IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MIROSLAW THOMAS LOBASZ,

Respondent.
_____/

Supreme Court Case No. SC08-1105

The Florida Bar File No. 2008-51,498(15C)

THE FLORIDA BAR'S INITIAL BRIEF

ON APPEAL FROM A REPORT OF REFEREE

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PRELIMINARY STATEMENT

The Florida Bar is seeking review of a Report of Referee recommending that respondent be suspended from the practice of law for three years (nunc pro tunc April 10, 2008), and that such suspension should run concurrently with the 3-year suspension imposed in Supreme Court Case No. SC06-2500.

Throughout this initial brief, the appellant will be referred to as "The Florida Bar," or "the Bar." The appellee, Miroslaw Thomas Lobasz, will be referred to as "respondent."

References to the Report of Referee shall be by the symbol RR, followed by the appropriate page number. Specific pleadings will be referred to by their title. Reference to the transcript of the final hearing shall be by the symbol T, followed by the appropriate page number.

THE STANDARD OF REVIEW

As to the facts in a Bar disciplinary case, the referee's findings are presumed to be correct unless the appellant demonstrates clear error or a lack of evidentiary support. Absent such evidence, the Court will not reweigh the evidence or substitute its judgment for that of the referee. The Florida Bar v. Rose, 823 So. 2d 727, 729 (Fla. 2002). The Court has more latitude with regard to the recommended discipline, however, and may disregard a referee's determination if the sanction recommended 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).

STATEMENT OF THE CASE AND OF THE FACTS

A. Statement of the Case

This case arises out of The Florida Bar's Petition for Contempt and Order to Show Cause, as filed on June 9, 2008. The Court issued a Show Cause Order on June 13, 2008, and respondent served his response on June 30, 2008. The matter was referred to the Chief Judge of the Seventeenth Judicial Circuit Court of Florida on September 11, 2008, and assigned to a referee on September 16, 2008. [RR 1-2.]

After a period of discovery, The Florida Bar served its Motion for Summary Judgment on January 8, 2009, and a supplement to that motion on February 23, 2009. An Agreed Order Granting Summary Judgment was entered on March 16, 2009. A final hearing on sanctions (only) was conducted, before the referee, on April 30, 2009. The Florida Bar sought disbarment. [RR 2.] The referee entered his Report of Referee on June 26, 2009, recommending that respondent be suspended for three years, nunc pro tunc April 10, 2008 (the date of his first appearance in immigration court, after his suspension), to run concurrently with the suspension imposed by this Court in Case No. SC06-2500. [RR 5, 10.]

The Florida Bar served its Petition for Review, seeking this Court's review of the referee's findings of fact and recommendation of discipline.

B. Statement of the Facts

On March 7, 2008, this Court entered an Order in Case No. SC06-2500, suspending respondent from the practice of law for three years and thereafter, until respondent demonstrated sufficient rehabilitation. The Court's suspension Order took effect 30 days thereafter, on April 7, 2008. Respondent's suspension was predicated upon multiple, serious trust account violations. [*See* The Florida Bar's Petition for Contempt and Order to Show Cause, Agreed Order on Summary Judgment, and Report of Referee, page 2.]

On or about April 25, 2008, The Honorable Denise A. Marks Lane, an immigration judge with the United States Department of Justice, Office for Immigration Review, called The Florida Bar to complain that respondent had appeared before her, and practiced law, during the term of his disciplinary suspension. On May 8, 2008, Judge Lane signed an affidavit, which she submitted to The Florida Bar, outlining the details of respondent's prohibited appearances in her courtroom on April 10 and April 17, 2008. In her affidavit, Judge Lane stated that respondent had, on April 10, 2008 and April 17, 2008, held himself out as legal counsel for an alien in an immigration matter, in her courtroom. Specifically, Judge Lane's affidavit stated that respondent appeared before her on April 10, 2008, in a removal (deportation) hearing. Judge Lane's affidavit established that on

that date, respondent took his seat at counsel's table, and that he "interacted as. . . co-counsel" with another lawyer (Linda Cahill) during the proceeding. She also advised that respondent made "statements on the record," and that he posed questions to the client, on the witness stand. Judge Lane's affidavit also stated that respondent returned to her courtroom, with Ms. Cahill, on April 17, 2008, in the same immigration matter, prepared to proceed. Before the hearing began, however, Judge Lane questioned both respondent and Ms. Cahill about respondent's extant suspension. Respondent admitted that he knew himself to be suspended, and followed the judge's direction to leave her courtroom. [*See* The Florida Bar's Petition for Contempt and Order to Show Cause, Agreed Order on Summary Judgment, and Report of Referee, page 2.]

