondent's Boca Raton, Florida law office letterhead, and both were written in connection with a contemplated malpractice claim that respondent threatened to bring against Pcolinski in Illinois. Respondent is not licensed to practice law in Illinois. RR 8. *See also* page 7 of Exhibit A to The Florida Bar's Complaint (Sworn statement of Gerald John D'Ambrosio), lines 2-3. In his two letters to Pcolinski, respondent expressed his legal opinion about the contemplated Illinois malpractice action, notified Pcolinski of the applicable Illinois statute of limitation, directed Pcolinski to contact his malpractice carrier, and asked Pcolinski to "contact" him to discuss settlement of the contemplated Illinois civil action. T2 Exhibits 4-5. At all times, respondent referred to the potential plaintiff in the contemplated Illinois action (his friend, chiropractor Thomas Bolera, T2. 13, 69 and 86) as his "client." T2. 14 and 15, 79. When his settlement efforts on behalf of Bolera were unsuccessful, respondent assisted his "client" in filing a "pro se" malpractice action against Pcolinski in the Circuit Court of the 18th Judicial Circuit, in and for DuPage County, Illinois. T2 Exhibit Composite 1; T2 Exhibit 6; T2. 13, 18-

24, 29-33. However, Bolera's "pro se" pleadings did not list Bolera's mailing address; they listed respondent's law office address and law office telephone numbers, instead. T1 Exhibits 1 and 4.

At trial, respondent admitted that he and Bolera (or respondent alone) "put together a complaint out of a form book." T2. 72. Respondent also admitted that he went on the internet to read Illinois law. T2. 89. Further, respondent admitted that he knowingly allowed Bolera to falsely list respondent's Boca Raton, Florida law office address and phone number as Bolera's personal and residential information, on the complaint as well as on the summons filed in the Illinois action. T2. 13, 25 and 87-88; T2 Exhibit 6. In furtherance of this deception, respondent admitted that he notarized a form that Bolera signed, containing this false address and contact information. T2. 26-27. Finally, respondent admitted that, as a result of his and Bolera's use of a false address in the Illinois pleadings, all pleadings in Bolera's Illinois malpractice action were delivered to respondent, at his Florida law office, while Bolera "traveled." T2. 14 and 26.

Based on the foregoing, and having taken judicial notice of the applicable Florida Bar rules and the comparable Illinois law on the subject [ILCS S. Ct. Rules of Prof. Conduct, RPC Rule 5.5 (Unauthorized Practice of Law)], the referee found that respondent engaged in the unlicensed practice of law in Illinois. RR 10.

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).

SUMMARY OF THE ARGUMENT

In the two cases at issue in the instant appeal, respondent appears before this Court burdened by a prior disciplinary record, as set forth in the Referee's Report. In 1994, he was admonished. In 1999, he received a public reprimand. In 2002, he was suspended for 90 days, for misrepresentation. In 2006, he was suspended for a year, for contempt of court and violation of the requirements of his (previous) 90-day suspension. In the instant case, the referee recommended respondent's disbarment — because of the gravity of his continued misconduct in the context of his cumulative disciplinary history. That disbarment recommendation is well-supported by the evidence, the case law, and *The Florida Standards for Imposing Lawyer Sanctions*. Respondent should be disbarred.

When he engaged in the conduct charged in the (first) contempt case (SC07-1369), respondent was under a one-year suspension because, in the opinion of this Court, he had "demonstrated a complete disrespect for this disciplinary process," by failing to give notice of his (prior) 90-day suspension to his clients, the courts, and some opposing counsel." Notwithstanding the Court's strident sanction and implicit warning in that case, respondent disrespected and disregarded the Court's prohibition against continued practice and intentionally violated the Court's disciplinary Order —

again. He did this by continuing to occupy his former law office and by maintaining his law office telephone and fax numbers, after his suspension.[2] He did this by continuing to list his office address and telephone numbers in the White Pages of the local telephone books, and by maintaining this contact information on his business letterhead. And he did this by writing a letter to Gary A. Kurtz, at his law office in Woodland Hills, California, and beginning his June 28, 2007 letter to him with this sentence: "I am counsel to Anglo Bio-Tran" — even though respondent had been suspended from the practice of law months before.

