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)

RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

Page(s)

TABLE OF CASES AND CITATIONS

Cases Page(s)

PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to herein as "the Bar" or "The Florida Bar." Gerald John D'Ambrosio, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the Report of Referee. The symbol "TT1" will be used to designate the transcript of the final hearing held before the Referee on February 15, 2008. The symbol "TT2" will be used to designate the transcript of the subsequent final hearing held before the Referee on May 9, 2008.

STATEMENT OF THE CASE AND FACTS

The Report of Referee being appealed herein is based upon two distinct Florida Bar disciplinary actions that were presented to the Supreme Court and ultimately a Referee through two different methods.

The first case presented to the Referee, Supreme Court Case Number SC07-1369, was prosecuted by The Florida Bar as a contempt proceeding.[1] The Bar's July 20, 2007 Petition for Contempt and Order to Show Cause is based upon its receipt of a July 5, 2007 letter. The Honorable John J. Murphy was appointed to preside as Referee in this proceeding by order of the Honorable Victor Tobin, Chief Judge of the Seventeenth Judicial Circuit of Florida, entered on November 15, 2007. The final hearing was held on Friday, February 15, 2008.

The second case, Supreme Court Case Number SC08-256, presented to the Referee is actually the older of the two cases and was brought first to a grievance committee and later to the Court with the filing of a formal complaint.[2] The Florida Bar opened an investigative file on or about January 20, 2007, but failed to serve a formal complaint until February 14, 2008, which was one day prior to the trial of Supreme Court Case No. SC07-1369. Judge Murphy was appointed to

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[1] This case will be referred to throughout this brief as the "contempt case" or will be referred to by its Supreme Court Case number.

[2] This second case will be referred to as the "grievance case" or will be referred to by its Supreme Court Case Number.

serve as Referee for the grievance case by order of the Honorable Victor Tobin, Chief Judge of the Seventeenth Judicial Circuit of Florida, dated February 27, 2008. Upon appointment as Referee in the grievance case, the Referee immediately set the newly filed case for a status conference due to concerns regarding the manner of the Bar's timing in filing the case and the impact and relation of same to a sanction, if any, that might have been recommended in the contempt case that he had already heard on February 15, 2008.

The status conference was held on March 7, 2008, and it was agreed by both parties that should the case survive the motion to dismiss Respondent was preparing for immediate filing, then both cases would be considered simultaneously in deciding what, if any sanction, would be appropriate. This agreement is set forth in the Order entered by the Referee on March 14, 2008. After hearing on May 1, 2008, the Referee entered a written ruling denying Respondent's Motion to Dismiss on May 5, 2008. The grievance case proceeded to trial on May 9, 2008.

Case No. SC07-1369:

The Florida Bar filed a petition seeking to have Respondent held in contempt for violating the Supreme Court of Florida's October 19, 2006 Order suspending him from the practice of law for one year. See *The Florida Bar v.*

D'Ambrosio, 946 So. 2d 977 (Fla. 2006). Pursuant to the above referenced order, the Respondent was to cease practicing law no later than November 18, 2006.

The Anglo BioTran Letter

The Bar's original petition alleged that Respondent should be found in contempt because he authored and sent a letter dated June 28, 2007, to a California attorney, Gary Kurtz, Esquire.[3] See Exhibit 2 to the Bar's Petition. The letter is clearly the threshold issue to the resolution of whether or not Respondent engaged in the practice of law after the effective date of his suspension. The June 28, 2007 letter was clearly written at a time when the Respondent was a suspended member of The Florida Bar. It was written on a personal, not legal, letterhead that gave absolutely no indication that he was an attorney or that the address was a law office.

The location is former law office where Respondent remained after November 18, 2006, in order to conduct his non legal business affairs and personal matters. The premises was utilized as a sanctuary to Respondent during the difficult period of suspension, motivated by the urging of his wife who thought it best that he have a place to go during the day. That he had an ongoing leasehold obligation was a convenient and facilitating factor in the endeavor [TT1,p89,l24-25]. All indicia of respondent's having been there as an attorney were removed

[3] The Bar's initial pleading misidentified Kurtz as a member of The Florida Bar. A point that the Bar later conceded was in error.

from the premises, as well as from his letterhead, telephone listings, etc. in compliance with the terms and conditions of his suspension[TT1,p19-20].

Respondent's signature on the letter dated June 28, 2007, was in his individual capacity only and did not include a designation of "Esq.", notwithstanding that on that date he remained a member in good standing of the New York State bar[TT1,p82-83;89-90].

