IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ROBERT JOSEPH RATINER,

Respondent.
_____/

Supreme Court Case
Nos. SC08-689

The Florida Bar File
No.: 2008-70,084(15A)

RESPONDENT'S AMENDED INITIAL BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "The Bar" or "The Florida Bar." Robert Joseph Ratiner, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held on September 11, 2008 and the symbol "SJT" will be used to designate the hearing which was held on August 12, 2008 to resolve both parties' motions for summary judgment. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

STATEMENT OF CASE AND FACTS

A. Overview.

A Referee has recommended that a lawyer be disbarred for intemperate behavior during a deposition. The complaint filed by the Bar, and specifically confirmed by Bar counsel, clearly defined the scope of the charges against Respondent. The incident for which disbarment has been recommended is completely contained within 2.5 pages of transcript excerpted from the fourth day of a five day deposition. See Appendix at page 1 (Excerpt of Naylor Deposition Pages 154 through 156).

B. Procedural History.

On April 3, 2008, The Florida Bar filed a complaint against the Respondent, Robert Joseph Ratiner, in which the Bar alleged that the Respondent had engaged in unethical conduct during a deposition in the case styled *Claire J. Sidran v. E.I. Dupont de Nemours & Co., Inc.,* and designated by the Eleventh Judicial Circuit as case number 92-18377 CA 23. The Honorable George S. Reynolds, III, was appointed to serve as Referee. By order dated September 5, 2008, he entered partial summary judgment in favor of The Florida Bar in regard to five rule violations, but also found in favor of the Respondent as to two alleged rule

violations.[1] A final hearing was held on September 11, 2008, and a Report of Referee recommending disbarment was served on November 12, 2008. This appeal follows.

C. Facts.

In order to fully understand the actions taken by the Respondent at the May 17, 2007, deposition it is important to provide the background to these events. The Respondent has represented several plaintiffs against E.I. Dupont de Nemours & Co., (hereinafter "Dupont") concerning a fungicide that Dupont manufactured called Benlate. The Respondent began his first Benlate case in 1992 and over time he began the representation of several other plaintiffs against Dupont. TT64. The *Sidran* case, referenced above, is one of these cases.

One could easily describe the Benlate litigation as hotly contested and aggressively defended by Dupont's counsel or worse. TT71-72. Admitted into evidence as Resp. Exhibit 2, was a copy of this Court's Order in *The Florida Bar v. St. Louis*, 967 So. 29 108 (Fla. 2007), which made the following comment on DuPont's litigation tactics in the Benlate litigation:

> DuPont vigorously defended itself with carefully calculated strategies and "scorched earth" discovery tactics. St. Louis aggressively pursued discovery, motion practice, and investigations. He documented a pattern and practice of DuPont's deliberate discovery abuse. By "diligent and extraordinary"

[1] The Referee found that as a matter of law the Respondent did not violate R. Regulating Fla. Bar 3-4.4 or R. Regulating Fla. Bar 4-8.4(b).

> efforts, St. Louis discovered a secret Benlate field test DuPont conducted in 1992 in Costa Rica, in which Benlate had severely damaged the plants. He proved that DuPont had concealed or destroyed all of the physical evidence of that test, and that DuPont had denied under oath that the test even took place. St. Louis parlayed that evidence, together with other DuPont discovery violations, into a 110-page motion for sanctions, asking the trial judge to strike DuPont's pleadings in the Davis case. The judge agreed, and orally advised the parties that she was striking DuPont's pleadings as a sanction. *Id.*

Prior to the May 2007 deposition at issue, there were significant discovery disputes between Dupont and plaintiffs' counsel across the country over the documents that had been produced in litigation or could be produced for discovery purposes. TT76. Ultimately, Dupont established a records depository in Wilmington, Delaware where discovery documents could be reviewed.[2] TT76. With great effort, the Respondent was able to compel Dupont to fully describe the documents available in the depository and Dupont complied by producing multiple DVDs, one of which they asserted contained a "searchable index" of all of the documents that were in the depository and contained within the DVDs that were produced. TT94-95.

With the searchable index in hand, the Respondent sought to depose a corporate representative of Dupont to ascertain the accuracy of the index and the identification, accumulation, and organization of the documents that were available

[2] The testimony at trial was that there are "somewhere between 4.5 and 7 million pages of documents" in this depository. TT94.

in the depository. TT81. Dupont attempted to block this deposition by way of a motion for protective order, which was denied. TT79-80.

The subject deposition commenced on May 14, 2007 and the person designated by Dupont as the person with the most knowledge of the depository was Deborah Naylor. RR2. While the deposition was originally scheduled for two days (TT80) it lasted for five days and concluded on May 18, 2007. RR2.

In attendance at the deposition, along with the Respondent, was the deponent, Ms. Naylor, Fred Haupt, who was assisting the Respondent during the deposition, opposing counsel, Tom Sherouse, a court reporter[3] and a videographer.

This was a difficult deposition. Four different telephonic hearings were conducted with the trial judge during the course of the deposition.[4] The transcript

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[3] The same court reporter was not present on every day of the deposition. TT125.

