IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	}	
Complainant,	}	
v.	}	CASE NO. SC08-1105
MIROSLAW THOMAS LOBASZ,	}	TFB File 2008-51,498(15C)
Respondent.	}	

On Petition for Review of a Referee's Report

RESPONDENT'S ANSWER BRIEF

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As framed by the Bar:

The Referee erred in finding Respondent's wholly unsupported trial testimony regarding mitigation (which was not disclosed to the Florida Bar during discovery) sufficient to vitiate the clear indicators of Respondent's intent to willfully disregard the Court's suspension order by appearing in federal court, and practicing law, after his suspension.

As suggested by Respondent as neutral and more accurate:

Whether the Referee's findings that Respondent did not consciously intend to violate the suspension order and did not intend and has not at any time intended to continue to practice law during his suspension is supported by competent, substantial evidence.

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As framed by the Bar:

> Given Respondent's substantial prior discipline (3-year suspension for trust accounting violations), his dishonest responses to this Court's order to show cause, the Referee's finding that Respondent is guilty of the conduct charged, and the ample case law and Florida Standards supporting disbarment for the continued practice of law after suspension, the Referee erred in recommending a concurrent, 3-year suspension—resulting in an actual additional suspension of only two days.

As suggested by Respondent as neutral and more accurate:

> Whether the Referee's recommendation that Respondent be suspended for three years running retroactively from April 10, 2008 (the date of his appearance in immigration court), and concurrently with the existing suspension has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

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PREFACE

This is the answer brief of Respondent, Miroslaw Thomas Lobasz. This matter is an original lawyer-disciplinary contempt proceeding that now is before the Court on the Bar's petition for review of the report and recommendations of the Referee.

ISSUES PRESENTED

ISSUE I

***As framed by the Bar*:**

The Referee erred in finding Respondent's wholly unsupported trial testimony regarding mitigation (which was not disclosed to the Florida Bar during discovery) sufficient to vitiate the clear indicators of Respondent's intent to willfully disregard the Court's suspension order by appearing in federal court, and practicing law, after his suspension.

***As suggested by Respondent as neutral and more accurate*:**

Whether the Referee's findings that Respondent did not consciously intend to violate the suspension order and did not intend and has not at any time intended to continue to practice law during his suspension is supported by competent, substantial evidence.

ISSUE II

***As framed by the Bar*:**

Given Respondent's substantial prior discipline (3-year suspension for trust accounting violations), his dishonest responses to this Court's order to show cause, the Referee's finding that Respondent is guilty of the conduct charged, and the ample case law and Florida Standards supporting disbarment for the continued practice of law after suspension, the Referee erred in recommending a concurrent, 3-year suspension—resulting in an actual additional suspension of only two days.

***As suggested by Respondent as neutral and more accurate*:**

Whether the Referee's recommendation that Respondent be suspended for three years running retroactively from April 10, 2008 (the date of his appearance in immigration court), and concurrently with the existing suspension has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE AND THE FACTS

A. *Statement of the Case*

Respondent disagrees with the Bar's statement of the case in one respect: contrary to the Bar's statement, the final hearing was not on sanctions only. (*Cf.* Initial Br. 3.) It was on all issues not previously adjudicated by the "Agreed Order Granting Summary Judgment," which deemed as established only the following:

> Respondent's active participation in that certain hearing held on April 10, 2008, before the Honorable Denise A. Marks Lane, U.S. Immigration Judge, in *Removal Proceedings of Alberto Gaspar-Martinez*, Case No. A28 957 234, namely, his addressing and responding to the court and conducting examination of Mr. Gaspar-Martinez, constituted the practice of law.

(Agreed Order Granting Summ. J. ¶ 2 (Mar. 16, 2009); Report of Referee 2 [hereinafter "Report"].) Whether Respondent by virtue of that participation was in contempt of this Court and, if so, to what degree remained for adjudication at the final hearing and, in fact, was adjudicated by the Referee based on the evidence presented at the final hearing. (Report 5.)