The contents of the letter were gleaned from Respondent's own personal knowledge as a member of the Anglo Bio Tran organization, and not as an attorney. It provided the recipient with purely factual comment concerning the ongoing and aggrandizing dispute between his company, Anglo Bio Tran, and Gould Advertising, Mr. Kurtz' client. The subject matter of the communication involved infomercials and other dealings of the company that occurred in 2005 and 2006. These were matters in which Respondent had been deeply involved and to which he had substantially contributed in the decision-making processes that gave rise to the dispute.

To his subsequent regret, Respondent had inadvertently employed the phrase "counsel to" in the letter in an attempt to convey a non litigious tenor to attorney Kurtz [TT1,p91-92]. The letter clearly states that California counsel was being retained consistent with the fact that Respondent never represented in any manner that he was appearing in the capacity of an attorney. The topic of the letter

concerned a California lawsuit involving an alleged California breach of contract between a California plaintiff and a company based in London, England. The only nexus between this California legal matter and the state of Florida was that Respondent, a member of the board of directors and shareholder in Anglo BioTran wrote a letter to California counsel while he was in Florida [TT1,p93-94].

On June 28, 2007, the same day as the letter in the Bar's Exhibit 2 was written, Respondent received by facsimile a letter from attorney Kurtz in response thereto. See the Bar's Exhibit 6. Significantly, in the letter, Mr. Kurtz failed to address or refer to Respondent as an attorney [TT1,p94-95].

Complaint of Phyllis Folsom

The Florida Bar's second claim, not included in the Bar's original Petition for Order to Show Cause, was that the Respondent was engaged in the unlicensed practice of law in Florida based upon a letter written by Phyllis Folsom[4] to The Florida Bar, wherein Ms. Folsom claimed that she had surreptitiously called the Respondent's law office and attempted to hire him for a legal problem that she did not have. See Folsom July 30, 2007, letter to Bar Counsel. The Referee found that the Bar failed to introduce clear and convincing evidence of the claim and found Respondent not guilty of this charge.

[4] Folsom was a witness in the prior disciplinary action, and portions of the case that were overturned by the Supreme Court related to Ms. Folsom's son.

Case No. SC08-256:

On February 14, 2008, one day prior to the final hearing in the contempt case, The Florida Bar filed a two-count complaint against Respondent [the grievance case]. The record indicates that the Bar had opened its file in this matter over one year earlier, in or about January, 2007 and that Respondent's initial response to the Bar was dated February 6, 2007. The complaint indicates that the Bar took a sworn statement from Respondent on May 29, 2007, but the record reflects that the Bar made no meaningful effort to pursue the matter until the later part of the third quarter of 2007. On or about November 29, 2007, Grievance Committee 15C entered a finding of probable cause and The Florida Bar intentionally refrained from filing a formal complaint, strategically electing instead to delay for a period of two and a half months. The record reflects that the Bar's formal complaint in this action was docketed by the Supreme Court on February 14, 2008.

In the grievance case, the Bar alleges that Respondent engaged in the unlicensed practice of law in the State of Illinois, while the second count asserts that he made a misrepresentation to The Florida Bar relative to this alleged conduct, a matter that was abandoned at trial by the Bar. The record reflects that at all times material, Respondent was not licensed to practice law in the State of Illinois, nor had he sought admission on a *pro hac vice* basis. Further,

significantly, during the time-frame of the initial actions in this case, Respondent was a member in good standing with The Florida Bar. The record clearly reflects that his one-year suspension from the practice of law became effective on November 18, 2006.

While he was a member in good standing with The Florida Bar, Respondent consulted with Dr. Thomas Bolera concerning a claim for legal malpractice against an Illinois lawyer, one John J. Pcolinski. Respondent had represented Bolera on other matters and they have been personal friends for many years, having first met in 1996 or 1997 [TT2,p69]. The only testimony presented about this consultation came from Respondent. He stated that in 2004 they discussed the general nature of the malpractice claim after Dr. Bolero received a letter from an Illinois lawyer advising that Pcolinski had committed malpractice while representing Bolera in defense of a breach of lease matter [TT2,p18-19]. Respondent related to Bolera what the Florida law would be, but stridently urged him to seek advice as to the Illinois law.

Pcolinski had failed to abide by a discovery order and as a result was precluded by the trial court from presenting evidence of mitigating circumstances on behalf of Dr. Bolera [TT2,p19]. Respondent testified that Dr. Bolera, though a close friend, is “an intelligent individual who is incredibly cheap and doesn’t want to use lawyers” [TT2,p69,lls9-10]. From 2004 to 2006, prior to his suspension,

Respondent continuously urged Dr. Bolera to get an Illinois lawyer [TT2,p20]. In September, 2006, while still an active member of the Florida and New York bars, Respondent provided Bolera with a form book of complaints by facsimile that he could complete and use, as well as a pro forma complaint from Westlaw that would be used in Florida, since Bolera remained intent on filing pro se. Respondent's efforts involved nothing more than computer generated research which was done prior to the effective date of Respondent's suspension [TT2,p21-23].