[4] The first hearing, held on May 14, 2007, was at the Respondent's request based upon Dupont's counsel aggressively instructing the witness to read a document prepared by Dupont's lawyers in response to the Respondent's inquiries and resulted in the judge giving direction to the witness that she had to testify as to her personal knowledge prior to reading from notes or other documents. See Resp. Ex. 1 (May 14, 2007) at 176-184. The second hearing was held on May 15, 2007. This was also conducted at the Respondent's request and resulted in the trial judge admonishing Mr. Sherouse over his method of making objections and instructing the witness to answer the questions that were being asked. See Resp. Ex. 1 (May 15, 2007) at 119-129. A third hearing was held in the morning of May 16, 2007, at the judge's instruction, made at the hearing the day before to address the question of whether or not the judge needed to appoint a special master to attend the deposition, which was deemed unnecessary by the parties. See Resp. Ex. 1 (May 16, 2007) at 87-97. The last hearing, also held on May 16, 2007, was at Mr.

of the total deposition was introduced as Resp. 1. The deposition was also videotaped and that portion of the deposition which was the basis of the Bar's complaint was also introduced on CD as TFB 1.

In its complaint the Bar alleged that the Respondent had violated certain provisions of the R. Regulating Fla. Bar in relation to his reactions to an attempt, by Mr. Sherouse, to make the Respondent's personal laptop an exhibit to the Naylor deposition. It has been the Bar's position that the misconduct in this case, as contained in the Bar's complaint, was solely contained on the DVD introduced by the Bar. See TFB 1. The following exchange occurred during a hearing before the Referee:

> The Court: . . . the Bar's complaint only goes to what's occurred on the DVD.
>
> Ms. Lazarus: Correct.
>
> The Court: The Bar's motion for summary judgment . . . only goes to what occurred on the DVD.
>
> Ms. Lazarus: Yes. SJT p.62, l.5-11.

Sherouse's request where he complained about the conduct of the Respondent and the Respondent countered that Mr. Sherouse was once again improperly instructing the witness. The judge was not pleased with either attorney and directed the court reporter to provide her with an affidavit on what she had observed. See Resp. Ex. 1 (May 16, 2007 at 183-189). Interestingly, there was no hearing directed to the activity referenced in the Bar's complaint.

The Referee's Partial Summary Judgment is therefore only directed to the conduct that is found on the DVD. See TFB Ex. 1. The Report of Referee's factual findings are based on the Partial Summary Judgment that the Referee had previously granted, in part, in the Bar's favor. RR2. In particular the referee found that during the course of the deposition Sherouse "attempted to place an exhibit sticker on the Respondent's lap top computer" and that the Respondent reacted poorly to Sherouse's actions. RR2. While the Referee finds that Mr. Sherouse's actions were improper[5], he fails to note that just prior to the video camera being turned on at the Respondent's insistence, that Sherouse had made a previous attempt to make the Respondent's lap top an exhibit to the deposition by trying to place an exhibit sticker[6] on the lap top and that the camera is turned back on at the Respondent's insistence. See TFB 1. The video tape clearly shows that the Respondent places his lap top back on the table after Mr. Sherouse returned to his seat (having removed it after the first attempt to place an exhibit sticker on it) and that Sherouse thereafter made a second attempt to place an exhibit sticker on the laptop even though he had been warned not to do so. See Resp. Ex 1 (May 17, 2007) at 154, l. 7-9. The Referee found that the "Respondent very briefly touched

[5] In fact the Referee found that Mr. Sherouse's actions "were deliberately provocative" and "in retaliation for Respondent's placing Ms. Naylor's computer into evidence." RR17-18.

[6] See Resp. Ex 1 (May 17, 2007) at 154, l. 6-7.

Mr. Sherouse's hand" at the moment Sherouse tried to put an exhibit sticker on the lap top. RR2.

It is clear from the video tape of this portion of the deposition that the Respondent is extremely upset by Sherouse's actions.[7] See TFB 1. As a direct result of Sherouse's actions the Respondent takes two quick steps towards the head of the table, with the thought of placing himself on the same side of the table as Sherouse. See TFB 1. As quickly as he makes this sideways movement, the Respondent returns to his original location and begins a short animated conversation with Sherouse, the content of which includes the following exchange:

> Mr. Ratiner: Counsel, first of all you have no right to claim an exhibit, it isn't your deposition yet. That's number one, counsel.
>
> Mr. Sherouse: You have taken it off and torn off the exhibit.
>
> Mr. Ratiner: Sir, you are not going to touch it. How dare you? You are going to go before the Board Ethics Committee on this one, son. We are going to quit the deposition right now for the day so you can rethink what you are doing.[8] Resp. Ex. 1 (May 17, 2007), p. 155, l. 6-17. Also see TFB 1.

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[7] The Referee makes a specific finding that "Mr. Sherouse's conduct was deliberately provocative, especially in light of Respondent's forceful and deliberate admonition that Mr. Sherouse should not touch or attempt to place into evidence Respondent's computer." RR17-18.

[8] Mr. Sherouse, contrary to his subsequent charges of fear and intimidation, refused to allow the deposition to be concluded for the day and stated right after the laptop incident "We're either going forward with the deposition now or you have terminated it." Resp. Ex. 1 (May 17, 2007) p. 161, l. 1-2.

