IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, CASE NO.: SC08-1786

Complainant, TFB NO.: 2008-10,621(20D)

v.

MICHELLE ERIN BERTHIAUME,

Respondent.
_____/

THE FLORIDA BAR'S CROSS ANSWER/REPLY BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as “The Florida Bar” or “the Bar.” The Respondent, Michelle Erin Berthiaume, will be referred to as “Respondent.”

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC08-1786 held on April 14, April 15, May 22, and July 9, 2009. “SH (March 19, 2010)” will refer to the transcript of the Sanctions Hearing held on March 19, 2010, “SH (May 19, 2010)” will refer to the Sanctions Hearing held on May 19, 2010, and “SH (July 9, 2010)” will refer to the Sanctions Hearing held on July 9, 2009. “GC (April 24, 2008)” will refer to the transcript of the hearing before Grievance Committee 20D on April 24, 2008. “GC (May 29, 2008)” will refer to the transcript of the hearing before Grievance Committee 20D on May 29, 2008. “GC (June 12, 2008)” will refer to the transcript of the hearing before Grievance Committee 20D on June 12, 2008. "TFB Exh." will refer to exhibits presented by The Florida Bar and "R Exh." will refer to exhibits presented by Respondent at the final hearing before the Referee. The Final Report of Referee dated July 1, 2010, will be referred to as "RR." “Rule” or “Rules” will refer to the Rules Regulating The Florida Bar. “Standard” or “Standards” will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS AND OF THE CASE

The Bar's Initial Brief contains a detailed Statement of the Facts and of the Case, which will not be repeated here. This Statement will address matters raised by Respondent's Statement of Facts and the Case.

Issuance of "Subpoena" to Pelican National Bank

In her Statement of Facts, Respondent attempts to minimize the impact of the unauthorized subpoena by asserting that the Bank and its attorneys "immediately" knew the document was not a valid subpoena and therefore simply did not respond to it. Answer Brief, p. 6. Respondent's characterization of the Bank's reaction to the "subpoena" is contrary to the testimony. Although the Bank's officials suspected the document was not a valid subpoena, they were very concerned and took action to investigate the matter. June Kossow was vice president of operations and compliance officer for Pelican National Bank. TR2 164-165. Ms. Kossow was concerned about potential liability to the Bank if the Bank turned over records in response to an invalid subpoena. Ms. Kossow was also worried that the Bank could be penalized for violating banking regulations, including Regulation P. TR2 224-226. She forwarded a copy of the purported subpoena to the Bank's legal counsel, Steven Kushner, who investigated the matter and determined the subpoena was not authentic. TR1 127-132. Mr. Kushner

testified that he was concerned about the potential consequences to the Bank if it complied with a subpoena that was not valid. TR1 136-137. Mr. Kushner sent a letter to Respondent expressing his concerns about the "subpoena." TFB Exh. 2, MEB 17.

The Bank's attorney, Michael Whitt, also reviewed the purported subpoena. Mr. Whitt knew the document was not a valid subpoena, but he took steps to investigate the matter, including checking the Clerk of Court's website to determine no action was pending by Respondent or her law firm against Mr. Furlan or his company. TR2 263-265. Mr. Whitt was concerned about the language in the purported subpoena that would lead a nonlawyer who received the document to believe they could be held in contempt or jailed if they did not comply. SH 42 (March 19, 2010). Mr. Whitt testified that Bank employees had already begun to pull records and copy them to comply with the "subpoena." SH 37 (March 19, 2010). Mr. Whitt was also concerned that the Bank could face potential liability under banking regulations for producing protected records. TR2 276-77.

Contrary to Respondent's assertion that the Bank immediately recognized the invalidity of the "subpoena" and simply did not comply, the record shows that the Bank took the document very seriously. The Bank's officers and attorneys spent time investigating the matter, and the Bank incurred legal fees for the

investigation. SH (March 19, 2010), at 50-53.

Respondent states she "made a mistake" in mailing the offending document to Pelican National Bank containing the subpoena language. She states she instructed her secretary to change the document from a "form subpoena" to a "letter" requesting Mr. Furlan's records. Answer Brief, p. 4-5. Respondent's position is inconsistent with the record. Respondent's legal assistant, Tanya Smith, testified before the grievance committee that Respondent saw the subpoena in its final form before signing it and directing her secretary to mail it. GC (May 29, 2008) at 94-95; TR5 781-782. Respondent's statement that she mistakenly sent the document with the contempt language testimony is also inconsistent with her own testimony. Respondent testified at the final hearing and before the grievance committee that she believed she had the authority to issue an "attorney subpoena" requiring records to be produced. TR5 677-678, 725; GC (April 24, 2008) at 37. She attempted to explain why the language threatening contempt was included in the document. TR5 642-644; GC (April 24, 2008), at 20-21. Her attempts to justify the inclusion of the contempt language contradict her position that it was a secretarial "mistake" to send the document with the contempt language.

Disciplinary Proceedings:

As noted by the Referee, a large amount of time was spent in this proceeding

dealing with Respondent's multiple challenges to the authority of The Florida Bar to prosecute her. RR 12. Respondent made multiple unfounded accusations of misconduct against the two grievance committees that investigated the grievance against her, the designated reviewer in the first disciplinary case, and the Bar.

Dismissal of First Complaint and Referral to Second Grievance Committee

Respondent accuses The Florida Bar of pursuing a second investigation of Respondent in 2008 after agreeing to dismiss the first disciplinary case, Supreme Court Case No. SC07-274, TFB No. 2005-10,817(20A). Respondent claims The Florida Bar agreed to dismiss the case, "which should have caused the previous finding of no probable cause to be reinstated and resolve this matter." Answer Brief, at p. 7. Respondent has mischaracterized the circumstances that led to the dismissal of the first complaint filed by the Bar.