In August, 2006, in an effort to resolve the matter pre-litigation, and prior to his suspension, Respondent sent a letter to Mr. Pcolinski as a result of his consultations with Dr. Bolera. Throughout these efforts, Respondent continued to urge his friend to retain Illinois counsel [TT2,p20-21].

Eventually, a complaint was completed by Dr. Bolera and filed pro se in Illinois with no assistance from Respondent [TT2,p22]. In drafting the complaint, with Respondent's permission, Dr. Bolera gave Respondent's office address and telephone number as his contact information. Respondent gave his permission in deference to the multiple residences of Dr. Bolera and his heavy European travel schedule at that time. Respondent did not assist in the filing of the complaint for

legal malpractice[5] or advance any funds related thereto. This complaint was dismissed with leave to amend [TT2,p25-26].

Dr. Bolera then returned to Respondent just after the effective date of his suspension, seeking assistance. Respondent informed him that his suspension prevented him from advising him in any way. At the insistence of Dr. Bolera, Respondent directed him to a paralegal for assistance in drafting an amended complaint. The uncontroverted evidence at trial was that the paralegal assisted Dr. Bolera and the amended complaint was filed by Dr. Bolera and served on Pcolinski without any assistance from Respondent [TT2,p26-27].

Respondent's only connection to the amended complaint occurred on or about November 30, 2006, when he notarized an affidavit produced by Dr. Bolera for filing in support of the amended complaint. In so doing, Respondent merely acknowledged and verified Bolera's signature, neither advising, counseling, reviewing, drafting, reading, or even commenting on the contents of the document. As a result, Respondent took no part in the drafting or filing of either the amended complaint or affidavit, a matter established by Respondent under direct examination by the Bar [TT2,p.28-29].

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[5] The malpractice action by Dr. Bolera against Pcolinski was based on Pcolinski's alleged failure to file a response to a discovery request and his failure to represent Bolera with competence and diligence. Dr. Bolera sustained substantial damages due to the inability to advance evidence of mitigating factors in regard to the landlord's conduct [TT2,p54-55].

In his complaint to the Bar, Pcolinski admitted that he had "no direct evidence of respondent's misconduct." Pcolinski admitted that it was only a matter of his belief [TT2.p.59]. He sent Respondent's letter to the Illinois Supreme Court, the body to which unethical conduct is reported in Illinois [TT2,p.59]. They responded that they did not have jurisdiction over a non Illinois lawyer. Next, Pcolinski sent the letter to the DuPage County State attorney's office and no action was ever taken [TT2,p.60]. Pcolinski testified that there has been no finding whatsoever in Illinois that Respondent ever engaged in the practice of law in Illinois [TT2,p.60,ll.20-24].

At trial, the only independent witness called by the Bar regarding the claim of the unlicensed practice of law in Illinois was Mr. Pcolinski, who readily admitted his assertions regarding the drafting and filing of the complaints against him were assumptions based at best on conjecture and speculation. Neither Dr. Bolera nor the paralegal, the only parties who truly had direct knowledge regarding the matters upon which the Bar's case was based, were called to buttress the Bar's burden of proving its allegations by clear and convincing evidence.

Respondent specifically denied that he drafted or filed the complaints and the Bar presented no direct evidence in contradiction of his testimony.

In the second count of the formal complaint in the grievance case, the Bar alleged that Respondent made a false statement to Bar counsel in a letter dated

October 17, 2007, regarding his participation in the filing of the pro se complaint filed by Dr. Bolera. At the trial, Respondent's testimony totally vitiated the allegations and the Bar failed to offer testimony, documentary evidence or comment in support of the allegations, effectively abandoning the claim.

Notwithstanding the facts and evidence introduced at trial, the Referee found the Respondent guilty of the acts pled in the contempt case and the grievance case. In particular, the Referee found, regarding the Anglo Bio Tran letter, that the Respondent held himself out as a lawyer and practiced law after his suspension in disregard of this Court's "two prior Orders suspending him from such practice, and in contempt of the Supreme Court of Florida.[6] As to the grievance case the Referee found that the Respondent had committed the following substantive rule violations:

> Rule 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] and
>
> Rule 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

[6] As mentioned above, the Referee found the Respondent not guilty of the Folsom matter and neither party is appealing this finding.

> 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.

The Referee also found the following substantive rule violations and "catch all" provisions:

> Rule 3-4.2 [Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline.
>
> Rule 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.];
>
> Rule 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;] and
>
> Rule 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.].

After making the foregoing findings, the Referee recommended that Respondent be found in contempt of the Court's Order of suspension and recommending disbarment as an appropriate sanction.