Mr. Sherouse's first and second attempts to place the Respondent's laptop into evidence and the Respondent's reaction thereto only covers less than three pages of transcript. Resp Ex. 1 (May 17, 2007) p. 153. l. 17 through p. 156, l. 22. Further the elapsed time for the conduct at issue in the Bar's complaint is just under three minutes. See TFB Ex. 1.

The Referee, in his Report at page 3, found in reference to what the Referee refers to as "the Laptop incident" that:

> The Respondent's conduct during the deposition was outrageous, disruptive and intimidating to the witness, opposing counsel, and other persons present during the deposition and otherwise prejudicial to the administration of justice.

As such the Referee found the Respondent guilty of having violated R. Regulating Fla. Bar. 3-4.3 [The commission by a lawyer of any act contrary to honesty and justice is cause for discipline]; 4-3.5(c) [A lawyer shall not engage in conduct intended to disrupt a tribunal]; 4-4.4(a) [A lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person]; 4-8.4(a) [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct.] and 4-8.4(d) [A lawyer shall not engage in conduct prejudicial to the administration of justice.].

In the final hearing, which after the granting of summary judgment was solely for a determination of the appropriate sanction and consideration of any mitigating or aggravating factors, the Respondent testified, as did Dr. Haupt and

one of the Respondent's law partner's, Christos Lagos, Esq. The Bar presented no live witnesses but did introduce certain exhibits and cross examined each of the Respondent's witnesses.

With regard to mitigation and aggravation, the Referee makes no reference to the Florida Standards for Imposing Lawyer Sanctions. Instead the Referee engages in a wide ranging discussion on other incidents, matters that were considered by the Bar's grievance committee but which the grievance committee had specifically declined to enter findings of probable cause and information contained within a Grievance Committee Recommendation of Diversion. It is the Respondent's position that the Referee erred in considering those matters as aggravation.

Notwithstanding that the Bar had recommended a ten day suspension, the Referee is recommending that the Respondent be disbarred. RR28. Knowing that his disbarment recommendation is not supported by existing case law, the Referee has also made an alternative sanction recommendation. RR.29-30. The Referee's "Plan B" is for a two year suspension from the practice of law coupled with three conditions for reinstatement which are:

1. Mental Health counseling;
2. All future depositions attended by the Respondent must be videotaped; and

3. Letters of apology to Ms. Naylor and the court reporters and videographer who attended the Naylor deposition.

The Respondent is appealing both of the Referee's sanction recommendations as they are clearly outside existing precedent.

SUMMARY OF THE ARGUMENT

The lawyer in this case behaved poorly at one discovery deposition wherein he temporarily lost his professional demeanor due to opposing counsel's repeated attempt to make the Respondent's personal lap top computer an exhibit to that deposition. While the Referee has specifically found that opposing counsel's actions were deliberately provocative, the Respondent's reaction immediately after the provocation fell below the standards for the legal profession and for this the Respondent is deeply remorseful,[9] professionally embarrassed and willing to accept the appropriate sanction for his actions. However, both sanctions being recommended by the Referee are extremely excessive and unsupported by existing case law and the Florida Standards for Imposing Lawyer Sanctions. An attorney's actions in being rude, obnoxious or otherwise offensive to opposing counsel, a litigant or a trial judge have resulted in a public reprimand, but the Referee in this case seeks to disbar the Respondent or at least suspend him for two years. Either recommendation can not be allowed to stand as both clearly violate all of the standards for imposing a disciplinary sanction by being unduly harsh, failing to allow for rehabilitation and depriving the public of an otherwise good and ethical attorney.

[9] See pages 24 through 25 of this brief and TTp.168, l.15-p.169. l. 16 .

ARGUMENT

I. WHETHER A LAWYER, WITH NO PRIOR DISCIPLINARY HISTORY, SHOULD BE DISBARRED BASED UPON PERSONAL CONDUCT AT ONE DEPOSITION?

At issue in this appeal is whether a lawyer should suffer the ultimate disciplinary sanction due to his personal conduct during one discovery deposition. In this case the Referee, notwithstanding his own acknowledgement that there is no precedent to support disbarment, is recommending that sanction to the Court. Realizing that his recommended sanction of disbarment does not meet this Court's standards, the Referee has also provided a "Plan B" sanction, wherein he recommends a two year suspension coupled with certain conditions. This "Plan B" sanction recommendation also fails to follow existing case law and precedent.

A. A PUBLIC REPRIMAND IS THE APPROPRIATE SANCTION, NOT THE REFEREE'S RECOMMENDATION OF A DISBARMENT OR A TWO YEAR SUSPENSION.

This Court has consistently held that it has a broader discretion when reviewing a sanction recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997). The Court should exercise its discretion in

finding both of the Referee's proposed sanctions[10] are too harsh under the facts of this case.

The Supreme Court in *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), stated that in selecting an appropriate discipline certain fundamental issues must be addressed. They are: (1) Fairness to both the public and the accused; (2) sufficient harshness in the sanction to punish the violation and encourage reformation; and (3) the severity must be appropriate to function as deterrent to others who might be tempted to engage in similar misconduct. Also see The Standards for Imposing Lawyer Sanctions, Standard 1.1. Both of the Referee's sanction proposals do not meet these criteria.

