IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-622

MARY ALICE GWYNN

PETITIONER/CROSS RESPONDENT

VS.

THE FLORIDA BAR

RESPONDENT/CROSS PETITIONER

RESPONDENT'S
AMENDED REPLY BRIEF AND CROSS ANSWER BRIEF

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Petitioner/Cross 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. References to the Amended Initial Brief will be referred to as **"IB."** References to the Bar's Answer Brief/Cross Initial Brief will be referred to as **"AB."**

STATEMENT OF FACTS AND CASE

Because the Bar's Statement of Facts contains certain misrepresentations, Respondent will address those herein. **First**, when recounting the procedural history, the Bar states that, "respondent withdrew her plea."[1] (**A.B. at 7)** Respondent **never signed any guilty plea in this case.** The Bar did present Respondent with their proposed order in conjunction with a proposed guilty plea that included a finding that Respondent lacked dishonesty or selfish motive and that Respondent had a good reputation as a hardworking and honest professional within the local community. **Second**, at **page 13** of the Bar's Statement of Facts and Case, the Bar states that the "Respondent sat before me and testified that she did this because she believes that the judge was part of an "old boys club"…… this is patently false. The trial transcript is void of any such testimony or anything remotely similar.

At **page 6** of the Bar's Statement of Facts and Case, The Bar states that the Respondent continued to file pleadings in the Bankruptcy case when she no longer represented any party. Respondent testified that the filed pleadings in question were solely related to Respondent's self defense against opposing counsel's

[1] The Bar fails to mention the findings it was prepared to submit to the Referee for approval in the event the Respondent accepted the Bar's guilty plea. Those findings include the following: "Respondent lacked any dishonest or selfish motive, that the Respondent has a good reputation as a hardworking and honest professional within the local community." (**A #15 attached hereto**)

motions for sanctions against her. (**TR. pp. 435-437**) (**D.E. #230**) Respondent testified that she was involuntarily brought back into the proceedings to defend ***herself*** (**TR. pp. 436-437**). The Bar's own expert witness, Patrick Scott, acknowledged that Respondent certainly had a right to defend herself in the sanctions proceedings. (**TR. p. 400**)

The Walker bankruptcy proceeding began in April 2003, and the litigation portion concluded at the end of 2009. Respondent represented Judgment Creditor, Eleanor Cole, for a short period of just eleven months.[2] In **June 2004**, Respondent, without objection from any party, was replaced by attorney Arthur Neiwirth.

The Bar makes reference, at **page 7** in its Answer Brief, that there were four (4) Referees assigned to this proceeding, which must be clarified. In **April 2008**, the Bar filed its complaint against Respondent, which was assigned to Referee, Judge Carlos Rebollo. Referee Rebollo presided over the case for eighteen months until **November 2009**, when he sua sponte disqualified himself, after denying the Bar's Motion for Summary Judgment, and after Respondent filed a Second Motion for Sanctions against the Bar (**A #8**). Judge Arthur Birken immediately recused himself. Judge Eric Beller disqualified himself upon Motion for Disqualification.

[2] During the bankruptcy proceeding, Cole had four lawyers, Robert Anguiera, Esq., Arthur Neiwirth, Esq., Lawrence Taube, Esq. and Bruce Kravitz, Esq., representing her interests. The litigation continued for five years after Respondent exited the case. (**TR.p.504**)

The trial was assigned to Referee, Judge John B. Bowman. (**D.E. #153 and #164**)

ARGUMENT

ISSUE 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.

One of the central arguments raised in support of Respondent's request to reject the Referee's report is that the unsigned recommendations are based exclusively on the hearsay orders of the Bankruptcy Judge, which is contrary to Florida case law. The Bar asserts that pursuant to Florida Bar v. Shankman, 41 So.3d 166 (Fla. 2010), "[t]he referee was therefore justified in finding that "standing alone, the three Orders entered by the federal bankruptcy judge on April 26th, May 15th, June 7th 2006, are sufficient to meet the Florida Bar's burden of proof to all charges related to the Walker bankruptcy." (**A.B. at 15).** In the alternative, the Bar argues that the referee did not rely exclusively on the orders of the bankruptcy court judge when finding respondent guilty. However, the Bar's legal argument is simply wrong and its factual argument is belied and not supported by the record below.

In the Initial Brief, Respondent detailed for this Court why the referee's reliance on Florida Bar v. Head, 27 So. 3d 1 (Fla. 2010), and Florida Bar v. Behm, 41 So. 3d 136 (Fla. 2010) were unavailing to its position that the bankruptcy

court's order "standing alone" was sufficient proof. (**I.B. at 14-15).** By ignoring Respondent's argument, the Bar fails to offer any insight or legal rationale in support of its defense of the referee's inadequate report. The Bar also chose not to address Respondent's reliance on the dispositive case of Florida Bar v. Vining, 707 So. 2d 670 (Fla. 1998) and instead the Bar simply rehashed its position that the bankruptcy court's order alone supported the Referee's recommendation.