SUMMARY OF THE ARGUMENT

Respondent fervently believes that the Referee's findings are not supported by the record or by the existing law. Consequently, he has filed this appeal seeking review of the Referee's factual findings, his findings of guilt and his sanction recommendation.

In the case at hand, the Court is faced with making a determination of whether the Bar met its burden to introduce clear and convincing evidence into the record that would support the Referee's findings and recommendations, both as to the Respondent's contempt, his culpability for the rule violations found by the Referee and whether disbarment is the appropriate sanction the Referee recommended therefore.

The Referee and the Bar have painted with a broad brush and have attempted to make it appear that the Respondent engaged in contemptuous conduct in contravention of this Court's suspension Order. However, the Bar has presented no clear and convincing evidence of the transgressions found by the Referee, relying instead upon the baseless assumptions and innuendos advanced by the Bar without documentation or corroboration.

As an example, and a singular one evidencing only the very tip of the iceberg foisted by the Bar, in order to find a violation of Rule 4-5.5(a), it is necessary, inter alia, to prove that the alleged conduct violated the law of the

offended state. No attempt was made to introduce the law of that state to prove this point and in fact the Bar did not even try to have the Referee take judicial notice of the law in Illinois until Bar counsel's rebuttal argument (to defend against arguments raised by Respondent's counsel during closing about the Bar's failure in this regards) which accorded the Respondent no opportunity to make any comment on this point. It is axiomatic the closing argument is not the proper entre for the introduction of new evidence.

ARGUMENT

I. THE REFEREE COMMITTED ERROR BY DENYING RESPONDENT'S MOTION TO DISMISS CASE NO. SC08-256.

The record clearly reflects that The Florida Bar opened its file in this matter in or about January, 2007, and Respondent's first response to the Bar is dated February 6, 2007. The Bar took a sworn statement from Respondent on May 29, 2007. However, the Bar made no genuine effort to pursue the matter until in or about October or November, 2007. The grievance committee entered its finding of probable cause on November 29, 2007, and The Florida Bar intentionally and strategically did not promptly file a formal complaint for two and a half months, waiting instead until the contempt case was ready to be tried. The complaint was docketed by the Clerk of this Court on February 14, 2008, one-day prior to the trial of the contempt case. This conduct constitutes a classic example of "stacking" by the Bar.

The record reflects that contempt case was initiated by virtue of the Bar filing a Petition for Rule to Show Cause on or about July 20, 2007, wherein the Bar alleged that Respondent had engaged in the unlicensed practice of law relative to a California case. The Supreme Court referred this case to a Referee in October 2007, and ultimately the Honorable John J. Murphy was appointed to hear this case on November 15, 2007. On December 11, 2007, the Referee conducted a

scheduling hearing and set the contempt case down for final hearing on February 15, 2008.

It is of primary significance that a mere two days prior to the trial of the contempt case, and in excess of two-months after a finding of probable cause, the Bar served its complaint in SC08-256, and Judge Murphy was appointed Referee shortly after the final hearing and, significantly, while deliberating the contempt case tried before him on February 15, 2008.

This Court has held it is impermissible for The Florida Bar to "stack cases" against a lawyer. In *The Florida Bar v. Rubin,* 362 So. 2d 12, 16 (Fla. 1978), the Court was faced with the Bar's decision to withhold the presentation of one case to the Court while awaiting the filing of a second one, an obvious strategic ploy to secure a harsher sanction generated by "cumulative misconduct." At that time the Court, in discussing this issue noted:

> The purpose for requiring a "prompt" filing of a recommendation for public reprimand obviously relates to the fact that the Court alone can issue a public reprimand and that once the report is prepared, the fact-finding, record-developing process is completed and the cause is ripe for final Court disposition. Whatever other objects the rule may seek to achieve, it obviously contemplates that the Bar should not be free to withhold a referee's report which it finds too lenient until additional cases can be developed against the affected attorney, in an effort to justify the more severe discipline which might be warranted by cumulative misconduct. The Bar's violation of the prompt filing requirement in this case, to allow a second grievance proceeding against

> Rubin to mature, is directly antithetical to the spirit and intent of the rule. In addition, it has inflicted upon Rubin the "agonizing ordeal" of having to live under a cloud of uncertainties, suspicions, and accusations for a period in excess of that which the rules were designed to tolerate.

In dismissing a potential disbarment proceeding for a breach of confidentiality, the Supreme Court of Florida stated in *Rubin* that:

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so.

It is respectfully submitted that the Bar has failed to turn a "square corner" in the prosecution of these cases by improperly stacking them to Respondent's distinct disadvantage. This conduct by the Bar produced the result intended by unduly inflaming the Referee's deliberation process which substantially enhanced the sanction recommended by virtue of the aggravating circumstance of perceived cumulative misconduct, a conclusion borne of the anticipation and association desired by the Bar.