The Respondent seeks review of the Referee's disbarment and two year suspension recommendations because there is no precedential support for either sanction under the facts of this case. *The Florida Bar v. Shoureas*, 892 So. 2d 1002 (Fla. 2004) [A Referee's sanction recommendation is not second-guessed if it has a reasonable basis in existing case law.] In fact, the Referee acknowledges this lack of precedential support regarding disbarment at page 29 of his Report.

The Supreme Court of Florida has consistently held that disbarment is an extreme measure of discipline that should be used only when that lawyer "has

[10] In *The Florida Bar v. Isis*, 552 So. 2d 912 (Fla. 1989) this Court held that a referee should recommend a definite and precise form of discipline. This Referee's dual proposed sanctions fail to meet this requirement.

demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards" and therefore there must be a showing that this person "should never be at the bar." *The Florida Bar v. Moore*, 194 So. 2d 264, 271 (Fla. 1967). In a more recent decision, the Court affirmed that disbarment is "the extreme measure of discipline" that should "never be decreed where any punishment less severe . . . would accomplish the end desired." *Shoureas* at 1006. This Court has even stated that disbarment is reserved for those individuals who are "beyond redemption." *The Florida Bar v. Turk*, 202 So. 2d 848 (Fla. 1967). This Respondent is not "beyond redemption." The Respondent had a brief lapse of professional judgment during a hotly contested discovery deposition. Such conduct is neither demonstrative of "an attitude or course of conduct that is wholly inconsistent with approved professional standards." Based upon the foregoing analysis it is evident that the Referee's recommended sanction of disbarment is not warranted on the facts of this case. Further, the Referee's "Plan B" sanction of a two year suspension from the practice of law, coupled with some probationary conditions is also not warranted.

As in many disciplinary matters, there is no direct precedent that governs this dispute. However, there are many similar fact patterns resolved by the Court for which we can seek guidance in resolving this case. The first line of cases, some of which are cited by the Referee in his Report, discuss the appropriate

sanction for misconduct in the courtroom or at the courthouse. In each of these cases the Court was faced with a lawyer who had been disrespectful and confrontational with a judge during a hearing or a trial. For example, in *The Florida Bar v. Morgan*, 938 So. 2d 496 (Fla. 2006), a lawyer was suspended for being disrespectful to a trial judge during a felony trial. Part of the exchange between the lawyer and the judge was with the jury present. *Id.* at 497. The Court in *Morgan* goes into great detail about the comments made by the lawyer, which included the lawyer telling the judge he was "out of line", that the judge was being "obnoxious" and also stated to the judge that "You don't talk to me like this." *Id.* at 498. This heated exchange lasted for several minutes and the judge gave multiple warnings that the lawyer needed to reign in his commentary. *Id.* at 496-498. The Court in *Morgan* found that there was a reasonable basis in existing case law and the Standards for the 91 day suspension being recommended by the Referee, especially when you took into account that this lawyer had been disciplined twice for similar conduct. *Id.* at 499. The first discipline was a public reprimand[11] and the second sanction was increased to a ten day suspension.[12] Interestingly the Court noted in *Morgan* that Morgan's "repeated misconduct"

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[11] See *The Florida Bar v. Morgan* 717 So. 2d 540 (Fla. 1998) [making several intemperate or derogatory remarks to and about the judiciary].

[12] See *The Florida Bar v. Morgan* 791 So. 2d 1103 (Fla. 2001) [making false statements about the qualifications and integrity of a judge].

warranted "the next level of available discipline – a rehabilitative suspension and that any future misconduct of the same vein could result in disbarment." *Id.* at 499. The Court in the three *Morgan* cases took a measured approach to the lawyer's actions by starting with a public reprimand, moving to a ten day suspension, concluding with a ninety one day suspension but warning that any future conduct could result in disbarment. Unlike *Morgan*, the Respondent in the instant case did not disrespect a judge or the sanctity of our judicial process. Also, unlike *Morgan*, the Respondent has never been disciplined in the past. Accordingly, the Referee's recommendation that the Court enter the highest sanction in this case is contrary to the measured approach demanded by the Court consistent with its decisions in *Morgan*. Moreover, the Referee readily admits page 29 and 30 of his Report that there was no precedent to support disbarment.

In a more recent case this Court affirmed the *Morgan* sanction philosophy by imposing a ninety one day suspension for a lawyer who had been publicly reprimanded twice. *The Florida Bar v. Abramson*, 34 Fla. L. Weekly S30 (Fla. 2009). The Court made the following comment on Abramson's misconduct:

> Abramson's misconduct was egregious. He was disrespectful and confrontational with the presiding judge in an ongoing courtroom proceeding in the presence of the pool of prospective jurors in a criminal case. Regardless of any perceived provocation by the judge, Abramson responded inappropriately by engaging in a protracted challenge to the court's authority. His ethical alternative, if he believed the trial court had erred, was by writ or

> appeal. He has also been publicly reprimanded twice before for serious misconduct.

The Court in *Abramson* also discussed the applicability of Standard 6.22 which states that a lawyer should be suspended when that lawyer "knowingly violates a court order or rule, and causes injury or potential injury to a client or party, or causes interference or potential interference with a legal proceeding." The Court found that Abramson's confrontation with the trial judge caused "interference with a legal proceeding" in that the conduct occurred in the court room and before the jury. In the case at hand, the conduct occurred during a discovery deposition and while it briefly interrupted the deposition, the deposition continued immediately after the conduct (at Mr. Sherouse's insistence) and concluded the next day. And again, this Respondent has never been previously disciplined by the Bar.