Mr. Whitt's grievance against Respondent was initially investigated by the Twentieth Judicial Circuit Grievance Committee "A." The designated reviewer for the committee, J. Christopher Lombardo, rejected the finding of no probable cause and recommended that the Board of Governors of The Florida Bar make a finding of probable cause. R. Exhs. 3, 4. The Board of Governors found probable cause and the Bar filed a complaint against Respondent in Case No. SC07-274.

After a referee was assigned, Respondent for the first time complained that

Mr. Lombardo had a conflict of interest. Respondent alleged Mr. Lombardo was representing the opposing party in a domestic relations case in which Respondent had filed a charging lien and had threatened her with adverse consequences in the disciplinary matter if she failed to remove the charging lien. *See* Respondent's Motion to Dismiss, dated November 24, 2008, attached as "Exhibit A" to Respondent's Answer and Affirmative Defenses, dated December 5, 2008. The parties agreed to a dismissal without prejudice so that a new grievance committee could be assigned the case for a new, taint-free investigation. RR 12.

At a hearing before the referee in Case No. SC07-274, the parties agreed to enter into a stipulation for dismissal:

> MR. PAUL: . . . And at this point, what we have agreed to do is to work out a stipulation of dismissal and we intend to send the case back to the Grievance Committee, start the investigation again without any—to remove any type of allegation of taint or conflict.
>
> And Mr. Keenan is working on drafting a stipulation and a Court Referee. (sic) And I will have a chance to review it and then get it in to you, and hopefully it will meet with your approval.
>
> MR. KEENAN: That is correct, Judge. What Mr. Paul has stated is correct. And what I propose to do—what we propose to do is to submit a stipulation for dismissal. It will [be] without prejudice, and specifically recognizing the right of the Bar to refer the matter back to Grievance Committee.
>
> The case law in Florida indicates that—specifically, that the Bar has that right and authority, it's not like a double jeopardy issue. And then, of course, the proposed report of Referee that we would submit to the Court for its review would have a—an indication, if the Court so inclined, an indication that the Court approves the stipulation and

recommends that the—that the Supreme court enter an order on it.

See Transcript of September 28, 2007 hearing in Case No. SC07-274 attached as "Exhibit A" to The Florida Bar's Response to Respondent's Motion to Amend Affirmative Defenses, dated March 20, 2009. As shown in the transcript quoted above, Respondent's counsel agreed on the record that the dismissal was without prejudice for the Bar to refer the matter back to a grievance committee. The case was referred to the Twentieth Judicial Circuit Grievance Committee "D" and probable cause was found on June 26, 2008.

Respondent's continuing unlitigated allegations concerning Mr. Lombardo have been addressed in this proceeding and rejected by the Referee. *See* The Florida Bar's Response to Motion to Dismiss Complaint, dated January 16, 2009; The Florida Bar's Motion for Protective Order and Motion in Limine, dated February 24, 2009; and The Florida Bar's Response to Respondent's Motion to Amend Affirmative Defenses, dated March 20, 2009. *See also* Transcript of Hearing on Motion to Dismiss, February 2, 2009.

Second Grievance Committee Proceeding: Questioning of Tanya Smith

Respondent also moved to dismiss the complaint in the instant proceeding based on the failure of the grievance committee to recuse itself and committee member, Andrew Epstein, for alleged bias. *See* Respondent's Motion to Dismiss,

dated November 24, 2008, attached as "Exhibit A" to Respondent's Answer and Affirmative Defenses, dated December 5, 2008. The Motion to Dismiss was denied. *See* Order, dated March 9, 2009. Respondent asserts that Mr. Epstein exhibited bias because he asked a witness, Respondent's employee Tanya Smith, if she was involved in a romantic relationship with Respondent. Answer Brief, p. 8. Before the grievance committee, Respondent testified that she never had a telephone conversation with bank official June Kossow about the purported subpoena. GC (April 24, 2008) at 51-52. Respondent's employee, Tanya Smith, was called to testify before the grievance committee at Respondent's request. Ms. Smith claimed Respondent did not speak with Ms. Kossow because Ms. Smith would have overheard such a conversation. Ms. Smith claimed that, except when Respondent was in court, she was with Respondent 24 hours a day and was "never" out of earshot. GC (May 29, 2008) at 89, 114-115, 119-122. Mr. Epstein questioned Ms. Smith concerning the nature of her relationship with Respondent, stating that his inquiry went to the issue of bias. GC (May 29, 2008) at 126.

On June 12, 2008, Respondent filed a motion to disqualify the grievance committee and transfer the grievance to another judicial circuit. This motion was denied by the grievance committee chair. *See* The Florida Bar's Response to Motion to Dismiss Complaint, dated January 16, 2008. The grievance committee

reconvened on June 26, 2008, and Respondent was given the opportunity to present additional evidence. The committee made a finding of probable cause and also voted to ratify the chair's denial of Respondent's motion to disqualify. GC (June 26, 2008). Respondent raised the issue of Mr. Epstein's alleged bias in her Motion to Dismiss, which was denied. *See* Order, dated March 9, 2009.

Second Grievance Committee: Alleged Conflict of Interest of Andrew Epstein

Respondent then filed a Motion to Amend Affirmative Defenses, asserting "a course of conduct by which Complainant, The Florida Bar has violated its own rules and regulations on numerous occasions in connection with its investigation and prosecution of Respondent." *See* "Respondent, Michelle Berthiaume's Motion to Amend Affirmative Defenses," dated March 10, 2009. Respondent alleged that grievance committee member Andrew Epstein had a conflict of interest mandating his disqualification and that of the committee. Respondent alleged that Mr. Epstein represented Victor Basile, brother of Ramono Basile, an adverse party in a quiet title action to Tanya Smith, Respondent's office manager and a witness in the disciplinary proceeding. Respondent alleged that Mr. Epstein used information learned about Ms. Smith from Victor Basile to discredit her as a witness in the disciplinary proceeding. The Florida Bar filed a detailed response refuting the allegations and pointing out that Respondent failed to raise the alleged conflict of

interest at the time of the grievance committee proceedings, and instead waited almost a year after the case had been assigned to the Referee. The Bar also pointed out that the case in which Mr. Epstein represented Victor Basile involved damages related to the purchase of a motorcycle, and concluded over a year prior to the entirely unrelated quiet title action between Victor Basile's brother and Tanya Smith. *See* The Florida Bar's Response to Respondent's Motion to Amend Affirmative Defenses, dated March 20, 2009. A lengthy hearing on this matter was held on March 23, 2009.

