IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-622

MARY ALICE GWYNN

APPELLANT/RESPONDENT

VS.

THE FLORIDA BAR

APPELLEE

ON APPEAL, REQUESTING A REVIEW OF THE REFEREE'S REPORT

AMENDED INITIAL BRIEF IN SUPPORT OF RESPONDENT'S PETITION FOR REVIEW

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Appellant/Respondent

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PRELIMINARY STATEMENT

For purposes of this Brief, Mary Alice Gwynn, will be referred to as "Respondent" or "Gwynn." The Florida Bar will be referred to as "The Florida Bar" or "the Bar," and the Referee will be referred to as the "Referee."

References to the **Appendix**, previously filed on 3/9/2011, will be set forth as "**A**" followed by the sequence number and corresponding page number(s), if applicable. The Trial Transcript will be set forth as "**TR.**" followed by the corresponding page number(s). References to the "**Vol. # __ D.E. # __**" will designate the Volume number and the Docket Entry number for all pleadings filed in the Record below, All references to any Pretrial Hearing Transcripts will be set forth as **"SR. # ___ p. ___**," designating the appropriate page number(s), and any reference to the Respondent's or The Florida Bar's Exhibits Admitted into Evidence during the Trial will be referred to as **"R.EX # ___" or "Bar's EX # ___"** respectively, followed by the page number(s), if applicable. References to any Supplemental Record items will be set forth as "**SR**. **#___ p. ___."** "**RR.**" will refer to the unsigned Report of Referee dated October 20, 2010.

STATEMENT OF THE CASE AND FACTS

Since 1991 Respondent has been an attorney in good standing with the Florida Bar. For eleven (11) years prior to becoming a member of the Bar, Respondent was (and remains) a Florida licensed Registered Nurse. (**TR. p. 440**)

This Bar proceeding originated from two Bar complaints filed by Respondent's opposing counsel, Gary Rotella, Esq., in two separate ongoing bankruptcy litigations: In re: Carl Santangelo, 2004-51-111(15C) and In re: James Walker, 2004-51-254(15C). In the **Walker** Bankruptcy, Respondent represented the largest judgment creditor, Eleanor Cole ("Cole"). Cole obtained a civil and criminal judgment in excess of $300,000 against debtor, James Walker, for a felony civil theft back in 1989.

In **October 2002**, prior to debtor filing Chapter 7 bankruptcy, Respondent assisted Cole in the execution of her domesticated Bahamian judgment, having a state court appoint a receiver for Cole. (**TR. pp. 442; 444**). In April, 2003, at the commencement of the **Walker** bankruptcy Cole retained Robert Angueira, a seasoned bankruptcy attorney. However, four months later, when Cole ran out of funds, Angueira ceased representing her. Respondent recognized Cole's need to be represented by counsel, regardless of her ability to pay at that time, resulting in Respondent's representation of Cole in the Walker bankruptcy, which lasted a total of eleven (11) months. At the time Respondent agreed to the representation of Cole, Respondent familiarized herself with the bankruptcy rules, especially the **mandatory** Disclosure Rules, 2014 and 2016.

On May 28, 2004, the bankruptcy court conducted a hearing approving Respondent's withdrawal of her previously filed motion for sanctions against

debtor's counsel, Rotella. (**TR. pp. 461-471**) In **June, 2004**, one week after the May 28, 2004 hearing, Respondent, with the bankruptcy court's approval, withdrew from representing Cole for medical reasons. Respondent, a sole practitioner, was defending herself against multiple motions for sanctions, two Bar Complaints and a civil suit, **all** filed by opposing debtor's counsel, Gary Rotella.[1] Also, at that time, Respondent was caring for her elderly terminally ill parents; one with end stage cancer, and the other with Alzheimer's. Subsequent attorneys who represented Cole, after Gwynn withdrew were: Arthur Neiwirth, Lawrence Taube, and Bruce Kravitz. (**TR. p. 455**) **(TR. pp. 455; 530-531).**

In June, 2004 the bankruptcy court signed the orders approving Gwynn's withdrawal and motion for substitution of counsel, all without reserving jurisdiction to sanction Gwynn at a later date. Seven months later, in January, 2005, Gwynn was involuntarily forced back into the Walker Bankruptcy, to defend against debtor's counsel, Rotella's numerous motions for sanctions, despite the fact that the bankruptcy court never reserved jurisdiction to ever sanction Gwynn.

In both the bankruptcy court's initial and first revised order, Judge Hyman found Respondent **guilty of negligence** (**R.EX. #38**). He stated as follows:

[1] Debtor's counsel, Gary Rotella, filed a Bar complaint and a civil lawsuit against Respondent, Gwynn in the Santangelo matter, and then two weeks later, Rotella followed up with another Bar complaint in the Walker proceeding.

> The various allegations lodged against Rotella by Gwynn throughout her motions for sanctions reveal a pattern of carelessness and inconsistency that could easily have been avoided through cursory investigation and reasoned caution.

Judge Hyman implicitly did not find bad faith by Gwynn, as he stated:

> As a general observation, the court notes that Gwynn would not have lodged many of her allegations if she had only undertaken the most routine forms of investigation and research.

Ultimately, on **April 26, 2006**, the bankruptcy judge rendered its third rendition of the sanction order (**Bar's Ex. 1**). This third rendition of the two prior orders is what the Bar relied on as its sole evidence to seek disciplinary sanctions against Gwynn. In the April 26, 2006 order, Judge Hyman "revised" his two prior published findings, sounding in "carelessness," regarding Gwynn's "objective" bad faith without notice to Gwynn, without taking any additional evidence, and concluded that Gwynn's conduct in filing the sanctions motion and the motion to disqualify was "tantamount to bad faith." (**Bar's EX. #1 pp. 21-23, 32)** The bankruptcy court simply, without any further due process to Gwynn, added several new sentences to its prior published findings of negligence, stating that Respondent's actions were "tantamount to bad faith." (**Bar's EX. # 1 pp. 32-34)** Judge Hyman then sent a copy of his April 26, 2006 Order to The Florida Bar for an investigation.

The Bar filed a four count complaint against Respondent: Count I related to Respondent's representation of Eugene Gorman in the Carl Santangelo bankruptcy

matter. The Bar Complaint was filed by opposing counsel, Gary Rotella, in February 2004. Count II through IV related to Respondent's representation of Eleanor Cole in the Walker bankruptcy and was premised exclusively on the bankruptcy court's hearsay orders.

Pre-trial litigation ensued on two related fronts before the first Referee, Judge Carlos Rebollo: (1) The Bar moved for partial summary judgment on Counts II, III and IV, based on the Bar's steadfast position that Judge Hyman's orders were all the proof required to sustain a judgment on those three counts. (2) Respondent moved for discovery relating to those motions, i.e., requesting to depose the author of the orders, Judge Hyman, which were all denied. (**D.E. #19, 26, 54, 145, 173**) (**A #9**). On July 13, 2009, Referee, Carlos Rebollo denied the motions for partial summary judgment. Following pre-trial litigation, Referee Rebollo, sua sponte, recused himself before ruling on Gwynn's second motion for sanctions against the Bar. (**A #7**; **A #8)**.

This case was scheduled for trial on June 7 and 8, 2010. However, Prosecutor Hoffmann filed a motion for continuance as she was called for oral argument in the Florida Bar v. Lobasz, SC-08-1105.

The three day trial was conducted on August 9, 10 and 12, 2010, during which the Florida Bar put on its **sole witness**, a hired expert in bankruptcy, not ethics, Patrick Scott, Esq. Respondent put on three witnesses: Gary Rotella, Esq.,

opposing counsel in both bankruptcy litigations; Carl Santangelo, Esq.; and Respondent, herself.[2] Following the trial, the Referee found the Bar did not put on clear and convincing evidence to support a finding of guilt as to Count I. With respect to Counts II through IV, the unsigned report states as follows:

> I have taken Judicial Notice of these orders and have relied upon the facts set forth in these orders in reaching my determination in this case….
>
> Accordingly, **standing alone**, the three sanctioning orders entered by the federal bankruptcy judge on April 26th, May 15th and June 7th **are sufficient to meet the Florida Bar's burden of proof as to all charges** related to the Walker bankruptcy.

See **RR. pp. 13 and 15**. (emphasis added). Following the denial of Respondent's motion for rehearing is this timely appeal.