While *Morgan* and *Abramson* were both ninety one day suspensions, the Court has also suspended a lawyer for six months. *The Florida Bar v. Wasserman*, 675 So. 2d 103 (Fla. 1996). In *Wasserman* the lawyer:

> . . . attended a hearing before Judge Bonnie Newton and lost his temper after a ruling by Judge Newton. He stood and shouted his criticism, he waived his arms, he challenged Judge Newton to hold him in contempt and displayed his arms as if to be handcuffed, he stated his "contempt" for the court, he banged on the table and generated such a display of anger that the bailiff who was present felt it was necessary to call in a backup bailiff. *Id.* at 104.

If that was not enough, the lawyer continued his tirade outside the courtroom where he instructed his client to disobey the judges ruling and in a second case before the court the lawyer also engaged in another incident where he profanely berated a judicial assistant. *Id.* The lawyer in *Wasserman* had been previously disciplined on four occasions – an admonishment, two public reprimands and a sixty day suspension. It is clearly evident that Wasserman's angry tirade in the court room was much more significant than the Respondent's animated shredding of an exhibit sticker. Further, in the instant case there was no tirade—just a brief colloquy. There was no significant disruption of a judicial proceeding but rather a brief three (3) minute delay. There was no instruction by Respondent to disobey any ruling. There was no profanity. There was no abuse or embarrassment of any judicial officer or third person involved in the judicial process. This is precisely why the ultimate sanction of disbarment or a prolonged suspension is not supported by the case law or the facts. And once again, this Respondent has never been previously disciplined.

Abusive conduct outside the courtroom has also not been tolerated by this Court. However, the Court has recognized that this type of conduct was deserving of less than a suspension. For example a lawyer received a public reprimand for mailing an insulting and highly unprofessional letter to a client's former husband concerning a child support obligation. *The Florida Bar v. Uhrig,* 666 So. 2d 887

(Fla. 1996). Similarly in *The Florida Bar v. Buckler*, 771 So. 2d 1131 (Fla. 2000), a lawyer was publicly reprimanded for criminal defense attorney's actions in sending a humiliating and intimidating letter to the victim of a crime in an attempt to have her drop the charges she had filed. Lastly, a lawyer's actions in sending a letter to opposing counsel in a workers compensation case in which he provided a copy of a newspaper article describing the recent murder of an attorney at a deposition in a workers compensation case also resulted in a public reprimand. *The Florida Bar v. Sayler*, 721 So. 2d 1152 (Fla. 1998).

The Court has also been faced with evaluating misconduct during a discovery deposition. Just after the completion of a deposition a lawyer made demeaning and profane comments to opposing counsel. *The Florida Bar v. Martocci*, 699 So. 2d 1357 (Fla. 1997). In affirming a Referee's finding of no guilt this Court stated that they could not condone the conduct but based on the totality of the circumstances, inclusive of the conduct of opposing counsel, that they would not overturn the Referee. *Id.* at 1360.

In a case that combines some of the same themes of misconduct in the courtroom as well as outside the courtroom during the course of litigation a lawyer was suspended for ninety one days. *The Florida Bar v. Tobkin*, 944 So. 2d 219 (Fla. 2006). In *Tobkin*, the lawyer engaged in contumacious conduct before the trial court, knowingly violated a variety of discovery orders and created a

disturbance "at a cancer center . . . when he tried to prevent defense counsel from obtaining his client's medical records." *Id.* at 222.

When comparing the Referee's two sanction recommendations to the case law it is clear that both sanctions, the disbarment and the two year suspension, fail to follow existing precedent. Both the *Morgan* and *Abramson* cases resulted in a ninety one day suspension, but the reason for those ninety one day suspensions was based upon the fact that both lawyers had been previously disciplined on several occasions. Both lawyers started their disciplinary history with public reprimands and in *Morgan* the public reprimand (and later ten day suspension) was for the same type of misconduct. Accordingly, the appropriate sanction for a lawyer who engages in the conduct referenced by the Referee in this case is a public reprimand.[13]

B. THE REFEREE IMPROPERLY FAILED TO CONSIDER MITIGATING FACTORS.

The Referee's Report is devoid of any comment on the mitigation that is present in this case. The Florida Standards for Imposing Lawyer Sanctions, which should be considered by a Referee prior to determining an appropriate sanction, sets forth the potential factors that can be considered in mitigation of a disciplinary

[13] If the Court believes that a suspension is warranted, that suspension should be no more than the 10 days in the second *Morgan* case or the 10 day suspension requested by the Bar during the trial of this matter.

sanction. Fla. Standards for Imposing Lawyer Sanctions, Standard 9.32 (hereinafter Standard ___.). Three of these factors are clearly evident on the record.