In Respondent's Response to Order to Show Cause, respondent stated that he appeared before Judge Lane "as a legal assistant" to Ms. Cahill. He said that he appeared at the hearings, after his suspension, to "fulfill his ethical duty to take steps to the extent reasonably practicable to protect the interests of a former client. . . ." 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. . . ." [*See* Respondent's Response to Order to Show Cause, pages 1-2.]

At the sanctions hearing, respondent testified differently. He stated that he was *not* working as a paralegal for Linda Cahill. [T 147-148.] Respondent also testified that he knew that Ms. Cahill was inexperienced and generally unprepared for a court appearance, and so agreed to go to court with her to "assist her" and to "whisper in her ear." [T 54-55, 26.] 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. [T 47, 61, RR 4.] Respondent admitted that he never withdrew from the subject immigration case or sent Judge Lane a copy of his suspension order [T 50], even though he knew about the deportation hearing at least 60 days before it took place. [T 54.] Finally, although respondent stood by his earlier assertion[1] that his participation in the April 10, 2008 hearing was limited, the hearing transcript revealed respondent's active participation in the entire hearing. This participation included the questioning of a witness (respondent's former client), as well as responses and comments addressed to the court (Judge Lane). [T 62-70 and Transcript of April 10, 2008 hearing before Judge Denise Marks Lane, attached as Exhibit B to The Florida Bar's Supplement to Its Motion for Summary Judgment, and in evidence as Respondent's Exhibit 1.] Respondent also admitted that this

[1] *See* Respondent's Response to Order to Show Cause, as served on June 30, 2008.

"active participation" in the deportation hearing before Judge Lane "constituted the practice of law." [T 4, RR 2.]

At the sanctions hearing and under cross-examination, respondent admitted to additional questionable conduct, after the date of his April 2008 appearances before Judge Lane, and through the date of the sanctions hearing. Respondent admitted that he continues to go to his law office nearly every day, and that he continues to work with Ms. Cahill on his former clients' cases. [T 90, 91.] Respondent admitted that he was still meeting with (former) clients in his (former) law office, alone, and that he continues to receive fees from them, in cash. [T 92-93, 97-98.] Respondent testified that many of these (former) clients do not speak English, and cannot read. [T 92, 98.] Respondent testified that the cash payments he receives from these (former) clients, who meet with him in his (former) law office, have been his only source of income, through the date of the April 30, 2009 sanctions hearing. [T 95.]

As respondent agreed to summary judgment, the only issue before the referee was the determination of sanction. [T 4, RR 2.] Over The Florida Bar's objection, the referee allowed respondent to testify as to his emotional, psychiatric, and psychological problems and treatment (which were not disclosed in

discovery)[2] — for purposes of mitigation. [T 36, 42-45, 78-80.] Based on respondent's untested and unsupported testimony at the sanctions hearing, the referee found that respondent "was suffering from post-traumatic stress syndrome, anxiety, and depression, and his father was hospitalized and dying." During The Florida Bar's cross-examination of respondent, the referee commented that, "[o]bviously, [respondent's] judgment's impaired." [T 82.] Based on this belief, the referee found that "it was not Respondent's conscious intention to violate the suspension order," and that he "did not intend and has not at any time intended to continue practicing law during his suspension." [RR 5.] Based on this assessment of respondent's mental state at the time of his admitted misconduct, the referee found that respondent's practice of law, during his suspension, was deserving of a 3-year suspension, to run concurrently with his present 3-year suspension — but for two days.[3] In essence, then, the referee has found respondent guilty of actively

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[2] *See* Respondent's Answers to The Florida Bar's First Set of Interrogatories, response to interrogatory number 7.