Respondent reasserts that such is not the law in Florida. Although Florida Bar v. Shankman, 41 So. 3d 166 (Fla. 2010) and Florida Bar v. Tobkin, 944 So. 2d 219 (Fla. 2006) allows a referee to rely on a prior order of another tribunal **in support** of its findings, that does not allow a referee to rely **solely and exclusively** on that order as the only evidence to support a recommendation of sanctions against an attorney.

Also, in response to the argument raised in Issue I, the Bar argues that the Referee's recommendation was not predicated solely on the hearsay Orders of Judge Hyman. However, there is no factual support for that statement and, in fact, the Bar makes **numerous material misrepresentations of the record, in an attempt to create facts.** For instance, the Bar claims that the Referee relied upon the testimony of Respondent's witnesses Carl Santangelo and Gary Rotella; the testimony of the Bar's bankruptcy expert Patrick Scott; and a statement made by Respondent. (**A.B. at 15-17).**

The first major flaw in the Bar's argument is the fact that the Bar cannot now, on appeal, fill in the huge gaps in the Referee's report with the "alleged factual findings" it thinks the Referee relied upon. It is the Referee who must make the **independent** factual findings in support of its ruling. The Referee's failure to fulfill that duty cannot be rectified by the Bar, while it peruses the transcript months after the fact and guesses as to what the Referee was thinking. Cf. Florida Bar v. Boland, 702 So. 2d 229-239 (Fla. 1998)(rejecting defendant's challenge to the Referee's findings of facts by reprinting the extensive detailed findings of the referee which spanned two pages in the opinion); Florida Bar v. Vining, 707 So. 2d 670, 673 (Fla. 1998)(describing Referee's findings as independent as the explicit individual findings that were accompanied by a citation to the testimony offered during the disciplinary hearing). Consequently, the Bar's attempt to correct the Referee's deficiency in its report is unpersuasive. It cannot fill in the void created by the Referee.

The next flaw in the Bar's argument is its egregious misrepresentations of the record below. **First**, the Bar states: "The referee also took into account the testimony of respondent's own two witnesses, Carl Santangelo and Gary Rotella." (**A.B. at 17**). **The Bar misrepresented the record,** as neither witness offered a scintilla of evidence relevant to any of the counts for which the Referee found

Respondent guilty.[3] Ironically, the Referee did indeed rely on the testimony of both witnesses. However, what Bar counsel omits from its argument, is the fact that the witnesses' testimony was the basis for the Referee's decision to **dismiss** Count I of the Bar's complaint.[4] Therefore, the Bar's factual assertion in the Answer Brief on this point, is completely false and not supported by the record.

Second, the Bar misrepresents the record below, by arguing that the Referee considered the testimony of Patrick Scott, the Bar's "expert."[5] (**See A.B. p. 16**). The Bar again misrepresents the use of a witness' testimony as the report does not contain a single reference to Patrick Scott's testimony regarding a finding of guilt. The Referee **never mentioned** Scott's testimony when discussing Counts II through IV. Instead, the Referee discussed extensively Judge Hyman's orders and found that they were sufficient evidence, **standing alone,** to support a finding of guilt. (**R.R. p. 13**) (**A #1 p. 13**)

The **only** reference to Scott at all, was in the Referee's findings as to Count I of the Bar's complaint. Therein, Patrick Scott testified that "in his opinion"

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[3] As noted in the Amended Initial Brief, the complaint against Respondent included four counts. Count I involved Respondent's representation of Mr. Carl Santangelo in a bankruptcy matter. Both Santangelo and Rotella testified solely to Count I; Counts II through IV involved the Walker bankruptcy case only, and is unrelated to Count I.

[4] The Bar has not appealed that decision.

[5] Patrick Scott was presented as the Florida Bar's expert in bankruptcy law. In his thirty years of practice this was only the "second or third" time he has so testified. He was not presented as an expert on ethics or Florida Bar rules.

Respondent made a false statement in a pleading while representing Carl Santangelo. (**RR. p. 4**) The irony is that the Referee **rejected** Scott's testimony on this point given the fact that Count I was **dismissed due to insufficient evidence**. (**RR. p. 15)** (**A#1 p. 15**).