In the second case consolidated for purposes of sanction recommendation (SC08-256), respondent practiced law in Illinois, where he was not (and had never been) admitted. In that case, in February 2005 (while respondent was still a member in good standing of The Florida Bar), Dr. Tom Bolera, respondent's friend and client, contemplated a legal malpractice action against his former counsel, John J. Pcolinski, an Illinois lawyer. Notwithstanding his inability to practice law in Illinois, respondent actively assisted Bolera in filing and amending a civil action against Pcolinski, in Illinois. [Respondent also testified that he assisted Bolera on another occasion, in an

[2] Indeed, respondent testified that he renewed his (former) law office lease, months after his suspension, in March 2007. T2. 85

Oregon case. Respondent is not licensed to practice law in Oregon.] [3] Respondent provided this active assistance to Bolera by researching the (Illinois) law on the internet, counseling Bolera on the applicable statute of limitations, developing legal strategy, coordinating paralegal assistance, providing help with document and pleading preparation, and strategizing the prosecution of Bolera's civil claim. In furtherance of his aim to assist Bolera, respondent knowingly allowed Bolera to use respondent's law office address, telephone number and fax numbers as Bolera's own residential address, for the purposes of the Illinois action.

On February 15, 2005, respondent wrote a letter to 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 Pcolinski, expressed his legal opinions about this claim, and directed Pcolinkski to contact respondent to discuss the case. Respondent also directed Pcolinski to contact his malpractice carrier. Based on these facts, which are established by respondent himself, in his own words in his February 15, 2005 letter to Pcolinski, it was profoundly disingenuous for respondent to testify, at the final hearing in this cause and under oath, that Bolera's malpractice action against Pcolinski was advanced by Bolera alone, pro se.

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[3] *See* T2, page 21.

Under the applicable case law considered by the referee and cited in his report, there are certain precepts that should be followed in imposing Bar discipline. First, the judgment must be fair to society, providing both protection from harm and permitting the delivery of valuable legal services. Second, the disciplinary judgment must be fair to the respondent — as it punishes appropriately but encourages reformation and rehabilitation. Finally, the judgment imposed must be severe enough to deter others who might be prone, or could be tempted, to engaged in like violations. In this case, respondent has been prosecuted and disciplined, over and over, for ethical violations as a Florida lawyer. He has already been prosecuted, and harshly disciplined, for improper conduct during suspension. Because he was warned and punished before, and still continues to disregard the Orders of this Court, respondent has demonstrated that he is unfit to practice law. He cannot be reformed, and he will not be rehabilitated. Respondent must be disbarred.

ARGUMENT

ISSUE I

THE REFEREE CORRECTLY DENIED RESPONDENT'S MOTION TO DISMISS SUPREME COURT CASE NO. SC08-256 [THE UNLICENSED PRACTICE OF LAW COMPLAINT].

Respondent filed a motion to dismiss The Florida Bar's complaint in the same pleading in which he served his answer and affirmative defenses. Respondent's motion charged that The Florida Bar had strategically delayed the prosecution of its first case in order to try its two cases against respondent in tandem, "in an attempt to secure a harsher sanction." The blatant falsity of respondent's charge is demonstrated by respondent's own conduct — in expressly *agreeing to consolidate* the two separately filed and separately tried cases, for purposes of imposing sanctions. [4] Because the referee clearly remembered respondent's early charges of prohibited stacking, as well as his later contradictory agreement to consolidate the two cases, the referee took pains to highlight and clarify this issue at trial. In response to the referee's comment and request for assurance of sustained agreement on this point, respondent's

[4] *See* Agreed Order Consolidating Cases for Disciplinary Recommendation and/or Report of Referee, as entered on March 14, 2008.

counsel restated (on the record) respondent's agreement to consolidate the cases. *See* T2. 96.

Notwithstanding the foregoing, The Florida Bar harbored no malicious intent in advancing its prosecution in this matter. It did not "stack" respondent's cases, and it neither created nor caused intentional delays. The first case The Florida Bar filed against respondent (in the instant matter) was the contempt action (SC07-1369), which was filed in the Supreme Court of Florida, via The Florida Bar's Petition for Contempt and Order to Show Cause, on July 20, 2007. The Court (which could have determined the matter without a referee referral) elected to make a circuit appointment on October 23, 2007. The intervening three-month delay was wholly outside the control of The Florida Bar and cannot, therefore, be construed as intentional conduct by The Florida Bar.

The Florida Bar's second case against respondent (in the instant matter) was the unlicensed practice of law case (SC08-256). The Florida Bar's investigation of this case was not completed until October 2, 2007. On that date, The Florida Bar prepared and served respondent with a notice of probable cause hearing, to take place before a Florida Bar grievance committee. On that date, and until October 23, 2007, The Florida Bar was still waiting for the Supreme Court's decision regarding the disposition of its contempt action against respondent. Accordingly, The Florida Bar

cannot be viewed as timing the filing of these matters in order to gain an advantage — or for any other purpose.[5]

Finally, it is noteworthy that while the two pending cases against respondent traveled to the referee separately, were tried separately, and would have been determined separately, the only reason that they were consolidated (and therefore "stacked") for purposes of disciplinary consideration is because respondent himself expressly agreed that this should occur.