[3] Respondent's suspension in Case No. SC06-2500 took effect on April 7, 2008. In the instant case, the referee has recommended that respondent be suspended for three years, nunc pro tunc April 10, 2008, and that this suspension should run concurrently with the one respondent is currently serving in Case No. SC06-2500. Were this sanction approved by the Court, respondent would serve only two additional days of suspension for his admitted defiance of this Court's suspension Order.

practicing law while suspended, and recommended that he be sanctioned with two additional days of suspension. [T 5.]

SUMMARY OF ARGUMENT

Respondent agreed to the entry of summary judgment against him, and thereby admitted that he had practiced law during his suspension. At the sanctions hearing, respondent attempted to excuse his contemptuous misconduct by demonstrating incapacity born of a mental illness he failed to disclose during discovery. Respondent did this by his own testimony in response to his lawyer's questions, and by his own testimony in response to the referee's extensive questions — all over The Florida Bar's objections. Respondent called no witness to corroborate his testimony, and introduced into evidence no medical reports, documents, or records to substantiate it. His only shred of corroborating evidence was an unsigned and emailed report from his "therapist" (a "clinical social worker" whom respondent claimed to see every three weeks), sent to respondent's lawyer a few days before the sanctions hearing. Notwithstanding this lack of record evidence (whether it was disclosed in discovery or not), the referee made a finding that respondent "suffered from post-traumatic stress syndrome, anxiety, and depression." Based on this finding, the referee also concluded that respondent "did not intend and has not at any time intended to continue practicing law during his suspension." [RR 5.]

Under the applicable case law, the referee's analysis and findings of fact as to intent are fatally flawed. By a litany of knowing and deliberate acts before and after his appearance before the federal immigration judge, respondent demonstrated that his practice of law after his suspension was knowing and intentional.

The referee also erred in his disciplinary recommendation. Believing that respondent was impaired and therefore not responsible for his misconduct, the referee recommend a 3-year suspension, to run concurrently with the 3-year suspension that respondent is already serving — nunc pro tunc to the date of his April 10, 2008 appearance in immigration court. This recommendation amounts to an additional suspension of two days. This recommendation is contrary to the case law, and to the Florida Standards for Imposing Lawyer Sanctions. Both call for respondent's disbarment.

Respondent should be disbarred.

ARGUMENT

ISSUE I

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.

The Florida Bar filed its Petition for Contempt and Order to Show Cause, in the instant case, on June 9, 2008. After the Court referred the case for trial, and a referee was appointed, The Florida Bar propounded discovery. On October 29, 2008, The Florida Bar served its First Set of Interrogatories. Interrogatory number 7 asked: "[p]lease set forth any and all mitigation which you will seek to advance at the final hearing in this cause." Respondent's (tardy) Answers to Florida Bar's First Set of Interrogatories were served on December 4, 2008. In response to interrogatory number 7, respondent answered "[n]ot yet determined." Respondent did not file a supplement to his original answer, nor did he ever communicate to The Florida Bar any plan to introduce mitigation evidence at the sanctions hearing on April 30, 2009. Similarly, The Florida Bar propounded a Request for Production, on October 29, 2008. In this request, The Florida Bar asked for "[a]ny and all evidence in any form, upon which respondent will rely, or which he will

seek to admit into evidence, in the final hearing in this cause." The Bar also asked for "[a]ny and all evidence, in any form, which supports respondent's denial of any charges set forth in The Florida Bar's Complaint." In his (tardy) December 3, 2008 response, respondent stated, in response to The Florida Bar's first request, that "the described category of documents does not exist. . ." In response to The Florida Bar's second request, respondent posed a work product objection. In short, respondent produced *no* mitigation information, documents, or evidence of any kind to The Florida Bar, in response to its *express* discovery requests for same.

Notwithstanding this discovery position, respondent came to the sanctions hearing well-prepared to advance several theories of mitigation to excuse his admitted misconduct.[4] On direct examination and over the Bar's objection, respondent immediately began to testify about his mental illness. He said that he has suffered from depression "over a long period of time." He said that the Florida hurricanes made his depression spiral. [T 16.] He said he was currently in treatment and on "meds" [T 16.], and had been taking something[5] at the time of his appearance before Judge Lane — but later testified that he is an "optimist," and

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[4] Respondent admitted his misconduct immediately, at the beginning of the sanctions hearing. In response to the referee's question, respondent's counsel admitted to a "legal conclusion" that respondent had practiced law. [T 4.]