Respondent's Motion to Amend Affirmative Defenses was denied without prejudice. *See* Order, dated April 3, 2009. Respondent still had 10 affirmative defenses pending which preserved all of Respondent's defenses relating to alleged misconduct of The Florida Bar. The Referee allowed Respondent ample opportunity to be heard concerning her repeated assertion of irrelevant defenses. The Referee's tolerance is evidenced by the large volume of pleadings and transcripts in the record.

Respondent's Attempts to Depose Bar Counsel, Designated Reviewer, and Grievance Committee Members

Respondent also sought to take the depositions of Henry Paul (Bar counsel), Charles Green (investigating member of the first Grievance Committee 20A to investigate Respondent), Christopher Lombardo (designated reviewer for

Grievance Committee 20A), and Andrew Epstein (member of Grievance Committee 20D). The Bar objected to these improper attempts to depose Bar counsel and grievance committee members. *See* Objection to the Subpoena, dated March 6, 2009; The Florida Bar's Motion for Protective Order and Motion in Limine, dated February 9, 2009; and, The Florida Bar's Second Motion for Protective Order and Motion in Limine, dated March 4, 2009. *See also Scottsdale Insurance Co., v. Camara De Comercio,* 813 So.2d 250 (Fla. 3d DCA 2002). The Referee granted the Bar's Motions for Protective Order, ruling that Respondent was not authorized to take testimony or documents from Mr. Paul, Mr. Green, or Mr. Epstein. Respondent withdrew the request to take testimony from Mr. Lombardo. The Referee also denied Respondent's Motion to Amend Affirmative Defenses. *See* Order dated April 3, 2009. The Referee considered and rejected all of Respondent's arguments concerning alleged bias and conflict of interest on the part of the designated reviewer in the first proceeding, and the grievance committee in the second proceeding.

The Bar did not "abandon" its claim that Respondent violated Rule 4-8.4(c).

Respondent states that the Bar, "recognizing that Respondent's conduct in sending the disputed request for documents was a mistake, agreed to abandon its claim that Respondent's conduct involved fraud." Answer Brief, p. 10. This

statement is incorrect and mischaracterizes the Bar's position. The Bar never deviated from its position that Respondent intended to mislead the Bank by sending the purported "subpoena" commanding the Bank to produce Mr. Furlan's records, or that Respondent violated Rule 4-8.4(c) by engaging in conduct involving dishonesty, deceit, or misrepresentation in sending the purported "subpoena." As noted in the Report of Referee, the Bar stipulated that it was not pursuing a charge of **fraud** against Respondent. RR 2. While the Bar agreed not to pursue allegations of fraud against Respondent, the Bar always made clear it was proceeding on the other elements of a Rule 4-8.4(c) violation: dishonesty, deceit, or misrepresentation. *See* Transcript of Hearing on February 2, 2009, at 63-64, 68-69, 82-83. *See* Order, dated March 9, 2009. At the Sanctions Hearing, the Referee confirmed her earlier ruling. SH 47 (May 19, 2010).

SUMMARY OF THE ARGUMENT

Respondent's allegations against The Florida Bar were thoroughly heard and repeatedly rejected by the Referee. Respondent's allegations are simply an attempt to divert this Court's attention from her own misconduct. Respondent agreed to the dismissal of the Bar's complaint in the first disciplinary proceeding without prejudice to refer the matter to a new grievance committee. Nevertheless, Respondent continues to complain about the "misconduct" of the Bar in the first proceeding. The Referee properly rejected Respondent's motions in this proceeding to dismiss the Bar's complaint and amend her affirmative defenses based on the Bar's alleged failure to follow the Rules in the first and second disciplinary proceedings.

The Referee erred in finding Respondent not guilty of violating Rule 4-8.4(c). Respondent was responsible for sending a document that was deceptive on its face. By knowingly sending the unauthorized "subpoena," Respondent engaged in intentional misconduct designed to mislead the Bank. Respondent's misconduct caused harm or potential harm to the Bank and its employees, her client, and the legal profession. The 10-day suspension recommended by the Referee does not have a reasonable basis in the case law or Standards. Respondent's intentionally misleading conduct warrants a suspension of 91 days.

ARGUMENT

I. THE BAR DID NOT VIOLATE ITS OWN RULES. THE REFEREE DID NOT ERR IN PROHIBITING RESPONDENT FROM PURSUING ALLEGATIONS OF MISCONDUCT AGAINST THE BAR.

Respondent claims the Referee erred in prohibiting her from presenting evidence that The Florida Bar failed to follow its own Rules in prosecuting the disciplinary matter against her. Respondent's complaints about alleged grievance committee bias, conflict of interest, and misconduct by the Bar were presented to the Referee and the Referee correctly rejected them. In essence, Respondent seeks immunity by raising untimely and unfounded claims of conflict and bias by participants in the disciplinary process. Respondent went so far as to seek to depose Bar counsel, grievance committee members and the designated reviewer in an effort to shred the investigatory and deliberative privilege of the grievance committee. Respondent has shown no remorse for her conduct and sought to vilify all who participated in her prosecution.

Respondent claims that the Bar violated the Rules by: a) the failure of the designated reviewer to recuse himself in the initial disciplinary case against Respondent because of conflict of interest; b) the failure of the grievance committee and its member, Andrew Epstein, to disqualify themselves based on bias and prejudice against Respondent and her witness; and c) failure of Mr.

