IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

KOKO HEAD,

Respondent.
_____/

Supreme Court Case No. SC10-1175

TFB File Nos. 2009-31,193(4C)
2010-30,043(4C) and
2010-30,467(4C)

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Complainant, The Florida Bar, is seeking review of the Report of Referee recommending an admonishment and one-year probation to complete 5 hours of CLE.

Complainant will be referred to as The Florida Bar, or as the Bar. Respondent, Koko Head, will be referred to as Respondent, or as Mr. Head throughout this brief.

References to the Report of Referee shall be by the symbol "ROR" followed by the appropriate page number.

References to specific pleadings will be made by title. References to the transcript of the final hearing are by symbol "TR," followed by the volume, followed by the appropriate page number. (e.g., TR III, 289).

References to Bar exhibits shall be by the symbol "TFB Ex." followed by the appropriate exhibit number (e.g., TFB Ex. 10).

STATEMENT OF THE CASE

On June 17, 2010, The Florida Bar filed a 2-count Complaint and Request for Admissions based on 3 underlying grievances filed against Respondent.

On July 8, 2010, Respondent filed a Motion to Dismiss as well as an Answer and Affirmative Defenses.

The Honorable Terrence R. Perkins was appointed referee to hear this matter on July 14, 2010.

Respondent filed his Response to Request for Admissions on July 19, 2010.

On July 21, 2010, a telephonic case management conference was set for September 2, 2010. Respondent's Motion to Dismiss was set to be heard at the same time.

The Florida Bar filed its Response to Respondent's Motion to Dismiss on August 25, 2010.

On August 26, 2010, Respondent filed a Motion to Continue/Reschedule Hearing.

On August 27, 2010, the court entered an Order Granting Respondent's Motion to Continue/Reschedule Hearing and rescheduled the case management conference for September 17, 2010.

On that date, the parties appeared by phone for the case management conference and the court verbally denied Respondent's Motion to Dismiss. On September 28, 2010, the court entered its order denying Respondent's Motion to Dismiss and allowing him 10 days to amend his Answer if he so wished.

On October 20, 2010, Respondent filed his First Request for Production of Documents, Interrogatories and Request for Admissions to The Florida Bar. The Notice of Service of the Interrogatories, however, was dated October 29, 2010.

On October 25, 2010, the final hearing was set for December 20, 2010.

However, due to a conflict in the court's schedule, on November 4, 2010, the final hearing was re-set for January 14, 2011.

As a result, the Bar filed a Motion for Extension of Time to File Report of Referee on November 11, 2010. That motion was granted on November 17, 2010, allowing the referee until February 28, 2011, to file the report of referee.

The Florida Bar filed its First Interrogatories and First Request for Production on November 18, 2011. On December 14, 2010, The Florida Bar filed its responses to Respondent's First Request for Production and Request for Admissions and on December 15, 2010, filed its answer to Respondent's First Interrogatories.

On January 12, 2011, two days before the scheduled final hearing, Respondent filed an Emergency Motion to Continue Final Hearing alleging that his "indispensible

witness," Circuit Judge Michael Traynor, was unable to be present. Consequently, Respondent requested a 30 day continuance. Judge Traynor was unavailable because Respondent had only attempted to subpoena him the day before.

On January 13, 2011, the court conducted a telephonic hearing on Respondent's "Emergency Motion." During the hearing, The Florida Bar objected to the continuance arguing that Respondent had had sufficient time to prepare for the final hearing and to arrange for his witnesses to be present since the final hearing date had been set in early November 2010. Bar counsel also moved *ore tenus* for an order compelling Respondent to respond to the pending discovery requests. Nevertheless, the referee granted Respondent's motion.

On January 19, 2011, the referee entered an Omnibus Order Granting Respondent's Motion to Continue, Resetting the Final Hearing and Granting The Florida Bar's Ore Tenus Motion to Compel. The final hearing was continued to February 18, 2011, and Respondent was ordered to respond to The Florida Bar's discovery requests within 5 days.

On January 21, 2011, Respondent filed his Answers to Interrogatories and responded to the Bar's Request for Production.

On Friday, February 11, 2011, at 7:12 p.m., nearly one month after receiving his requested continuance, Respondent emailed Bar counsel his Notice of Taking

Deposition of Judge Traynor, unilaterally setting the deposition for Monday, February 14, 2011. Respondent failed to consult with Bar counsel about this date and consequently, Bar counsel was unavailable to attend. TR I, 8-10.

On February 14, 2011, based on Respondent's improper notice of Judge Traynor's deposition and his failure to notify (or consult with) Bar counsel and other interested parties, The Florida Bar filed an Emergency Motion to Quash Respondent's Notice of Taking Deposition.