B. *Statement of the Facts*

Respondent disagrees with much of the Bar's statement of the facts as argumentative, misleading, or inaccurate. In particular (in the order in which they appear):

1. The Bar cites its petition for contempt, the agreed order granting summary judgment, and the Referee's report as authority for its statement that "Respondent's [existing] suspension was predicated on multiple, serious trust account violations." (Initial Br. at 4.) In matter of fact, neither the agreed order granting summary judgment nor the Referee's report says any such thing—or even mentions the basis for the existing suspension. (Agreed Order Granting Summ. J.; Report.) The characterization of the basis for the existing suspension is solely the Bar's.

2. The Bar devotes a long paragraph to a recitation of the content of a presuit affidavit submitted to the Bar by Denise A. Marks Lane, the Department of Justice immigration judge before whom Respondent appeared on April 10, 2008 (three days after his suspension went into effect). (Initial Br. 4–5.) That affidavit was not admitted into evidence before the Referee at the final hearing and, thus, is not part of the record on which the Referee's findings and recommendations were based.

3. The Bar purports to contrast Respondent's statement in his response to the Court's order to show cause with his testimony before the Referee:

> In Respondent's Response to Order to Show Cause, [R]espondent stated that he appeared before Judge Lane "as a legal assistant" to Ms. Cahill. … Respondent also stated that his participation in the April 10, 2008[,]

> hearing before Judge Lane "consisted solely of a single response to an inquiry from the judge … and five brief questions to the respondent."
>
> At the sanctions [sic] hearing, [R]espondent testified differently. He stated that he was *not* working as a paralegal for Linda Cahill. [Record citation omitted.]

(Initial Br. 5–6 (second omission in original) (emphasis in original).) That comparison is misleading in two respects: (1) the response to the order to show cause refers to his appearance before Judge Lane on April 10, 2008, whereas Respondent's testimony before the Referee refers to his relationship to Ms. Cahill at the time of the final hearing on April 30, 2009, and (2) there is a distinct difference in the legal industry between a "legal assistant" and a "paralegal." The purportedly contrasted statements are not contradictory.

4. The Bar states that "Respondent testified that he knew that Ms. Cahill was inexperienced and generally unprepared for a court appearance." (Initial Br. 6 (citing Tr. Final Hr'g 54–55).) That is inaccurate: Mr. Lobasz did *not* testify that Ms. Cahill was "inexperienced" or "generally unprepared" for a court appearance. His actual testimony was as follows:

> Q [by Bar Counsel]. And what provisions did you make to inform the client and to make sure the client was protected at that hearing?
>
> A. First I talked to Linda Cahill about the client. The client came in.

Q. Excuse me. Mr. Lobasz, but isn't it so that Linda Cahill doesn't go to court?

A. She does now.

Q. Does now. But this time she didn't go to court, did she?

A. She had not been to court in a while.

Q. Not a little while as you testified, but a very long while; isn't that correct?

A. I'm not sure how many years. It was years.

Q. Years.

A. But I'm not sure how many years.

Q. Isn't it so that Linda Cahill is terrified of going to court?

A. She—I don't think she's terrified. She doesn't like it.

Q. She didn't want to go this day, did she?

A. Huh?

Q. She did not want to go?

A. I'm not sure what you mean by that.

Q. *She wasn't prepared to represent this client, was she?*

> A. *Of course she was. We had spent hours going through that file. And she had spent hours talking with Mr. Gaspar, making sure he understood the questions that were going to be asked.*
>
> Q. Mr. Gaspar was her lawn man, wasn't he?
>
> A. Yes and friend.
>
> Q. Okay. And so she knew him in that context?
>
> A. Yes.
>
> Q. *But in terms of her preparation and her confidence to represent him at a removal hearing, Ms. Cahill wasn't competent to do that, was she?*
>
> A. *Yes, she was.*

(Tr. Final Hr'g 54:13–55:25 (emphasis added).)

5. The Bar states that "Respondent admitted (and the referee found) that he *deliberately* misled Judge Lane and opposing counsel (the lawyer for the United States Department of Homeland Security) about his status as a suspended lawyer." (Initial Br. 6 (emphasis added).) In support of that statement, the Bar cites Respondent's testimony at the final hearing and the Referee's report. (*Id.* (citing Tr. Final Hr'g 47, 61; Report 4).) The statement mischaracterizes both the testimony and the Referee's findings. The cited testimony was as follows:

> THE COURT [Referee]: So what did you tell the judge exactly?