Third, the Bar's other reference to Scott's testimony is also a mischaracterization of the record in the following manner: In its Answer Brief, the Bar recounts one of the many times where Scott simply **paraphrased or actually read** from Judge Hyman's order. The passage recounted by the Bar as its "proof" involved Scott's reference to Hyman's finding of "ad hominem attacks" by Respondent." (**A.B. p. 16**). When Scott **attempted** to say that he agreed with Judge Hyman's conclusion, Respondent **objected and the objection was sustained.** Bar counsel unsuccessfully attempted **three** additional times to invite Scott to vouch for Judge Hyman's conclusion. Each attempt was met with objections that were **sustained** by the Referee. In fact, the statement of Scott **relied upon by the Bar as proof that the Referee relied upon Scott's testimony,** was actually **stricken** by the Referee, as it was a misrepresentation of what Judge Hyman found.[6] (**TT. p. 118, lines 13-21**). The Bar's use of these statements, as proof that the Referee relied on Scott's testimony, are blatant misrepresentations of the record, as the Referee explicitly sustained Respondent's evidentiary challenge

[6] Judge Hyman did not make any finding regarding Respondent's honesty, veracity and forthrightness. (**TR. p. 116-118**).

to their admission on **four separate occasions**. (**TR. pp. 116-118**). The record cannot be clearer, that the Bar's reliance on those statements by Scott is inexcusable misrepresentations.[7]

The final material misrepresentation is the Bar's continued and completely false recitation to a "quote" alleged to have been made by Respondent regarding Judge Hyman. The Bar states, "Respondent also argues that these Orders are somehow tainted by the fact that Judge Hyman is part of a 'good ole boy club.'" (**AB. p. 14**) This "statement" was **never** made by Respondent; it does not appear anywhere in the transcript but yet the Bar chose, not only to include such an inciting statement, but yet again repeated such a falsity. It initially appeared in its written closing argument at the end of the evidentiary hearing, and again in the Bar's proposed report, and on three separate occasions in the Bar's Answer Brief. [8] (**A #13**).

And lastly, the Bar argues, "Furthermore, the referee considered and took into account respondent's own testimony. Despite respondent testifying that the Orders were entered against her because he was biased against her, (**TR. p. 546**), **the**

[7] Scott also stated that "normally" these types of cases contain few pleadings but this one was over-litigated and Respondent presented obstacles to the court. (**AB. p. 16**). However, Scott never explained the obstacles, and never explained what Ms. Gwynn should have filed to "end" the litigation expeditiously. Ms. Gwynn's representation of the creditor in this matter spanned **just** eleven months out of **six years** of this bankruptcy litigation. .

[8] The referee adopted the Bar's proposed order in its entirety except for that portion which dealt with Count I of the complaint, which was dismissed. (**A #1**) (**A #13**)

referee did not accept the testimony as a basis for defeating Judge Hyman's specific findings as to respondent's misconduct." (**AB. p. 17**)(emphasis added). The Bar's focus on what it assumes the Referee **rejected** is hardly proof of what evidence the Referee **found** to support his "independent findings." Relying on the rejection of Respondent's affirmative defense, as its sole support for claiming that the Referee relied on clear and convincing evidence other than the bankruptcy order is nonsense.

Additionally, this candid characterization corroborates Respondent's argument presented in the Initial Brief, (**I.B. p. 12)** that the procedural posture of the evidentiary hearing was, that the bankruptcy court's order was the sole and conclusive proof of Respondent's guilt and the trial was focused on Respondent's ability to **"defeat" or** "**rebut**" the findings of Judge Hyman as they appeared in that hearsay order. (**SR #15 pp. 23-24).** The Bar's admission above, that Respondent lost because she could not defeat the bankruptcy court's order, further illustrates that the Referee's findings were predicated solely on the hearsay order.

In addition to the aforementioned material falsehoods, the Bar's Answer Brief utterly fails to address the pertinent and dispositive legal arguments presented by Respondent in the remainder of Issue I in the Amended Initial Brief. The Bar fails to answer Respondent's claim that the Referee grossly misapplied the doctrines of

Judicial Notice and Collateral Estoppel. Nor did the Bar address the allegation that Respondent was erroneously precluded from meaningful discovery.

The Referee adopted the proposed order of the Bar without any notice or opportunity for the Respondent to be heard. Before a referee is permitted to adopt a proposed order, the referee must make specific findings and inform the parties of those findings. At that point, a party may submit a proposed order, at which time the referee gives notice that it intends to adopt the proposed order. **That was not done in this case**. The record clearly demonstrates the Referee did not make any independent factual findings, Florida Bar v. Cramer, 678 So.2d 1278 (Fla.1996); Florida Bar v. Barrett, 897 So. 2d 1269 (Fla. 2005).

Bar counsels' answer to Issue I, is comprised of material factual misrepresentations and completely irrelevant arguments. The Referee's finding of guilt must be rejected. In summation, the Referee did not make any independent findings, and instead relied exclusively on the Orders of Judge Hyman. The Bar's repeated misrepresentations to the contrary fortify Respondent's arguments; thus, rejection of the Referee report is required.

ISSUE 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).