Respondent filed a Response to the Motion to Quash on February 14, 2011.

On February 14, 2011, after being notified of Bar counsel's unavailability, Respondent again unilaterally re-scheduled Judge Traynor's deposition for Wednesday, February 16, 2011, again serving the Notice via email. Bar counsel once again informed Respondent of his unavailability since he was traveling to Jacksonville that day for Grievance Committee meetings and to prepare for the upcoming trial which was scheduled for February 18, 2011. TR I, 8-10.

On February 16, 2011, Respondent filed an Emergency Motion for Issuance of Subpoena for Deposition based on Judge Traynor's refusal to submit to deposition without the presence of Bar counsel.

In addition to his Emergency Motion, Respondent filed a Second Amended Notice of Taking Deposition, this time scheduling Judge Traynor's deposition for

11:15 a.m. on Thursday, February 17, 2011. On that date, however, Judge Traynor was taken ill and was not able to attend. TR I, 8-10.

On February 17, 2011, Respondent filed Respondent's Second Emergency Motion to Continue Final Hearing or in the Alternative to Bifurcate Final Hearing or in the Alternative to Postpone Final Argument Pending Receipt of Judge Traynor's Deposition Transcript. The court declined to hear Respondent's latest motion.

Consequently, the parties appeared for final hearing on February 18, 2011. Before the final hearing began, the referee granted the Bar's Emergency Motion to Quash Notice of Taking Deposition but reserved ruling on sanctions.[1] The court then denied Respondent's Second Emergency Motion to Continue and the final hearing began.

As an initial matter, The Florida Bar moved to strike Respondent's Supplemental Notice of Answering Interrogatories and Supplemental Response to Request to Produce because that morning, at the final hearing, Respondent handed Bar counsel both documents. Respondent had listed a new witness and additional documents none of which the Bar had had time to investigate or review.

[1] Ultimately, the court sanctioned Respondent by ordering him to pay $500 to The Florida Bar Client Security Fund. Respondent has already complied with the court's order and has paid the money.

The referee granted the Bar's motion to strike stating that the Bar had requested this information from Respondent months before in discovery. Additionally, the court granted the Bar's request to prevent Respondent from introducing any of the underlying documents from the stricken materials.

Although the Bar was able to present its case-in-chief, due to time constraints, the court continued the final hearing until Thursday, February 24, 2011, to allow Respondent to present his case.

On February 21, 2011, Respondent filed a Third Amended Notice of Taking Deposition, scheduling Judge Traynor's deposition for Wednesday, February 23, 2011 – the day before the conclusion of the final hearing. Because of Respondent's failure to timely and properly schedule Judge Traynor's deposition, Bar counsel was forced to attend the deposition by cell phone while sitting in a car pulled over on the side of the road in a parking lot. *See*, Respondent's Ex. 39, Deposition of Judge Traynor, p. 4, lines 11-13.

Respondent filed an Emergency Motion for Extension of Time to File Report of Referee on February 21, 2011, which was granted by Order dated February 23, 2011, allowing until March 30, 2011 for the filing of the Referee's Report.

The final/penalty hearing concluded on February 24, 2011.

On March 30, 2011, the referee filed the Report of Referee finding Respondent guilty of professional misconduct. Specifically, the referee found that Respondent had violated the following Rules Regulating The Florida Bar: As to Count I: 4-3.3(a)(Candor Towards the Tribunal), 4-4.1 (Truthfulness in Statements to Others) and 4-8.4(c) (A Lawyer Shall Not Engage in Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation); and, As to Count II: 4-1.8(h)(Limiting Liability for Malpractice). Based on the foregoing, the referee recommended that Respondent receive an Admonishment, be placed on probation for a period of one year to complete during such time at least five hours of continuing legal education and training in the topics of ethics and/or professionalism, and be ordered to pay the Bar's costs in these proceedings.

STATEMENT OF THE FACTS

This is a two count complaint, arising out of three grievances filed with The Florida Bar against Respondent.

COUNT I

Count I arose from an on-going commercial tenant eviction where Respondent still represents the landlord, Mr. Lucas. TR I, 62, 104. Complainant, Margaret Wharton, is Respondent's opposing counsel representing both the tenant, Mr. Lehmann, owner of Nation's Fence, and the new buyer, Chris Johnson, also a complainant herein. TR I, 62, 72-73.

Mr. Johnson's company, a competitor of Nation's Fence, was negotiating to purchase the assets, fixtures, inventory, and current jobs at the branch of Nation's Fence located at the premises in question. TR II, 214. The sale had not yet consummated because Mr. Johnson had not been able to enter the premises to "take an inventory of what was actually there." Id.