[5] The referee specifically inquired as to whether respondent was taking a particular drug: Thorazine. Respondent testified that he was not. [T 44.]

plans to make "an appointment with a psychiatrist coming up to help [him] redo the meds." [T 99.] At the sanctions hearing, respondent had no prescriptions with him, could remember the names of no prescription drugs he takes (or has taken), and testified as to no specific time periods for his unsubstantiated claims of debilitating mental illness. Indeed, when the referee asked respondent whether he had received "a diagnosis" for his condition, respondent could only state: "I'm on anti-depressants and I go about every three weeks to see my therapist and deal with the issues for that week." [T 42.] From that point forward, the referee questioned respondent himself, actively supporting the introduction of the unsupported, undisclosed mitigating evidence to which the Bar had objected:

> **THE COURT**: What manifestation, physical manifestations did you have of this depression?
>
> **THE WITNESS**: Crying, sitting, driving my car and crying, getting anxious about things that I shouldn't.
>
> **THE COURT**: Did you have trouble sleeping?
>
> **THE WITNESS**: I constantly - -
>
> **THE COURT**: Have trouble concentrating?
>
> **THE WITNESS**: Yes, I did.
>
> **THE COURT**: Mind wander?
>
> **THE WITNESS**: Yes. Or else I would be just - - concentrate on one specific thing for a long, long, time.

THE COURT: So you get obsessed by it?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay. What was your state of mind during that hearing, at the time of the hearing?

THE WITNESS: Anxiety. Anxious. I was anxious for my client - - my former client. Anxious that Linda would do a good job.

THE COURT: Were you under treatment during that time too?

THE WITNESS: I had started the meds that - - these particular meds, several months before that. So they were beginning to start to work. The kind of depression I have is that I can last on meds for about nine months, ten months at a time and then they don't work anymore. By [sic] brain adjusts to that med and refused to let it operate correctly. So I have to change the meds.

THE COURT: What were you on? What medication were you on at that time?

THE WITNESS: Uh - -

THE COURT: Thorazine?

THE WITNESS: No, Your Honor.

THE COURT: Do you remember?

THE WITNESS: I'm not real good with med names.

THE COURT: Okay. Is it reflected in that? [indicating Ms. Compton's email to respondent's counsel.]

THE WITNESS: I'm sorry?

THE COURT: If you don't remember, you don't remember.

THE WITNESS: I know it's 300 milligrams of something.

THE COURT: You want to ask him some more?

MR. SMITH: Yes, sir. Thank you. [T 42-44.]

On cross-examination, The Florida Bar attempted to test the veracity of respondent's testimony, as teased out by the referee over the Bar's objection. In response to the Bar's question regarding respondent's non-disclosure of this mitigating "evidence," respondent stated that he disclosed his mental health issues in a prior hearing — his first Bar disciplinary case. When pressed by the Bar to admit that he produced no admissible and verifiable evidence to support his mental illness defense in that case either, respondent's counsel advanced an objection — which was sustained by the referee. [T 78-80.]

Further, although he testified about receiving treatment from a Sue Compton,[6] respondent never disclosed her as a witness, called her as a witness, or provided any information about her or his treatment to The Florida Bar during discovery. Nonetheless, respondent sought to admit into evidence (at the sanctions hearing) an unsigned, emailed communication that Ms. Compton had directed to respondent's counsel — four days before. Over the Bar's objection, the referee

[6] Ms. Compton was identified, at the sanctions hearing, as a "licensed clinical social worker," and respondent's "therapist." [T 40.]

allowed respondent to testify from this emailed communication, and rely upon it, at the sanctions hearing. The referee stopped short of admitting the document into evidence. [T 35-44.]

Respondent also testified, at the sanctions hearing, that his mental state (and his ability to formulate intent) was impaired at the time of his prohibited appearance before Judge Lane, because his father was hospitalized "in ICU," and dying in April 2008. [T 34.] Respondent testified that his father died in late June, 2008. Again, no evidence to support these facts, or their effect upon respondent's mental state or conduct, was produced at the sanctions hearing, or disclosed during discovery.