The Bar does not present any answer to Issue II of Respondent's Amended

Initial Brief, regarding her inability to conduct any discovery associated with the author of the bankruptcy order, Judge Hyman. However, Respondent reasserts that the prejudice to her is underscored by several other errors. **First**, the bankruptcy order was founded on the **lesser standard** of "preponderance of the evidence" rather than the higher standard "of clear and convincing evidence," which is the standard in Bar proceedings. **Second**, the bankruptcy court's first order of sanctions was premised on a finding that Respondent was negligent, and an implicit finding that she did not act in bad faith. Yet, without any further notice or hearing, the bankruptcy court altered its finding and "upped the ante" and found that Respondent's actions were "tantamount to bad faith." **Third**, the un-rebutted evidence of disparate treatment suffered by Respondent, more than warrants the opportunity for discovery. Respondent provided a detailed list of some of the legitimate inquiries that she was entitled to discover. **Fourth**, the fact that the Bar admits, that the only way Respondent would not have been found guilty in these proceedings, was if she could somehow **defeat** the findings in the hearsay order. (**A.B. at p. 17**). Respondent's due process rights were violated as she was unable to confront her accuser because the **Bar refused to make Judge Hyman available for deposition and/or appear as a witness at trial.**

<u>ISSUE III</u>: THE REFEREE ERRED IN FAILING TO CONSIDER THE UN-REBUTTED EVIDENCE OF THE BANKRUPTCY COURT'S BIAS.

The Florida Bar does not present any answer to Issue III of Respondent's Initial Brief. The Respondent's un-rebutted evidence precludes sole reliance on the hearsay orders of Bankruptcy Judge Hyman.

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

The Florida Bar argues that, "a referee may award costs to the prevailing party unless 'it is shown that the costs of the Bar were unnecessary, excessive, or improperly authenticated.'" **Answer Brief at p. 18.** Respondent does not take issue with this general proposition. However, in order to "show" that the Bar's costs are unnecessary, excessive or improperly authenticated, the Respondent must be given an opportunity to be heard on these issues, **which was denied**. Respondent's entitlement to such an opportunity is codified in Bar Rule 3-7.6(q)(5), which states:

> "The Report of Referee **cannot** be filed with the Supreme Court until after the time period for filing a Motion to Assess Costs by the prevailing party and the Objection has run. (**A #16**)

See "Referee Manual Revised April, 2010," at p.10, §11. (**A #16, attached hereto**) The Referee violated this section, by immediately filing the report five days after its rendition on October 25th, 2010. Respondent's crux of this argument is that the costs were excessive and unnecessary. The "expert" was not competent to testify in these proceedings, given he was not an expert on ethics. Moreover, the expert could not vouch for the factual findings of the Bankruptcy Judge. In other words,

he could not and did not assist the fact finder in these proceedings. In rebuttal of Respondent's assertion that she was not given any opportunity to present mitigation, the Florida Bar misleads this court by citing a **single passage** in Respondent's testimony regarding the depression she was experiencing during the prolonged illnesses and eventual death of both her parents. (**Answer Brief at p. 19)** Here again, the **Bar** chose to **falsely characterize** the record below by **misrepresenting** the context in which this statement was made.

First of all, this testimony referenced by the Bar was never presented as **substantive evidence** of mitigation by Respondent. Second, the passage referenced by the Bar was actually Respondent's cross-examination. (**TR. pp. 530 –533**) When viewed in its proper context, it can hardly be characterized as a meaningful opportunity to present mitigating evidence. The accurate context of how this information was presented is as follows: During direct testimony, Respondent provided the Referee with examples of Judge Hyman's disparate treatment against her. (**TR. pp. 480-483**) Because Judge Hyman now agreed with the substantive motion Gwynn had filed, Neiwirth then asked Judge Hyman to reverse his Order of sanctions against Gwynn regarding that motion. (**R.EX # 31 and #32**). In his request to reverse the sanction motion, Neiwirth mentioned that Respondent withdrew from the case in part because of her emotional stress relating to her mother's terminal illness. **(TR. pp. 471-480).** Consequently, the information

regarding Respondent's depression and family loss was not presented as substantive mitigation, but it was recounted as what was pled in Neiwirth's Motion for Rehearing. During cross-examination, Bar counsel seized upon that information and attempted to characterize Neiwirth's motion as his opinion, that Respondent was incapacitated to practice law, and even intimated, without any evidence, that Respondent had been treated for a psychological condition. (**TR. pp. 528-532)** The Bar clearly was attempting to characterize the information in Neiwirth's pleading as **negative information against Respondent in an attempt** to minimize the compelling nature of Respondent's evidence of unequal treatment. (**TR. pp. 527-532**). In addition, Respondent testified on cross, that Bar Prosecutor Hoffmann exploited Respondent's depression caused by the loss of her parents, and opened a new Bar file requiring the Respondent to sit for a three hour psyche examination with the Bar's psychologist. **(TR. pp 528-532)** The Bar now claims that the testimony of Respondent should be considered as a fair opportunity to present mitigation. This is further proof of the Bar's relentless "win at all costs" bad faith pursuit of Respondent.

The Referees reliance on the Bankruptcy Court order, while refusing Respondent due process is fundamental error.