The referee's order denying respondent's Motion to Dismiss [The Florida Bar's] Complaint is well supported by the cited case law and Rules Regulating the Florida Bar. In challenging the referee's denial of his motion to dismiss, respondent does not argue the sufficiency of his motion or the insufficiency of The Florida Bar's complaint. Instead, he argues that The Florida Bar "stacked" cases against him, in violation of The Florida Bar v. Rubin, 362 So. 2d 12 (Fla. 1978). Simply stated, and for the reasons set forth herein as well as in The Florida Bar's reply to respondent's motion to dismiss, Rubin does not apply in the instant case because The Florida Bar made no decision to withhold or delay prosecution. To the contrary, the referee considered and determined the two pending cases together because respondent *asked*

[5] *See* The Florida Bar's Response to Respondent's Motion to Dismiss, as served on May 1, 2008

him to. Accordingly, the referee committed no error in allowing the parties to *voluntaril*y consolidate the two pending matters, to allow respondent to receive a single (and combined) disciplinary recommendation. Because there had been no prohibited "stacking" of the two cases, and because this was the thrust of respondent's motion to dismiss, respondent's motion failed. The referee committed no error in his denial of respondent's motion to dismiss.

ISSUE II

THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATION AS TO GUILT ARE WELL SUPPORTED BY COMPETENT AND SUBSTANTIAL RECORD EVIDENCE.

A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without record support. The Florida Bar v. Vining, 761 So. 2d 1044 (Fla. 2000). This Court has the authority to review the record to determine whether "competent substantial evidence supports the referee's findings of fact and conclusions concerning guilt." The Florida Bar v. Cueto, 834 So. 2d 152 (Fla. 2002), *citing* The Florida Bar v. Jordan, 705 So. 2d 1387 (Fla. 1998).

When this Court reviews the record, the party contesting the referee's findings of fact and conclusions as to guilt bears the burden of proving that the report of referee is erroneous, unlawful, or unjustified. *See* R. Regulating Fla. Bar 3-7.7(c) (5). In order to prevail, an appellant must demonstrate either a lack of record evidence to support

the referee's findings and conclusions, or record evidence that clearly contradicts such findings and conclusions. The Florida Bar v. Feinberg, 760 So. 2d 933 (Fla. 2000), *quoting* The Florida Bar v. Sweeney, 730 So. 2d 1269, 1271 (Fla. 1998). In the instant case, The Florida Bar presented competent substantial evidence to support all of the referee's findings of guilt and disciplinary conclusions.

While respondent challenges all of the referee's factual findings in his initial brief, he fails to demonstrate that the referee's report is erroneous, unlawful, or unjustified. Instead, he bases his argument on generalizations and his own testimony, as presented at the final hearing. This argument is ineffective and insufficient because respondent may not 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). This is because, in Bar disciplinary cases, the referee is charged with assessing the credibility 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 instant case, the referee listened carefully to the testimony presented and scrutinized the documents received into evidence. Utilizing the discretion reserved unto him alone, the referee found The Florida Bar's evidence to be the more credible. Respondent may not vitiate the referee's determination, as to the

weight and substance of that evidence, by arguing that other evidence (however unsupported) exists in the record.

Although these are few, respondent does challenge some specific factual findings in his initial brief. The first of these is the referee's observation (as this determination does not constitute an actual finding of fact) that any discipline respondent will receive in the instant case will be cumulative — because of his prior disciplinary history. Respondent challenges the referee's acceptance of his prior disciplinary history as a "misinterpretation of the holding in the matter that resulted in Respondent's suspension." Respondent's argument is unpersuasive because the record evidence in support of respondent's disciplinary record is clear: The Florida Bar filed an unchallenged Affidavit of Prior Discipline, executed by The Florida Bar's record custodian.

Next, respondent challenged the referee's finding that respondent continued to occupy his (former) law office after his suspension. Again, respondent's challenge is trounced by his own testimony. Under direct examination by bar counsel as well as by his own lawyer, respondent repeatedly admitted that he remained in his former law office, using the same telephone and fax numbers, long after the effective date of his suspension. T1.19, 23, 89, T2. 10-12, 37-41. Under The Florida Bar's cross-

examination, respondent also admitted that he renewed the lease on his former law office, months after his suspension took effect. T2. 85.