It is respectfully submitted that the Order dated May 5, 2008, entered by the Referee denying the motion neither addresses nor denies the grounds presented by respondent in his Motion to Dismiss filed as part of his Answer and Affirmative Defenses on March 20, 2008. The Order denying the Motion refers to R.

Regulating Fla. Bar 3-7.6 relating to procedures and format for filing complaints and the requirement to provide adequate notice of the alleged rule violations advanced against a respondent. As such, Respondent restates the Motion to Dismiss as one that has not been adjudicated requiring the deliberation of this Court in order that the rights of Respondent receive the just and fair determination prescribed by the requirements of constitutional due process fundamental to our system of jurisprudence and sense of justice and fair play.

II. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATION OF GUILT ARE NOT SUPPORTED BY THE RECORD OR CLEAR AND CONVINCING EVIDENCE.

At the very core of the Bar's disciplinary process lies the indelible concept that this Court has the responsibility to protect the public from being harmed from the wrongdoings perpetrated by unethical attorneys. It is the Bar's burden to prove any alleged transgressions by clear and convincing evidence. By any reasonable interpretation of the evidence in this record, the Bar has failed to present clear and convincing evidence that Respondent, Gerald John D'Ambrosio, committed the alleged transgressions. The findings of fact reached by the Referee are not supported by evidence reaching the required burden of proof, nor does the record before this Court substantiate the findings advanced by the Referee in his report.

Supreme Court Case No. 07-1369

The Bar initiated this matter by filing a petition seeking to have the Respondent held in contempt for violating the Order of this Court dated October 19, 2006, suspending him from the practice of law for one year. See *The Florida Bar v. D'Ambrosio*, 946 So. 2d 977 (Fla. 2006). Pursuant to this Order, Respondent was to cease practicing law no later than November 18, 2006.

In *D'Ambrosio*, this Court overturned the Referee's recommendation of disbarment in favor of a one-year suspension. The Court specifically found that the Referee's findings ***did not support the conclusion that respondent continued to engage in the unlicensed practice of law while suspended***, noting that the Referee did not include any findings of the nature of the alleged court appearances by D'Ambrosio. In looking at the actual record the Court determined that he attended the Circuit Court proceedings "solely to ensure a smooth transition of his former clients' cases to their new attorneys." In ordering the suspension for other unrelated misconduct, the Court also found that D'Ambrosio failed to notify one or two clients of the prior suspension order.

In the case herein under review, the Referee's determination of cumulative misconduct [RR,p13] is based solely upon his misinterpretation of the holding in the matter that resulted in Respondent's suspension.

At the time of the entry of the Order, Respondent had been practicing law at an office suite in Boca Raton, Florida. The evidence in the record is clear that after the effective date of his suspension, November 18, 2006, Respondent, who had an ongoing leasehold obligation, continued to occupy the premises and utilize the same telephone number for personal and nonlegal business purposes. Among those was his involvement as a company known as Anglo BioTran and/or Media International Group. Mr. D'Ambrosio meticulously removed all indicia of his law practice from the premises, letterhead and business cards and directed the phone company to remove all reference to his law practice from his listings and records. For reasons inherent in his business relationship with Anglo BioTran and other entities, Respondent did not include the company on his business letterhead, electing instead to maintain it and his listings in a generic status. The record herein contains no evidence whatsoever in contradiction of his efforts of compliance.

However, the Referee, without any corroboration, substantiation or legal basis in the record, found at item 6 of his Report that "Respondent continues to occupy his (former) law office." [RR,p4]

It is arduously submitted that there is nothing in this Court's underlying Order of suspension, the applicable R. Regulating Fla. Bar or case law that requires a suspended attorney to abandon a leasehold obligation or to discontinue his telephone service as elements of compliance with a suspension order.

With regard to the letter dated June 28, 2007, written to one Gary Kurtz, Esq., a California attorney, on generic letterhead, respondent used questionable judgment in reciting that he was "counsel to Anglo BioTran." Respondent testified that, although he was still an active member of the New York State bar at the time, he did not use the designation "Esq." on the signature line [TT1,p90]. The facts set forth in the letter were based on his own personal knowledge acquired in 2005 and 2006 and were not related to him by a client. The subject matter of the dispute with Kurtz's client was the result of decision making by Anglo BioTran in which Respondent had been directly involved. [TT1,p91-92]. Respondent's phrase "counsel to" was written rather than "counsel for" because he was seeking to emphasize that he had not, and was not, appearing in any manner in regard to litigation in California. Respondent admitted of his own volition that the use of the phrase was unfortunate and in poor judgment but not in violation of this Court's Order of suspension. [TT1.p92-93].