Prior to the incidents giving rise to the grievances, Mr. Johnson and the landlord (who at the time was not represented by Respondent) had had several phone conversations, finally agreeing that Mr. Johnson would pay the remaining month's rent to allow sufficient time to move the business out of the leased premises. TR II, 217, TR IV, 438-439. He obtained the certified funds, specifically requested by the landlord,

and on March 19, 2009, went to the property to pay the balance of that month's rent and to provide the landlord a copy of a letter from Mr. Lehmann giving him authority to enter the premises. TR II, 219, ROR 15, TFB Ex. E.

However, when Mr. Johnson arrived, the landlord, based on Respondent's advice, denied him access to the property. TR II, 219. Respondent arrived shortly thereafter and produced a letter which purported to show that an action had been filed in civil court for distress. TR II, 221, ROR 16, TFB Ex. F. In fact, no such case had been filed, no distress writ had been obtained, and the case number listed on the letter was a fabrication. TR IV, 438-440, ROR 11-12.

Respondent admitted that he dictated the letter, went to the location, and to prevent access to the property, brought with him his letter (containing the fictitious case number) and eventually posted the letter on the door. TR IV, 439, ROR 12. The referee rejected Respondent's testimony regarding how the case number came to be on the letter finding instead that the only reason that information was on the letter was to make it appear as though a case had been filed to give Respondent a tactical benefit. ROR 11-12.

At some point the police were called to the scene and the officers ultimately asked Mr. Johnson to leave. TR II, 220-222. There is conflicting testimony regarding Respondent's presence at the premises while the police were there; however, Mr.

Johnson's testimony was that Respondent's letter, that he hand-delivered to the scene, was what finally caused the police to ask Mr. Johnson to leave because he was allegedly being evicted. TR II, 222.

On that same date, Ms. Allen, a Nations Fence employee, visited the premises, accompanied by her husband and a driver with a truck, to collect the tenant's business records for a sales tax audit. TR II, 172-178. Upon arrival, Ms. Allen noticed that there were sheriff's deputies on the scene and there was a notice posted on the door that the landlord was enforcing his distress writ. TR II, 179. Ms. Allen told the landlord initially, and later Respondent, that she needed the books and records; but both the landlord and Respondent refused to allow her to take them. TR II, 179-180, ROR 9-10.

Ms. Allen eventually sent the driver and his truck away, but she and her husband remained on the premises, in hopes of obtaining at least some of the files, for approximately six hours before leaving. TR 180, ROR 9-10.

Later that same afternoon, Respondent sent an email to Ms. Allen stating that he would make the files available to her ONLY after Mr. Lehmann had issued a letter, on Nation's Fence letterhead, revoking his authority to Mr. Johnson to act on behalf of Nation's Fence. TR II, 180-182, ROR 10. Respondent attached a copy of an email he sent to Mr. Lehmann which included instructions for Mr. Lehmann to "cut and paste"

the language from his email into the letter he wanted. TR 180-181, ROR 10, TFB Ex. I.

Although Ms. Allen did finally obtain most of the records,[2] it was only after the circuit court ordered Respondent to deliver the records during the eviction proceedings. TR I, 75, TR II, 208-212.

Regarding the files, in the circuit court eviction matter, Respondent filed an Affidavit of Compliance wherein he misrepresented that he made the tenant's business records available to Ms. Allen on March 19, 2009, but she refused to take them. TR I, 79-80, TR II, 182-183, TFB Ex. J, ROR 10-11.

Respondent denied that he refused her the records and testified during the final hearing (and in his affidavit) that he had made the records available on that date and that Ms. Allen was being untruthful. TR IV, 440-442. However, both Ms. Allen's and Mr. Johnson's testimony directly contradicts Respondent's claim as does his own email to Ms. Allen. TR II, 182-183, TR II, 230, TFB Ex. I.

Consequently, the referee rejected Respondent's testimony finding that the affidavit he filed with the circuit court was inaccurate and untrue. ROR 10-11.

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[2] Significantly, Respondent never produced the current pending job files resulting in monies being misappropriated by a former employee who has been criminally charged. TR I, 64, TR II, 212.

COUNT II

As to Count II, grievance complainant Tastan hired Respondent for a water intrusion case. TR I, 29. Tastan filed his grievance alleging that Respondent had: failed to provide copies of documents including an offer of settlement, drafted poor responses, delayed the case, responded late on several occasions, and failed to communicate with him. TR I, 30-36. Eventually, Respondent withdrew from the case which later settled via a new attorney. TR I, 41, 51. Respondent was aware of the new attorney's involvement. TR I, 48. The Bar initially closed Tastan's complaint as a fee dispute. TR I, 52-54. However, after a failed request for fee arbitration, Respondent sent Tastan a letter attaching a statement of claim for fees allegedly owed and a mutual release. TR I, 38-39. Respondent stated that he would not file the complaint if Tastan signed the release. Id. Tastan did not sign it, but did consult with his new attorney and then forwarded the letter to the Bar. TR I, 43. Consequently, the Bar reopened the case alleging that Respondent had violated Rule 4-1.8(h) by failing to advise Tastan of his right to independent counsel when attempting to limit his liability through the mutual release. ROR 20-21.