THE WITNESS [Respondent]: That Linda was there—there was a form she files in order to be the attorney.

THE COURT: Notice of Appearance?

THE WITNESS: I'm sorry, yes.

THE COURT: But what did you tell the judge?

THE WITNESS: I said that Linda was going to take over the case and she was going to be the trial attorney.

THE COURT: Did you tell her why? Did you say—

THE WITNESS: No, I didn't.

THE COURT: Oh.

THE WITNESS: I was ashamed.

THE COURT: I understand that. So the judge was under the impression that you were still a functioning attorney?

THE WITNESS: I believe so, yes. I'm sure she was.

THE COURT: How did she—come to her attention that you weren't? Do you know?

THE WITNESS: I believe the Bar sent—she said that she got an e-mail that I had been suspended.

….

Q [by Bar Counsel]: Mr. Lobasz, is there any doubt in your mind at the time that you appeared before Judge

> Lane Marks on October [sic] 10th, 2008, that she thought you were still a lawyer in the case?
>
> A. Probably. No, there's no doubt.
>
> Q. You know she assumed you'd be a lawyer in the case?
>
> A. No, not in the case. She assumed I was a lawyer. Because Linda gave her the Notice of Appearance, said she was going to be the lawyer. I'm sure at some point I had told her that Linda was going to be the lawyer. It's not in here.

(Tr. Final Hr'g 47:2–48:1; 61:2–13.) That testimony hardly constitutes an admission of deliberate deception. Likewise, the supposed finding by the Referee that Respondent deliberately misled the immigration judge reads in its entirety as follows:

> At no time during the hearing on April 10, 2008, did Respondent or Ms. Cahill inform Judge Lane or opposing counsel (the lawyer for the U.S. Department of Homeland Security) that Respondent had been suspended.

(Report 4, ¶ 9.) That hardly constitutes a finding of deliberate deception.

6. The Bar states that "Respondent admitted that he never withdrew from the subject immigration case." (Initial Br. 6 (citing Tr. Final Hr'g 50).) The actual testimony was as follows:

> Q [by Bar Counsel]. And at the time that this proceeding began on April 10th, you had never withdrawn from the case, had you, sir?
>
> A. We don't—we don't practice like that in Immigration.
>
> Q. You never filed any Notice of Withdrawal as representing this client in this case, did you, sir?
>
> A. I haven't filed any Notice of Withdrawal in any of my cases except when there's no attorney. And the only time I filed a Notice of Withdrawal is when a client refused to cooperate and I had to withdraw from the case because I couldn't represent her.

(Tr. Final Hr'g 49:15–50:1.) Stating that Respondent "admitted" that he never withdrew from the immigration case is argumentative and misleading. According to Mr. Lobasz's testimony, that was an unnecessary procedural step (in light of the appearance by successor counsel), and the Bar offered no evidence to the contrary.

7. The Bar states that "Respondent admitted that he never … sent Judge Lane a copy of his suspension order." (Initial Br. 6 (citing Tr. Final Hr'g 50).) This statement is particularly argumentative if not disingenuous in light of Bar Counsel's own concession on the record that it was not required. The pertinent proceedings were as follows:

> Q [by Bar Counsel]. And you never sent the judge a copy of your suspension order, did you, sir?
>
> A. No, I did not.

Q. And the order of the Supreme Court of Florida compelled you to do that, didn't it, sir?

A. I don't remember.

THE COURT: Do you have a copy of the order?

MS. HOFFMAN [Bar Counsel]: Yes, sir.

….

MS. HOFFMAN: A copy of the order, Your Honor, is attached to the Florida Bar's petition for contempt which is in the original pleading that you received as Exhibit A.

MR. SMITH [Respondent's Counsel]: Do you have an extra copy?

MS. HOFFMAN: No, I'm sorry I don't. I'm sorry, Judge. That's the one for the previous suspension. Excuse me. That's the previous suspension case. Yes. And let's see—

….

THE COURT: I mean, you have an attachment here Exhibit A. But—

MS. HOFFMAN: It does not say that, Judge.

THE COURT: It doesn't say that.

MS. HOFFMAN: No.