SUMMARY OF THE ARGUMENT

The Referee erred in finding that the prior orders of the bankruptcy court standing alone were sufficient to establish presumptive proof of Respondent's guilt. The error was compounded by the Referee's refusal to permit any discovery associated with the author of the orders, Judge Paul Hyman. Moreover, the Referee misapplied the Doctrine of Judicial Notice and erred in failing to make any independent factual findings of his own to support the Referee's conclusions.

[2] Due to the page limit Respondent will not recount the evidence in this portion but instead will cite to the relevant evidence in the argument section of this brief.

Finally, the record does not contain clear and convincing evidence to support the Referee's "findings."

The Referee erred in failing to conduct the parties' agreed upon bifurcated trial regarding guilt and recommendation of sanctions. Respondent was denied her due process rights as she was not given any opportunity to present mitigation evidence or an opportunity to refute the Bar's costs. The unsigned Referee report (**A #1**) is an almost identical copy of the former Bar Prosecutor, Hoffmann's proposed Referee Report (**A #13**), which is replete with misrepresentations. Recently, in February, 2011, this same Bar Prosecutor was admonished by this Court for making misrepresentations, Lobasz.

ARGUMENT

I. THE REFEREE FAILED TO MAKE AN INDEPENDENT REVIEW OF THE EVIDENCE BELOW AND INSTEAD SIMPLY ADOPTED THE FACTUAL FINDINGS OF ANOTHER JUDICIAL TRIBUNAL AS ITS SOLE SUPPORT FOR RECOMMENDING THAT RESPONDENT BE DISCIPLINED.

In finding that the Florida Bar had met its burden in Counts II through IV of the complaint, the Referee relied **exclusively** on the hearsay orders of bankruptcy Judge Paul Hyman as the only evidence in support of its recommendation. (**R.R. pp. 13 and 15**) Indeed, as to Counts II through IV, the Referee failed to make a single, independent factual finding about any of the critical issues in dispute. The report is wholly inadequate as it is simply

a "rubber stamp" of the Bar's flawed interpretation of another court's order, rendered in a separate case, which operated under a less stringent standard, than what is required in Bar proceedings. The Referee failed to include any citations to the record, failed to conduct any analysis of the evidence presented at trial, and failed to even mention what standard of proof was to be applied. Instead, it merely references a prior order from the bankruptcy judge, as the sole support for its recommendation. **See RR. pp. 13 and 15** (**A #1**).

The bankruptcy orders were predicated on the lowest standard of proof, i.e., "preponderance of the evidence." In re Cochener 360 B.R. 542, 573-574 (S.D. Tex. 2007); Gould v. Clippard, 340 B.R. 861 (M.D. Tenn. 2006). In Bar proceedings, the standard of proof is "clear and convincing," a standard which is much more stringent. Therefore, the Referee erred in finding that the bankruptcy orders alone were **presumptive** proof of Respondent's guilt. For instance, Florida Bar v. Musleh, 453 So. 2d 794 795 (Fla. 1984) this Court rejected application of collateral estoppel in part because the standard of proof between the two proceedings were different. See also Florida Bar v. Price, 478 So. 2 812 (Fla. 1985) (same). Consequently, here the Referee's exclusive reliance on the bankruptcy court's order was in error, given the glaring difference in the burden of proof. Pfeiffer v. Roux Laboratories, 547 So. 2d 1271 (Fla. 1st DCA 1979). In

fact, there can be no confidence in the findings, and hence no **presumption** of anything, let alone guilt, given the lower standard of proof in a bankruptcy proceeding, as compared to the heightened standard in a Bar proceeding.

The due process violation is further aggravated because the bankruptcy court's findings did not include a finding of **actual bad faith;** the court's third revised order found that Respondent's conduct was "tantamount" to bad faith. These two findings are not synonymous. A finding that Respondent's action was "similar" to or "equal" is not "close" enough. The Referee erred in elevating the bankruptcy court's findings of a lower standard, to **presumptive** proof of actual bad faith. The Referee never insisted that the Florida Bar be required to carry its burden, by actually putting on clear and convincing evidence at trial. The Referee's error was further compounded by its sole reliance on the bankruptcy court's third revised order, which escalated a negligence finding to that of "tantamount to bad faith," without the bankruptcy court conducting a required evidentiary hearing, and therefore, denying Respondent due process. The first two orders entered by Judge Hyman concluded that Respondent should be sanctioned for filing a sanction motion against opposing counsel. Clearly, the bankruptcy court made such findings, premised exclusively on a finding that Respondent acted negligently. (**R.EX. #38 pp.4 and 21**).

Judge Hyman's exposition of Ms. Gwynn's conduct in filing a sanction motion, which was subsequently withdrawn, can only be inferred to as negligent. The bankruptcy court stated Gwynn had: a) neglected to take a deposition before filing the motion; b) neglected to acquaint herself with procedural rules; and c) failed to "closely" read a hearing transcript. This language clearly ascribes negligence to Gwynn. It does not address nor describe in any manner whatsoever subjective intent. Yet, the third incarnation final order of April 26, 2006, upon which the Bar relies as its **sole** evidence, was signed by Judge Hyman within weeks after the appellate opinion by U.S. District Court, Judge Gold, had reversed Hyman's previous **$80,572.50** sanction award against Ms. Gwynn, in favor of Rotella. (**R.EX. #37)**. Judge Gold, in his reversal, noted that, before a court can impose sanctions, it must enter a finding of bad faith. (**R.EX. #37**). Upon publication of this order, Judge Hyman "revised" his two prior published findings sounding in "carelessness" (discussed hereinabove) without any additional evidence, and concluded that Ms. Gwynn's conduct in filing the sanctions motion and the motion to disqualify was "tantamount to bad faith."

Judge Hyman's sua sponte revisions simply were sentences stating a new finding of "tantamount to bad faith," in addition to keeping in place his prior findings of negligence. The third revised final order continues to find that Gwynn would not have filed many of her accusations had she performed routine

investigations. (**Bar's EX. #1 p. 32**). Yet, the very next page finds that "her frivolous claims were prosecuted for the purpose of harassing her opponent such that her conduct is tantamount to bad faith." (**Bar's EX. #1 pp. 33-34**). The mutually exclusive findings of Judge Hyman appear in consecutive paragraphs of one another, yet nowhere in the order can one glean what Judge Hyman meant to convey by such inconsistent findings. These glaring errors alone required clarification that only the complaining witness, Judge Hyman could explain. The Referee denied Respondent this crucial discovery needed to challenge the Bar's sole evidence.

From the inception of these proceedings, the Bar steadfastly maintained that all it had to do to prove its case against Respondent was to simply attach a copy of the bankruptcy judge's orders[3] to its complaint as exhibits. At various hearings before the Referee, Bar counsel voraciously described its complaint as, "tracking the Judge's order," or describing it as a **mirror image of** the Judge's order. See hearing **SR. #5, 3/5/10 hearing transcript, p. 9**, and Bar's Closing Argument p. 2.

The Bar, in its unwavering belief, filed a motion for summary judgment on Counts II through IV, arguing that the sanction order of the federal bankruptcy court concluded the matter. Bar counsel stated that there were no genuine issues of

[3] For this Court's edification, the bankruptcy court did not impose three separate sanctions against Respondent. The bankruptcy court kept altering its order which ultimately led to the final order rendered on April 26, 2006. See **Bar's EX. #1** and **R.EX. #s 23** and **#38**.

material facts that remained, as Judge Hyman's April 26, 2006 order "said it all." Despite the fact that the Bar's motion for summary judgment was denied, the Bar refused to call the complaining witness, Judge Hyman, and instead, over Respondent's objections, attempted to carry the Bar's burden by hiring Patrick Scott, a bankruptcy attorney as its expert witness to opine on ethical violations. In fact, at the pre-trial conference before the new Referee, Judge John Bowman, the Bar continued to argue that the Referee need only consider the orders of the bankruptcy court. The Referee agreed with the Bar's position and summarized the procedural posture of the upcoming evidentiary hearing as follows: (**SR. #15 pp. 23-24**. (emphasis added).

> It has been represented to the Court, the Bar's position is, "We are basing our complaint solely and exclusively on the finding of this order." Therefore I think it's pretty straightforward. Either the order is sufficient or not sufficient. You can rebut that order with your own testimony and your client's testimony, if you'd like. Obviously, they're going to be silent, because they've got to sit with that order, and all they can do is cross your witnesses, but that's going to be the way it goes, based on what's being represented to me at this conference.