Despite Respondent's argument that because Tastan had a new attorney, Respondent had no further duties vis-à-vis his former client, the referee found Respondent guilty of violating 4-1.8(h) (limiting liability for malpractice) noting that

Respondent indeed had a duty to advise his former client in writing that independent representation regarding the release was appropriate and that Respondent had failed to advise his former client of his right to independent counsel for settlement/release purposes. ROR 21.

SUMMARY OF THE ARGUMENT

Although a landlord's lien does not need to be recorded to be valid, and in that sense alone it is "possessory," a landlord does not thereby have the right to "lock-out" a tenant but must instead obtain civil process unless the premises have been abandoned. Florida statutes and case-law define "abandonment;" failure to comply with the statute, in the absence of actual knowledge of abandonment, precludes an inference of abandonment and subsequent action in conformity therewith.

In the case at bar, the referee erred in finding that the landlord's lien entitled Respondent to deny the tenant's agents access to the premises. The referee also erred in finding that the premises had been abandoned since the evidence in the record clearly established on-going communications, negotiations, and a proposed pending settlement. Consequently, there was no basis in law or in fact for Respondent to deny the tenant's agents access to the premises.

The referee properly found that Respondent, in order to deny access to the premises, fabricated a document to suggest that a civil case had been filed when, in fact, no case had been filed. The referee found that this fabrication was not a simple mistake but was instead deliberately done for a tactical advantage. The referee also found that an affidavit that Respondent filed in the civil case was inaccurate and untruthful and the referee rejected Respondent's testimony on this issue.

Consequently, the referee erred in finding that Respondent's misconduct, as noted above, was "minor and of no consequence" and "shows no more than . . . misjudgment." Additionally, in light of the conduct noted above, the referee properly found that Respondent had violated 4-8.4(c). However, the referee erred in finding that such violation was negligent given the nature of the violations – fabricating a document, intentionally disseminating it, lying in an affidavit, filing the false affidavit with the court, and then testifying untruthfully about it during the discipline hearing. Such conduct, by definition, is deliberate and knowing and not negligent.

Finally, based on his erroneous findings, the referee cited to negligence standards in support of his recommendation that Respondent be admonished. In fact, lawyer discipline standards and this Court's precedents provide for a rehabilitative suspension given the referees' proper findings of significant Rules violations.

STANDARD OF REVIEW

A party seeking to review a report of referee must demonstrate that the report is "erroneous, unlawful, or unjustified." Rule 3-7.7(c)(5) Rules Regulating The Florida Bar, *The Florida Bar v. Centurion*, 801 So. 2d 858 (Fla. 2000). The referee's findings will not be overturned unless they fail to be supported by "competent, substantial evidence," and are found to be "clearly erroneous." *The Florida Bar v. Marable*, 645 So. 2d 438 (Fla. 1994).

This Court has held that the referee is in a better position to evaluate the demeanor and credibility of witnesses. *The Florida Bar v. Marable*, 645 So. 2d 438, 442 (Fla. 1994). Additionally, a referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See, The Florida Bar v. Vining*, 761 So. 2d 1044, 1047 (Fla. 2000); *The Florida Bar v. MacMillan*, 600 So. 2d 457, 459 (Fla.1992); *The Florida Bar v. Vannier*, 498 So. 2d 896, 898 (Fla. 1986).

If the referee's findings are supported by competent, substantial evidence, this Court is precluded from re-weighing the evidence and substituting its judgment for that of the referee. *See, MacMillan*, 600 So. 2d at 459. The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that

the record evidence clearly contradicts the conclusions. *See*, *The Florida Bar v. Miele*, 605 So. 2d 866, 868 (Fla.1992). Pointing to contradictory evidence in the record is not enough to overturn a referee's findings on appeal. *The Florida Bar v. Head*, 27 So. 3d 1 (Fla. 2010).

ARGUMENT

I. THE REFEREE ERRED IN FINDING THAT THE LANDLORD'S LIEN IS "POSSESSORY" BECAUSE SUCH A FINDING IS CONTRARY TO ESTABLISHED PRECEDENT.