THE COURT: It just says that he has to submit proof or [sic: *of*] payment, disciplinary cause [sic: *costs*].

MS. HOFFMAN: And it says that it's the Court—approves the report of referee.

THE COURT: Notified that—[“]no longer practicing law[”]—

MS. HOFFMAN: [“]Pursuant[”]—right.

THE COURT: [“]And does not need the 30 days, this Court will enter an order making[”]—

MS. HOFFMAN: Yes, sir. I'm sorry, I stand corrected. This order is different from the usual order.

….

Q [by Bar Counsel]. Let me ask the question this way, Mr. Lobasz. You received a notice from the Florida Bar advising you of your requirement to comply with Rule 3-5.1(g) making notice, did you not, sir?

A. I have no idea.

Q. Are you aware that Rule 3-5.1(g) requires all suspended lawyers to file notice with opposing counsel, with all judges, with all clients?

A. No, I wasn't. I mean, I—I don't know what rule.

Q. And it's your testimony that you never received notice of that from the Florida Bar?

A. No, it's not my testimony.

Q. No, it's not your—

THE COURT: No, he said he didn't remember.

> THE WITNESS: At that point I was receiving all sorts of things.

(Tr. Final Hr'g 50:5–52:12.) The Bar did not offer evidence that it had sent such a notice to Respondent. Rule 3-5.1(g) requires such notice by a suspended lawyer unless the requirement "is waived or modified in the court's order." R. Reg. Fla. Bar 3-5.1(g). It was one thing for Bar Counsel to have harbored a perfectly understandable albeit mistaken belief at the final hearing that this Court had included in its suspension order a direction that Respondent notify judges. It is quite another to suggest now, in the face of contrary knowledge, that Respondent failed to meet that obligation. In short, there is no evidence of any such failure.

8. In an apparent effort to demonstrate that Respondent continued to practice law after the effective date of his suspension, the Bar states that Responded "admitted to" certain "questionable" conduct, namely, (1) that he "continues to go to his law office nearly every day," (2) that he "continues to work with Ms. Cahill on his former clients' cases," (3) that he "was still meeting with (former) clients in his (former) law office, alone," and (4) that he "continues to receive fees from them." (Initial Br. 7.) This recitation, both in its separate parts and as a whole, is misleading. Mr. Lobasz testified as follows:

> Q [by Bar Counsel]. And you continue to go to the office everyday that you share space with Ms. Cahill, correct?

A. Well, we have separate offices.

Q. But in the same building?

A. Yes.

Q. And you had that same arrangement when you were practicing law?

A. No.

Q. What was different then?

A. She had her cases, I had my cases.

Q. I'm talking about the physical location.

A. Oh, yes.

Q. You had the same office that when you were practicing law as you have now that you're suspended, correct?

A. Yes.

Q. And she had the same office now before you were suspended that she has now, correct?

A. Yes.

Q. And you are continuing to help her in advancing your cases, correct?

A. Yes.

Q. And you go to the office everyday?

A. No.

Q. Just about everyday?

A. Yes.

Q. And you're still working on your client cases?

A. By working on them, I am briefing her about what the case—most—the cases just sit there until they're ready to go to hearing.

Q. Right.

A. And when they're ready to go to hearing, she pulls it out, sits down with me and *I explain [to] her the history of the case*, yes.

THE COURT: Do you get paid for that?

THE WITNESS: No, sir. It seems funny, but like I said, most of these cases last several years. When I was open then, I charged, let's say, $3,000, $4,000 to do a complete case. Eighty percent of that is done by the time the final hearing occurs.

So the client would have paid down $500 and was paying $200 a month. I'm still getting some of that *for the work I had done prior to the suspension*.

They're still coming in and giving me that $200 a month that—*for the work that had been done.*

….

Q [by Bar Counsel]. So the clients are coming in and speaking with you outside of her presence, correct?

> When they're giving you money, they come in and they meet just with you?
>
> A. Sometimes.
>
> Q. So you're meeting with clients outside the presence of Ms. Cahill, correct?
>
> A. I'm taking money from them, yes.