In essence, the new Referee's acquiescence allowed the Bar to completely dilute the impact of the prior Referee, Judge Carlos Rebollo's denial of the motion for summary judgment. Indeed, during the trial, Respondent continued to argue that the Referee could not simply adopt the findings of the bankruptcy court as the sole evidence. Respondent emphasized this argument given that the state

proceedings required a more stringent, heightened standard of proof than that required in the bankruptcy proceedings. See **TR. pp. 308-313**. The Bar, relying on Florida Bar v. Shankman, 41 So. 3d 166 (Fla. 2010) and Florida Bar v. Tobkin 944 So. 2d 219 (Fla. 2006) disagreed. See **TR. pp. 311-312**. The Referee determined that he was permitted to take judicial notice of the bankruptcy order. However, the Referee erroneously determined that such notice then shifted the burden to Respondent to present evidence to refute the prior order. See **TR. p. 313**. The only way Respondent could do that was to be given the guaranteed right of due process by questioning Judge Hyman, the author of those orders, which the Bar refused, and which the Referee upheld. (**D.E. #19, 26, 54, 145, 173**) (**A #9**).

The Referee's report adopted the Bar's erroneous interpretation of the bankruptcy court's sanction order and stated, "I have taken Judicial Notice of these orders and relied upon the facts set forth in these orders in reaching my determination in this case." See **RR. p. 13** Respondent asserts that the Referee's order must be rejected as it was not predicated on any independent analysis of the evidence. Indeed, the report is not based on any evidence presented below, but rather on the "judicially noticed" prior order of a bankruptcy judge. This was error. Florida Bar v. Vining, 707 So. 2d 670 (Fla. 1998) (explaining that findings of fact that include citations to the record rebut an argument that a Referee merely adopted the findings of another).

This Court has **never** held that a Referee may rely **exclusively** on the hearsay order of another judicial tribunal, as the **sole evidence** in support of its recommendation, for the obvious due process reasons. If that is the law, the Bar would always be entitled to a summary judgment in disciplinary proceedings when the gravamen of the complaint is a prior order of another tribunal. Under that premise, the orders themselves would supplant the need for any further evidentiary development before a Referee. Thankfully, that is not the law in Florida nor do the cases relied upon by the Referee support that radical usurpation of one's constitutional rights proposition. Unfortunately, that is exactly what occurred in this Bar trial before this Referee.

The Referee merely adopted the Bar's position, and relied on Shankman, supra, Florida Bar v. Behm, 41 So. 3d 136 (Fla. 2010) and Florida Bar v. Head, 27 So. 3d 1 (Fla. 2010). However, those cases are all clearly distinguishable and do not support the ruling below. For instance, in Behm, the Referee was permitted to take judicial notice of a North Carolina trial court order in support of the Referee's findings, Behm, 41 So. 3d at 143. However, the prior order did not involve an ultimate finding of wrongdoing but rather a predicate fact. The ultimate finding of wrongdoing was still required to be made by the Referee based on the evidence presented at the hearing, and to cite such evidence presented. That did not happen

herein, as the Referee failed to identify any clear and convincing evidence in support of any of the Bar's adopted findings.

Equally unavailing is the Referee's reliance on Head supra. The Referee's adoption of the Bar's findings explained, that Head was particularly relevant because it also involved a Respondent representing a bankruptcy client. (**RR at 14)** However, Head does not stand for the proposition that a Referee may rely **exclusively** on another court's prior orders, with different burdens of proof, as its sole hearsay evidence of wrongdoing in a disciplinary proceeding. In fact, Head stands for the opposite, and exposes the glaring deficiency in the Bar's presentation, and the Referee's adopted Bar's "findings" below. For instance, in denying Head's claim that the evidence in support of the findings were insufficient, this Court explained that the Referee **cited extensively to the record, "scrutinizing" testimony of the witnesses before him,** and quoting from the bankruptcy proceedings Head 27 So. 3d. at 8. The report here lacks any such analysis.

It is indisputable that the bankruptcy judge's sanction orders were the linchpin of the entire state proceeding below. In essence, the bankruptcy judge was the complaining witness, and the Referee in these proceedings, and fulfilled both roles without ever having to make an appearance in state court. There is no Florida statute, rule of procedure, or case that would support a claim that this

Referee's report was premised on an "independent" review of the record below, and supported by clear and convincing evidence presented at a fair proceeding. The Referee's recommendation does not "scrutinize any witness testimony from the disciplinary hearing, nor does it "examine" any previous finding of the lesser standard bankruptcy court, nor does it "quote" any transcripts from the bankruptcy proceeding, nor does it "cite" to any documents or record portions of the bankruptcy proceedings below.

The Referee's report must be rejected with respect to Counts II through IV.[4] Vining, Boland, Florida Bar v. Poe, 662 So. 2d 700, 704 (Fla. 1995), In re Finkelstein, 901 F. 2d 1560 C.A.11 (Ga. 1990) (rejecting the argument that simply because a lawyer was sanctioned by a bankruptcy court does not automatically equate to a violation of the ethical rules).

Next, the Referee misapplied F.S. §90.201, which was the sole legal authority for its decision to adopt in toto and rely exclusively on the factual findings in a prior order. The Referee's misuse of the §90.201 is evidenced by the following (**RR. p. 13**.):

> The most persuasive evidence is that advanced by the federal bankruptcy judge…. I have taken judicial notice of these orders, and relied upon the facts set forth in those orders, in reaching my determination in this case.

[4] The Bar failed to put on any evidence or advance a single argument regarding Count IV. Respondent submitted a detailed Memorandum of Law in support of her Motion for Directed Verdict on Count IV. (**Vol.#12 D.E #230**)

However, the Referee misapprehended and misapplied the doctrine of judicial notice, well beyond its intended use and purpose.

The relevant legal principles,[5] which require a reversal of the Referee's misapplication of the judicial notice statute, follows: First, in cautioning against relying on judicial notice for determining very serious factual matters, this Court recognized that judicial notice was premised on the innocuous rationale of simple convenience and avoidance of having to "reinvent the wheel." The court explained:

> The concept of judicial notice is essentially premised on notions of convenience to the court and to the parties; some facts need not be proved because knowledge of the facts judicially noticed is so notorious that everyone is assumed to possess it Huff v. State, 495 So. 2d 145, 151 (Fla. 1985).

Second, in conjunction with the idea of convenience is the notion that the facts to be judicially noticed **must not** be subject to reasonable dispute, because they are generally known or can be determined by resorting to sources whose accuracy cannot be reasonably questioned. See also Taylor v. Charter Medical Corp., 162 F.3d 827 (C.A. 5th Cir. 1998). Judicial notice should be exercised with great caution, and the matters judicially noticed must be matters of common knowledge which are authoritatively established and free from doubt. However, the best way

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[5] And finally, the doctrine of judicial notice in Florida is premised on the identical doctrine in federal law. See Transportes Aereos Nacionales, S.A. v. De Brenes 625 So.2d 4 (Fla. 3rd DCA 1993).

to resolve factual disputes is through the taking of evidence. Neilsen v. Carney Groves Inc. 159 So. 2d 489, 490 (Fla. 2nd DCA 1964), Gulf Coast Home Health Services of Florida, Inc. v. Dept. of Health and Rehabilitative Services, 503 So.2d 415 (Fla. 1st DCA 1987).

Moreover, judicial notice may never be used as a vehicle to relieve a party of its burden of proof on contested material issues in the name of convenience. Nor can it be used to circumvent the rules of evidence which preclude the admissibility of hearsay unless it contains an indicia of reliability State v. Ramirez, 850 So.2d 620 (Fla. 2d DCA 2003). For instance, even if an entire court file is judicially noticed, all documents contained in that court file are still subject to the same rules of evidence to which all evidence must adhere. Burgess v. State, 831 So.2d 137 (Fla. 2002).