Epstein to disqualify himself based on an alleged conflict of interest. Respondent raised the first two issues in her Motion to Dismiss, attached as "Exhibit A" to Respondent's Answer. After the Motion to Dismiss was denied, Respondent filed a Motion to Amend Affirmative Defenses, reiterating the first two issues and raising the additional issue of an alleged conflict of interest by Mr. Epstein. The Referee correctly denied Respondent's motions. The facts relating to these issues are set forth in the Bar's Statement of the Facts and the Case, *supra*.

Christopher Lombardo

Any potential prejudice to Respondent from the alleged conflict by Mr. Lombardo was cured by dismissing that case and initiating a new investigation with a new grievance committee and a new designated reviewer. Respondent stipulated to the dismissal without prejudice to refer the case to a new grievance committee. The Bar argued that the alleged conflict of interest on the part of Mr. Lombardo in the dismissed case was not a defense to the Bar's complaint in the current proceeding. *See* The Florida Bar's Response to Respondent's Motion to Amend Affirmative Defenses, dated March 20, 2009. *See also* The Florida Bar's Response to Motion to Dismiss Complaint, filed on January 16, 2009, and The Florida Bar's Motion for Protective Order and Motion in Limine, filed on February 24, 2009. The Referee correctly rejected Respondent's attempt to re-raise the issue

concerning Mr. Lombardo alleged conflict of interest.

Andrew Epstein's Questioning of Tanya Smith:

Mr. Epstein's questions concerning the nature of Tanya Smith's relationship with Respondent were directed towards possible bias on the part of Ms. Smith. The determination of whether an important witness is biased is a matter clearly appropriate for investigation by a grievance committee where the rules of evidence do not apply and the committee's role is primarily investigatory. *See Florida Bar v. Swickle*, 589 So.2d 901 (Fla. 1991), *Florida Bar v. Wagner*, 175 So.2d 33 (Fla. 1965). The nature of the relationship between a respondent and a witness may reveal bias that impacts on the credibility of a witness. Such evidence is often admissible in trial that is subject to the rules of evidence. *See Stanley v. State*, 648 So.2d 1268 (Fla. 4th DCA 1995), *Tobin v. Leland*, 804 So.2d 390 (Fla. 4th DCA 2001). The inquiry by Mr. Epstein into the potential bias of Ms. Smith was entirely appropriate in these circumstances. As the Referee recognized, Ms. Smith's claim that she was with Respondent 24 hours a day and never out of earshot except when Respondent was in court, was incredible. The Referee stated, "how could that be? That's not a customary business relationship. We need to know who we're dealing with." Transcript of Hearing on February 2, 2009, at 21. The Referee properly denied Respondent's Motion to Dismiss based on the

grievance committee's failure to recuse itself. *See* Order dated March 9, 2009; The Florida Bar's Response to Motion to Dismiss Complaint, dated January 16, 2009.

Andrew Epstein's Representation of Victor Basile

Grievance committee member Epstein's former representation of Victor Basile was completely unrelated to the litigation between Tanya Smith and Ramono Basile. Respondent presented no colorable evidence that Mr. Epstein had any involvement in litigation against Respondent, much less Respondent's employee/witness. In addition, Respondent waited almost a year, after the disciplinary proceeding was before the Referee, to raise the issue of bias and/or conflict of interest on the part of Mr. Epstein. Respondent had ample opportunities to raise this issue at three evidentiary hearings before the grievance committee. At no time during the grievance committee proceedings in 2008 did Respondent raise this issue.

Prior to taking any testimony, Bar counsel asked Respondent and her attorney if they had any concerns based on conflict of interest:

> MR. PAUL: Before we start . . . I just want to ask Ms. Berthiaume and her counsel, I want to be clear that if you have any challenge because of any conflict or any other procedural matter, please bring it forward at this time.
>
> You are aware of all the committee members here, and I just wanted to be absolutely certain that there's no issue of any conflict, potential conflict, any concern whatsoever in that regard.

> MS. BERTHIAUME: No, sir. . . .
>
> Mr. PAUL: And with the designated reviewer of this committee, Mr. Larry Ringers, do you have any complaint or conflict in regard to him?
>
> MS. BERTHIAUME: I don't even know Larry Ringers, other than the fact that he is the reviewer.

GC (April 24, 2008), at 3-4.

Mr. Epstein was abundantly cautious in disclosing any possible conflict he might have. During the course of the grievance committee hearing on April 24, 2008, Mr. Epstein recalled that he had previously defended an action brought by George Furlan. Mr. Furlan was the former client of Respondent whose banking information she sought when she served the unauthorized subpoena on Pelican National Bank. Mr. Epstein disclosed this information and offered to recuse himself if Respondent had any objection to him sitting on the committee. Respondent replied that she had no objections. GC (April 24, 2008), at 73-76. Thus, Respondent was given the opportunity to raise any issues regarding conflict of interest and failed to do so.

Respondent cites *Florida Bar v. Rubin*, 362 So.2d 12 (Fla. 1978), to support her argument that the case against her should have been dismissed. In *Rubin*, this Court dismissed all charges against the responding attorney based on the Bar's violation of several disciplinary rules. The facts of *Rubin* are distinguishable. In

Rubin, the Bar filed an untimely (by 51 days) petition for review of the Referee's report, released confidential information to the press concerning the disciplinary proceedings without giving Rubin the opportunity to object as required by rule, and withheld filing a report of referee in order to allow a second grievance proceeding against Rubin to mature. In contrast to the deficiencies cited in *Rubin*, the Respondent here made unsubstantiated claims of bias, prejudice and conflict of interest against the grievance committee, its member Andrew Epstein, and the designated reviewer.