Despite respondent's discovery violations, the lack of *any* substantive, record evidence to support his claim of mitigation, and The Florida Bar's objection to same, the referee relied upon respondent's uncorroborated and untested testimony, and accepted it as true. Based on this finding, the referee found that respondent was "suffering from post-traumatic stress syndrome, anxiety, and depression." [RR. 4-5.] The referee also found that because of these conditions, "[i]t was not Respondent's conscious intention to violate the suspension order." Instead, the referee found that respondent's admitted disobedience of this Court's suspension Order was "driven more by his emotional state and his desire to help a

former client than by contumacious disregard for an order of the Court, and he harbored no dishonest or selfish motive." [RR 5.] Finally, the referee found that "[r]espondent did not intend and has not *at any time intended* [emphasis provided] to continue practicing law during his suspension." [RR 5.]

The referee's findings are not supported in the record. First, there is insufficient record evidence to support *any* finding as to what respondent did, "at any time." The referee may only make findings as to the time period at issue in the current case. Further, there is no record evidence (beyond respondent's own testimony) to support respondent's mitigation claims. Accordingly, the referee's acceptance of, and reliance upon such claims as sufficient mitigation for respondent's misconduct, is erroneous. In The Florida Bar v. Horowitz, 697 So. 2d 78 (Fla. 1997), a respondent admitted The Florida Bar's allegations against him by accepting a default judgment. Thereafter, he appeared at a sanctions hearing and attempted to advance mitigation testimony regarding diminished capacity due to clinical depression. The referee rejected this unsupported testimony as insufficient mitigation, and recommended disbarment. On appeal, this Court upheld the referee's determination regarding the mitigation testimony, and disbarred Mr. Horowitz.

Respondent himself was educated regarding this Court's position on unsupported mitigation testimony at a sanctions hearing, in his own, prior disciplinary case. In Supreme Court Case No. SC06-2500 (involving trust account shortages), respondent allowed a default judgment to be entered against him. He appeared, for the first time, at the sanctions hearing, and testified about his mitigating mental health issues. The referee in that case rejected respondent's unsupported testimony as insufficient to mitigate his misconduct, and recommended disbarment. [T 78-80.] On appeal, this Court approved the referee's report with regard to the findings of fact and recommendations of guilt, but imposed a 3-year suspension, instead of disbarment. The Florida Bar v. Lobasz, 979 So. 2d 220 (Fla. 2008). *See also* The Florida Bar v. Travis, 765 So. 2d 689 (Fla. 2000) [a trust accounting case where the Court recommended disbarment despite the trial testimony of the respondent's treating psychiatrist regarding respondent's established depression at the time of the misconduct.]

While there is *no* record evidence (beyond respondent's unsupported testimony) to support the referee's finding that respondent did *no*t intentionally violate this Court's suspension Order, there is substantial record evidence to establish that he did. Under the clear holding of this Court in The Florida Bar v. Forrester, 916 So. 2d 647 (Fla. 2005), a respondent's intent to violate a Court

Order may be established by circumstantial evidence. In the instant case, the circumstantial evidence is well buttressed by actual evidence, and respondent's own admissions.

The actual and circumstantial evidence of respondent's intent to violate this Court's suspension Order, and practice law after his suspension, is overwhelming. First, respondent testified that he knew of the April 10, 2008 deportation hearing before Judge Lane "probably more than 60 days" before it took place. [T 54.] Accordingly, he clearly knew of that hearing date when he received the Court's Order imposing his own suspension, 30 days before it took effect, in March of 2008. Having the benefit of this knowledge, and with ample time to inform all parties (including Judge Lane, opposing counsel, and his own client), respondent admitted that he informed no one. Instead, he made plans to accompany Ms. Cahill to immigration court, on a day that he knew he would be suspended from the practice of law. Were that not enough, respondent did not disclose his extant suspension to the judge or opposing counsel, even on the date of the deportation hearing. Instead, he sat at counsel's table and said nothing when the judge addressed him — knowing that she understood him to be there as an attorney. [T 47.]