With these principles in mind, along with the facts adduced below, the Referee's misapplication of §90.201 alone requires rejection of the report. Under no interpretation of the proceedings below can the Florida Bar or the Referee maintain that the there was no dispute about the ultimate facts at issue. And, although the Referee was certainly entitled to take judicial notice of the orders and documents filed in the federal bankruptcy court, for the proposition that such litigation occurred and resulted in the imposition of sanctions, the Referee erred in taking judicial notice of the **factual findings** of that court as they are subject to

reasonable dispute United States v. Jones, 29 F. 3d 1549 (11th Cir. 1994 (explaining that a court may take notice of another court's order only for the limited purpose of recognizing the "judicial act" that the order represents or the subject matter of the litigation). To hold otherwise is to commit an error of constitutional magnitude as it is akin to a directed verdict which is condemned by the Constitution United States v. Martin Linen Supply Co. 430 U.S. 564, 572-573 (1977), United States v. White Horse, 807 F.2d 1426, 1429-1430 (8th Cir. 1986).

In the proceedings below, the "perfect unconstitutional storm" was created when the Referee allowed the following two legal errors to converge; the Florida Bar was allowed to rely solely on the hearsay orders as conclusive proof as the ultimate findings; and, the Florida Bar was successful in blocking Respondent's repeated requests for discovery related to the orders of the complaining witness, Judge Hyman. The application of judicial notice as justification for this unfair and untenable proposition must be reversed. As explained in Florida Bar v. Centurion, 801 So. 2d 858 (Fla. 2000) although hearsay is admissible in disciplinary proceedings, parties may challenge that hearsay through examination of the declarant of the hearsay if they choose to do so. Under the guise of judicial notice, Respondent was precluded from doing just that. Additionally, the Referee's decision to embrace in toto the Florida Bar's interpretation of the scope and parameters of the doctrine of judicial notice amounted to a collateral estoppel of

Respondent's ability to defend herself. The doctrine of collateral estoppel was completely inapplicable in these proceedings.

In order for the doctrine of collateral estoppel to apply to Bar re-litigation of an issue, five factors must be present: (1) an identical issue must have been presented in the prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated Holt v. Brown's Repair Serv., Inc. 7808 So. 2d 180 (Fla. 2nd DCA 2001); See also City of Oldsmar v. State, 790 So. 2d 1042 (Fla. 2001).

The Florida Bar cannot establish many of the factors. First, the issues are not identical, as the issues litigated in the bankruptcy proceedings dealt with the principles of bankruptcy law and was predicated on a lower standard of proof. Moreover, simply because issues may or may not be substantively meritorious in a bankruptcy proceeding, does not automatically translate into a violation of the Florida Bar's ethical rules. If that were the law, then any sanction by a bankruptcy judge would automatically be sufficient proof of a state's ethical rules for lawyers. See Florida Bar v. Poe, 662 So. 2d 700 (Fla. 1995) In re Finkelstein, 901 F. 2d 1560 C.A.11 (Ga), (rejecting automatic assumption that simply because a lawyer was sanctioned in bankruptcy court, that lawyer must have violated the Bar's

disciplinary rules as well); See also Cook v. State, 921 So. 2d 631 (Fla. 2nd DCA 2005) (explaining that different standards of proof or persuasion between two proceedings militates against application of collateral estoppel).

Second, the parties in the two proceedings are not identical. Dispositive of this issue is Stogniew v. McQueen, 656 So. 2d 917 (Fla. 1995) and Vining supra. In Stogniew, this Court found that an administrative determination of professional misconduct cannot be used as conclusive proof of an underlying action for negligence against the professional Stogniew 656 So. at 921. This Court spoke specifically to the issue of collateral estoppel and the requirement of mutuality of the parties.

Herein, the sanction proceedings in bankruptcy court were initiated by Respondent's opposing counsel, Gary Rotella, in the bankruptcy case of In re Walker. In these proceedings, Respondent's being sued by The Florida Bar, who clearly was not a party in the bankruptcy proceedings, nor does The Florida Bar act in privity with James Walker or his counsel, Gary Rotella.

Also instructive is Vining supra. Therein, attorney Vining challenged a Referee's factual findings which included reliance on a prior court order, which found him guilty of committing an extrinsic fraud on the circuit court in a divorce proceeding. Vining argued that reliance on the prior order basically estopped him from challenging those findings. This Court rejected that argument based on two

reasons, neither of which is applicable to this case. First, the Referee relied on other evidence presented, including the live testimony of Vining's former client and the former client's subsequent attorney. Vining, 707 So. 2d at 672 n.10. Secondly, this Court found Vining's reliance on Stogniew misplaced and explained that Respondent was not precluded from presenting evidence to refute any evidence. There is no doubt that the Referee herein did not rely on any other evidence, but the bankruptcy order. **(RR. P.13)** And, Respondent was denied the opportunity to directly challenge the prior order, as no discovery was permitted of the complaining witness, Judge Hyman. That error was compounded by the Referee's decision to "find" the order as presumptive proof of Respondent's guilt. Respondent asserts that the Referee's decisions in this regard were tantamount to collateral estoppel and requires that the report be rejected.

There is no legal authority that would allow the "factual findings" of a Referee which were nothing more than the adoption of the Bar's erroneous interpretation and paraphrased version of a prior judge's findings to stand. **(A #13).** Finally, the Referee's abdication of its duty to conduct an independent review of the evidence in order to make the required independent factual findings to the Bar prosecutor Lorraine Hoffmann, is even more troubling especially in light of the Lobasz opinion.

Respondent's **Appendix #13** is a copy of Ms. Hoffmann's proposed Referee report, replete with misrepresentations and falsehoods, which was adopted almost verbatim, with the exception of Count I, in the Referee report of October 20, 2010. (**A #1**).

For instance, at page 1 of both Hoffmann's proposed and the Referee's report, it states: "… on or about February 18, 2009, Respondent withdrew her guilty plea." That statement is an outright falsehood as Respondent never signed nor filed a guilty plea.[6] Therefore, one cannot withdraw something that was never filed. Another adopted misrepresentation/falsehood of Bar Prosecutor Hoffmann is found on page 17 of the report, "She sat before me and testified that she did this because she believes the judge was part of an 'old boys club' …". This intentional outrageously inflammatory finding was never made, nor is it reflected in the three-day trial transcripts. There are additional inaccuracies that will be further demonstrated below to further support the rejection of the Referee Report.

II. RESPONDENT WAS DENIED HER DUE PROCESS RIGHTS TO EXAMINE AND CROSS EXAMINE THE COMPLAINANT, WHICH DEPRIVED RESPONDENT THE ELEMENTS ESSENTIAL TO A FAIR TRIAL, IN RE MURCHISON, 349 U.S. 133 (1955).

[6] Even if true, such inclusion of that statement is in violation of F.S. 44.40, F.S. 90.410, Rule 3.70(F) and Rule 3.172(i) of the Florida Rules of Criminal Procedure.

Even though the case law supports taking testimony from a judge in a Bar proceeding,[7] Respondent was repeatedly blocked from doing so. (**D.E. 19, 26, 54, 145, 173**) (**A #9**). This was pure error. Several areas of inquiry applicable to the complaining witness-judge are relevant to Ms. Gwynn's defense of her professional conduct in the Walker case, which did not involve or implicate in any way Judge Hyman's "mental processes" in crafting the subject orders. For example: the Judge's awareness of certain facts, when – or if – he knew such facts; his familiarity with Mr. Rotella; the nature and extent of his interaction with the local bankruptcy Bar; his previous awareness of the aggressively vexatious manner in which Mr. Rotella practices law; his potential bias in favor of Mr. Rotella, who practices in his court all the time, or against Ms. Gwynn, who does not; his referral to a disciplinary authority *vel non* of other attorneys in the Walker case (e.g., Mr. Rotella); why he did not refer Ms. Gwynn to the federal disciplinary apparatus.

[7] Florida Bar v. Bailey, 803 So. 2d 683 (Fla. 2001); Florida Bar v. Solomon, 711 So. 2d 1141 (Fla. 1998) (sitting appellate judge testified at trial); Florida Bar v. Kravitz, 694 So. 2d 725 (Fla.1997) (admitting deposition of circuit court judge into evidence); Florida Bar v. Laing, 695 So. 2d 299 (Fla. 1997) (finding admissible the deposition of judge into evidence); Florida Bar v. Kleinfeld, 648 So. 2d 698 (Fla. 1994); The Florida Bar v. Swickle, 589 So.2d 901 (Fla. 1991) (trial testimony by circuit judge who purportedly was bribed by respondent); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978) (testimony by appellate judge as to influence respondent toward outcome of appeal); The Florida Bar v. Penn, 351 So.2d 979 (Fla. 1977) (testimony by three judges regarding respondent's competence). See also Wasserman v. State, 671 So.2d 846 (Fla. 2d DCA 1996) (After judge issued order of indirect criminal contempt against lawyer for abusive language toward his judicial assistant, the resulting criminal case was presided over by a different judge, at which the original judge testified).

