IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner/Appellant,

v.

PETER M. MACNAMARA,

Respondent/Appellee.

_____/

Supreme Court Case
No. SC11-1029

The Florida Bar File
No. 2009-70,304(11G)

THE FLORIDA BAR'S INITIAL BRIEF ON APPEAL

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SYMBOLS AND REFERENCES

For the purpose of this brief, Peter M. MacNamara may be referred to as "Respondent". The Florida Bar may be referred to as "The Florida Bar" or the "Bar". The referee may be referred to as the "Referee". Additionally, the Rules Regulating the Florida Bar may be referred to as the "Rules" and the Florida Standards for Imposing Lawyer Sanctions may be referred to as the "Standards".

References to the Report of Referee will be by the symbol "ROR" followed by the corresponding page number(s). References to the transcript of the final hearing held on February 22, 23, and 24, 2012 will be by the symbol "TR" followed by the corresponding page number(s).

References to The Florida Bar's exhibits will be by TFB, followed by the exhibit number. References to Respondent's exhibits will be by R, followed by the exhibit number.

STATEMENT OF THE CASE AND OF THE FACTS

On May 23, 2011, the Florida Bar filed a formal Complaint, alleging that Respondent, Mr. Peter MacNamara, violated Rules 4-1.4, 4-8.1 and 4-8.4(c) of the Rules Regulating the Florida Bar, in connection with his representation of the Estate of Velma Major. Specifically, the Florida Bar alleged that Respondent failed to adequately communicate with the estate representative, Ms. Kathleen Earl, and that he failed to perform specific duties, such as file federal and state tax returns on behalf of the estate. The Bar asserted that, rather than acknowledge his mistake in not timely filing the returns, Respondent instead attempted to cover up his mistake by fabricating evidence and making misrepresentations to the client, the probate court and the Bar. (See the Complaint of the Florida Bar, filed in this Court on May 23, 2011).

This Court referred the matter to the Chief Judge of the Eleventh Judicial Circuit for appointment of a referee. The Honorable Darrin P. Gayles was appointed Referee and the matter proceeded to Final Hearing, commencing on February 22, 2012. (ROR 2).

At the final hearing in this cause, the Florida Bar presented documentary and testimonial evidence to prove the assertions contained in the Complaint. Respondent took the stand in his own behalf and denied the allegations contained in the Complaint. Respondent's testimony was the only substantive evidence

produced to prove his version of the facts. Respondent did introduce additional evidence, in the form of IRS documents, a computer expert, and an IRS expert. However, none of this additional evidence corroborated, and/or advanced, his version of the events. This additional evidence was more in the nature of impeachment evidence, introduced solely to undermine the case of the Florida Bar, and not to advance his own theory of the case. Thus, the only substantive evidence introduced by Respondent to establish his version of the events was his own testimony.

In his own testimony at the Final Hearing, Respondent directly contradicted a multitude of written statements he previously submitted to the Florida Bar in this cause, and at least one written pleading previously filed in the Probate Court. (ROR 5-7). In his prior written statements, Respondent averred that he sent the estate's tax return to the IRS, and then sent it again for the second or third time, when the IRS started sending notices that it had not received any tax return for the estate. At the Final Hearing, Respondent testified that he only sent an unsigned tax return to the IRS for the first time on December 16, 2005, following the IRS's second notice that no tax return had been received.

Following presentation of the evidence and argument of counsel, the Referee issued his Report of Referee containing his findings and recommendations. The Referee recommended a finding of guilty of each of the charged Rule violations.

ROR 8). Specifically, the Referee found that Respondent made knowingly false statements in order to mislead the Florida Bar (ROR 6), the IRS (ROR 6), and the probate court. (ROR 7).

In his Report of Referee, the Referee narrowed the focus of the case to two questions: 1) did Respondent file a tax return, and 2) did Respondent attempt to cover up his alleged failure to file a tax return. (ROR 5). The Referee ultimately found that Respondent submitted an unsigned tax return to the IRS on December 16, 2005. (ROR 7). The instant appeal follows, based on the fact that the only evidence in the record to support that specific finding is Respondent's own testimony, and the Referee himself found Respondent to lack credibility on this issue. There is, therefore, no competent and substantial evidence to support the Referee's findings in this limited regard.