RESPONDENT'S CROSS ANSWER BRIEF

STATEMENT OF FACTS

Before trial the Referee ordered the parties to attend mediation. Respondent objected on the basis that The Florida Bar lacked authority to settle the matter at the present stage of the proceeding as such authority is specifically reserved to the Florida Supreme Court. (**D.E. #191**) Nevertheless, the Referee insisted that mediation take place. (**D.E. #195**)

The Bar, at **page 20** based its entire Cross Appeal on Respondent's Verified Request for an Evidentiary Hearing, which the Referee denied. Prosecutors, Hoffmann and her supervisor Quintela, represented the Bar during the court-ordered mediation. It was during the mediation wherein a series of unusual circumstances led Respondent, and her counsel, to a good faith belief that the mediation process was being taped and/or eavesdropped upon. (**A #3**) Hoffmann left her handbag for over one and one-half hours in the "main mediation room" while Respondent, her counsel appearing by phone, and the Mediator was the only ones occupying the room. Clipped to the outside of Hoffmann's handbag was an electronic device with a **solid red light** displayed. Respondent followed up by filing a Verified Motion, under F.S. §44.405(4)(9)(6) requesting an evidentiary hearing regarding Respondent's good faith belief that the mediation process was tainted. Attached to the Motion were five Affidavits, including two from "Smart

Phone" experts. (**A #3**) During the confidential discussions with the Respondent, the Mediator, and Respondent's counsel, Brett Geer, the parties discussed the Bar's fatal evidentiary error of not filing a Motion Requesting Judicial Notice of Judge Hyman's Orders. **(A #3)** This case was initially previously set for trial in June, 2010; Ms. Hoffmann never filed a motion requesting judicial notice of Judge Hyman's orders prior to that initial trial date. The very next day, following mediation, the Bar cured its fatal flaw, and filed a Motion Requesting Judicial Notice of Judge Hyman's Orders. (**emphasis added**) (**Vol. XII D.E. #212)** (**A #3**)

The Bar never filed a written response to Respondent's Verified Motion for an Evidentiary Hearing. During a subsequent hearing, Prosecutor Hoffmann, appearing by phone, verbally denied the allegations contained in Respondent's Verified Motion. (**SR. #17 pp. 21-22**) Hoffmann was not put under oath, nor was she subjected to a cross examination. The Referee merely summarily denied the Motion for an Evidentiary Hearing, ignoring the fact that Respondent attached **five** Affidavits in support of Respondent's Motion for an Evidentiary Hearing. (**A #3**)

The Bar never amended its complaint to include the taping issue, nor was it ever raised or considered at trial. Yet, the Bar's "Proposed Closing Argument" and "Proposed Referee Report" (**A #13**) was the first time the taping issue was addressed. The taping issue is what prompted Hoffmann to escalate the Bar's previous request for a public reprimand to a rehabilitative 91-Day suspension. The

Bar then changed its previous proposed findings to now include new findings of dishonesty, selfish motives, amongst others, which were never articulated, raised or found at trial. **Previously**, the Bar submitted a Proposed Referee Report to the first Referee, Judge Carlos Rebollo, which negated all of the new improperly included/unfound findings. As mentioned above, the Bar's first proposed Referee report described Respondent's character as lacking dishonesty or selfish motive, and that Respondent had a good reputation as a hardworking and honest professional within the local community. (**Attached hereto as A #15**).

SUMMARY OF THE ARGUMENT ON CROSS APPEAL

The Bar improperly seeks to justify a ninety-one day suspension based on an allegation that was never included in the complaint, for which there was no evidence offered at trial, and for which no argument was ever presented. The Bar continues to misrepresent the record. Lastly, the Bar improperly attempts to punish Respondent for asserting her innocence.

THE REFEREE'S UNSIGNED RECOMMENDATION IS NOT SUPPORTED BY THE RECORD, AS IT INCLUDED A NEW ISSUE NEVER TESTED AT AN EVIDENTIARY HEARING NOR WAS IT INCLUDED IN THE BAR'S COMPLAINT

The Bar continues to blatantly mislead this Court by relying on a **misrepresentation** of the record. The Bar's bad faith prosecution is further demonstrated by its decision to **again** rely on a "finding" that was never made

following an evidentiary hearing (***emphasis added***). Specifically, The Florida Bar is challenging the Referee's findings that Respondent "deserves" a non rehabilitative ninety-day suspension as error because of two "alleged findings" that warrant a more severe sentence. The following two "findings" are false:

1.) Respondent testified that the federal judge was part of an "old boys' club" and she believes the federal judge is wrong;
2.) Respondent's claim, that Bar counsel may have taped the proceedings were "false, reckless or unfounded."

Cross-Appeal Initial Brief at p. 20. The Bar's argument is yet again made in bad faith and without any evidentiary support, since the taping issue was never mentioned at trial and no evidence was ever taken on the taping issue. The taping issue was never tested at an evidentiary hearing, as the Referee denied Respondent the right to an evidentiary hearing despite the fact that five Affidavits were produced in support of Respondent's Verified Motion regarding the taping issue. (**A #3**) Thus, the entire Cross Appeal of the Bar should be stricken as the taping issue and the "old boys' club" statement were never included in the complaint, raised, argued or preserved at trial. The Bar's repeated inclusion of a false inflammatory quote, which the Bar attributed as being made by the Respondent, is absolutely unconscionable.