(Tr. Final Hr'g 90:21–92:18, 97:19–98:1 (emphasis added).) None of this suggests that Mr. Lobasz has continued to practice law during his suspension. He merely is collecting payments on fees earned prior to his suspension. As for his activities at the office:

> THE COURT: So what do you do in that office everyday?
>
> THE WITNESS: Honestly, most of the time, play computer games. What do you call it? The cards out one?
>
> MR. SMITH: Solitaire?
>
> THE WITNESS: Solitaire. That's about it. Plus I go on the Internet, look for jobs. I don't have Internet at home. It's only at the office.
>
> I'll answer the phone if she's got a client. And I'll answer the phone and leave a message for her.

(Tr. Final Hr'g 148:2–13.) In any event, the Bar did not charge Respondent with any instance of practicing law during his suspension other than his appearances in

immigration court on April 10 and 17, 2008. Bar Counsel acknowledged this at the final hearing. (*Id.* 145:1–18.)

SUMMARY OF THE ARGUMENT

The Referee found as fact that it was not Respondent's conscious intention to violate the suspension order and that his actions at the hearing before the immigration judge on April 10, 2008, were driven more by his emotional state and his desire to help a former client than by contumacious disregard for an order of this Court. The Referee further found as fact that Respondent did not intend and has not at any time intended to continue practicing law during his suspension. The Bar attacks those findings as based on "Respondent's wholly unsupported trial testimony." The fact remains, however, that Respondent's trial testimony—unsupported or not—constitutes competent, substantial evidence that the Referee judged credible, which is sufficient as a matter of law to support the Referee's factual findings.

Given the nature of the violation as found by the Referee—an unintended violation of the order driven more by a desire to help a former client than by a contumacious disregard for this Court's authority—the Referee's recommended sanction is supported by case law and the Florida Standards for Imposing Lawyer Sanctions. Each of the cases cited by the Bar in support of disbarment is readily

distinguishable. Respondent's isolated participation in a hearing that he was attending solely to acquit his ethical obligation to a former client to ensure that the client's interests were protected in the transition to successor counsel hardly warrants disbarment. Indeed, case law suggests that in light of the Referee's finding of no willful contempt, no sanction should be imposed.

ARGUMENT

ISSUE I

***As framed by the Bar*:**

> **The Referee erred in finding Respondent's wholly unsupported trial testimony regarding mitigation (which was not disclosed to the Florida Bar during discovery) sufficient to vitiate the clear indicators of Respondent's intent to willfully disregard the Court's suspension order by appearing in federal court, and practicing law, after his suspension.**

***As suggested by Respondent as neutral and more accurate*:**

> **Whether the Referee's findings that Respondent did not consciously intend to violate the suspension order and did not intend and has not at any time intended to continue to practice law during his suspension is supported by competent, substantial evidence.**

A. *The Standard of Review*

In a lawyer-disciplinary contempt proceeding, the Bar has the burden of proving the respondent's specific violations by clear and convincing evidence. *Fla. Bar v. Forrester*, 916 So. 2d 647, 651 (Fla. 2005). The referee's findings of fact come to this Court with "the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." R. Reg. Fla. Bar 3-7.6(m)(1)(A). As the Bar acknowledges (Initial Br. 2), if those findings are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Rose*, 823 So. 2d 727,

729 (Fla. 2002). The same standard of review applies to a contempt case. *Fla. Bar v. Shoureas*, 913 So. 2d 554, 561 (Fla. 2005).

B. *The Referee's Findings That Respondent Did Not Intend to Violate the Suspension Order, that His Actions at the April 10, 2008, Immigration Hearing Were Driven More by His Emotional State and His Desire to Help a Former Client than by Contumacious Disregard for the Court's Order, and that He Did Not Intend and Has Not at Any Time Intended to Continue Practicing Law During His Suspension Are Supported by Competent, Substantial Evidence.*

The Bar's argument appears to rest on three propositions: (1) Respondent did not provide responses to discovery requests; (2) Respondent gave vague testimony that was uncorroborated; and (3) the "actual and circumstantial evidence" of Respondent's "intent to violate" the suspension order is "overwhelming." (Initial Br. 20.)

First: The record will reveal no discovery violation. In any event, the Bar filed no motion to compel discovery, made no motion to continue the final hearing, and has not raised as an issue for review the Referee's admission into evidence of any of the information supposedly withheld from discovery.