The referee properly found that under Florida law, a landlord has a statutory lien on a tenant's property that attaches when property is brought onto the leased premises. ROR 8. However, the referee erred by subsequently finding that a landlord's lien is "possessory, that is, the landlord loses its lien when the property is removed from the premises." *Id.* In support of this erroneous finding, the referee cited to *Lovett v. Lee*, 193 So.2d 538 (Fla. 1940) – a case which does not stand in any way for that proposition. Furthermore, based on the incorrect finding and citation, the referee then erroneously concluded that

> [a]ccordingly, the Respondent's client had a direct interest in seeing that his landlord's lien was preserved and the property was not removed from the leased premises. Suffice to say that Respondent prevented anyone from removing anything from the leased premises on that date. The court sees no improper or unethical conduct by Respondent in preserving the status quo until the matter could be reviewed by a court. *Id.*

In reality, Florida Statute § 83.08 provides that a landlord shall have a lien for such rent upon the property found upon *or off* the premises leased or rented. Subsection (3) specifically provides that the lien on "all other property of defendant"

(that not kept on the premises) attaches *from the date of the levy of the distress warrant*.

Therefore, there was no possibility of the landlord "losing his lien" on property removed from or located physically off the premises as long as the lien was perfected by acquiring a distress warrant.

In addition, although there is no question that a landlord's lien attaches immediately to property that is brought on to leased premises, in order for a landlord to exercise that lien, s/he must perfect the lien by obtaining a distress warrant. *See, Van Hoose v. Robbins*, 165 So. 2d 209 (Fla. 2nd DCA 1964)(where tenant's property was taken without actual or implied consent and without resort to statutory distress, landlord's lien was procedurally unperfected and did not give him the right to assume and withhold the possession of tenant's property); s*ee also*, *Seymour v. Adams*, 638 So. 2d 1044 (Fla. 5th DCA 1994)(landlord's lien did not give landlord superior right to the tenant to retain the property and as a result of the wrongful conversion, the tenant had stated a claim for civil theft), and *Herrell v. Seyfarth et al.*, 491 So. 2d 1173 (Fla. 1st DCA 1986)(landlord seeking to recover possession of non-residential property must file an action for possession in all circumstances except those enumerated circumstances which permit the landlord to reenter premises peaceably and retake possession)(emphasis added).

Based on the precedent above, despite "possessing" a landlord's lien, neither the landlord nor Respondent were authorized to deny the tenant's agents access to the premises since doing so amounts to nothing more than "self-help" eviction which is prohibited under the law.

II. THE REFEREE ERRED IN FINDING THAT THE PREMISES HAD BEEN ABANDONED AND THAT RESPONDENT'S DENIAL OF ACCESS TO THE PREMISES WAS AUTHORIZED BECAUSE THE RECORD EVIDENCE AND THE ESTABLISHED PRECEDENT ARE CONTRARY.

The referee erred in finding that

> . . . [t]he facts are similarly unclear as to whether the landlord, the tenant or Mr. Johnson had a superior interest to the furniture, fixtures or inventory in the leased premises. The uncontested evidence shows the tenant was in default of the lease at this time . . .

since, as noted above, the landlord's lien must be perfected via a distress writ before a landlord can levy on the property. The only possible exception to this rule is when premises have been abandoned in which case immediate possession of the abandoned premises may be had.

In the case at bar, it is apparent that the referee accepted Respondent's expert's testimony that the premises had been abandoned and consequently the landlord was required to take immediate possession to safeguard the property. ROR 17. Based on this erroneous finding, the referee then concluded

> . . . that the advice provided by Respondent to his landlord client . . . regarding their refusal to allow Mr. Johnson - on behalf of himself individually or as an agent of the defendant tenant - to remove business files and personal property from the leased premises based upon the existence of the statutory landlord's lien was proper - even though the breach of lease and foreclosure of landlord's lien action was not filed until approximately an hour after Respondent arrived at the leased premises. The subsequent perfecting of the landlord's lien occurred when the distress writ bond was posted and Judge Traynor issued the Distress Writ on March 20, 2009. *Id.*

In this regard, the issue is not the lien itself. The existence of the landlord's lien is not in question. The only issue is whether or not Respondent had the right, without first obtaining a distress writ, to "lock out" the tenant and his agents.

Without a distress writ, neither Respondent nor the landlord had the right to deny the tenant or his agents access to the property. Neither did they have the right to take possession of the property. The only way that right could have been acquired, as previously noted, was if the property could be validly declared abandoned.