Respondent addressed the complete **falsity** of the "old boys' club" comment in her Motion to Strike, Motion for Sanctions, Amended Initial Brief and Amended Reply Brief. Instead of the Bar retracting such an inflammatory statement, or at

the very least conducting an investigation to ensure its veracity, the Bar simply continues to repeat it, and makes the same misrepresentation to this Court, and does so without a **record cite to the trial transcript to prove its authenticity**. Such wrong and unethical conduct by the Bar is just one more example of the Bar's win at all costs tactics in its pursuit of Respondent's license and livelihood, which justifies a complete rejection of the Bar's argument.

Second, the Referee is punishing Respondent for defending herself as she continued to disagree with the findings of the bankruptcy court even though they were upheld on appeal. **Cross-Appeal Initial Brief at p. 20.** Respondent's affirmative defense was that the federal bankruptcy court was biased against her. In support thereof, Respondent presented a plethora of evidence that was un-rebutted.[9] **See Respondent's Amended Initial Brief at pp. 23-38.** It is highly improper for the Bar and the Referee to use Respondent's decision to maintain her innocence in these proceedings as an aggravation to enhance this disciplinary sanction. This Court has held that "it is improper for a referee to base the severity of a recommended punishment on an attorney's refusal to admit alleged misconduct or a 'lack of remorse' presumed from such refusal." Fla. Bar v. Lipman, 497 So.2d 1165, 1168 (Fla.1986); see also Fla. Bar v. Karten, 829 So.2d 883, 889-90

[9] Not only is that evidence un-rebutted, but the Bar chose not to file an answer to Respondent's Issues II and III where this evidence is detailed.

(Fla.2002); Fla. Bar v. Mogil, 763 So.2d 303, 312 (Fla.2000); Fla. Bar v. Corbin, 701 So.2d 334, 337 (Fla.1997).

The evidence presented clearly demonstrates that the substantive pleadings[10] for which Respondent was sanctioned and which were subsequently filed by other counsel, were either **granted, ignored and/or not ruled upon** by the Bankruptcy Court, or denied **without any sanctions being imposed** on counsel. The Referee's decision to punish Respondent by using her affirmative defense as a justification for the imposition of sanctions is a due process violation and must be rejected.

The Bar also relies on the non-existent finding of the Referee which was a copy and paste from the Bar's proposed Referee report that states:

> I have also considered the conduct of Respondent in these proceedings including false and 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 notice of a flashing message light on a cell phone.

See **page 17** of Referee Report; see also **Bar's Cross Appeal Brief at p. 20** (**emphasis added**). Respondent acknowledges that a Referee's findings will not be overturned if they are supported by substantial and competent evidence. In order to succeed on overturning the findings of a Referee, it must be demonstrated that:

[10]The sanction orders imposed by Judge Hyman are all based on substantive pleadings filed by the Respondent long before May 15, 2006.

> To succeed in challenging the referee's findings of fact, Karten must establish that there is a lack of evidence in the record to support such findings or that the record clearly contradicts the referee's conclusions

Florida Bar v. Karten, 829 So. 2d 883, 888 (Fla. 2002) (**emphasis added**) Obviously, Respondent has demonstrated that there is a complete lack of evidence on the issue, as the Referee **summarily denied Respondent's request for an evidentiary hearing on the matter.** (**SR. #17 pp. 21 23**) In other words, the Referee refused to grant an evidentiary hearing on the allegation, but yet went ahead and made factual findings. In essence, the Referee allowed the Bar to bring an additional charge against Respondent, and use it as aggravation. In the unsigned Report, the Referee included, as aggravating factors, pursuant to 9.22 (e) and 9.22(f), Respondent's conduct included the "submission of false evidence, false statements, bad faith obstruction of the disciplinary proceeding, and other deceptive practices during the disciplinary process; all of these aggravating factors were adopted by the Referee without the taking or submission of any evidence to support these serious allegations, nor was there any reference to any evidence cited in the record to support such serious findings. This was all accomplished without ever having to amend the complaint, without ever requiring a written response, and without ever taking any evidence. This was gross error.[11] Instead, the Referee's "finding" was supported by the unsworn, telephonic denial of the allegation by

[11]For a detailed explanation of the Respondent's allegation regarding this issue please refer to pages 39-40 of the Amended Initial Brief.