Second: Even if Respondent's testimony was vague and uncorroborated, it nonetheless qualifies as substantial, competent evidence to support factual findings. It was for the Referee to weigh the evidence and judge Mr. Lobasz's credibility. Bar Counsel cross-examined Mr. Lobasz at length. The Bar had ample opportunity

to develop and offer evidence of its own regarding Mr. Lobasz's actions during his suspension. It offered none other than through cross-examination of Mr. Lobasz. Instead, the Bar argues that there was no evidence that Mr. Lobasz did *not* continue to practice law while suspended. (Initial Br. 18.) It was the Bar's burden to prove Mr. Lobasz's violation of the suspension order by clear and convincing evidence—not Mr. Lobasz's burden to prove a negative.

Third: The Bar's invocation of "overwhelming" evidence is based on the same inaccurate and misleading characterizations as appear in its statement of facts. (*Compare* Initial Br. 20–21 *with supra* at 4–17.) The best that can be said about the Bar's assertion is that it merely is arguing the weight of the evidence.

The Referee's factual findings are supported by competent, substantial evidence, and, therefore, should be affirmed.

ISSUE II

***As framed by the Bar*:**

> **Given Respondent's substantial prior discipline (3-year suspension for trust accounting violations), his dishonest responses to this Court's order to show cause, the Referee's finding that Respondent is guilty of the conduct charged, and the ample case law and Florida Standards supporting disbarment for the continued practice of law after suspension, the Referee erred in recommending a concurrent, 3-year suspension—resulting in an actual additional suspension of only two days.**

***As suggested by Respondent as neutral and more accurate*:**

> **Whether the Referee's recommendation that Respondent be suspended for three years running retroactively from April 10, 2008 (the date of his appearance in immigration court), and concurrently with the existing suspension has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.**

A. *The Standard of Review*

In reviewing a referee's recommended discipline, this Court's scope of review is broader than it is for factual findings, because the Court has the ultimate responsibility of ordering the appropriate sanction. *Fla. Bar v. Wolf*, 930 So. 2d 574, 577 (Fla. 2006). The Court, however, generally will not second-guess a recommendation that has a reasonable basis in existing case law and the Florida

Standards for Imposing Lawyer Sanctions. *Id.* The same standard of review applies to a contempt case. *Fla. Bar v. Shoureas*, 913 So. 2d 554, 561 (Fla. 2005).

B. *A Three-Year Suspension for Indirect Contempt of the Court for Technical Violation of the Earlier Order of Suspension, to Run Retroactively From the Date of Respondent's Isolated Instance of Practicing Law and Concurrently With His Existing Suspension, Has a Reasonable Basis in Existing Case Law and the Florida Standards for Imposing Lawyer Sanctions.*

The Bar's argument for disbarment is predicated on the following premises: (1) Respondent already had been suspended for serious trust-account violations; (2) Respondent filed a "knowingly and blatantly false" responsive pleading in this case; (3) Respondent "admitted that he practiced law while he was suspended"; (4) the Referee "found that Respondent practiced law while he was suspended"; and (5) the Referee found that Respondent should be held in indirect contempt of the Court for technical violation of the suspension order. (Initial Br. 23–24.) On those premises the Bar contends that both case law and the Florida Standards for Imposing Lawyer Sanctions compel disbarment.

All but the first and fifth of the foregoing premises are false. In particular:

1. *Respondent filed a "knowingly and blatantly false" responsive pleading in this case*. The Bar bases this assertion on Respondent's "Response to Order to Show Cause" served on June 30, 2008, and in particular on the following statement contained in it:

> Respondent's active participation [in the April 10, 2008, immigration hearing] consisted solely of a single response to an inquiry from the judge about which provision of the Nicaraguan Adjustment and Central American Relief Act was being invoked and of posing five brief questions to the respondent pursuant to the judge's suggestion at the conclusion of the hearing that the respondent be qualified for voluntary departure in the event the judge found the evidence in opposition to removal insufficient.