The following evidence was presented at the Final Hearing in this cause:

The Bar presented the testimony of the Complainant, Ms. Kathleen Earl. Ms. Earl testified that her full name is Kathleen Margaret Earl. (T. 13). She has personally known Respondent for approximately twenty-five years. (T. 14). In February of 2004, Ms. Earl retained Respondent to settle the estate of her mother, Ms. Velma Major. (T. 14). As part of his duties, Respondent was to file a tax return on behalf of the estate with the State of Florida and with the IRS. (T.15).

In early September, 2004, Respondent filed with the IRS a request for an

extension of time in which to file the estate's tax returns. (T. 15-16; TFB Ex 1). He identified the Estate of Velma Major and listed "Marjorie Earl" as the executor of the estate. (T. 16-17; TFB Ex 1). Marjorie is not Ms. Earl's legal name, and that name does not appear on any of the other documents filed on behalf of the estate. (T. 17, 100**)**. On the request for extension, Respondent further indicated that all future correspondence from the IRS be delivered to Ms. Earl care of Respondent, and listed his office address as the only contact address. (T. 17; TFB Ex 1). Following the filing of this document, the IRS did not send anything directly to Ms. Earl. (T. 17). The IRS granted the requested extension, up to and including March 2, 2005. (TFB Ex. 1).

One year following the IRS's extended deadline, in March 2006, Ms. Earl began a frantic series of communications in an effort to obtain from Respondent the estate's tax return so that her accountant could complete her 2005 income taxes. (T. 19). She phoned, faxed, and e-mailed Respondent; however, he did not reply. (T. 23-24). Finally, on April 10, 2006, Respondent responded via e-mail, explaining his delay by saying that he got tied up. (T. 24). In the e-mail Respondent wrote: "Attached please find form 706 estate tax return. *As expected, no tax.*" (T. 24; TFB Ex 4)(emphasis added). The language employed clearly conveys that Respondent has just completed drafting or compiling the estate tax return, and the result is as he expected it to be, no tax.

This April 10, 2006, electronic communication is the first time Respondent ever produced a copy of the purported Estate tax return to his client, Ms. Earl. (T. 19, 23-24, 26, 65; TFB Exs 2, 3, 4). The tax return was dated March 2, 2005. (T. 19; TFB Ex 2). The estate tax return dated March 2, 2005, contrary to the prior filing of the Request for Extension, lists the correct name of Kathleen M. Earl as the executor of the estate, and also includes Ms. Earl's address, rather than Respondent's. (T. 19; TFB 2).

Despite the date on the document being March 2, 2005, this document was never presented to Ms. Earl for her signature. (T. 19). Ms. Earl checked her records for the time period surrounding March 2005 and found that she was physically located in Miami and available to Respondent during the first six months of that year, except for a weekend trip here or there. (T. 20). Therefore, Respondent had ample opportunity to communicate with her and obtain her signature on the tax return dated March 2, 2005, if he was going to legitimately file such a document with the IRS. (T. 20).

Simultaneously with the April 10, 2006 e-mail, Respondent mailed to his client a cover letter, an unsigned estate tax affidavit, and his fee statement for services rendered in connection with the preparing and filing of the estate's tax returns. (T. 20-21; TFB Composite Ex 3). The fee statement states that it is in reference to "Federal Estate Tax Return for the Estate of Velma I Major,

Deceased." (TFB Composite Exhibit 3). The fee statement specifies the time period for Respondent's services regarding the federal estate tax return to be July, 2003 *through March, 2006*. (T. 21, TFB Composite Exhibit 3) (emphasis added). The bill totaled $12,000.00, which Ms. Earl paid by check the next month. (T. 22, TFB Composite Exhibit 3). This fee statement, issued in April, 2006, was the first time Respondent had billed for services in connection with preparing the estate tax returns which were dated and purportedly filed one year before. (T. 45).

Upon receipt of a copy of the estate's tax return in April 2006, Ms. Earl believed that Respondent had properly filed the document with the IRS. (TFB Ex 14). She believed that Respondent had signed the document on her behalf, using a previously executed Power of Attorney. (TFB Ex 14).

When Ms. Earl had the opportunity to review the tax return that was purportedly filed on behalf of the estate, she noticed several irregularities. One of those items included a fee of $30,000.00 for the demolition of one of her mother's properties in Pennsylvania. (T. 27). The demolition project in question was a difficult one due to the close proximity of the home to other buildings. (T. 27-32; TFB Exs 6, 7). As a result, it was impossible for the demolition team to provide an actual estimate for the project. (T. 31-32). Instead, they could only provide an estimated range from $25,000.00, or $27,000.00 to $35,000.00. (T. 32). Despite this, the line item on the tax return indicated $30,000.00 for the demolition cost (T.