These are just a few named areas of inquiry – none of which have anything to do with Judge Hyman's mental processes in crafting the subject orders, and all of them fall within the low threshold of materiality/potential admissibility that pertains to discovery – and yet, Respondent is absolutely denied such discovery - for what legitimate reason?

The Bar's deliberate refusal to call Judge Hyman as a witness obviously stems from its understanding that he does not wish to testify. But he chose to refer Ms. Gwynn to The Florida Bar – not to the federal bar – and so his referral, and the curious twists and turns in the Walker case, open up areas of inquiry for discovery – not relevance at trial evidence, but discovery – which Ms. Gwynn was rightly entitled to pursue regardless of the judge's preference, but was denied over and over again.

As stated, *supra*, the Order upon which the Bar relies as its sole evidence is the **third incarnation** of a sanction order against Respondent, Ms. Gwynn. Upon publication of this Order, Judge Hyman "revised" his two prior published findings, sounding in "carelessness" without taking any additional evidence, and concluded that Gwynn's conduct in filing the sanctions motion and the motion to disqualify was "tantamount to bad faith." (**Bar's EX. #1 pp. 21-23, 32**)

However, **Judge Hyman did not remove his prior findings of negligence.** (**Bar's EX. # 1 p. 32)**. Yet, the very next page finds that "her

frivolous claims were prosecuted for the purpose of harassing her opponent such that her conduct is tantamount to bad faith." (**Bar's EX. #1 pp. 33-34**). The mutually exclusive findings of Judge Hyman appear in consecutive paragraphs of one another, yet nowhere in this order can one glean what Judge Hyman meant to convey by these inconsistent findings. Did he mean to imply that the evidence, like his findings, was inconsistent on the issue of intent and therefore he could not decide? Upon which evidence did Judge Hyman base his finding of bad faith? What precluded Judge Hyman from making that finding in either of the two previous versions of this order? Why did he decide to include a finding of bad faith without hearing any further testimony? Did he intentionally decide to retain the finding of negligence?

It becomes abundantly clear that there is a plethora of legitimate questions raised by the internal inconsistency in the court's order and that Respondent was never given the opportunity to discover. This inconsistency goes to the heart of the Bar's case against Ms. Gwynn. Did she act in bad faith or didn't she? The order itself is not clear as it appears that Judge Hyman found both negligence and tantamount to bad faith. The Bar cannot reconcile this fatal inconsistency nor demonstrate how anyone could interpret this grave ambiguity without speaking to the declarant of the hearsay document.

In these proceedings, Ms. Gwynn also admitted evidence of significant contradictions in how all other attorneys in the Walker litigation were treated. Ms. Gwynn admitted into evidence an affidavit of attorney Daniel Lubell, who was counsel for Susan Lundborg, the pre-petition buyer of the Cat Cay property, the main asset in the Walker proceeding. Also admitted into evidence was a copy of attorney Lubell's similar motion for sanctions which he also filed against Mr. Rotella regarding the very same issue as Respondent, "the doctored Bahamian sale order," for which Respondent was sanctioned and Lubell was not. (**R.EX. #19 pp. 10-27**). Judge Hyman denied Lubell's motion for sanctions against Rotella finding insufficient proof to establish any wrongdoing on Rotella's part. Lubell was not sanctioned by Judge Hyman, in spite of Lubell's failure to present any evidence in support of his theory. (**R.EX. #19 p. 2**). In contrast, Respondent withdrew her similar motion for sanctions against Rotella, and after she was formally excused from the case, was sanctioned. (**Bar's Ex. #1**). This, in spite of the fact that Lubell relied on far less evidence in support of his claim than what Respondent had uncovered. The unequal treatment dispensed by Judge Hyman is yet another puzzling contradiction that further supported Gwynn's entitlement to depose Judge Hyman, her accuser.

Equally puzzling is Judge Hyman's contradictory rulings with regards to Respondent's successor counsel, Neiwirth's total adoption and renewal of Ms.

Gwynn's motion to disqualify Rotella, motion for sanctions against Rotella, and Gwynn's Adversary Action against Carol Walker. As detailed fully, at (**TT pp. 471-481**), approximately ten (10) days following Ms. Gwynn's withdrawal, Gwynn testified that Arthur Neiwirth substituted in the case as counsel for Eleanor Cole, believing all of Gwynn's motions had merit, and immediately filed a separate motion to rehear **all three** of the motions filed by Gwynn, which she had been sanctioned for, as being frivolous. (**R.EX. #s 20 and 33**). One of the pleadings Neiwirth sought to resurrect was the Amended Adversary Complaint against Carol Walker; Neiwirth adopted Ms. Gwynn's pleading verbatim. Judge Hyman **reversed** his previous order of dismissal of the adversary complaint with prejudice, now agreeing with Neiwirth that there was a viable cause of action. Neiwirth then asked Judge Hyman to reverse his order of sanctions against Ms. Gwynn. (**R.EX. #31 and 32**) Judge Hyman refused to do so. (**R.EX. #30**) Again, this glaring contradiction/unequal treatment of Gwynn by Judge Hyman made Gwynn's entitlement to discovery more crucial, which she repeatedly requested but was consistently and wrongfully denied. Moreover, how could Neiwirth's resurrection of Gwynn's **identical** pleadings have merit, yet when Gwynn filed them, they were considered without merit, sanctionable and filed in bad faith? Why was Gwynn's motion for sanctions against Rotella regarding the "doctored Bahamian sale order" considered frivolous, yet Lubell's and Neiwirth's motions for sanctions on the

same order not considered frivolous? Why were Lubell's and Neiwirth's motives for filing the identical pleadings as Gwynn's not called into question? Mr. Lubell was unable to prove those allegations in his motion for sanctions; however, unlike Gwynn, he was not sanctioned for failing in that regard. Even worse, Gwynn withdrew her motion for sanctions and withdrew from the case, but was brought back into the case seven months later to be sanctioned on motions which she previously withdrew, without any objection or reservation.

Further proof of Judge Hyman's disparate treatment of Respondent, is the fact that Judge Hyman referred Ms. Gwynn to the Florida Bar for an investigation of unprofessional conduct as the Code of Conduct for United States Judges, Canon 3(B)(3) states that he "should" do so if he finds that a lawyer or other judge is guilty of unprofessional conduct. (**Bar's EX. #1 p. 52**). Yet, in this very same order, Judge Hyman lists several instances of Rotella's conduct which can be described as unprofessional. (**Bar's EX. #1 pp. 39-41, 53**) For instance, Rotella filed motions and responses that were "over the top" and "that were without merit." He further found that one such motion "[w]as a perfect example of why this has been the most litigious case that has ever come before the court." He pointed out that Rotella's actions had been at times, "excessive, unnecessary and which fueled the hostility." Judge Hyman also found that Rotella shared responsibility for unnecessarily and improperly over litigating this case. (**Bar's**

EX. 1 pp. 39-41, 53). And, the bankruptcy court, later in July 2009 awarded Ms. Lubell over $190,000 in sanctions against Rotella for his "bad faith" litigation tactics. (**A #6**) Yet, Mr. Rotella testified at trial, that he had never been referred to the Florida Bar by Judge Hyman. (**TR p. 356**)

Another significant example of Rotella's unprofessional conduct, for which Judge Hyman did not refer him to the Bar, relates to Rotella's habit of drafting enhanced proposed orders that did not reflect the oral rulings of the Court. Ms. Gwynn testified that this was an ongoing problem of Rotella that he either augmented or outright misstated the court's rulings in proposed orders that were ultimately signed by Judge Hyman. Gwynn testified that she was forced to purchase every hearing transcript and attach each to the respective motions for rehearing, for reconsideration, in her efforts to correct these unfair and crucial errors. **Bar's EX. #6 D.E. #s 679, 777, 792, 793, 825, 827, 892, 943, 996, 998 (TR pp. 484-487)**