(Resp't's Resp. Order Show Cause ¶ 3 (June 30, 2008).) The pleading in which this statement appears is an unverified pleading signed by counsel. (*Id.* at 3.) It is counsel's work product. The proceedings at the April 10, 2008, hearing had not yet been transcribed. The transcript of that hearing was not prepared until February 17, *2009*—after the Bar filed served a motion for summary judgment. Once the transcript of the hearing became available to refresh Respondent's recollection of exactly what occurred, Respondent voluntarily agreed to an adjudication that his participation in that hearing constituted the practice of law. (*See* Agreed Order Granting Summ. J.) Indeed, Bar Counsel conceded at the final hearing that both sides were trying to get the transcript to see what actually transpired. (Tr. Final Hr'g 134:11–22.) Now to characterize Respondent's response to the order to show cause as a "knowingly and blatantly false" pleading is contrary to what Bar Counsel acknowledged at the hearing was the parties' previous states of mind.

2. *Respondent "admitted that he practiced law while he was suspended."* Unless this statement refers solely to the adjudication reflected in the "Agreed Order Granting Summary Judgment"—that Respondent's activities at the April 10, 2008, immigration hearing constituted the practice of law—it is false. At no time has Respondent otherwise practiced law during his suspension, much less "admitted" that he has done so. (*See* Stmt. of Case and Facts, *supra* at 13–16.) In any event, as Bar Counsel acknowledged at the final hearing (Tr. Final Hr'g 145:10–18), the Bar has not charged Respondent with any instance of practicing law while suspended other than his participation in the two April 2008 immigration hearings.

3. *The Referee "found that Respondent practiced law while he was suspended."* Here, too, unless this statement refers solely to the adjudication reflected in the "Agreed Order Granting Summary Judgment"—that Respondent's activities at the April 10, 2008, immigration hearing constituted the practice of law—it is false. The Referee did not find that Mr. Lobasz at any other time practiced law while suspended—nor did the Bar charge Mr. Lobasz with having done so.

The Bar relies on Florida Standard for Imposing Lawyer Sanctions 8.1(a) as supporting disbarment. Standard 8.1(a) is inapplicable. It provides that

disbarment is appropriate when a lawyer "*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." Fla. Std. Imposing Law. Sancs. 8.1(a) (emphasis added). The Referee found as fact that Respondent did not consciously intend to violate the suspension order. (Report 5, ¶ 11.) More closely on point is Standard 8.3(a), which provides that *public reprimand* is appropriate when a lawyer "*negligently* violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession." Fla. Std. Imposing Law. Sancs. 8.3(a) (emphasis added). The standards do not support disbarment under the facts of this case as found by the Referee. If anything, they suggest the imposition of a public reprimand.

The Bar relies on several cases as supporting disbarment. Each of them is distinguishable, and some actually have been distinguished by this Court. In particular:

1. *Florida Bar v. Greene*, 589 So. 2d 281 (Fla. 1991) (Initial Br. 24–25): Unlike Mr. Lobasz, Greene was found to have engaged in the practice of law on four occasions while suspended and had "a long history of disciplinary violations." 598 So. 2d at 282 (citing six prior decisions of the court over a twenty-year span). The Bar asserts that this Court "agreed with the Florida Bar that a further

suspension of an already disciplined lawyer who practiced while suspended 'would be fruitless.' " (Initial Br. at 25.) That assertion mischaracterizes this Court's statement, which was as follows:

> We agree with the Bar that further suspension of Greene would be fruitless. Greene has a long history of disciplinary violations. [Citations to six prior decisions over twenty-year span omitted.] He has completely disregarded lesser forms of discipline imposed by this Court. He has failed to abide by conditions of probation. He has continued to practice law despite his suspension.

598 So. 2d at 282. The Court went on to say that "[g]iven Greene's past disciplinary violations, his *refusal* to adhere to lesser forms of discipline, and his failure to participate in this case, we find that disbarment is warranted." *Id.* at 283 (emphasis added). The Court's conclusion that further suspension "would be fruitless" obviously was based on far more than the mere fact that Greene practiced law while suspended. Indeed, *Greene* was distinguished by this Court on that very basis in *Florida Bar v. Shoureas*, 913 So. 2d 554, 563, 563 n.5 (Fla. 2005) (finding no sanction proper in light of referee's finding of no willful contempt).