The relevant inquiry in this proceeding is Respondent's misconduct in serving an unauthorized subpoena on Pelican National Bank in an attempt to obtain confidential banking information related to a former client. Respondent's unfounded allegations against the Bar were correctly rejected by the Referee. The Referee correctly denied Respondent's Motion to Dismiss and Motion to Amend Affirmative Defenses.

The Referee was correct in denying Respondent's attempt to depose Bar counsel and grievance committee members.

The attempt by Respondent to invade the investigatory and deliberative process of the grievance committee was nothing more than an attempt to vilify participants in the process. This was a pattern of conduct engaged in by Respondent which started in her initial response to The Florida Bar, where she

accused the complainant, Mr. Whitt, of making libelous allegations and impugned his motives. TFB Exh. 2. Respondent did not apologize to the Bank, to Michael Whitt, or anyone else. *See* RR 11. Instead, Respondent chose to impugn the prosecution with untimely and unfounded allegations of improper motive. This type of defense, *i.e.*, of seeking to take the deposition of Bar counsel, is appropriately described as offensive in *Scottsdale Insurance Co. v. Camara De Comercio*, 813 So.2d 250, 252 (Fla. 3d DCA 2002), in which the court stated that "deposing opposing counsel in the midst of an ongoing proceeding is generally offensive to our adversarial system and is an extraordinary step which will rarely be justified." *See* Objection to Subpoena, dated March 6, 2009; The Florida Bar's Response to Motion to Dismiss Complaint, dated January 16, 2009; The Florida Bar's Motion for Protective Order and Motion in Limine, dated February 24, 2009; and The Florida Bar's Response to Respondent's Motion to Amend Affirmative Defenses, dated March 20, 2009; Transcript of Hearing on Motion to Dismiss, February 2, 2009; SH (March 19, 2010), at 61-63.

II. REPLY: RESPONDENT VIOLATED RULE 4-8.4(c) BY SENDING A FICTITIOUS SUBPOENA. THE BAR DID NOT "ABANDON" ITS CLAIM THAT RESPONDENT VIOLATED RULE 4-8.4(c).

Respondent argues that the Referee correctly found that she did not violate Rule 4-8.4(c) (conduct involving dishonesty, deceit or misrepresentation) because

she did not act dishonestly. Respondent also claims the Bar failed to prove by clear and convincing evidence that she acted with the intent necessary to violate Rule 4-8.4(c). Respondent is not contesting the Referee's finding of guilt as to Rule 4-8.4(d) (conduct prejudicial to the administration of justice).[1]

Respondent fails to address the findings in the Report of Referee, which support a conclusion that Respondent violated Rule 4-8.4(c) by intentionally sending out a "clearly misleading" document purported to be a subpoena. Respondent lists the following "facts" (without citations to the record) to support her contention that she did not violate Rule 4-8.4(c):

a. Inexperience in civil practice. Respondent's inexperience does not excuse her intentional misconduct. The Referee considered Respondent's inexperience in recommending a sanction.

b. Check stamped "Refer to Maker" as opposed to "Non-sufficient Funds." The State Attorney refused to prosecute worthless check charges against Mr. Furlan because the checks were stamped "Refer to Maker." This provided Respondent with a motive to issue the fictitious subpoena. As found by the

[1] In her Petition for Review, Respondent sought review of the Referee's finding of guilt as to Rule 4-8.4(d); however, in her Answer Brief, Respondent states that "the Referee was correct in finding a single Rule violation of Rule 4-8.4(d)." Answer Brief, p. 11.

Referee: "In attempting to collect the debt, Respondent resorted to a type of self help that subjected the Bar to disrepute." RR 10.

c. Respondent's failure to review the offending document before it was mailed. Respondent's legal assistant, Tanya Smith, testified before the grievance committee that Respondent read the final version of the document before signing it. GC (May 29, 2008) at 94-95. Ms. Smith testified at the final hearing and acknowledged that her grievance committee testimony was correct. TR5 781-782. Also, Respondent testified that she believed she had the authority to issue an "attorney subpoena" requiring records to be produced. GC (April 24, 2008) at 37; TR5 675-678; 725. This testimony conflicts with her explanation that she instructed her secretary to make changes and did not see the document before it was mailed. GC (April 24, 2008) at 16-17; TR4 596-98.

d. Document was on Respondent's letterhead and did not contain a case name or number. The document appeared to be a valid subpoena. It was entitled "SUBPOENA DUCES TECUM FOR RECORDS" and contained the caption "CIVIL ACTION." It stated "YOU ARE HEREBY COMMANDED, pursuant to Florida Law, to furnish, provide or bring to the undersigned attorney. . . ." the listed documents. It contained language threatening contempt if the Bank failed to produce the documents. TFB Exh. 1, MEB 10-11. The Referee found the

language in the purported subpoena was "clearly misleading." RR 3.

e. The document was not served by a process server. The method of service is not relevant. The document looked like a subpoena and was labeled as a subpoena. Bank employees believed the document was a subpoena and began pulling and copying documents in order to comply with it. June Kossow was so concerned she referred the matter to the Bank's counsel.

f. Respondent initially referred the matter to the State Attorney for prosecution. *See* paragraph (b) above. It was the Bank's refusal to prosecute Mr. Furlan that frustrated Respondent and caused her to turn to self-help. RR 8, 10.

g. Finding of no probable cause by first grievance committee. The finding of the grievance committee in the first disciplinary proceeding is not relevant here. As previously discussed, the complaint in the first disciplinary proceeding was dismissed by agreement and the case referred to a new grievance committee. *See* Section I, *infra*.

h. Respondent instructed her secretary to send a demand letter, not a subpoena. The evidence contradicts this assertion. *See* paragraphs (c) and (d). The Referee found by clear and convincing evidence that Respondent was responsible for including language threatening incarceration and contempt in the purported subpoena, which was clearly designed to cause the Bank to produce the

records without legal authority. RR 3.