27, 33; TFB Ex 2), which was the exact amount that was actually billed for the demolition project upon completion in November 2005 (T. 33). Ms. Earl was not provided the actual cost of the demolition project until November 8, 2005. (T. 27, 33). Thereafter, Ms. Earl faxed the invoice and her canceled check for payment to Respondent. (T. 33; TFB Ex 8). As such, it would have been impossible for Respondent to have known the figure of $30,000.00 to include in the tax return in March 2005, when the demolition cost was not determined until eight months later. (T. 33).

Ms. Earl also testified as to the instructions she gave, and the conversations she had with Respondent regarding preparation of the estate tax returns. (T. 34-36, 66-67). Specifically, she did not ask him to skew the numbers in order to favor the estate. (T. 34, 36, 67; TFB Ex 14). She simply asked him to determine the amount owed and she would pay it. (T. 36). She was having a very difficult time with the loss of her mother, and she just wanted it to be over. (T. 36). She could not understand why they kept taking extensions when she was anxious to end the process. (T. 36).

On October 27, 2006, the probate court presiding over the administration of the estate issued a *sua sponte* notice of intent to dismiss, indicating that the matter had been dormant for one year. (T. 39-40). This caused concern for Ms. Earl, as it became clear to her that Respondent was not keeping her informed regarding the

matter. (T. 41). She had been under the impression that the probate case had been concluded. (T. 41).

Apparently in response to the probate court's notice, on October 31, 2006, Respondent filed a Petition for Extension of Time to Close Estate Administration in the probate court. (T. 39; TFB Ex 10). In the body of the petition, Respondent indicated that the request was necessary because, "[t]he estate has *filed* a federal estate tax return which is under review and/or audit. That audit and/or review has not been concluded and the Federal estate tax closing letter has not been issued." (T. 39;TFB Ex 10)(emphasis added). The Petition further states, "Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged are true to the best of my knowledge and belief." (TFB Ex 10).

Based on her new found concerns, Ms. Earl retained Mr. Howard Gordon to investigate the status of the probate action and to otherwise represent the interests of the estate. (T. 41). She terminated Respondent's services, and a Stipulation for Substitution of Counsel was filed in the probate action on November 2, 2006. (T. 41; TFB Ex 11).

Beginning November 1, 2006, Mr. Gordon made numerous attempts over several months to obtain a copy of Respondent's file in this matter. (T. 77-78; TFB Ex 11). Respondent continually made excuses for his failure to provide a copy of the file in a timely manner. (T. 41-42; TFB Ex 11). When the file was finally

produced on January 9, 2007, it contained two notices from the IRS, one dated October 10, 2005, and the other dated December 5, 2005, both of which indicated that the IRS had not received the estate tax return and it was overdue. (T. 37; TFB Ex 9). The file turned over by Respondent also contained what purports to be a cover letter to the IRS, dated December 16, 2005, apparently in response to the IRS's second notice of no tax return being received. (T. 45; TFB Ex 12). The purported cover letter indicates that Respondent is providing the IRS with a *duplicate copy* of the estate tax return. (T. 43-45; TFB Ex 12)(emphasis added). Prior to seeing these documents, Ms. Earl was unaware of any difficulties in connection with the filing of the estate tax return. (TFB Ex 14).

Mr. Gordon contacted the IRS on at least two occasions regarding the filing of the estate tax return, first on January 26, 2007, and again on May 22, 2007. (T. 47; TFB Ex 13). On both occasions, Mr. Gordon was informed that no tax return had been filed on behalf of the estate. (T. 47; TFB Ex 13). Mr. Gordon was specifically advised by IRS personnel that, had such an estate tax return been filed with no signatures, the IRS would have processed the return and a notice would have been sent to the tax payer requesting that signatures be provided separately under penalty of perjury. (T. 47; TFB Ex 13).

Mr. Gordon ultimately prepared and properly filed the estate's tax returns with the IRS and the State of Florida in May, 2007. (T. 46, 50-51). He also filed

petitions for the abatement of the late filing fees and accrued interest, based on the estate representative's mistaken belief that Respondent had properly filed the estate's tax return. (T. 46, 49-50; TFB Ex 13, 14, 15). These were filed with both the State of Florida and the IRS. (49-51; TFB Ex 15). Mr. Gordon's estate tax return reflected the actual tax owed by the estate as $65,643.79. (T. 51). Ms. Earl submitted payment for the taxes simultaneous with the filing of the estate tax return. (T. 51).