2. *Florida Bar v. Bauman*, 558 So. 2d 994 (Fla. 1990) (Initial Br. 25): Unlike Mr. Lobasz, Bauman was found to have engaged in at least five distinct acts of practicing law while suspended. On one of those occasions he was held in contempt by a circuit judge for holding himself out as an attorney, yet he thereafter

continued to represent clients in court. 558 So. 2d at 994. As noted by the Bar, this Court stated, "We can think of no person less likely to be rehabilitated than someone like respondent, who *willfully, deliberately, and continuously, refuses* to abide by an order of this court." *Id.* (emphasis added). That hardly describes Mr. Lobasz. As with *Greene*, *Bauman* was distinguished by this Court in *Shoureas*, 913 So. 2d at 563 n.5.

3. *Florida Bar v. Weisser*, 721 So. 2d 1142 (Fla. 1998) (Initial Br. 25–26): Unlike Mr. Lobasz, Weisser "*intentionally* violated this Court's order [granting his resignation from the Bar] by initiating litigation and engaging in *extensive* legal representation *for over two and one-half years*." 721 So. 2d at 1145 (emphasis added). In addition, Weisser had previously been suspended for similar acts of "intentional" and "unconscionable" misconduct. *Id.* That does not describe Mr. Lobasz.

4. *Florida Bar v. Heptner*, 887 So. 2d 1036 (Fla. 2004) (Initial Br. 26): Unlike Mr. Lobasz, Heptner not only practiced law while suspended but also engaged in felony criminal conduct with a client involving the sale and use of cocaine and engaged in multiple acts of misconduct over an extended period of time.

5. *Florida Bar v. Forrester*, 916 So. 2d 647 (Fla. 2005) (Initial Br. 26): Unlike Mr. Lobasz, Forrester not only practiced law while suspended but also engaged in a multitude of independently sanctionable offenses.

6. *Florida Bar v. Walkden*, 950 So. 2d 407 (Fla. 2007) (Initial Br. 26–27): Unlike Mr. Lobasz, Walkden was being sanctioned for a second instance of contempt and had engaged in a pattern of misconduct.

Thus, none of the cases relied upon by the Bar supports disbarment in this case. If anything, the case law supports a less severe sanction. In *Florida Bar v. Pipkins*, 708 So. 2d 953 (Fla. 1998), this Court imposed a ninety-day suspension on a lawyer for receiving and disbursing funds in his trust account and continuing to accept new business while serving a sixty-day suspension and eighteen-month probation for similar misconduct. 708 So. 2d at 954–55 (rejecting Bar's request for ninety-one-day suspension). Indeed, this Court's decision in *Shoureas* suggests that because the Referee found no *willful* contempt on Mr. Lobasz's part, *no* sanction should be imposed. 913 So. 2d at 562–63.

Mr. Lobasz did not engage in (nor was he charged with engaging in) continuing conduct in violation of the suspension order. He was found to have engaged in acts constituting the practice of law during a single, two-hour hearing that he was attending solely for the planned purpose of helping protect the interests

of his former client by being available to "whisper in the ear" of successor counsel if and as necessary. As the events of the hearing unfolded, he crossed the line into what constitutes the practice of law and, as found by the Referee, thus committed a technical violation of the suspension order without intending to do so and without contumacious disregard for this Court's authority. That does not warrant disbarment.

Mr. Lobasz currently is serving a three-year suspension. He will be required to demonstrate rehabilitation as a prerequisite to his being reinstated. The public has been more than adequately protected. Disbarment for this isolated instance occurring during the first week of his suspension in the course of transferring his clients' matters to new counsel would be unduly harsh.

CONCLUSION

The Referee's findings of fact are supported by competent, substantial evidence and should be affirmed. The Referee's recommended sanction is supported by the case law and the Florida Standards for Imposing Lawyer Sanctions and likewise should be affirmed.

Respectfully submitted,

s/ DCulverSmithIII

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof was furnished to Lorraine Christine Hoffman, Bar Counsel, The Florida Bar, Suite 130, Lakeshore Plaza II, 1300 Concord Terrace, Sunrise, FL 33323, and Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300, by mail on January 14, 2010.

s/ D. Culver Smith III

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

s/ D. Culver Smith III

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