Ms. Gwynn testified that Judge Hyman adopted Rotella's expanded written rulings ex post facto, as something the court claimed he "was thinking at the time." It goes without saying that Rotella would augment or misstate the court's verbal rulings in his proposed orders so as to benefit himself/Rotella and/or his debtor-

client.[8] Successor counsel, Arthur Neiwirth, also complained to Judge Hyman that Rotella had on more than one occasion drafted inaccurate proposed orders. (**R.EX. #20**). On one such occasion, Judge Hyman did admonish Rotella for such behavior. (**R.EX. #29 pp. 6-7)**. Again, Judge Hyman did not feel compelled to sanction Rotella or refer him to the Florida Bar irrespective of these actions. Again, these apparent contradictions and inconsistencies in Hyman's rulings beg the question, what was egregious about Ms. Gwynn's actions that warranted such "disparate treatment" of her? This notion illustrates why it was crucial and relevant for Ms. Gwynn to depose Judge Hyman. Similarly, Mr. Rotella admitted he never complied with the mandatory disclosure rules of 2014 and 2016. Yet again, Mr. Rotella was never sanctioned for that egregious violation. If Ms. Gwynn were allowed to depose Judge Hyman she would ask, what was Judge Hyman's understanding of the requirements of the disclosure Rules 2014 and 2016 mandated under the United States Bankruptcy Code? (**R.EX. #10**). There were many questions Gwynn had a right to ask: For example, did Judge Hyman change his view regarding who was really to blame for the "over-litigation" of the Walker case (especially in light that he later, in July 2009 sanctioned Rotella over

[8] This was a chronic problem to which Judge Hyman did nothing. Ultimately, Ms. Gwynn filed a motion to recuse Judge Hyman mainly due to his unwillingness to rectify the problem. That motion was denied. Within weeks of denying that motion, Judge Hyman signed two *ex parte* break orders and entry into Gwynn's home and law office. (**A # 10** and **11**)

$190,000. (**A #6**)) – and if so, when? Did he ever sanction – or consider sanctioning – Mr. Lubell? Did he ever deem – or even consider – that Mr. Lubell, bringing the same allegations against Rotella (of doctoring the orders) amounted to a frivolous claim or issue? There is certainly no evidence of that in this record. Did he ever refer Mr. Rotella to the Florida Bar? Or Mr. Lubell? Despite Respondent's concerted efforts to gain such discovery, Gwynn was repeatedly denied her due process rights to do so, and was prejudiced by such denial. All of these questions were critical to Ms. Gwynn's defense.

The Bar's witness, Patrick Scott, noted that the Walker docket contains numerous motions for sanctions filed by Mr. Rotella, impertinent responses filed by Mr. Rotella, and impertinent appeals pursued by Mr. Rotella. Mr. Rotella admitted this, and he admitted he had been sanctioned for pursuing frivolous claims. Yet he was never referred to the Bar. *See also* Slip Op., 2009-WL-163021 (11th Cir. (Fla.) Jan. 26, 2009).

Without the opportunity to inquire of Judge Hyman regarding the numerous inconsistencies and contradictions in his findings and rulings, one is left to imagine why was Ms. Gwynn treated so differently? There is sufficient documentation presented to call into question the validity and accuracy of Judge Hyman's order. At the very least, the deficiencies in the order alone expose the deprivation of any fairness or due process attached to Ms. Gwynn's inability to participate in

discovery. However, should there be any lingering doubt remaining regarding the appropriateness *vel non* of rejecting the Bar's hearsay document, one need only review Judge Hyman's actions involving **the *ex* parte break orders** he entered at the request of Mr. Rotella. (**R.EX. #s 34** and **35**)(**A #s 10** and **11**) Judge Hyman's decision involving these break orders leaves no doubt that his personal feelings of bias affected his official duties. Ms. Gwynn testified that these orders were entered, *ex parte,* at a time when both the Judge and Mr. Rotella knew that Ms. Gwynn was actively appealing the sanctions order upon which the judgment and break orders were predicated. Rotella obviously knew, as he was the Appellee in the appeal that was set for oral argument two weeks before. Ms. Gwynn further argued to Judge Hyman that one of the *ex parte break and entry orders* was against her P.A. (Law Office) and the judgment was against her personally and not her P.A. Gwynn also argued that the other *ex parte break and entry order* was against her constitutionally protected homestead. **(TR p. 489-493)** Gwynn testified that upon finding these "*ex parte break and entry orders,* she had to scramble, with the assistance of friends to move all of her clients files and computers in fear that the Federal Marshals would show up and start taking everything. Moreover, upon uncovering the existence of these *ex parte break and entry orders*, Gwynn immediately went to Judge Hyman requesting that they be stayed pending the appeal. He denied her request. (**TR pp. 489-493**)

The Bar's feeble attempt to diffuse the impact of this evidence pointed out that the orders had not been executed. That fact does not mitigate their impact as evidence of bias and prejudice against Ms. Gwynn. By their terms the break orders gave the U.S. Marshal's Service plenary authority to enter and seize Ms. Gwynn's property in order to satisfy the judgment. Ms. Gwynn spent hours moving clients' files to protect their confidentiality. (**TR pp. 489-493**) Ms. Gwynn believes this is further evidence of Judge Hyman's bias against her. Again, however, Ms. Gwynn was not permitted to ask Judge Hyman about this matter. Without knowing any other pertinent facts regarding why Judge Hyman would sign these intrusive orders, his actions are subject to only one interpretation, he allowed his authority to be a weapon in Rotella's contempt of Ms. Gwynn. It was U.S. District Court, Judge Gold who entered an immediate stay of the break orders and thereafter dissolved them when he vacated Judge Hyman's order. (**R.EX. #37 pp. 19-20**) In fact, Judge Gold noted that regardless of the merits of the sanction order itself, the amount of the judgment could never stand as it was an abuse of discretion by Judge Hyman to award such an unreasonable amount. (**R.EX. #37 p. 18**). At trial, Respondent gave a plethora of testimony and documentary evidence of the bankruptcy court's unequal treatment of the Respondent. That testimony went unrebutted and unexplained by the Bar. (**TR. pp. 480-481; 485, 488-492, 502, 546-547**)

Which, at the very least justifies a prohibition against the wholesale reliance on the hearsay Order as the gospel truth and sole support for the Referee's ultimate conclusion. The Referee did not in any way acknowledge, nor did the Referee explain its rejection of, Respondent's compelling evidence, which will be explained, *supra*.

III. THE REFEREE ERRED IN FAILING TO CONSIDER THE UN-REBUTTED EVIDENCE OF THE BANKRUPTCY COURT'S BIAS.

As part of Respondent's defense, which was her belief of unfair and unequal treatment by the bankruptcy court which was brought out at trial during the testimony of Ms. Gwynn, and the direct examination of Gary Rotella, regarding the "Ferrell conflict," Respondent admitted **(Exhibit 16)** "Order Awarding Fees and Costs dated August 18, 2005," into evidence. (**A #12, p. 3**). On page 3, paragraph 9, of this order, Judge Hyman, not only ignored the Ferrell firm's violation of the mandatory disclosure Rule 2014, but Judge Hyman lost his **impartial and objective position as a "disinterested neutral fact-finder**," and actually participated in the Walker bankruptcy proceeding (**R.EX. #16 p. 3) (A # 12 p. 3**). The (Milton) Ferrell's firm was counsel for the former trustee, Linda Walden. Frances Carter, a partner of the firm, filed an employment affidavit, claiming no conflicts and that the firm had no connections with the debtor, creditors, or any other party connected to the Walker bankruptcy. The Ferrell firm did not disclose

the fact that senior partner, Milton Ferrell was the President for the Cat Cay Homeowners Association, where the debtor's Bahamian property was located. During Mr. Rotella's testimony it was brought out that the Homeowners Association **was also a creditor** in this case, as reflected in (**Bar's EX. #6), (D.E. #83, 1052** and **1053)**. When Gwynn brought these obvious undisclosed conflicts to the attention of Judge Hyman, rather than address the seriousness of the "hidden" conflicts, by confronting the attorneys who failed to disclose, in violation of mandatory disclosure Rule 2014, Judge Hyman instead admonished Gwynn, and sent a copy of his order to the Bar as well. Judge Hyman never disclosed that he had previously, on August 18, 2005, signed an order (**R.EX. #16**) which absolved the Ferrell firm from any liability for its violation of the **mandatory** disclosure rules. Furthermore, Judge Hyman's order authorized the trustee to enter into an agreement that the bankruptcy estate would not pursue any malpractice claims against the Ferrell firm. (**R.EX. #16 p. 3 para. 9) (A # 12 p. 3 para. 9)**. The Ferrell firm was neither sanctioned nor referred to the Bar for its misrepresentations made in their employment affidavit.