While each disciplinary action is different, one of the most significant mitigating factors is the lack of a prior disciplinary record.[14] Standard 9.32(a). In this case the Respondent comes before the Court having never received a disciplinary sanction! The Respondent's testimony at trial was that he was admitted to the Florida Bar in 1990 and that during his approximate 19 years of practice he has never been disciplined by The Florida Bar. See TT p.63, l.20 – p. 64, l. 2. There is no conflicting evidence presented by the Bar, or any other witness, on this point, nor can there be. Therefore, the unrefuted clear and convincing evidence in this case is that this Respondent has no prior disciplinary record. Yet, the Referee erroneously fails to mention this fact in his Report of Referee and fails to consider this mitigation in his sanction recommendation.

Equally evident on the record and unrefuted by the Bar at trial was Standard 9.32(g) [character or reputation]. The Respondent presented two witnesses who opined on the Respondent's character and qualities as a lawyer. The more compelling character testimony was presented by Cristos Lagos, Esquire, one of

[14] This Court has consistently noted that the "Court considers the respondent's previous history and increases the discipline where appropriate." *The Florida Bar v. Morrison*, 669 So.2d 1040, 1042 (Fla.1996).

the Respondent's law partners. Mr. Lagos testified at length about his knowledge of the Respondent as a lawyer and a family man. TT 54-63. Mr. Lagos' testimony included the following comment about why he became Mr. Ratiner's partner: "I was very . . . impressed with not only Bobby's abilities and his integrity and the way that he presented himself, but also his legal family was very loyal to him." TT58, l. 1-4. Mr. Lagos' testimony was even more compelling in response to a question concerning how the firm's clients perceive the Respondent. Mr. Lagos stated that: ". . . the way that Bobby treats his clients is very similar to the way he treats his family and the way that he treats everybody at the firm. . . So his clients – love is a hard word, but a lot of his client's love him." TT 50, l. 12-21.

Another witness, Dr. Haupt, added the following testimony about the Respondent:

> Q. Would you have any reservation about recommending Mr. Ratiner as counsel to a loved one or a friend of yours?
>
> A. The answer is no. I would not…. TT p.42, l.18-25.

The Referee makes no mention in his Report about this character testimony. Nor does the Bar take issue with this testimony. Thus there is unrefuted testimony in the record that establishes Standard 9.32(g) [character or reputation].

Standard 9.32(b) states that an absence of a dishonest or selfish motive may be considered as mitigation. None of the substantive rule violations found by the Referee have any element of dishonesty or selfishness. Further, there is no

evidence of same in the record below. In fact the major thrust of the Referee's findings have to do with personal conduct that he found to be unprofessional, rude, and otherwise inappropriate regarding the manner in which a lawyer should act at a deposition.

The last mitigating factor in this case is discussed by the Referee in his Report, wherein he opines that he does not feel that the Respondent has expressed remorse for his actions. At page seven of his Report the Referee remarked that "Not once did the respondent express remorse for any of his multiple acts of misconduct." He then uses an example to support his position, but this example of "misconduct" (chewing tobacco during the deposition) was not charged in the Bar's complaint.

During cross examination by Bar counsel, the Respondent was directly asked about his remorse to the "lap top incident". In his response to this questioning, the Respondent testified as follows:

> . . . and if I had it all to do over again, could anticipate this coming, I definitely would act – would respond differently. I would not respond to it at all. I would ignore it. If it came to a point where something happened, you know, I would handle it very differently. . . **I am sorry I reacted that way** . . . TTp.168, l.15-p.169. l. 16 (emphasis supplied).[15]

[15] Also included in the record is a copy of Judge Amy Steele Donner's June 28, 2007 Order on Dupont's Motion for Protective Order wherein Judge Donner declined to sanction the Respondent for the acts referenced in this case and specifically found at paragraph two of said order that the Respondent had apologized for his conduct.

The Respondent also expressly apologized for a remark **(**not included in the Bar's complaint**)** made during the deposition that he had intended only Dr. Haupt to hear, but was apparently overheard by others. See TTp.141 l. 1-3.

The foregoing references to the record clearly show that the Referee is mistaken in his statement that "not once did the respondent express remorse" for any of the conduct that the Referee found offensive. The Referee failed to consider the foregoing testimony that was unrefuted in any manner by the Bar. Further, the Referee, in his quest to harshly punish the Respondent, failed to consider any mitigating factor that was found in the record (lack of a prior disciplinary record, otherwise good character and remorse). In *The Florida Bar v. Clement*, 662 So. 2d 690 So. 2d 690 (Fla. 1995), this Court held that a Referee "should not arbitrarily reject unrebutted testimony." As demonstrated above this Referee has arbitrarily rejected the unrebutted testimony related to the mitigating factors referenced above.

C. THE REFEREE IMPROPERLY CONSIDERED CERTAIN MATTERS AS AGGRAVATION.

While the Referee ignored the mitigation that was present in this case, he improperly went out of his way to consider a variety of topics as aggravation.[16]

[16] He even allowed the Bar, post trial, to improve one of its exhibits. At trial The Florida Bar introduced a document executed by a witness, Deborah Naylor, but the document did not indicate that it was made upon personal knowledge and

The Referee, in his Report, accurately reflected the Respondent's argument why these issues should not be considered. The Referee noted:

> Similarly, Respondent maintains incidents covered by Respondent's prior no probable cause finding and diversion cannot be used as aggravators. Respondent's position is the consideration of these bare allegations and accusations without any competent, substantial evidence establishing the occurrence or impropriety of such events violates any concept of fundamental fairness. Further, allowing the Bar to proffer matters for which a grievance committee found no probable cause improperly gives the Bar the ability to second-guess its own committee. RR24-25.