On July 10, 2007, while the IRS was still processing Mr. Gordon's May 2007 tax return, it also mistakenly issued a refund check, made out to "Marjorie Earl" in the amount of $65,643.79, and mailed care of Respondent at Respondent's address. (T. 51-52; TFB Ex 17). It is clear that this check was not issued as a result of the tax return allegedly submitted to the IRS by Respondent, because the name on Respondent's purported tax return, dated March 2, 2005, was Kathleen M. Earl, and the contact address listed was Ms. Earl's address. (T. 51-52, 99-100; TFB Ex 2). The only document submitted to the IRS under the name Marjorie Earl was Respondent's prior request for Extension of Time in which to file the tax return. (T. 51-52, 100; TFB Ex 1). In that same document he simultaneously directed that all correspondence be sent care of himself and to his address. (TFB Ex 1). Accordingly, the erroneous refund check, dated July 10, 2007, was mailed to Respondent. (T. 51-52; TFB Exs 1, 16).

Several months later, on October 9, 2007, Respondent mailed the refund check to Ms. Earl. (T. 51, 54; TFB Ex 16). The IRS spoke with Mr. Gordon and confirmed that the Service had made a mistake in processing their estate tax return and the check was issued in error. (T. 54-55; TFB Ex 17). Mr. Gordon instructed Ms. Earl not to cash the check, as it was improperly issued and cashing it would result in interest and penalties accruing from the time of payment until the funds were returned. (T. 98-99). Instead, in order to return the check to the IRS, Mr. Gordon hand delivered the voided check, along with a cover letter documenting these events to the local IRS office. (TFB Ex 17).

Ultimately, the IRS denied the request for abatement of the fees and interest, and the estate was required to pay $43,586.82 in fees and interest to the IRS. (T. 57-58; TFB Ex 17). The Florida Department of Revenue agreed to abate the penalties, but not the interest. (T. 57; TFB Ex 18). The estate was required to pay an additional $4, 813.37 in interest to the State of Florida. (T. 57; TFB Ex 18).

Ms. Earl contemplated suing Respondent for malpractice in the handling of her mother's estate. (T. 58). She consulted with an attorney, Mr. Gabriel Bach. (T. 58). However, Respondent has no malpractice insurance. (T. 244). Ms. Earl ultimately decided not to pursue the lawsuit. (T. 58). Before the decision was made not to pursue a lawsuit, Mr. Bach directed several written inquiries to Respondent. (T. 58; TFB 19). Respondent responded in writing to those inquiries.

(TFB Ex 20). Mr. Bach requested a copy of the complete and executed tax return filed on behalf of the estate. (TFB Ex 19). In his response, Respondent directly implied that a signed copy of the tax return existed, but that he simply could not locate a copy in his files. (TFB Ex 20). He also claimed to have filed a copy of the estate tax return with the Florida Department of Revenue. (TFB Ex 20).

The Florida Bar also presented evidence from Mr. Howard W. Gordon, Ms. Earl's successor counsel, who was also accepted in these proceedings as an expert in tax law. (T. 75-77). Ms. Earl retained Mr. Gordon to take over the probate case and to review the estate tax return situation. (T. 77). Mr. Gordon requested Respondent's file, however it took multiple requests and several months for Respondent to produce same. (T. 77-78; TFB Ex 11). When the file was ultimately produced, it contained a copy of the tax return purportedly filed by Respondent and dated March 2, 2005. (T. 78-79). Upon review, it became apparent that documents were missing from the file that Respondent produced to Mr. Gordon. (T. 104-105). Both Mr. Gordon and another associate of the Firm made written requests for Respondent to produce additional documentation, including but not limited to, any and all correspondence between himself and the IRS. (T. 104-105; TFB Ex 27). Respondent did not produce anything in response to these written requests. (T. 105).

Mr. Gordon verified the conversations he had with Ms. Earl regarding the

preparation of the tax return. She was consistent throughout all of their conversations that she wanted the correct amount of tax to be determined. (T. 34-36, 66-67, 80). She indicated that she did not personally contribute to the stocks, properties and bank accounts in the estate, despite the fact that her name appeared on many of those items. (T. 35-36, 80). She wished the tax return to accurately reflect what had belonged to her mother. (T. 35-36, 80).