Respondent claims she made "an honest mistake" and did not act out of dishonesty, fraud, or deceit. The evidence supports a finding that Respondent intentionally sent a misleading document designed to look like a subpoena to Pelican National Bank in an attempt to obtain Mr. Furlan's banking records. She sent the "subpoena" within a few days of learning that the State Attorney's Office would not pursue her bad check complaints as a criminal matter. There was no civil case pending and the "subpoena" was not authorized by law.

Respondent argues that *Florida Bar v. Riggs*, 944 So.2d 167 (Fla. 2006), and *Florida Bar v. Shankman*, 41 So.2d 166 (Fla. 2010), do not support a violation of Rule 4-8.4(c) because her conduct was dissimilar. These cases were not cited for the similarity of the misconduct, but rather for this Court's holding that in order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing. *Shankman*, at 173. The Referee found that Respondent acted knowingly and deliberately in sending the purported subpoena. Respondent violated Rules 4-8.4(c) by knowingly sending a misleading document labeled as a "subpoena" to the Bank.

Respondent further contends the Bar "abandoned" its claim that Respondent acted fraudulently, and thus recognized that Respondent's conduct did not violate

Rule 4-8.4(c). This statement is incorrect and does not accurately reflect the record. While the Bar agreed it was not alleging fraud, the Bar made clear that it was pursuing a violation of Rule 4-8.4(c) based on the remaining elements of the Rule: dishonesty, deceit, and misrepresentation. Transcript of Hearing on Motion to Dismiss, February 2, 2009, at 63-64, 68-69, 82-83. Respondent is correct that the Referee declined to find as aggravating factors a dishonest or selfish motive, or the submission of false evidence, false statements, or other deceptive practices during the disciplinary process. RR 8. These findings concerning aggravating factors are relevant to the Referee's disciplinary recommendation. They do not change the Referee's finding that Respondent knowingly and deliberately sent the purported subpoena with the offending language and that the language was clearly misleading. RR 3.

Inconsistencies in Respondent's Explanations for the "Subpoena"

Respondent claims the Bar "created a myth" that her testimony at the final hearing was inconsistent with her grievance committee testimony, and that her changing explanations for her conduct do not support a violation of Rule 4-8.4(c). Answer Brief, p. 20, 22. The Bar cited the inconsistencies in Respondent's testimony, not as a basis for a violation of Rule 4-8.4(c), but rather as a factor to be considered in imposing discipline. Nevertheless, this brief will respond to

Respondent's argument that the Bar misrepresented her testimony.

As found by the Referee, Respondent's explanation of how and why she sent the subpoena changed over the course of the disciplinary process. RR 9. The inconsistencies in Respondent's explanations regarding the creation of the "subpoena" begin with her initial responses to the Bar. In her written responses to the Bar concerning Mr. Whitt's grievance, Respondent took the position that she was authorized by the Rules of Civil Procedure to issue the "Subpoena." TFB Exh. 2; TR5 647-48. In her initial response to the Bar concerning the grievance, Respondent described the document she sent the bank as "an attorney subpoena." TFB Exh. 2. In a follow-up inquiry, Respondent was asked to provide the legal authority for the "attorney subpoena" she sent to Pelican National Bank. She responded that the Florida Rules of Civil Procedure authorized her to issue the "attorney subpoena." TFB Exh. 4. Respondent further claimed that the grievance by the Bank's attorney, Michael Whitt, was libelous. TFB Exh. 2.

At the grievance committee hearing, Respondent began to change her story. She testified that the document was initially prepared as an actual subpoena, but she realized she could not send it out like that since there was no case pending. She instructed her secretary to put the document on her letterhead so it would look like a demand letter. Respondent testified that she never intended it to be a legal

process document. GC (April 24, 2008), at 16-17. However, Respondent never stated to the grievance committee that she intended the contempt language to be removed from the "subpoena." Tanya Smith, Respondent's legal assistant, also testified before the grievance committee. Ms. Smith testified that she heard Respondent instruct her secretary to make three changes to the subpoena: add her letterhead to the document, remove the case number, and take off the words "Civil Action." GC (May 29, 2008), at 101-103. Neither Respondent nor Ms. Smith testified that Respondent requested the contempt language to be removed from the document.

The grievance committee members were understandably confused by Respondent's testimony. She was asked about her initial position that she was authorized to issue an "attorney subpoena." The following testimony highlights the confusing and inconsistent nature of Respondent's explanations:

> Q Well, I'm a little confused because I was under the impression that it was your position that you thought under the rules it was appropriate for you to serve a subpoena without a civil action pending.
>
> A It was my understanding at the time that I thought I could serve what they call an attorneys demand, but at the same time in this particular case we didn't have any court case, no court number. So when I wrote back in my response to the Bar, I explained to them that what an attorneys subpoena was—or what my belief was at the time—and that's why you have the issue where it seems like it's a subpoena but it's not a subpoena. It never was.
>
> . . . .

> Q [A]t the time you sent this document that was entitled "Subpoena Duces Tecum For Records," did you believe that under the law you were authorized to send a subpoena demanding records without a pending court case?
>
> A **Well, at the time when I actually sent this particular document, I believed that an attorney subpoena was one that was basically signed by an attorney, that I could actually send this to them**, and if they objected then I would have to institute or open a court case. . . . .

GC (April 24, 2008) at 17, 19-20.

Respondent was then asked why she included the contempt language in the document. Respondent replied by attempting to explain why she intended the language to be included. Respondent never said it was a mistake to include the contempt language.