Bar Rule 4-1.8(h) states that a lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. That did not occur in this context. Again, the violation of the

mandatory disclosure rules that were brought to the court's attention by Gwynn, raises additional questions not answered as to why the court chose to ignore disclosure violations of the Ferrell firm and Rotella, but punished the messenger, Gwynn, for abiding by and complying with the rules.

It is Judge Hyman's unequal treatment of Gwynn, as compared to that of numerous other attorneys, that underscores the complete lack of objectivity of Judge Hyman. The Bar's response to Gwynn's defense of disparate treatment was, "well two wrongs don't make a right and the propriety of Rotella's actions are for another day." **(TR pp. 288-293)** Gwynn is not arguing that, "well he is bad too and he didn't get punished." Ms. Gwynn clearly established through the evidence that her actions did not warrant a Bar referral as other attorneys adopted her substantive pleadings, which obliterates any notion that her actions were "tantamount to bad faith." Moreover, Judge Hyman's unequal treatment of Ms. Gwynn warranted at least a modicum of scrutiny of the Bar's hearsay evidence, i.e., Hyman's order. Instead, "the order" and its author were completely insulated from even a routine challenge to which all evidence is subjected. At trial, Bar counsel professed that Rotella's unprofessional conduct is not germane to the issue and ignored the import of Gwynn's defense.

Judge Hyman's loss of objectivity completely clouded his ability to be fair, impartial, and objective. As such, reliance on the hearsay document authored by

Judge Hyman, without any discovery regarding the factual findings therein, is a complete denial of any due process to Ms. Gwynn in these proceedings. The unsigned Referee's report must be rejected.

Based on the facts presented above, this Court must reject the Referee's report in its entirety: 1) the Referee erred in determining that the bankruptcy court's orders alone were clear and convincing evidence to support a recommendation for sanctions. The prejudicial effect of that determination was exacerbated by the fact that Respondent was precluded from conducting any discovery related to the complaining witness, the bankruptcy court judge; 2) the Referee misapplied the concept of judicial notice with regards to the bankruptcy court orders. The Referee's application of the "judicial notice" was so expansive it amounted to a collateral estoppel of Respondent's ability to refute the allegations in the Bar's complaint; and 3) the Referee's "findings" are not supported by clear and convincing evidence produced at trial.

IV. THE REFEREE ERRED IN CONSIDERING A NEW COUNT WHICH WAS NEVER RAISED IN THE COMPLAINT NOR ARGUED AT TRIAL.

A new Rule violation cannot be considered without adequate notice. Attorneys must be given reasonable notice of the charges they face before the Referee's hearing on those charges. Florida Bar v. Batista 846 So. 2d 479 (Fla.

2003) Florida Bar v. Fredericks 731 So. 2d 1249 (Fla. 1999). At **page 17** of the report, the Referee stated:

> …I have also considered the conduct of the Respondent in these proceedings including false or reckless allegations against bar counsel during the pending of these proceedings including an unfounded charge that a mediation session was surreptitiously tape recorded, **based on nothing more than Respondent's [sic] notice of a flashing message light on a cell phone**, …[**Emphasis Added**].

The above adopted finding from the "Referee's Report" was never raised at trial, nor was **any evidence** taken at trial on this issue. Approximately two weeks prior to trial, Respondent filed a Verified Motion requesting an evidentiary hearing under F.S. § 44.405(4)(a)(6), for perceived improper mediation conduct of the Bar, which occurred during the Respondent's "objection to" Court ordered mediation. (**Vol. #XII D.E. #219, #229**) (**A #3**) The verified motion cited Respondent's good faith belief that the Court-ordered mediation session, conducted on July 8, 2010 over Respondent's objection, may have been surreptitiously taped or "eaves-dropped" upon. As evidentiary support, Respondent attached five (5) separate Affidavits: Two Affidavits from two separate experts on electronic "PDA" Smart-phone (cell phone) devices, who testified to cell phones/PDA's recording and eaves-dropping capabilities (**A #3**). The "RR" improperly states that the only evidence Respondent relied upon was a "**flashing message light** on a cell phone," which is false. In addition to the two expert Affidavits, Respondent, herself, testified that she saw a **"solid red light,"** not a flashing light, on the electronic

device attached to Bar counsel Hoffmann's handbag. **Respondent also testified that she had a good faith belief that her private caucus in the mediation meeting room with her counsel, and mediator may have been tape recorded or listened to,** based on the pre-arranged seating assignment and the fact that Ms. Hoffmann left her handbag unattended for approximately one and one-half hours,[9] in a private caucus room occupied only by the Respondent, her counsel, and the mediator. The conduct that occurred immediately after the mediation, confirmed Respondent and her counsel, Brett Geer's, belief that a taping or eavesdropping occurred. Mr. Geer was aghast at the coincidence that the one issue he **privately** discussed with the Mediator, was the Bar's fatal flaw in failing to file a "Motion for Judicial Notice." The Bar corrected this fatal flaw the very next day following mediation, and filed its Motion for Judicial Notice. (**Vol. XII D.E. #212; A #3**) What was so interesting is that previously this case was set for trial two other times; the most recent being June 7 and 8, 2010. Ms. Hoffmann filed a motion to continue due to her attendance at oral argument in the Lobasz case SC08-1105. The other two times this case was set for trial, Ms. Hoffmann never filed a motion for judicial notice. The only time she did was the very next day following the forced mediation.**(D.E. 212)**

[9] Ms. Hoffmann's handbag contained the solid red light electronic device.

The Referee never conducted the requested and required evidentiary hearing to flush out these serious allegations, but merely, summarily denied Respondent's request on three days before trial, **August 6, 2010**; Bar counsel, Lorraine Hoffmann appeared at that hearing by phone. The Referee, without taking any evidence, nor receiving even a written response from Bar counsel, denied Respondent's Motion. The taping issue was never mentioned nor considered at trial. Yet, the Referee adopted the self-serving "evidentiary findings" proposed by Bar counsel Lorraine Hoffmann. (**A #13**) This error was compounded by the Referee's consideration of this "finding" as **aggravation evidence** under 9.22(f), which states, "submission of false evidence, false statements or other deceptive practices during the disciplinary process." In essence, the Referee allowed the Bar to bring an additional charge and use it as aggravation evidence, without ever having to amend the Complaint, without ever requiring a written response, and without ever taking any evidence. This was gross error.

V. RESPONDENT WAS DENIED DUE PROCESS TO PUT ON ANY MITIGATING EVIDENCE AND AN OPPORTUNITY TO REFUTE THE BAR'S UNAUTHORIZED COSTS.

At the beginning of the final hearing, Bar counsel announced in her opening statement that the trial would be **bifurcated** into two phases: (1) the evidentiary phase and (2) the penalty phase (**TR. p. 10**). The Referee, in error, never conducted the second phase, "the penalty phase," prior to entry of the October 20,

2010 Order. This error was brought to the Referee's attention, to no avail. (**Vol. #12 D.E. #245**). Additionally, Respondent also objected to the Referee's Award of Costs based on the Respondent's lack of due process to refute the Bar's alleged costs in Respondent's motion for reconsideration. (**SR. #2**) Due process in a disciplinary proceeding is satisfied as long as an attorney is given an adequate opportunity to explain the circumstances of the alleged offense and **to offer testimony in mitigation.** The Florida Bar v. Baker, 810 So. 2d 876 (Fla. 2002); The Florida Bar v. Carricarte, 733 So. 2d 975 (Fla. 1999); The Florida Bar v. Tobkin, 994 So. 2d 219 (Fla. 2006).