Based on Ms. Earl's statements, and after reviewing the tax return contained in the file turned over by Respondent in January, 2007, Mr. Gordon concluded that the tax return needed to be amended or changed, as it did not accurately reflect what Ms. Earl had discussed with him. (T. 80-81). Mr. Gordon obtained a power of attorney from Ms. Earl and called the IRS to begin that process. (T. 81). Each of the two or three times he called, he was told that no estate tax return had been filed, and there was an extension on file. (T. 81). Based on documents Mr. Gordon obtained from the IRS through a Freedom of Information Act request seeking the entire file related to the estate, and also based on his own conversations with the IRS and his review of the file documents, there is no record anywhere of Respondent ever submitting any document or correspondence to the IRS on behalf of the estate following his Request for Extension filed in September 2004, including the purported December 16, 2005 cover letter and its attached tax return. (T. 81-84, 106-107). Further, the IRS records do not reflect that they received and

returned the purported tax return because it was unsigned. (T. 106-107). Nor has Respondent produced anything to indicate that the IRS returned the unsigned tax return to him for signature. (T. 106-107). However, Mr. Gordon did acknowledge on cross examination that it is possible that the Service did not keep a copy, nor otherwise record, an item that they returned for lack of signature. (T. 107-108).

Mr. Gordon testified regarding the IRS account transcript for this matter. No where does the account transcript reflect any filing, or even correspondence, by Respondent other than the September 2004 Request for Extension. (T. 93-95, 106-107; TFB Ex 25). Mr. Gordon explained the method by which the service annotates these transcripts. For instance, next to the entry for the Request for Extension filed by Respondent in September 2004, there is an indication of "zero liability." (T. 94; TFB Ex 25). Mr. Gordon explained that this does not mean that an IRS agent has reviewed the estate return and made any actual determination of whether or not a tax was due. (T. 94-95). But rather, this statement simply reflects that no payments have been made and nothing has been filed as of yet from which a determination could be made that a tax was due. (T. 94-95). Significantly, Respondent's own IRS expert did not refute this testimony. (T. 170-181). Further, Mr. Gordon detailed the numerous mistakes the IRS made in the processing of the estate's tax return in this matter, demonstrating where debits and corresponding credits were notated on the account transcript. (T. 95-104; TFB Exs 25, 25B, 25C).

Although several mistakes were made in the processing of the return, Mr. Gordon demonstrated where the transcript indicates the IRS diligently corrected each mistake, and that the end result accurately portrayed the actual tax, penalties and interest owed. (T. 102-104; TFB Exs 25, 25B, 25C).

On May 16, 2007, Mr. Gordon ultimately prepared and filed the first and only tax return on behalf of the estate that the IRS actually acknowledges receiving. (T. 86; TFB Exs 23, 25). The executed and filed tax return showed a tax liability in the amount of $65,643.79, based on a more accurate rendition of the assets of the estate. (T. 87). A check in that amount was submitted along with the estate tax return. (T. 97).

Simultaneous with filing the estate tax return, Mr. Gordon filed his request for abatement of the anticipated fees and penalties. (T. 84-85; TFB Ex 15). Mr. Gordon testified that the statements and factual allegations contained in his request for abatement are true and accurate. (T. 85-86). The request was denied by the Service who assessed the penalties for late filing and payment, and Mr. Gordon filed an appeal. (T. 89; TFB Ex 24). The appeal was denied based on case law which holds that ineffective assistance of counsel in IRS proceedings does not excuse late filing and payment. The estate was required to pay the penalties and interest. (T. 89-90, TFB Ex 24).

The Florida Department of Revenue also assessed penalties for failure to file

and for failure to pay the estate's tax. (T. 90-91). The fact that the State of Florida assessed a penalty for failure to file the estate's tax return, along with the absence of any correspondence or declarations to indicate otherwise, demonstrates that Respondent's purported March 2, 2005 tax return was also not received by the State of Florida. (T. 91). Mr. Gordon was more successful in obtaining an abatement of the failure to file and pay penalties in the State of Florida, and the estate was only required to pay the accrued interest on the late payment of the taxes. (T. 90-91; TFB Ex 24).

As previously indicated, the IRS account transcript revealed several errors in the processing of the estate tax return. One such error involved the issuance of a refund check. Ms. Earl paid the estate's estimated tax simultaneous with the filing of Mr. Gordon's tax return. (T. 97). However, while the return was still being processed, the Service mistakenly issued a refund check in the exact same amount as the payment. (T. 97-98; TFB Ex 17, 26). The service issued the check care of Respondent, and made out to Marjorie Earl, apparently stemming from Respondent's prior Request for Extension, which is the only document that used the name Marjorie Earl, and in which Respondent directed all future correspondence to go through him and to his office. (T. 98-100; TFB Ex 16). Upon Mr. Gordon's return of the uncashed check to the Service, they corrected their prior mistake and credited it back on the account transcript as if the mistake

never happened. (T. 98; TFB Ex 26).