> Q Well, can you explain why you have this language in italics at the bottom, and I will just read it, "If you fail to produce these records and the above requested information described you may be held in contempt of court punishable by a find or incarceration or both."
>
> A Because at the time I also believed that I could ask the court, explain to them that I already sent a demand to these people and be able to state to them that they may be held liable to it.
>
> This originally just said it was an actual subpoena and I could not send a subpoena, could not send a court subpoena because there is no court case pending, so I put it in my own letterhead to send it out.
>
> **I didn't take this language out**, but at the same time it says, "If you fail to produce these records and the above requested information described you may be held in contempt of court punishable by a find or incarceration or both," and what that means in all subpoena cases, you have to take an order to show cause to the

court and only the court can actually do that.

GC (April 24, 2008), at 20-21; TR5 642-644.

Respondent's grievance committee testimony is inconsistent and confusing. She attempted to back away from her initial position that she was authorized to send the subpoena to the Bank, and began to provide a different explanation—that she instructed her secretary to remove some of the subpoena language and put the document on letterhead. She attempted to justify the inclusion of the contempt language.

At the final hearing, Respondent testified that she instructed her secretary to take out **all language** referencing a subpoena and to put the document in the form of a demand letter. TR4 596-597. Respondent testified that it was her intent to remove all language that dealt with a subpoena, including the language in the first paragraph stating "You are commanded to appear" and the language threatening contempt for failure to produce the records. TR4 597. She stated that she marked several changes on the first page of the document, signed the certificate of service on the second page, and then left to go to court. She stated did not see the document again before it went out. TR4 598.

This testimony at the final hearing is directly contradicted by Respondent's testimony at the grievance committee in which she attempted to justify the

inclusion of the contempt language in the subpoena. The Referee found Respondent's explanation of her conduct to be contradictory, confusing and inconsistent, and that none of her explanations were sufficient to absolve her of misconduct. RR 9. Respondent's evolving explanations for her conduct support the Referee's finding that she deliberately sent the purported subpoena with the offending language. RR 3. The Referee found that Respondent violated Rule 4-8.4(d) (conduct prejudicial to the administration of justice). The competent and substantial evidence in the record also supports a finding that Respondent violated Rule 4-8.4(c) (conduct involving dishonesty, deceit or misrepresentation).

III. REPLY: A 91-DAY SUSPENSION IS THE APPROPRIATE SANCTION FOR RESPONDENT'S INTENTIONAL AND MISLEADING CONDUCT.

In her Answer Brief, Respondent argues that a public reprimand is the appropriate sanction because she acted negligently in sending the purported subpoena to Pelican National Bank. Respondent's assertion that she acted negligently contradicts the Referee's findings, which Respondent does not dispute. The Referee found that Respondent knowingly and deliberately sent the purported subpoena with the offending language. The Referee found that Respondent was responsible for including language threatening incarceration and contempt in the purported subpoena which was clearly designed to cause the Bank to produce the

records without legal authority. RR 3.

Respondent cites Standards 6.23 and 7.3 to support her argument that a public reprimand is appropriate. Standards 6.23 and 7.3 are inapplicable because they apply to negligent conduct. In this case, the Referee did not find that Respondent acted negligently. The Referee found the applicable Standards to be 6.22 and 7.2, which apply to knowing conduct. RR 8. Standard 6.22 provides for a suspension when a lawyer knowingly violates a court order or rule and causes injury or potential injury to a client or party. Standard 7.2 provides for a suspension when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Respondent also cites a number of cases in support of a public reprimand as the appropriate sanction. The case law on which Respondent relies is outdated and analyzes very different facts. Current, relevant case law supports a rehabilitative suspension of 91 days for Respondent's misconduct. By sending the unauthorized "subpoena," Respondent engaged in misrepresentation and committed conduct that was a serious abuse of the judicial process.

The cases cited by Respondent in support of a public reprimand are distinguishable because they present very different factual situations. The attorney

in *Florida Bar v. Buckle*, 771 So.2d 1131 (Fla. 2000), was a criminal defense attorney who sent a humiliating letter to the victim of a crime. The attorney in *Florida Bar v. Martocci*, 791 So.2d 1074 (Fla. 2001), made disparaging remarks to opposing counsel and the opposing party in divorce proceedings, and threatened the father of the opposing party in court. While the conduct of the attorneys in *Buckle* and *Martocci* was egregious and highly unprofessional, it did not include invoking the power of the court to obtain records from a bank by sending a purported "subpoena" containing language threatening contempt if the bank did not comply.

Florida Bar v. Carson, 737 So.2d 1069 (Fla. 1999), bears no resemblance to the instant case. In *Carson*, the Court approved the referee's recommendation that Carson be diverted to a practice and professionalism program for violating the Rules pertaining to contingency fees and division of fees between lawyers. *Florida Bar v. Von Zamft*, 814 So.2d 385 (Fla. 2002), is also factually dissimilar to the instant case. Von Zamft received a public reprimand for violating Rules 4-3.5(a) (seeking to influence a judge) and 4-8.4(d) (conduct prejudicial to administration of justice). Von Zamft had an ex parte communication with the judge presiding over a case being prosecuted by another attorney in his office in an attempt to influence the judge to grant a continuance.

In *Florida Bar v. Cocalis*, 959 So.2d 163 (Fla. 2007), an attorney failed to advise opposing counsel that he had inadvertently received the adverse party (plaintiff's) medical records prior to trial. The records contained new information, previously undisclosed, that was unfavorable to the plaintiff's case. At trial, when the plaintiff's attorney stipulated to entry of the medical records without reviewing them, Cocalis did not advise the attorney or the court about the additional information. *Id*. at 166-67. The Court found Cocalis guilty of violating Rule 3-4.3 (misconduct or minor misconduct) and imposed a public reprimand. In the instant case, Respondent's conduct was more egregious. Respondent knowingly invoked the subpoena power of the court when she prepared and sent out a clearly misleading document labeled as a "subpoena" in order to obtain Mr. Furlan's banking records.