In item 9 of his Report, the Referee found that Respondent "advised the parties to retain California counsel to defend the matter" and provided legal opinions regarding the legal sufficiency of the complaint [RR,p6-7]. The suggestion of retention of California counsel is the closest the record comes to supporting the finding that Respondent imparted legal advice. Further, it is submitted that these are matters that could easily be raised by any principle of

Anglo BioTran and do not require the thought processes of an attorney for conveyance to an adversary. The Referee's findings completely disregard the personal involvement of Respondent in the affairs of Anglo BioTran as exemplified by his status of shareholder and contributor to the company's decision-making over a period of several years prior to the effective date of the suspension, including the specific issues which gave rise to the dispute with Kurtz's client.

It is essential to a comprehensive determination of the issues presented by this appeal to emphasize that the Bar failed to introduce even a scintilla of evidence pertaining to the law of California, or that of Florida, regarding what constitutes "engaging in the practice of law", the conduct Respondent was found to have perpetrated. In item 10 of his Report, the Referee found that "Mr. Kurtz **believed** [emphasis added] Respondent to be a Florida lawyer acting as in-house or general counsel of Bio Tran[sic]." Without any reference to actual evidence in the record, the Referee goes on to find that "Kurtz knew that BioTran[sic] had a Florida connection [RR,p5].

Based solely on these findings, the Referee concluded Respondent is guilty of engaging in the practice of law in violation of his suspension. It is respectfully submitted that this conclusion, as well as the Referee's findings of fact on which the conclusion is based, are not supported by clear and convincing evidence

presented by the Bar or in the record submitted to this Court by the Referee along with his Report.

Supreme Court Case No. 08-256

With regard to the Report of Referee which in item 18 includes a finding that Respondent "continues to maintain an office on the premises of his former law firm as of the trial [May 9, 2008]." The Report also finds that he still maintains the same telephone number [RR,p.7]. Respondent re-iterates his position that these findings do not portend to incriminate Respondent as there is no requirement either in the Order of suspension or the R. Regulating Fla. Bar that he abandon the premises per se. Further, the finding that Respondent had "no non-legal business purposes" is not only extraneous to the issue as no non-legal business purpose is required in order that a suspended attorney maintain an office. However, even though no such evidence is required, the record clearly reflects Respondent's uncontroverted testimony that he still had involvement with several companies on May 9, 2008, including Anglo BioTran, and Transdermal Cosmetics in which he maintains a personal, financial interest [TT2,p.68,ll.5-18].

In item 21 of his Report, the Referee included a finding that Respondent assisted his friend, one Dr. Bolera in filing and amending a civil action for malpractice against an Illinois lawyer, one John J. Pcolinski, even though he was not a member of the Illinois bar and that Respondent testified that he researched

Illinois law [RR,p.8]. Firstly, one need not be a licensed attorney in order to research law on the internet. Individuals who are not trained or certified paralegals do so with impunity everyday. Secondly, Respondent testified that he selected some forms on the internet which he gave to Dr. Bolera to complete. These forms did not contain any specific factual information concerning the parties, the facts or any other specific particulars. Dr. Bolera was adamant that he had a cause of action for malpractice against Pcolinski and acted entirely on his own volition and in his own accord. There is no evidence in the record that discussing a potential matter in the state of Florida to determine if an action is warranted in Illinois constitutes engaging in the practice of law in Illinois. Further, Respondent never examined, proof read or filed the complaint in Illinois.

The same response is put forth with regard to item 22 of the Report of Referee in regard to the allegations concerning an Oregon matter [TT2,p.73].

That Respondent "knowingly allowed" Dr. Bolera, who is a close and trusted personal friend, to use his office address is probative of nothing pertaining to whether or not Respondent is guilty of practicing law in Illinois.

With regard to the February 15, 2005 letter written to Mr. Pcolinski on behalf of Dr. Bolera, it is significant to note that Respondent was a member in good standing of The Florida Bar when he wrote the letter. His intention was to determine whether the matter could be resolved satisfactorily and to determine

whether to seek *pro hoc* admission in Illinois. Respondent was still an active member of The Florida Bar and in good-standing. Respondent's motive in writing the letter was in connection with his effort to determine whether an application for pro hoc status in Illinois would be necessary. The February 15, 2005 letter is really a red herring as the true practice of law issue relates to the filing of a lawsuit in Illinois, which did not happen until a year and a half after this letter was sent.