Thereafter, respondent actively represented his client throughout the immigration court proceeding. He addressed the court, responded to the court's questions, and questioned the witness. Were this not enough to establish respondent's well-considered intention to violate this Court's suspension Order, respondent's admission about his *continued* conduct, after the April 10, 2008 hearing before Judge Lane, certainly is. Respondent testified that even as of the date of the sanctions hearing, he continued to go to his (former) law office nearly daily — where he meets with (former) clients, alone and unsupervised. He continues to receive fees from these clients — indeed he testified that he has lived off these fees, exclusively, since his suspension from the practice of law. Further, respondent admitted that he continues to "assist" Ms. Cahill with the representation of these clients, to date. While respondent also testified that he removed all signage (indicating his status as a lawyer) from the law office he continues to share with Ms. Cahill, he also testified that his clients are largely illiterate, and do not speak English. Accordingly, signage would be of no importance to them, once they found respondent present in his usual law office location.

It is axiomatic that a referee's finding of fact regarding guilt carries the 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).

Accordingly, this Court has the duty 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. Cuerto, 834 So. 2d 152 (Fla. 2002), *citing* The Florida Bar v. Jordan, 705 So. 2d 1387 (Fla. 1998). Such a review of the foregoing facts clearly demonstrates that the referee's findings, as to respondent's intent to violate the Court's suspension Order, are erroneous and without record support. All of respondent's conduct, as set forth herein, was deliberate, knowing, and well-considered. Such deliberate conduct is sufficient to establish intent. The Florida Bar v. Nicnick, 963 So. 2d 219, 223-224 (Fla. 2007), The Florida Bar v. Brown, 905 So. 2d 76, 80-81 (Fla. 2005), and The Florida Bar v. Barley, 831 So. 2d 163, 169 (Fla. 2002).

ISSUE II

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.

Respondent appears before this Court having already been sanctioned for serious trust account violations, and while serving a 3-year suspension for such misconduct. In response to the complaint filed against him by a federal judge, and the resulting Petition for Contempt and Order to Show Cause filed against him by The Florida Bar, respondent filed a false responsive pleading in the Supreme Court of Florida. In this pleading (Respondent's Response to Order to Show Cause), respondent stated that his participation in the deportation hearing before Judge Lane "consisted solely of a single response to an injury from the judge. . . and of posing five brief questions to the respondent pursuant to the judge's suggestion at the conclusion of the hearing. . ." [Respondent's Response to Order to Show Cause, page 2, paragraph 2.] Respondent's statement was knowingly and blatantly false. As demonstrated at the sanctions hearing, and indeed by the transcript of the

hearing before Judge Lane (in evidence as Respondent's Exhibit 1), respondent actively participated in the entire deportation hearing, as an attorney.

In the context of this disciplinary history and his dishonest response to the Supreme Court of Florida, respondent admitted that he practiced law while he was suspended. The referee found that respondent practiced law while he was suspended, and found that respondent should be held in "indirect contempt of the Court for technical violation of the order of suspension of March 7, 2008." [RR 5.] Based on this finding, both the case law and The Florida Standards for Imposing Lawyer Sanctions call for disbarment.

Generally speaking, this Court will not second-guess a referee's disciplinary recommendation if it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions (hereinafter "the Florida Standards"). *See* The Florida Bar v. Riggs, 944 So. 2d 167, 171 (Fla. 2006). In the instant case, the referee's recommendation of another 3-year suspension, to run concurrently with the 3-year suspension respondent is already serving (but for two additional days) is no discipline at all — and has no basis in the case law or in the Florida Standards.

The case law clearly calls for respondent's disbarment. A seminal case in this area is The Florida Bar v. Greene, 589 So. 2d 281 (Fla. 1991). In that case, The

Florida Bar filed a Petition for Rule to Show Cause alleging that the respondent had practiced law while suspended. Mr. Greene did not charge for his services, and represented a personal friend. The referee found him guilty of practicing while suspended, and recommended that the respondent be fined as a sanction. In rejecting the referee's recommended discipline, this Court agreed with The Florida Bar that a further suspension of an already disciplined lawyer who practiced while suspended "would be fruitless." Greene, at 282. Instead, the Court disbarred him.