But in order for a property to be considered abandoned, the following elements must be met: 1) the landlord must *reasonably believe* that the tenant has been absent from the property for 30 consecutive days; 2) the rent must be in default; and, 3) a notice pursuant to § 83.20(2) must be served and **10 days** allowed to elapse since service of that notice. Significantly, abandonment cannot be presumed if the rent is current **or** if *the tenant has notified the landlord in writing of an intended absence.*

The evidence below showed that a copy of the tenant's March 16th letter informing of the closure of the office was posted on the door. The landlord and Respondent were therefore aware that the tenant would be absent from the premises. Moreover, the record evidence is that the tenant's agent (who was buying the closing business) had been speaking to the landlord and they had negotiated a settlement whereby the agent would pay the remaining month's rent to allow him time to vacate the premises. In fact, the record evidence is that on the day Respondent denied the agent access, the agent had gone to the premises with certified funds for the landlord pursuant to their negotiations. TR II, 219, 276-277, TR IV, 440, ROR 15-16. Moreover, when Respondent's expert was confronted with these facts – of which he had been unaware – he begrudgingly changed his opinion that abandonment could be presumed. TR III, 366-374.

Although, admittedly, the rent was 16 days late, the tenant had not been absent for the required 30 days and there had been no notice served. Moreover, given the on-going negotiations and proposed settlement, with only the second prong (late rent) having been met, the premises could not properly have been considered abandoned and consequently, Respondent could not deny access to the premises to protect his client's interests.

Despite the foregoing, Respondent's untenable argument is that because the tenant had ceased conducting business on the premises and informed all employees of their termination by letter dated March 16, 2009, **three days later**, he and his client declared the property abandoned. TR IV, 452.

Unbelievably, Respondent makes this argument while at the same time testifying that

> the entire week everyone [the former employees] stayed at the premises because they were the -- I think Mr. Johnson just testified to this, he was in the process of buying the branches or the assets and so forth, and he had been to the property and discussed with each of them, including my daughter, I don't know if it was collectively or individually, the possibility of hiring them to continue to operate that office. So everybody stayed in anticipation or the hopes that they would have a job." TT III 286-287.

In addition, Respondent admitted during his examination of Mr. Lehmann, that he had personally communicated with him on March 19th regarding the property. TR II 162. Therefore, it is clear that both Respondent and his client were fully aware that the property had not been abandoned.

In conclusion, *Van Hoose v. Robbins*, 165 So. 2d 209 (Fla. 2nd DCA 1964) states

> . . . [i]t is recognized that a landlord has a general statutory right of re-entry, and where the tenant has actually abandoned the premises the landlord is licensed to re-enter and take possession. See 52 C.J.S. Landlord and Tenant § 717. This general right of re-entry, however, is not unqualified and may not be asserted *by trespass* on the lessee's unforeclosed right of possession. . . . Absent abandonment or voluntary

> relinquishment of the leasehold, the landlord's right to re-enter precedent to taking possession should appear as a matter of contract or be established by prescribed legal process. (Emphasis added, footnotes and internal citations omitted).

Therefore, it is evident that Respondent had no basis in law or in fact to deny the tenant's agents access to the leased premises.

III. THE REFEREE ERRED IN FINDING THAT RESPONDENT'S MISCONDUCT WAS "MINOR AND OF NO CONSEQUENCE IN THE CASE" AND "SHOWS NO MORE THAN . . . MISJUDGMENT."

The referee appropriately found that Respondent was guilty of misconduct by having violated 4-3.3(a)(Candor Towards the Tribunal), 4-4.1 (Truthfulness in Statements to Others), and 4-8.4(c) (A Lawyer Shall Not Engage in Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation):

Specifically, the referee found that: Respondent dictated the letter, went to the location, and to prevent access to the property, brought with him his letter (containing the fictitious case number) and eventually posted the letter on the door. TR IV, 439, ROR 12. "Although Respondent contends that the incorrect case number was a simple clerical mistake, no case number could have been provided since the case was not even filed until later. More likely, a fictitious case number was given by the Respondent for whatever tactical benefit it might lend to protect the landlord's lien." ROR 11-12.

Consequently, the referee rejected Respondent's testimony regarding how the case number came to be on the letter finding instead that the only reason that information was on the letter was to make it appear as though a case had been filed to give Respondent a tactical benefit. ROR 11-12.

However, despite acknowledging that Respondent fabricated a document to gain a tactical advantage, the referee concludes that "such violation was minor and of no consequence in the case. . . No evidence was presented that showed that the letter was relied upon by anyone or caused damage or harm. ROR 12. Accordingly, Ms. Wharton did not rely upon or suffer damage from the incorrect case number on the letter. ROR 14. . . . [I]t does not appear that the letter with the nonexistent case number played any role in preventing Mr. Johnson or Ms. Allen from removing property from the leased premises." ROR 18.

In like fashion, regarding Respondent's false affidavit, the referee found that: "Respondent denied this allegation and testified in these proceedings and in his affidavit filed in the eviction matter that he expressly made the records available to the tenant on that date." But the referee rejected Respondent's testimony finding that the affidavit he filed with the circuit court was inaccurate and untrue. ROR 10-11.