In item 27 of his Report, the Referee found that after receiving the communications from Respondent, Pcolinski "*reasonably believed* that Respondent was functioning as counsel to the entities on whose behalf he wrote….." [RR,p.9]. It is respectfully submitted that the threshold issue of whether a lawyer has committed unlicensed practice of law in another jurisdiction is based on a determination of whether he/she has violated the regulations of the legal profession in that jurisdiction or those of his/her home state. It is not controlled by the state of mind of a complainant who has been accused of committing malpractice to the detriment of a client. R. Regulating Fla. Bar 4-5.5(a) provides:

> 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. [Emphasis added]

Accordingly, the Referee's finding what Mr. Pcolinski "reasonably believed" was insufficient to support the finding that Respondent had functioned as

counsel in this matter. That Pcolinski's interest was piqued by the use of Respondent's address by Dr. Bolera thereby motivating him to discover that Respondent was not licensed to practice in Illinois is inconsequential and irrelevant given that he had not appeared in a legal matter, had not filed a legal action and was still eligible to apply for pro hoc vice status at the time that he wrote the letters to Pcolinski.

In item 30 of his Report, the Referee declared *sua sponte*, that he had taken judicial notice of the Illinois law regarding the Unlicensed Practice of Law, ILCS S. Ct Rules of Prof. Conduct, RPC Rule 5.5 [RR,p.10].[7] When a trial court takes judicial notice of a matter on its own initiative, pursuant to Sec. 90.204(1), Fla. Stat. the opposing party must be afforded a reasonable opportunity to present information relative to the propriety of the taking of judicial notice.

> **90.204 Determination of propriety of judicial notice and nature of matter noticed.**
>
> (1) When a court determines upon its own motion that judicial notice of a matter should be taken or when a party requests such notice and shows good cause for not complying with s. 90.203(1), the court shall afford each party reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed.

[7] This appears to be an attempt to fix the fact that the Bar introduced no evidence in this regards and only addressed the point in rebuttal argument after the Respondent's counsel noted the failure to have produced such evidence. It is axiomatic that argument of counsel is not evidence, and even if it was, evidence is not introduced during closing argument

The trial court may not simply adopt purported facts submitted to it in an argument or proposed judgment [or Report of Referee]. See *Smith v. Smith*, 934 So.2d 636, 649-41(Fla. 2d DCA 2006).

Accordingly, the finding that Respondent engaged in the unlicensed practice of law in Illinois which was based upon the judicially noted rules as well as the letters in evidence and testimony [RR,p.10], was not founded upon clear and convincing evidence. The record is devoid of any substantial, competent evidence supporting the Referee's findings. Instead, the conclusion that Respondent engaged in the unlicensed practice of law or that he intentionally and contemptuously violated the Court's Order of suspension was based on nothing more than innuendo and conjecture.

III. DISBARMENT IS UNREASONABLE AND CONSTITUTES AN EXCESSIVE SANCTION.

This Court has consistently held that it has broad discretion when reviewing a sanction recommendation because the responsibility to order an appropriate discipline ultimately rests with the Supreme Court. See *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997). It is respectfully submitted that the Court should exercise this cherished discretion. The recommendation of disbarment is exceedingly harsh in light of the lack of clear and convincing evidence of guilt and the unsubstantiated findings made by the Referee.

The Referee's determination of cumulative misconduct which was the bellwether for his recommendation of disbarment, is based solely upon his misinterpretation of the holding in the matter that resulted in Respondent's suspension [RR,p13] See *D'Ambrosio*. A failure to notify one or two clients of his suspension does not equate to the unlicensed engagement in the practice law. It is respectfully submitted that the Referee's finding of cumulative conduct used as a conduit to the recommendation of disbarment is not supported by the record.

The Supreme Court in *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), stated that in selecting an appropriate discipline certain fundamental issues must be addressed. These are: (1) Fairness to both the public and the accused; (2) sufficient harshness in the sanction to punish the violation and encourage reformation; and (3) the severity must be appropriate to function as a deterrent to others who might be tempted to engage in similar misconduct. Also see The Standards for Imposing Lawyer Sanctions, Standard 1.1.

It is vehemently urged by Respondent that the death penalty proposed by the Referee does not approach, much less adhere, to these Court imposed criteria. In recommending disbarment, the Referee relied upon his independent determination that Respondent continued to practice law, notwithstanding the fact that the record fails to disclose that Respondent "clearly continued to practice law" under the standards imposed by any state law or regulation.

In support of the recommended sanction, the Referee cited the following case law submitted by the Bar in which disbarment was found:

In *The Florida Bar v. Forrester*, 916 So.2d, 647 (Fla.2005), Forrester was disbarred after intentionally practicing law by hiring an associate to handle her cases after the effective date of her suspension and orchestrating and directing his every move and function. The instant case does not even begin to approach that level of culpability.

In *The Florida Bar v. Heptner*, 887 So.2d 1036 (Fla. 2004), the respondent's post-suspension conduct consisted of engaging in felony criminal conduct with a client involving the sale and use of cocaine, violating an order of suspension by engaging in the practice of law and engaging in multiple acts of misconduct over an extended period of time. Respondent's alleged conduct herein does not even come close to the egregious conduct portrayed by *Heptner*.