Respondent's next factual challenge is directed to the referee's finding, at paragraph 9 of his report, that respondent wrote to California lawyer Gary Kurtz, Esq., during the term of respondent's suspension, as Anglo Bio-Tran's legal counsel. In disputing the finding, respondent urges the Court to accept his testimony on this issue as the more credible. The referee soundly rejected respondent's testimony, and clearly referenced the record evidence that supports his finding. Again, respondent is defeated by his own words. In this instance, the words are contained in his June 27, 2007 letter to Gary Kurtz, in evidence as T1 Exhibit 5: "I am counsel to Anglo BioTran."

In the section of his initial brief dealing with the unlicensed practice of law case, respondent advances a few more challenges to the referee's findings and conclusions. He complains that the referee had insufficient evidence to support his finding that respondent practiced law in Illinois, on behalf of Dr. Bolera. However, instead of pointing to a scarcity of record evidence (in support of his claim), respondent elects to debate the weight that the referee has given to the considerable record evidence in support of his factual finding on this point. Respondent applied this same, unsuccessful strategy to the referee's findings that respondent allowed Bolera to

use respondent's law office address as Bolera's residential address in the pleadings he filed against John Pcolinski, in Illinois.

Finally, respondent challenges the referee's judicial notice of Illinois law regarding the unlicensed practice of law, and relies on Smith v. Smith, 934 So. 2d 636 (Fla. 2d DCA 2006). That case was determined by a Florida District Court of Appeal, and not the Supreme Court of Florida. Also, it was a civil divorce case, and not a quasi-judicial Florida Bar disciplinary proceeding. Finally, and most importantly, Smith bears no relevance to the issue of whether the referee correctly took judicial notice of Illinois law in the instant case. This Court has treated this issue, in the Bar disciplinary context, in The Florida Bar v. Tobkin, 944 So. 2d 219 (Fla. 2006). In that case, Tobkin argued that the Bar referee improperly considered the "unauthenticated" opinion of a Florida appellate court. In ruling against Tobkin, this Court stated that:

> Because Bar disciplinary proceedings are quasi-judicial rather than civil or criminal, the referee is not bound by the technical rules of evidence. Consequently, a referee has wide latitude to admit or exclude evidence, *see* The Florida Bar v. Rotstein, 835 So. 2d 241, 244 (Fla. 2002); The Florida Bar v. Rendina, 583 So. 2d 314, 315 (Fla. 1991), and may consider any relevant evidence, including hearsay and the trial transcript or judgment in a civil proceeding. *See* The Florida Bar v. Vining, 707 So.2d 670, 673 (Fla. 1998); The Florida Bar v. Vannier, 498 So. 2d 896, 898 (Fla. 1986). A referee's decisions about the admissibility of evidence will not be disturbed absent an abuse of discretion. Rotstein, 835 So. 2d at 244.

* * *

> Even if the rules of evidence did apply strictly, the referee's consideration of the Fourth District's opinion nevertheless would have been proper. Section 90.201, Florida Statutes (2005), entitled "matters which must be judicially noticed," provides that a court shall take judicial notice of: "Decisional, constitutional, and public statutory law and resolutions of the Florida Legislature and the Congress of the United States."

Tobkin, at 224.

Under the applicable Florida statute, the referee's judicial notice of the Illinois law on the unlicensed practice of law was not mandatory. However, it was lawful and appropriate, and wholly within the scope of the referee's broad discretion.

Based on the foregoing, respondent has failed to demonstrate that the referee's findings are erroneous, unlawful, or contrary to the weight of the evidence. He has failed to show that they lack competent, substantial, record evidence, and he has failed to prove that the referee abused his discretion in taking judicial notice of applicable Illinois law. Accordingly, the referee's findings of fact and determination of guilt should be upheld.

ISSUE III

BECAUSE THE REFEREE'S DISBARMENT RECOMMENDATION 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 referees' disciplinary recommendations than it does over their findings of fact. This is because it falls to this Court to determine and order appropriate punishment, when warranted. The Florida Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989). Notwithstanding this broader overview authority, the Court affords a presumption of correctness to referees' disciplinary recommendations *unless* they are 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 Lawyer Sanctions* and (2) has a reasonable basis in existing case law." The Florida Bar v. Spear, 887 So. 2d 1242, 1246 (Fla. 2004). In the instant case, the referee's disbarment recommendation is clearly authorized under *The Florida Standards for Imposing Lawyer Sanctions*, and has a reasonable basis under existing case law.

A. The Florida Standards for Imposing Lawyer Sanctions

The referee referred to and relied upon *The Florida Standards for Imposing Lawyer Sanctions* in recommending that respondent be disbarred. In his Referee Report (at page 16), the referee specifically referenced Standard 8.1, which authorizes disbarment 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.