Hoffmann. In essence, the Referee's finding that Respondent's claim of "improper taping" was without factual support was fundamental error. To reiterate, the Referee made this finding without any notice and without any opportunity to be heard. The Referee instead "found" that the unsworn statement/denial made by Bar Prosecutor, Lorraine Hoffmann, over the telephone was sufficient "evidence" to summarily deny Respondent's claim. The Referee's actions deprived Respondent of the most basic fundamental rights of due process. On February 3, 2011, in Florida Bar v. Lobasz, this Court found that the same Bar counsel, Lorraine Hoffmann, made inaccurate representations concerning the record at oral argument, which this Court found exceedingly troubling, and further stated that "all sides in bar proceedings must conduct themselves according to the applicable rules, without misleading the opposing party or this Court."[12]

Other similar conduct of Lorraine Hoffmann occurred during this proceeding, as described in Respondent's Amended Initial Brief at **pp. 45-47**, documenting Ms. Hoffmann's "win at all costs" tactics.

The Florida Bar does not present any answer to rebut Respondent's Issue IV of Respondent's Amended Initial Brief, nor does the Bar explain why the Bar increased the discipline it was seeking from a public reprimand to that of a 91-day

[12] Presumably, this also applies to every Court.

rehabilitative suspension; the Bar failed to explain the vast difference in its mitigation factors.

Attached hereto, as (**A #15)** is the "first" Proposed Referee Report drafted by Hoffmann. On page 7, under "D. Mitigating Factors" paragraph 2 states:

> 2. The disciplinary matter for which respondent pled guilty arose from a contested and acrimonious bankruptcy case. Respondent had **no dishonest or selfish motive** with respect to the conduct at issue, but was motivated by what she perceived as a continuing professional duty to zealously represent her client by bringing certain matters to the attention of the Court.

On page 8, under "D. Mitigating Factors" paragraphs 3, 4 and 5 state:

> 3. As a result of these efforts to zealously represent her client, Respondent incurred other penalties and suffered other sanctions above and beyond the Bar discipline to which she contends. These include civil fines and the obligation to complete certain continuing legal education requirements.
>
> 4. Notwithstanding the instant disciplinary case, Respondent has a **good reputation as a hardworking and honest professional within her local legal community**.
>
> 5. The instant conduct is an aberration in an otherwise good and productive legal career, and Respondent has remorse for the errors in judgment that prompted this disciplinary case and resulting sanction.

This is in stark contrast to the unsigned Report which was eventually filed by the Referee[13] to the Florida Supreme Court. [14] (**A #13**) The Bar's second Proposed

[13] The Referee Report was not signed and Respondent is not waiving her right to challenge same.

[14] As noted in the Initial Brief, the Referee adopted the Bar's proposed order in its entirety with the exception of Count I.

Referee Report, at page 19, "Standard 9.2 Aggravation". Suddenly, in direct opposition to the Bar's "first" proposed Referee Report, and despite the fact that no evidence was given at trial to support the change in aggravating factors, the Bar proposed the following: (**A #13**)

Standard 9.2 Aggravation

9.22(b)	**dishonest or selfish motive**;
9.22(c)	a pattern of misconduct;
9.22(d)	multiple offenses;
9.22(e)	bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
9.22(f)	submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
9.22(i)	substantial experience in the practice of law (respondent has been a member of The Florida Bar since April 26, 1991);

The Bar's motives must be questioned when such a drastic change appears in the Bar's two Proposed Referee Reports and none of the enhanced findings were addressed at trial. The Bar, without justification, is seeking a ninety-one day rehabilitative suspension. Normally, a ninety-one day rehabilitative suspension involve situations where a lawyer is in need of some type of rehabilitation, such as when a lawyer is accused of: stealing from his or her clients, suffering from some sort of substance abuse problem, anger problem or other personality disorders. Such conduct is absent from this proceeding and thus the question becomes, what conduct is the Bar asserting needs rehabilitation? No client was harmed or

damaged. The Respondent was initially complained about by her opposing counsel, and later for reporting to the bankruptcy court a number of conflicts of interest that were present in the Walker bankruptcy proceeding, which affected her and her client. (**TR. pp. 456-458**)(**IB. pp. 35-36**) Respondent testified at trial that she was involuntarily brought back into the Bankruptcy proceeding, not representing a client, but defending herself and protecting both Respondent's and her previous client, Cole's financial well being. Respondent and Mrs. Cole were jointly and severally sanctioned monetarily $80.000.00, which Respondent without any financial assistance from Cole successfully had reversed on appeal. **(R.E.X. #37).** Respondent who advised Mrs. Cole to seek a seasoned Bankruptcy attorney continued to assist Mrs. Cole, without compensation, when her seasoned bankruptcy attorneys refused to do so when Cole ran out of funds to pay them. **(A#2 Composite Ex.#4)** Cole had a total of five bankruptcy lawyers in a case that spanned six years. Clearly, this evidence negates any dishonest or selfish motive the Bar improperly injected in its second proposed referee report which was adopted by the Referee in his unsigned report. **(A#13)** Additionally, Respondent's client, Mrs. Cole, wrote directly to Bar Prosecutor Hoffmann on **September 12, 2007,** dispelling any wrongdoing and stated:

> I have learned that the Florida Bar has accused Ms. Gwynn of not properly representing me in the convicted felon James F. Walker's no asset Chapter 7 bankruptcy. Nothing could be further from the truth.