In the case of The Florida Bar v. Brown, 790 So. 2d 1081 (Fla. 2001), the Referee allowed and considered Brown's enviable reputation in the community as well as Brown's benevolent character through testimony from colleagues, clients, community leaders and several jurors who testified on Brown's behalf. Likewise, The Florida Bar v. Wells, 602 So. 2d 1236 (Fla. 1992) the Referee also considered testimony from witnesses as mitigating evidence. This critical opportunity to put on mitigating evidence was denied the Respondent. Some of the mitigating evidence Respondent would have put forward, if given the opportunity, would have been Respondent, Gwynn's 2010 Silver Medal Pro Bono Award from the Florida Supreme Court, acknowledging Respondent's over fifty hours of Pro Bono services. Respondent would have called members of the Clergy, from two separate

Catholic Churches where Respondent has, for years, regularly donated legal services. (**SR #2 pp. 6 - 7)**)

In failing to bifurcate the trial, the Respondent was **denied her due process rights to Cross-Examine the Bar on its $19,000 costs**. *Rule 3-7.6(q)(2), Rules Regulating the Florida Bar*, provides the referee with discretion to either award or disallow certain of the Bar's costs. *Rule 3-7.6(q)(3), Rules Regulating the Florida Bar*, expressly provides that the referee may assess the Bar's costs against the respondent, **unless** it is shown that the costs of the Bar were unnecessary, excessive, or improperly authenticated. Similarly in Bar proceedings, as in civil actions, it is generally the burden of the moving party to show that all requested costs were reasonably necessary either to defend or prosecute the case at the time the action precipitating the cost was taken. In re Amendments to Unif. Guidelines for Taxation of Costs, 915 So.2d 612 (Fla. 2005). Once a party's costs claims are contested, the party moving for costs is obligated to support their motion for taxation of costs by substantial, competent evidence. Neimark v. Abramson, 403 So.2d 1057 (Fla. 3d DCA 1981); Powell v. Barnes, 629 So.2d 185 (Fla. 5th DCA 1993. If the Respondent was given an opportunity to cross examine the Bar on its unsupported bill of costs, Respondent would have objected to a number of the Bar's costs, as unnecessary, excessive and improperly shifted to Respondent. Early on, Respondent objected to the Bar's hiring of an expert witness, thereby

shifting the cost of that expert to the Respondent. (**Vol. XI D.E. #146**) (**TR. pp. 49-54**) Respondent argued that the Bar's expert, Patrick Scott, was not competent to testify in this proceeding, as he lacked first-hand knowledge of the underlying bankruptcy proceeding and he was not qualified to give an "expert opinion" on whether or not the factual findings, contained in the bankruptcy court's order, equated to any ethical breaches. (**TR. pp. 49-54**) Additionally, the Bar's expert was not helpful to the Referee, as the Referee never relied on any of the expert witness' testimony. In fact, the Referee's only mention of the Bar's expert was under Count I, where the Referee discounted the Bar's expert testimony, and ruled in favor of the Respondent. (**SR. #1**) Thus, in error, the Referee improperly shifted over $11,500.00 in expert witness fees to the Respondent. The Referee's report, further erred, in failing to allocate any cost to the Bar for the Respondent's successful defense and **acquittal of Count I**. In addition, Respondent would have objected to numerous other costs.

The Referee merely adopted "take my word for it" method which is contrary to all recognized notions of fairness in cost adjudication and repulsive to the adjudicative process. Substantial notions of fairness and due process, as well as the orderly adjudication of cost awards, mandate a reversal of the Referee's award of costs.

As a result of the Referee's failure to give the parties their agreed to "bifurcated trial," Respondent was denied her due process right to argue her pled affirmative defense, of "abuse of process." Respondent rightfully relied upon the parties' agreed to bifurcation. Respondent would have argued the affirmative defense during the "second phase," the penalty phase. Respondent would have argued that Bar prosecutor Hoffmann abused the disciplinary process, causing the Respondent to endure unnecessary costs and fees, which could have been avoided.

Respondent Gwynn vigorously and rightfully objected to the Bar's forced mediation as being improper and inappropriate due to the then-stage of the grievance process, as The Florida Bar did not have full authority to settle the matter. (**Vol. XII D.E. #191**). Bar Rule 3-8.1(d) as merged with Chapter 14, "Fee Arbitration Rule" only provides for mediation in fee disputes and, when a complaint is at the grievance committee level. The reasons are clear that once the complaint is filed in this court, only this court has the full authority to approve a settlement.

Furthermore, during these ongoing proceedings, Bar Prosecutor Hoffmann continued to abuse the disciplinary process by opening three separate unwarranted new Bar files in violation of the Bar's ACAP Rules:

1) Respondent Gwynn testified at trial that she attempted to extricate herself as a result of serious family health issues, compounded by Rotella's multiple

sanction motions in the Walker proceeding. Thus, Respondent had to withdraw from Cole's representation. **(TR. pp. 455 and 530-533).** As stated hereinabove, Gwynn, also a licensed registered nurse was the primary overseer in the care of her terminally ill parents (mother with end stage lung cancer, and father with Alzheimer's) during the time she was representing Cole in the Walker proceeding. On **July 14, 2004**, Respondent Gwynn filed an Emergency Motion to Stay, with letters from her treating physician in support of her motion. Rotella sent the motion to Hoffmann, who on August 10, 2004 opened another Bar investigative file. Hoffmann used Respondent's request for a medical leave as a basis to declare that Respondent may be unfit to practice law. Therein, Hoffmann requested that Gwynn sit for a psychological evaluation. Gwynn immediately responded to the request, and sat for a three hour psychological evaluation; Respondent, Gwynn was cleared by the Committee. (**TR. pp. 455 and 530-533**)

2) In **2008**, Hoffmann opened another Bar File, No. 2008-50,422(15C) based on an **unsworn letter** from opposing counsel, Gary Rotella, in violation of the Bar's ACAP rules. (**D.E. #134**) Gwynn was denied an opportunity to argue her pled affirmative defense, abuse of process, when the Referee failed to bifurcate the trial as agreed to by the parties. **(TR. p. 10)**

3) On July 1, 2009, Hoffmann opened yet another Bar file against Respondent, without any prior notice to Respondent, Gwynn. This latest file was

opened as a result of a telephone call Hoffmann had with attorney, Lauri Waldman Ross, followed by an unsworn letter Lauri Waldman Ross sent to Hoffmann; both the telephone call and the unsworn letter involved pending litigation. Attorney Waldman Ross is the opposing counsel in a highly visible and substantial legal malpractice action wherein Gwynn represents two of the three plaintiffs. (D.E. #134) Respondent Gwynn first learned of this new file after Bar counsel Hoffmann assigned it to a Grievance Committee. Grievance Committee intervention was already in place, without Gwynn's knowledge of even the existence of the complaint, a violation of ACAP rules, when filing a "complaint against a Florida attorney." The Bar's ACAP rules specifically state in **PART FOUR – Signature**. "You must sign the form and certify under penalty of perjury that your allegations are true. **Unsworn complaints are not considered**." Yet, Waldman Ross' unsworn letter was given priority consideration as it managed to make its way to a Grievance Committee absent a response from Gwynn, who lacked any knowledge of its existence, another violation of the Bar's ACAP rules.

CONCLUSION

The Referee's unsigned order recommending a finding of guilt, and recommended discipline and assessment of costs should be rejected. The Referee abdicated its role as fact finder when it made no independent findings, under the guise of taking "judicial notice" of another's judge's findings. Not only did the

court rely exclusively upon the findings of another judge in another tribunal, but compounded the error by relying upon Bar counsel's rendition of the facts which were entirely refuted by the record. Alone that warrants rejection of the recommendation. However, that error was exacerbated by the fact that the prior findings of another judge were based on a more lenient standard of proof and the ultimate finding of "tantamount to bad faith" was made without evidentiary development, thereby denying Respondent notice and the opportunity to be heard. The Referee's abusive, arbitrary and erroneous rulings denied Respondent her due process rights. Respondent was denied the opportunity to depose or conduct discovery of the complaining witness; denied the opportunity to mount an affirmative defense of the abuse of process perpetrated by the Florida Bar; and denied the opportunity to present any mitigating evidence or refute the Bar's allegations of costs.

WHEREFORE, the Respondent respectfully requests this Court to REJECT the Recommendation of the Referee and dismiss the Bar's complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a the original and seven copies of the Amended Initial brief of the Respondent were sent via Federal Express Mail to Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and a true and correct copy of the foregoing was sent by facsimile and/or U.S. Mail to Adria E. Quintela, Chief Branch Discipline Counsel, The Florida Bar, Lake Shore Plaza II, Suite 130, 1300 Concord Terrace, Sunrise, FL 33323, and to Brett Geer. Esq., The Geer Law Firm, 3837 Northdale Boulevard, Suite 350, Tampa, Florida 33624, this 22nd day of June, 2011.

CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that the Initial Brief of the Respondent is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

Respectfully submitted,

By: _____

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