Notwithstanding that he understood the Respondent's argument in this regard, the Referee just plainly states "I reject this contention" without explaining why or addressing the fundamental fairness and due process concerns that were raised by the Respondent.

The first example of overreaching by the Referee was his decision to consider a grievance committee finding of diversion, and the conduct referenced therein, as aggravation. RR20-22. Also see TFB Ex. 8.

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was not sworn to by the witness. See TFB Ex. 3. Notwithstanding this fact, the Referee gave great weight to this document and post trial, over the Respondent's objection, allowed the Bar to supplement the record to cure the infirmity with the document. The Referee announced his ruling at the conclusion of the trial and this was before the Bar had Ms. Naylor execute a new document to replace the one introduced at trial.

R. Regulating Fla. Bar 3-5.3, sets forth the requirements for entry into a Practice and Professionalism Enhancement Program, also known as diversion. This Court has described R. Regulating Fla. Bar 3-5.3 as:

> . . . a new rule that creates a program of diverting disciplinary cases to practice and professionalism enhancement programs as an alternative to existing sanctions. The practice and professionalism enhancement programs are intended to provide educational opportunities to members of the Bar for enhancing skills and avoiding misconduct allegations. *The Florida Bar: re Amendments to the Rules Regulating Fla. Bar*, 664 So. 2d 282, 282-283 (Fla. 1994).

In deciding to adopt R. Regulating Fla. Bar 3-5.3, this Court stated:

> In spite of several comments in opposition to this new rule, we find that diversion to such practice and professionalism enhancement programs is a remedial action which serves the interests of both the Bar and the public. The thrust of this program is to identify lawyers who are beginning to have problems with the management of their practices as evidenced by minor disciplinary complaints. The lawyers are then provided skills training or professional enhancement, thereby diverting serious matters of misconduct. *Id.*

A lawyer, who has not violated the R. Regulating Fla. Bar, can be requested to attend a Practice and Professionalism Enhancement Program. See R. Regulating Fla. Bar 3-5.3(b). A finding of no probable cause with a letter of advice is one of two types of cases that can be sent to the diversion program. The second type of case that can be sent to diversion is a minor misconduct case. Assuming *arguendo* that the matters referenced in the diversion report constituted minor misconduct (a

point not conceded by the Respondent)[17] then what the Referee has done is decide that these issues on minor misconduct aggravate a public reprimand case all the way up to disbarment. [18] The same can be said about the use of issues that were rejected by a grievance committee in that the committee did not even deem them worthy of a finding of minor misconduct, yet the Referee finds that these acts coupled with the laptop incident equate to a disbarment for a 19 year attorney who has never been disciplined. Most respectfully, this is an absurd legal position. R. Regulating Fla. Bar 3-5.3(i).

Existing precedent as well as the Florida Standards for Imposing Lawyer Sanctions state that a lawyer's prior disciplinary history can be used as aggravation. See for example *Morrison*, Standard 9.22(a). In fact, Standard 9.22(a) goes further and also states that certain findings "of minor misconduct should not be considered as an aggravating factor."[19] As the grievance committee's diversion report is not considered as a prior disciplinary sanction, the

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[17] The diversion rule specifically states that acceptance into the diversion program will cause the grievance file to be closed and that the resolution of the case through diversion "shall not constitute a disciplinary sanction."[17] R. Regulating Fla. Bar 3-5.3(i).

[18] Notwithstanding that a diversion is not a disciplinary sanction, the Referee treated it as such and appears to have given it as much weight, if not more, than a disciplinary sanction.

[19] If it is more than seven years old.

report, and the matters referenced therein, should not have been considered as an aggravating factor.[20]

Even if the Court decides that the diversion report can be used as aggravation, it is clear that the incidents disclosed therein do not warrant the imposition of disbarment. The diversion report discusses two incidents.[21] The first incident was approximately nine years ago.[22] There is very limited testimony on this incident in the record and it does not explain this matter any further than that which is referenced in the Diversion Report, except that the Respondent had tried to recuse the trial judge in that case. TT206-297.

The second incident referenced in the Diversion Report is specifically denied by the Respondent and is explained in the record. TT207-209. One can clearly see that the incident arose outside the normal legal arena and that two lawyers had a quick conversation at a school basketball game that resulted in one lawyer accusing the other of verbally threatening behavior. The Respondent

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[20] The Diversion Report will also show that the Respondent never admitted to the factual accuracy of the allegations in the Report but acknowledged that he would accept diversion as a means of resolving the grievance. See TFB Ex. 8. TT164-165.

[21] Please note that other than the bare allegations in the Diversion Report, there is no proof of same in this case. The Bar presented no evidence to support the matters referenced in the Diversion Report and the Respondent provided testimony disagreeing with the content of significant portions of the Diversion Report.

[22] The Bar's statute of limitations is six (6) years. See R. Regulating Fla. Bar 3-7.16(a).

disagrees with the description of the event but agreed to accept the diversion as a means of resolving the grievance. In any event, both of these events did not rise to the level of a disciplinable offense and should not be used to aggravate the sanction recommendation in this case.