In The Florida Bar v. Bauman, 558 So. 2d 994, 994 (Fla. 1990), this Court disbarred another lawyer for practicing law during a six-month suspension, stating that it "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." In The Florida Bar v. Weisser, 721 So. 2d 1142 (Fla. 1998), The Florida Bar filed a contempt action against a respondent for practicing law after a disciplinary resignation. Like Mr. Lobasz, Mr. Weisser filed a response in the Supreme Court of Florida, denying The Florida Bar's charge. After an evidentiary hearing, the referee recommended a 10-year disbarment based, in part, upon respondent's untruthful testimony and the intentional nature of his misconduct. The Court specifically rejected Mr. Weisser's claim that his case

should be controlled by The Florida Bar v. Neckman, 616 So. 2d 31 (Fla. 1993),[7] and disbarred him for ten years.

Similar results occurred in subsequent cases. In The Florida Bar v. Heptner, 887 So. 2d 1036 (Fla. 2004), this Court rejected a referee's recommendation that a lawyer who violated a suspension order by practicing law be suspended for two years, and imposed disbarment. Similarly, in The Florida Bar v. Forrester, 916 So. 2d 647 (Fla. 2005), this Court held that the respondent knowingly violated its suspension Order by practicing law while suspended, and disbarred him for it. In so doing, the Court noted that "[t]he purpose of contempt proceedings brought against an attorney for violation of an existing disciplinary order is to punish the offending attorney and to vindicate the authority of this Court to discipline Florida attorneys." Forrester, at 651. This cannot be accomplished by the two days of additional suspension imposed by the concurrently running suspension recommended by the referee in the instant case. Finally, in The Florida Bar v. Walkden, 950 So. 2d 407 (Fla. 2007), the Court held that cumulative misconduct is viewed more seriously than isolated instances of misconduct, and determined that a

[7] This is the case upon which the referee relied in recommending a concurrent 3-year suspension in the instant case. [RR 6.] In Neckman, the Court publicly reprimanded the respondent for practicing law after resigning from The Florida Bar.

lawyer who practices while already suspended acts in contempt of the Supreme Court of Florida and is, therefore, deserving of disbarment.

The Florida Standards also clearly call for respondent's disbarment. Standard 8.1 states that "[d]isbarment 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." Respondent's intentional misconduct caused injury to each of the above-named entities. Respondent's client was harmed because his immigration status and case were put in jeopardy, and delayed. The public and the legal system were harmed because both were forced to bear the considerable judicial and prosecutorial expenses of the delay caused by respondent's misconduct in Judge Lane's courtroom on April 10 and April 17, 2008. And the profession was harmed because respondent's deliberate and dishonest conduct diminished the reputation of good and honest lawyers everywhere.

CONCLUSION

Respondent was suspended from the practice of law for serious trust accounting violations. The Court imposed a 3-year suspension, to take effect on April 7, 2008. On April 10, 2008, respondent attended an immigration deportation hearing which had been noticed at least 60 days before. He brought another lawyer with him, knowing that she was grossly inexperienced. He told no one that he had been suspended, sat at counsel table, and proceeded throughout the hearing in complete defiance of the Court's suspension Order. He responded to the immigration judge and questioned his client on the witness stand. When the case was continued to April 17, 2008, respondent returned to federal court, sat at counsel table again, and gave every indication of planning to do as he had done the week before. He was stopped because the judge had learned of respondent's suspension, and ejected him from her courtroom. When the judge reported respondent's misconduct to The Florida Bar, respondent filed an untruthful response in the Supreme Court of Florida. After summary judgment was entered against him, respondent presented unsupported testimony at the sanctions hearing, to explain away his intentional violation of the Court's suspension Order. Under the applicable case law and Florida Standards for Imposing Lawyer Sanctions, respondent must be disbarred.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Florida Bar's Initial Brief regarding Supreme Court Case No. SC08-1105, The Florida Bar File No. 2008-51,498(15C) was e-filed and furnished by regular U.S. mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, FL 32399-1927 and a true and correct copy has been mailed by regular U.S. mail to D. Culver Smith III, counsel for respondent, Fox Rothschild, LLP, 222 Lakeview Ave., Suite 700, West Palm Beach, FL 33401-6148, on this _____ day of November, 2009.

_____

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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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