However, despite acknowledging that Respondent had filed a false affidavit and then had testified untruthfully concerning that matter, the referee found that: "[t]he

conduct of the Respondent, viewed in light of all of the evidence shows no more than minor misconduct and misjudgments by the Respondent." ROR 19.

But fabricating documents to gain a tactical advantage by misrepresenting facts and then using that false document to intimidate others coupled with swearing out a false affidavit, then filing it in court, and lying about having done so are not inconsequential minor violations that demonstrate mere "misjudgment." Such fundamentally deceptive behavior by an attorney is intolerable and severely compromises an attorney's duty to and relationship with the court. *See*, *The Florida Bar v. Cox*, 794 So. 2d 1278 (Fla. 2001)(knowingly presenting false evidence is a violation of an attorney's professional duty); *The Florida Bar v. Rood*, 620 So. 2d 1252 (Fla. 1993)(misrepresenting facts to the court on two occasions by omission and false testimony warrants two-year suspension); *The Florida Bar v. Colclough*, 561 So. 2d 1147 (Fla. 1990)(six-month suspension warranted for misrepresentations to court and opposing counsel); *The Florida Bar v. Rosenblum*, 362 So. 2d 947 (Fla.1978)(fabricating progress reports and final judgment warrants suspension for three years).

IV. THE REFEREE PROPERLY FOUND THAT RESPONDENT VIOLATED 4-8.4(c), BUT ERRED IN FINDING THAT HIS CONDUCT WAS NEGLIGENT.

Although the referee found that Respondent had violated significant rules, the referee then relied on negligence Standards for his recommendation that Respondent should be admonished. However, Respondent's conduct was not negligent; it was absolutely deliberate, knowing, and intentional.

The intent element required for a finding of guilt under Rule 4-8.4(c) can be satisfied merely by showing that the conduct was deliberate or knowing. *The Florida Bar v. Brown*, 905 So. 2d 76 (Fla. 2005). In *The Florida Bar v. Shankman*, 41 So. 3d 166 (Fla. 2010), this Court recently ruled that the referee erred when he required the Bar to establish dishonesty, misrepresentation, fraud or deceit in order to prove intent. The Court cited *The Florida Bar v. Fredericks*, 731 So. 2d 1249 (Fla. 1999) for the proposition that in order to satisfy the element of intent, it must only be shown that the conduct was deliberate or knowing.

In the case at bar, based on the record evidence and the referee's findings, it cannot be fairly said that Respondent's misconduct was negligent, minor and mere misjudgment because: 1) Respondent knew, when he created the letter, that the case number was fraudulent; 2) Respondent knew, when he deliberately took the letter to the premises and represented that a case had been filed, that no case had been filed; 3) Respondent knew when he filed the Affidavit of Compliance with the circuit court that

the facts contained therein were not truthful; and 4) Respondent knew when he testified about the affidavit that he was testifying untruthfully.

Respondent's conduct was clearly deliberate and knowing. Consequently, this Court should reject the referee's reliance on 4-3.4, 6.24, and 7.4 Standards for Imposing Lawyer Discipline.

V. THIS COURT SHOULD IMPOSE A 91-DAY SUSPENSION AS AN APPROPRIATE DISCIPLINE UNDER THE FLORIDA LAWYER STANDARDS AND RELEVANT CASE LAW.

The referee found that Respondent had violated: As to Count I: 4-3.3(a)(Candor Towards the Tribunal), 4-4.1 (Truthfulness in Statements to Others) and 4-8.4(c) (A Lawyer Shall Not Engage in Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation), and as to Count II: 4-1.8(h) (Limiting Liability for Malpractice). The referee also found in aggravation Standard 9.22: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) refusal to acknowledge wrongful nature of conduct; and (f) substantial experience in the practice of law. The referee did not find any mitigation.

In light of the foregoing appropriate findings, the referee's recommendation of admonishment and one year probation in order to complete 5 hours of CLE is unreasonable and is not supported by the Florida Standards for Imposing Lawyer Sanctions and the relevant case law. Consequently, this Court should reject the

referee's recommended discipline. *See, The Florida Bar v. Temmer,* 753 So. 2d 555 (Fla. 1999) (generally speaking, the Supreme Court will not second-guess a referee's recommended discipline of attorney as long as that discipline has a reasonable basis in existing case law).

Clearly, the factual findings in the referee's report, as noted above, warrant significantly enhanced discipline than what the referee recommended. This Court's scope of review as to the referee's recommended discipline is broader than that afforded to the referee's findings of fact because this Court is the final arbiter of the appropriate disciplinary sanction. *The Florida Bar v. Miller,* 863 So. 2d 231, 234 (Fla. 2003).