> During the eleven months Ms. Gwynn represented me, she was competent, forthright, highly ethical and earnest. Ms. Gwynn filed only one action, and that was to block the sale of the felon Walker's Bahamian Cat Cay property that felon Walker secured with funds he stole from me. (**A#2 Exhibit 5)**

Ms. Hoffmann ignored Mrs. Cole's letter denying any wrongdoing and continued, at every opportunity, to open new Bar investigative files against the Respondent. **(See I.B. at pages 45-47)**

The Referee was previously put on notice of Hoffmann's conduct of opening Bar files, in violation of the Bar's ACAP Rules in Respondent's Motion for Abatement. **(D.E.#134)** In **August, 2008**, Ms. Hoffmann, opened another Bar file, No. 2008-50,422(15C), again based on an **unsworn letter** from opposing counsel, Gary Rotella. On **August 11, 2009**, Respondent served Hoffmann a copy of the Eleventh Circuit opinion, wherein the Appellate Court removed any implication of a perceived misrepresentation that may have been made, and stated it was nothing more than a "misunderstanding" by the bankruptcy court. Notwithstanding the Appellate Court's finding, exonerating Gwynn, Hoffmann refused to close the Bar file and, on **October 28, 2009,** sent Respondent a Notice of Probable Cause Finding for Further Disciplinary Proceedings, wherein Hoffmann stated: (**A #17, attached hereto**).

> "You are hereby notified that the Fifteenth Judicial Circuit Grievance Committee "C", at a duly constituted meeting on the **28th day of**

> **October 2009**, and by majority vote of the eligible members present, found **probable cause**…" (*emphasis added*) **(D.E. 134) (A #17)**

This is yet again another misrepresentation by Bar Prosecutor Lorraine Hoffmann. In direct contradiction to Hoffmann's **October 29, 2009** Notice of Probable Cause Finding, in Bar File No. 2008-50,422(15C), just recently, on **March 30, 2011**, Respondent received a letter from Hoffmann's successor, Adria E. Quintela, Chief Branch Discipline Counsel, stating that the Fifteenth Judicial Circuit Grievance Committee "C" met on **March 23, 2011**, **and found no probable cause** in the above stated case, and closed the file. This contradiction shows the Bar's wrongful pursuit and prosecution of Respondent by former Bar Prosecutor Hoffmann. (**A #17 attached hereto**)

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 and impartial" review of the record below, supported by clear and convincing evidence presented at a fair proceeding. In this case, the Referee made two independent findings – one based on an absolute false quote, which the Referee, by adopting the Bar's proposed findings attributed to the Respondent, absent any record cite, as none existed, for the statement "good old boys club" was never articulated by the Respondent. The Referee's second independent finding was as a result of depriving the Respondent the right to an evidentiary hearing on Respondent's allegation that the court-ordered mediation was either taped and/or eavesdropped upon by the Florida Bar,

despite the fact that the Respondent filed a Verified Motion supported by five separate Affidavits. Instead, the Referee dismissed Respondent's allegations, supported by sworn Affidavits, in favor of Bar Prosecutor, Lorraine Hoffmann's telephonic denial, not sworn to under oath, that such taping and/or eaves dropping never occurred at mediation.

CONCLUSION

For the foregoing reasons, the Referee's unsigned findings of facts, recommendations of guilt, recommended discipline and assessment of costs should be rejected.

Furthermore, the fact that the Bar was specifically put on notice by this Court in The Florida Bar v. Lobasz, that "all sides in bar proceedings must conduct themselves according to the applicable rules, without misleading the opposing party or this Court," no discipline is warranted, in any event, under the circumstances of this case, especially since the same Bar counsel prosecuted both cases.

Considering the Bar's numerous misrepresentations of the record and the facts in this proceeding, including inflammatory statements which were never made, as an attempt to wrongfully influence this Court, and the Bar's failure to correct such ethical misconduct, after being put on notice, in the Respondent's previously filed Initial Brief and Motion to Strike, warrants a dismissal of this action. Obviously,

the directive of this Court, as stated recently in Lobasz, was not strong enough to deter The Florida Bar's continuing misconduct and contumacious disregard for this Honorable Court. It is patently unfair, unethical and unconstitutional that rogue Bar prosecutors, those who should set the standard for professionalism, are allowed to build a case based on misrepresentations and take away someone's livelihood without any repercussions. This activity must stop. Attorneys like Respondent who strive to uphold their ethical duty of reporting "conflicts of interest" will be chilled from doing so, when the Bar is allowed to engage in the activity it has in this proceeding.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Reply/Cross Answer Brief of the Respondent was 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 **16th** day of **July, 2011**.

_____

Mary Alice Gwynn
Petitioner/Cross Respondent

CERTIFICATE OF TYPE, SIZE AND STYLE

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

_____

Mary Alice Gwynn
Petitioner/Cross Respondent