Respondent also cites *Florida Bar v. Feinberg*, 760 So.2d 933 (Fla. 2000), in support of a public reprimand. Feinberg was found guilty of violating multiple Rules, including 4-4.1(a) (truthfulness in statement to others); 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and 4-8.4(d) (conduct prejudicial to administration of justice). A careful reading of the case indicates that the public reprimand imposed was due to the unusual circumstances present in the case, including the fact that Feinberg had sought advice from a supervisor who

approved of his misrepresentations. The Court stated, "Had the unusual circumstances of the instant case not been present, substantially more severe discipline would have been imposed." *Id*. at 939. Far from concluding that the sanction had a reasonable basis in case law, this Court made clear that *Feinberg* was an anomaly.

The other cases cited by Respondent in support of a public reprimand are not only factually dissimilar, but also outdated. These cases were decided under the former Code of Professional Responsibility and are over 20 years old and in some cases over 30 years old. As this Court has recently recognized, attorney discipline has become stricter in recent years; current misconduct is sanctioned more severely now than similar misconduct was sanctioned in the past. *Florida Bar v. Herman*, 8 So.3d 1100, 1108 (Fla. 2009); *Florida Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2002). Despite the Court's announced trend, Respondent relies on numerous outdated opinions. Respondent's case law does not provide adequate authority to support her requested sanction of a public reprimand.

The relevant case law supports a sanction of 91 days or more. In this case, the Referee cited *Florida Bar v. Varner*, 780 So.2d 1 (Fla. 2001), in her Report. As discussed in the Bar's initial brief, the conduct in *Varner* is strikingly similar to that of Respondent. Respondent claims, however, that *Varner* does not apply

because in that case, there was present the additional factor that the attorney attempted to cover up his error, making the conduct more egregious. Respondent claims that her conduct in sending the subpoena was a "mistake" and she did not lie or create a deceptive scheme to cover up her error. The Referee, however, did not find that Respondent's conduct was a "mistake"; rather, the Referee found that Respondent knowingly sent the subpoena containing the threatening language. Like Varner, Respondent prepared a fictitious document that "invoked the power and prestige of the court." 780 So.2d at 4. Varner's fictitious document was created to cover up a previous mistake (representing that a lawsuit had been filed). Here, Respondent created the "subpoena" in order to obtain confidential banking records of a former client without legal authority. In both cases, the conduct was deceptive and designed to mislead.

Respondent's conduct is also similar to that of the attorney in *Florida Bar v. Steinberg*, 977 So.2d 579 (Fla. 2008) (approving Report of Referee dated April 27, 2007). Although Respondent did not use a fictitious case name and number on her "subpoena" as did the attorney in Steinberg, she intentionally sent a document designed to look like a subpoena to a third party in order to obtain documents. Like Steinberg, she invoked the power and authority of the court in an unauthorized subpoena. Respondent's conduct also warrants a 91-day suspension.

This Court has imposed harsh discipline on attorneys who create false documents and use them for their own interests. In *Florida Bar v. Baker*, 810 So.2d 876 (Fla. 2002), an attorney with no record of prior discipline was suspended for 91 days for forging his wife's name on documents related to the sale of their jointly owned home that was subject to foreclosure. Baker sold the home to avoid foreclosure and used the proceeds to pay marital debt. Baker and his wife were involved in a bitter divorce and she did not consent to his signing her name. In disapproving the referee's recommendation of disbarment, this Court recognized that misconduct not connected with the practice of law may warrant a less severe sanction that misconduct committed in the course of the practice of law. *Id*. at 881. In contrast, Respondent's conduct in this case was committed in the course of her law practice and she invoked the contempt power of the court in an attempt to secure the Bank's compliance with the purported subpoena. *See also Florida Bar v. Rotstein*, 835 So.2d 241 (Fla. 2002) (one year suspension for misconduct including creating a backdated letter to client to cover up negligent handling of client's case); *Florida Bar v. Head*, 27 So.3d 1 (Fla. 2010) (one year suspension for misconduct including filing a misleading suggestion of bankruptcy when no bankruptcy petition had been filed).

Respondent argues that the Bar attempts to justify an increased sanction by

pointing to certain findings of the Referee that were not specifically found to be aggravating factors as listed in the Standards for Imposing Lawyer Sanctions. This Court may consider all of the Referee's findings in imposing the appropriate discipline. The analysis of Respondent's conduct is not limited only to the aggravating and mitigating factors listed in the Standards. Standard 3.0 directs the Court to consider the following factors in imposing discipline: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. The existence of aggravating or mitigating factors is only one of the factors to be considered. The Referee's findings that Respondent attacked the complainant in her written response to the initial Bar complaint, that she offered no apology and took no remedial action, and that she acted in self-interest, are relevant to the duty violated and Respondent's mental state.

Respondent's conduct in sending the purported subpoena was deceptive and dishonest. She resorted to self-help and misused an official document in an attempt to obtain banking records without authority. Respondent's conduct warrants a rehabilitative suspension of 91 days.

CONCLUSION

The Referee correctly rejected Respondent's allegations against the Bar, the grievance committee, and the designated reviewer in denying Respondent's motions to dismiss and to amend affirmative defenses. The record evidence and the Referee's factual findings support a finding that Respondent violated Rule 4-8.4(c). This Court should disapprove the Referee's finding of not guilty and find Respondent guilty of violating Rule 4-8.4(c). As to discipline, this Court should disapprove the Referee's recommendation of a 10-day suspension and suspend Respondent from the practice of law for 91 days. Respondent should be assessed the costs of this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by UPS Delivery, Tracking Number 1ZE3277W2210002071, to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1900; a true and correct copy by regular U.S. Mail to **G. Michael Keenan**, Counsel for Respondent, 1532 Old Okeechobee Road, Suite 103, West Palm Beach, Florida 33409; by regular U.S. mail to **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of November, 2010.

_____
Henry Lee Paul
Bar Counsel

CERTIFICATION OF FONT SIZE AND STYLE
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Undersigned counsel does hereby certify that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

_____
Henry Lee Paul
Bar Counsel