The Referee in this case also considered other matters that were outside the scope of the actual complaint filed by The Florida Bar. As the Referee admits in his Report he was cognizant of the fact that these other issues had been considered by a grievance committee and that the grievance committee specifically rejected them by not finding probable cause on these other matters. RR 24-25. The R. Regulating Fla. Bar are very clear. There must be a finding of probable cause by a grievance committee in order for the Bar to file its formal complaint on an issue. See R. Regulating Fla. Bar 3-3.2(b). In essence what the Bar has done, as allowed by the Referee, is to circumvent the lack of a finding of probable cause as to certain matters but still present the same issues to the Referee in order to enhance the sanction that would be imposed.

This exact issue appears to be a case of first impression. However, *The Florida Bar v. Trazenfeld*, 833 So. 2d 734 (Fla. 2002), provides guidance on a similar issue. In *Trazenfeld* a grievance committee had considered a set of facts and entered a finding of no probable cause with a letter of advice as to certain potential rule violations. *Id.* at 736. Two years later the Bar filed a complaint on

the same core facts but with different rule violations. *Id*. at 735. While a Referee entered summary judgment in Trazenfeld's favor on *res judicata* grounds, the Court reversed finding that the original grievance committee finding of no probable cause was not a final determination[23] and therefore the Bar's prosecution could go forward. *Id.* The difference between this case and *Trazenfeld* is that there was a finding of probable cause from the grievance committee that formed the predicate of the issues raised by the Bar and in this case there is no probable cause finding on these other issues. Accordingly, the Referee should not have considered in aggravation any of the matters specifically rejected by the grievance committee as it was not part of its finding of probable cause in this case.

The majority of the matters raised by the Bar that were rejected by the grievance committee occurred during the Naylor deposition. Each of the matters were also considered by the trial judge in the case, Amy Steele Donner. While she did not approve of some of the things that occurred during the Naylor deposition, she declined to sanction either attorney. As the Referee notes in his Report, these other allegations can be summed as follows: ". . . it was very inappropriate and unprofessional for Mr. Ratiner to make rude comments to and about opposing counsel and the witness, and to chew tobacco during the deposition." RR16. While these matters certainly create issues of professionalism, when taken

[23] See R. Regulating Fla. Bar 3-7.4(j)(3).

individually and as a whole, did not result in sanctions by the trial court and did not even warrant a finding of probable cause by the grievance committee that had all of the operative facts and evidence before it. As such these additional matters should not be considered as aggravation.

D. THE REFEREE'S RECOMMENDED PROBATIONARY TERM REQUIRING ALL FUTURE DEPOSITIONS BE VIDEOTAPED IS NOT AUTHORIZED BY THE RULES REGULATING THE FLORIDA BAR.

The Referee has recommended three probationary requirements (or conditions precedent to being able to return to the active practice of law). Among these recommendations was the requirement that all future depositions taken by the Respondent be video taped. There was a secondary provision to the videotaping but the Referee was less clear in whether he was recommending that there be a co-counsel present at the depositions also.

The first difficulty with this proposed portion of the sanction is that it does not set forth a time frame on how long this procedure must remain in place or if the Referee wanted this provision to remain for the rest of the Respondent's legal career. R. Regulating Fla. Bar 3-5.1(c) states that a "respondent may be placed on probation for a stated period of time of not less than 6 months nor more than 3 years or for an indefinite period determined by conditions stated in the order." The Referee fails to provide the necessary time frame and as such his recommendation is flawed.

Secondarily, the requirement of co-counsel appears to follow one of the allowed probationary terms (supervision of all or part of the respondent's work by a member of The Florida Bar) but the requirement of video taping every deposition is clearly not set forth in the allowed probationary terms. R. Regulating Fla. Bar 3-5.1(c). Furthermore, this provision would unfairly and unnecessarily increase the costs of litigation to the Respondent's client's detriment or create a potential for conflict between the Respondent and his client relative to these costs attendant to video taping all future depositions.

CONCLUSION

This is not a disbarment case nor is it a suspension case. It is clear that this Court has consistently publicly reprimanded lawyers for the type of misconduct found in this case, as long as the lawyer had not previously engaged in the same type of misconduct. In this case the Respondent has never previously been disciplined, presented evidence of his otherwise good character and is remorseful for his actions. It is respectfully contended that both sanctions being recommended by the Referee be rejected and that the Court impose a public reprimand. If the Court believes that a suspension is warranted, such suspension under existing case law should be for no more than ten days.

WHEREFORE the Respondent, ROBERT JOSEPH RATINER, respectfully requests that the Referee's sanction recommendations be rejected, that the sanction

imposed in this case be a public reprimand and that the Court grant any other relief that is deemed reasonable and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail on this ___ day of June, 2009 to Randi Klayman Lazarus, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M100, Miami, FL 33131 and to Kenneth Marvin, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that e-mail forwarded to the Court has been scanned and found to be free of viruses, by McAfee.

By: _____
KEVIN P. TYNAN, ESQ.

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ROBERT JOSEPH RATINER,

Respondent.
_____/

Supreme Court Case
Nos. SC08-689

The Florida Bar File
No.: 2008-70,084(15A)

APPENDIX