In *The Florida Bar v. Weisser*, 721 So.2d 1142 (Fla. 1998), Weisser, while under suspension, filed suit in Dade County Court on behalf of his son, preparing, signing and filing numerous court documents specifically indicating that he was an attorney. The conduct was ongoing over a two and one half year period and resulted in the determination that the misconduct was "intentional and contemptuous." There are no lines to be drawn between *Weisser* and the instant case.

In *The Florida Bar v. Rood*, 678 So. 2d 1277 (Fla. 1996), Rood continued to meet with, represent and advise clients, and continued to receive and disburse client funds from his bank accounts. [Emphasis added]. Rood's behavior was a clear example of intentional and contemptuous misconduct, as well as a harbinger that Mr. D'Ambrosio's alleged conduct was not.

In *The Florida Bar v. McAtee*, 674 So.2d 734 (Fla. 1996), McAtee was guilty of negligently representing clients after suspension, failing to file a timely status report for which he was held in contempt of court, entering into a stipulation without his client's consent, failing to respond to motions and receiving a $2,000 fee without the required court approval. This is another prime example of what constitutes conduct rising to the level of intentional and contemptuous. Clearly, by comparison, Mr. D'Ambrosio's was not.

In *The Florida Bar v. Brown*, 635 So. 2d 13 (Fla. 1991), Brown was disbarred for continuing to practice law and ignoring the Bar's notices of contempt allegations after his disciplinary resignation.

The remaining cases cited by the Referee all fall within the same category of overreaching by the Bar in order to extract a draconian discipline that is unwarranted by virtue of the evidence nor by the entire record. It is worthy of note that in *The Florida Bar v. Spann*, 682 So. 2d 1070 (Fla. 1996), the Referee included as precedent a matter that did not involve alleged practice while under

suspension.[8] Spann's conduct was so egregious that it bears no resemblance whatsoever to the matter before this Court in much the proportion that a murder case bears to a breach of the peace. It is respectfully submitted that the case law, handed up to the Referee by the Bar at the final hearing is an example of the draconian attitude exhibited by the Bar towards Gerald John D'Ambrosio during the course of this proceeding.

As a beacon to the Court amidst the darkness and draconian gloom foisted upon the Court by the Bar in advancing the preposterous notion that Respondent's conduct warrants the death penalty, Respondent offers *The Florida Bar v. Neckman*, 616 So.2d 31 (Fla. 1993), in which this Court held that unauthorized practice of law by one who has resigned his license to practice rather than face disciplinary proceedings equates to violating a suspension order and warrants a public reprimand. Neckman had represented himself as an attorney in a debt collection matter after the date on which his resignation became effective and perhaps violated a statute in so doing. The Referee found as mitigating that Neckman had caused no injury to anyone; that he was not motivated by personal gain, but by a desire to help his friend. The Court found these sufficient to Order a public reprimand for Neckman.

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[8] One of the many charges included that Spann allowed a nonlawyer employee to engage in the practice of law.

Finally and compellingly, in *The Florida Bar v. Golden*, 563 So. 2d 81 (Fla.1990), this Court held that counseling and attempting to assist a client in requesting two continuances while under suspension constitutes unauthorized practice of law warranting a one-year suspension notwithstanding that Golden failed to inform the client of his suspension, lacked remorse and had a lengthy history of prior disciplinary actions.

CONCLUSION

Respondent urges the Court to take a close look at the evidence presented. It is ardently, though respectfully, contended that the Bar has failed to allege, much less prove by clear and convincing evidence that Respondent intentionally and contemptuously engaged in the practice of law after his suspension or that he committed the unlicensed practice of law either before or after the effective date of his suspension or that he intentionally or contemptuously violated the terms and conditions of his suspension.

Further, Respondent respectfully takes issue with the harsh sanction recommended by the Referee where the Court's precedent clearly indicates that the imposition of disbarment is warranted only in the face of far more egregious conduct than that alleged, much less proven, by the Bar. In the event that a sanction is deemed appropriate, it is respectfully submitted that no more than a

public reprimand would be appropriate and would fairly and adequately serve the needs of Respondent, the public, the Bar and this Court.

WHEREFORE the Respondent, GERALD JOHN D'AMBROSIO, respectfully requests that this Court find him not guilty of the Bar's complaints, and in the event that the Court sustains the Referee's recommendation of guilt, impose no more than a public reprimand as an appropriate sanction and grant any other relief that this Court deems reasonable and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via regular U.S. mail on this ____ day of September, 2008 to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and to Kenneth Marvin, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief or the e-mail forwarded to the Court has been scanned and found to be free of viruses, by McAfee.

By: _____
KEVIN P. TYNAN, ESQ.