In the instant case, respondent engaged in the unlicensed practice of law in Illinois, before his rehabilitative suspension in Florida. After he was suspended in Florida, respondent intentionally violated his suspension order and wrote to a California lawyer, announcing his appearance for his client, Anglo Bio-Tran. In both cases, respondent caused harm to the lawyers, to the legal system and to the legal profession.

B. The Existing Case Law

Respondent appears before this Court, in the instant case, with significant prior discipline. Accordingly, under existing case law, respondent's cumulative *past* discipline must be considered in determining the discipline he should receive in the current case. As this Court stated in The Florida Bar v. Cimbler, 840 So. 2d 955, 960 (Fla. 2002), *quoting* The Florida Bar v. Morrison, 669 So. 2d 1040, 1042 (Fla. 1996), the Court "considers the respondent's previous history and increases the discipline where appropriate."

In this context, the referee's disbarment recommendation is well-supported by existing case law. The Supreme Court of Florida has repeatedly held that clear violation of any order or disciplinary status that denies an attorney the right to practice law is generally punishable by disbarment, absent strong extenuating circumstances. In The Florida Bar v. Forrester, 916 So. 2d 647 (Fla. 2005), the respondent was disbarred for continuing to practice law after suspension. In The Florida Bar v. Heptner, 887 So. 2d 1036 (Fla. 2004), the respondent was disbarred for continuing to practice law after suspension (and R. Regulating Fla. Bar 3-5.1(g) violations), despite his claims of cocaine addiction and mental health issues (including depression). In The Florida Bar v. Weisser, 721 So. 2d 1142 (Fla. 1998), the respondent was disbarred for continued practice after disciplinary resignation. In The Florida Bar v. Rood, 678 So.

2d 1277 (Fla. 1996) and The Florida Bar v. McAtee, 674 So. 2d 734 (Fla. 1996), the respondents were disbarred for continued practice after suspension.

This Court has not hesitated to disbar suspended lawyers who continue to practice law, even where the referee has recommended otherwise, or where the instances of practice are limited and/or the practice is without compensation. In The Florida Bar v. Greene, 589 So. 2d 281 (Fla. 1991), the Court disbarred the respondent for four acts of practice while suspended, even though he acted for a personal friend, without compensation. Finally, in The Florida Bar v. Jones, 571 So. 2d 426 (Fla. 1990), the Court disbarred respondent for practice after suspension, even though the referee recommended a two-year suspension instead.

There are no extenuating circumstances in the instant case, strong or otherwise, to counterbalance the presumption of disbarment under existing case law. To the contrary, the referee found substantial, competent evidence that 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." RR 16. In recommending disbarment, the referee noted that:

> 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).

RR 16.

As respondent has failed to demonstrate that the referee's disbarment recommendation is not authorized under *The Florida Standards for Imposing Lawyer Sanctions*, or that it has no reasonable basis in existing case law, this Court should not second-guess the referee's well-reasoned recommendation. The Court should enter an Order of disbarment.

CONCLUSION

Despite his significant disciplinary history, respondent has been neither reformed nor rehabilitated. Instead, he has continued to willfully violate the The Rules Regulating the Florida Bar as well as the disciplinary orders that the Supreme Court of Florida has been forced to enter against him. By this conduct, respondent has "demonstrated an intractable contempt for the Court's suspension orders. He has spurned and rejected all invitations to achieve rehabilitation." RR 14. He has proven himself unfit to practice law.

What is worse, respondent's blatant misconduct was reported to The Florida Bar by two different out-of-state lawyers, from Illinois and California. Both lawyers were so troubled by respondent's grave misconduct that they brought it to the attention of The Florida Bar. Both lawyers cooperated fully in The Florida Bar's prosecution (at the cost of their own time and resources), both testified at trial, both were harmed by respondent's profoundly dishonest conduct in the practice of law.

Respondent's misconduct was knowing and willful, and caused actual harm to others and to the profession. Respondent has not responded to the corrective guidance of Bar discipline, but has shown an immutable and unyielding contempt for the Supreme Court of Florida. Respondent must be disbarred.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case Nos. SC07-1369 and SC08-256, TFB File Nos. 2008-50,083(15C)(OSC) and 2007-50,946(15C) has been mailed by regular U.S. mail to Kevin P. Tynan, Esq., attorney for respondent, 8142 N. University Drive, Tamarac, Florida 33321, and to Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 on this _____ day of _____, 2008.

_____

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Florida Bar No. 612669

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

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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Lorraine Christine Hoffmann, Bar Counsel

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