At the final hearing and in the proposed report of referee, the Bar cited to the following Standards and case law:

6.12	Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action.
6.22	Suspension is appropriate when a lawyer knowingly violates a court order or rule and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
6.32	Suspension is appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.
7.2	Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential

	injury to a client, the public, or the legal system.
TFB v. Mavrides, 442 So. 2d 220 (Fla. 1983)	Cumulative misconduct will be dealt with more harshly than isolated instance of misconduct and although separate instances of misconduct would not warrant disbarment, cumulative effect warrants disbarment.
TFB v. Ratiner, SC08-689 (Fla. 6/24/10)	"First, we consider the respondent's challenge to the pattern-of-misconduct aggravating factor. A referee's findings in aggravation carry a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. (internal citations omitted). Contrary to the respondent's argument, it is not necessary for misconduct to have been a basis for discipline in order for it to be considered in aggravation. Here, the respondent's pattern of engaging in abusive conduct is relevant to the appropriate sanction to be imposed for the violations at issue in this case.
TFB v. Cox, 794 So. 2d 1278 (Fla. 2001)	Knowingly presenting false evidence is a violation of an attorney's professional duty.
TFB v. Mitchell, 385 So. 2d 96 (Fla. 1980)	Evidence supported referee's recommendation that respondent be found guilty of 11 instances of violating the Code of Professional Responsibility and complete disregard of responsibilities of lawyer and as officer of court, resulting in serious harm to public, without any known mitigating reasons, would warrant disbarment.
TFB v. Salnick, 599 So. 2d 101 (Fla. 192)	Forging judgments of eviction and lying to trial judge about forgeries warranted disbarment despite lack of disciplinary history, great stress and inexperience in the practice of law.
TFB v. Rood, 620 So. 2d 1252 (Fla. 1993)	2-year suspension for attorney who on two separate occasions misrepresented facts to court first by omission and then by misrepresentation.
TFB v. Jordan, 705 So. 2d 1387 (Fla. 1998)	Attorney's violation of rules of professional conduct requiring competence, diligence, and communication with client and prohibiting attorney from making agreement with client limiting lawyer's liability to client for legal malpractice warranted suspension for one year in light of attorney's prior disciplinary convictions.
TFB v. Colclough,	6-month suspension warranted for misrepresentations to court

561 So. 2d 1147 (Fla. 1990)	and opposing counsel.
TFB v. Lathe, 774 So. 2d 675 (Fla. 2000)	91-day suspension for attorney's intentional misrepresentation to judge on two separate occasions that he could not attend deposition.
TFB v. Fortunato, 788 So. 2d 201 (Fla. 2001)	". . . providing false testimony at disciplinary hearing warranted 91-day suspension."
TFB v. NicNick, 963 So. 2d 219 (Fla. 2007)	Attorney's misrepresentations and obstruction of party's access to evidence warranted 91-day suspension.

However, despite considering the case law above, the referee relied on negligence Standards in his recommendation and did not cite to any case that would support admonishment. But, Respondent was not negligent in his actions. He instead acted knowingly and deliberately when he created a fictitious case number. Indeed, the referee rejected Respondent's testimony that the case number was an error. Respondent knew that his letter was fraudulent when he presented it at the premises and posted it on the door intending to create the illusion that he had obtained a distress writ.

Further, and perhaps most importantly, Respondent knew when he executed and filed his Affidavit of Compliance with the circuit court that, in actuality, he had denied Ms. Allen access to the company's records, yet he represented just the opposite to the court. In addition, during his testimony at the final hearing, respondent again insisted

that his Affidavit was accurate. But, as before, the referee rejected his testimony an untruthful.

As cited to the referee and noted above, the Florida Standards for Imposing Lawyer Discipline dealing with knowing and intentional conduct require suspension. The governing precedents also require suspension. In this case, the Florida Standards for Imposing Lawyer Sanctions and the case law support a rehabilitative suspension of at least 91-days.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Honorable Court reject the referee's recommended discipline and instead suspend Respondent for 91-days accordingly and order that he pay The Florida Bar's costs in this proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief regarding Supreme Court Case No. SC10-175, TFB File No. 2009-31,193(4C), *et al.*, was forwarded by regular U.S. mail to Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927, and a true and correct copy has been mailed by certified mail #7008 1830 0000 4285 5997, return receipt requested, to Respondent, Koko Head, whose record Bar address is 100 State Road 13 Suite D, Saint Johns, Florida 32259-3839, on this 17th day of June, 2011.

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

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

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Carlos Alberto Leon, Bar Counsel

Copy provided to:
Kenneth Lawrence Marvin, Staff Counsel