Ms. Earl filed a grievance with the Florida Bar based on these facts. (T. 60; TFB Ex 21). Several of Respondent's responses to the grievance were admitted into evidence at the final hearing in this cause. (TFB Exs 22, 32). In his responses, Respondent set forth his defense to the allegations and provided his version of the events. In both of his statements, dated March 21, 2009 and June 22, 2010 respectively, Respondent claimed multiple times in both responses that he prepared and sent to the IRS the tax return dated March 2, 2005, *prior* to receiving the IRS's October and December Notices of No Tax Return Received. (TFB Exs 22, 32). Indeed, in his June 22, 2010 submission to the Grievance Committee, Respondent claimed that the *duplicate* tax return he purportedly sent to the IRS on December 16, 2005 was the *third time* he had submitted the tax return to the IRS. (TFB Ex 32) (emphasis added).[1]

Pursuant to its investigation, the matter was referred to a Grievance Committee, and an Investigating Member was appointed. (T. 121; TFB Ex 28). The Investigating Member visited Respondent and viewed Respondent's computer containing the purported December 16, 2005 cover letter. (TFB Ex 29). Upon

[1] However, on the witness stand, under oath, Respondent testified for the first time that he mailed the tax return, dated March 2, 2005, to the IRS for the *first time* on December 16, 2005. (T. 206). This was, according to Respondent, true, despite the fact that he told the IRS in the purported cover letter that he was attaching a "*duplicate copy*" to the letter. (TFB Ex 12).

reviewing the properties information in the computer, the Investigating Member observed that the purported December 16, 2005 cover letter to the IRS was not actually created on the computer until January 8, 2007 at 6:20:36 pm. (T. 133, TFB Ex 28). The properties page also showed a "last accessed" date of June 14, 2010, which matched the date of the Investigating Member's memorandum detailing his findings. (T. 133; TFB Ex 28). Thus, the document was created only one day before Respondent finally mailed a copy of his file in response to Mr. Gordon's numerous requests for same. (TFB Ex 28). When confronted regarding these facts, Respondent gave conflicting responses. (TFB Ex 28). First, he indicated that he used a template from a prior letter. (TFB Ex 28). Then he stated that he retyped the letter in order to send it to Howard Gordon. (TFB Ex 28).

On June 22, 2010, Respondent replied to this evidence in writing, and produced another properties page from his computer. (T. 135; TFB Ex 29). The properties page submitted by Respondent showed the same creation date but a different creation time of 5:20:00 pm. (TFB Ex 29). Further, the document showed a previously printed date of June 15, 2004 at 5:32:00 pm. (TFB Ex 29). Finally, the document showed a last accessed date of June 15, 2010, one day following the investigating member's discovery of the creation date. (TFB Ex 29).

At the request of the grievance committee, the Bar retained Mr. Marcus Miranda, a computer forensics and digital investigations expert, to conduct a

forensic review of Respondent's hard drive. (T. 119-120). The Bar presented the testimony of Mr. Miranda at the Final Hearing in this cause. (T. 118). Mr. Miranda accompanied a Florida Bar staff investigator to Respondent's home to serve a subpoena to obtain a forensic image of Respondent's computer hard drive. (T. 137-138). Respondent admitted them to his home, but refused to comply with the subpoena nor to allow them access to the computer. (T. 139). Respondent eventually provided a laptop computer to his attorney, who allowed a forensic image to be created. (T. 139-140). However, upon review of the hard drive, Mr. Miranda determined that this computer was not the one that the document in question had been created on. (T. 140). The hard drive of the computer submitted by Respondent was not in existence on January 8, 2007, the creation date of the December 16, 2005 letter. (T. 141). Rather, Respondent submitted a computer hard drive that was not created until May 29, 2008. (T. 141; TFB Ex 30).

The Respondent ultimately provided the actual computer, a desk top computer. (T. 142; TFB Ex 31). Upon review, Mr. Miranda found that there was no way the computer file in question could have been created in December 2005. (T. 144; TFB Ex 31). He opined that the 2004 print date was the result of Respondent essentially taking an old letter from 2004, deleting the content, and then in January 2007 retyping the content that appears on the face of the IRS cover letter dated December 16, 2005. (T. 144-146; TFB Ex 31). Finally, Mr. Miranda

found six additional documents related to the estate of Velma Major, which were form documents used to close out an estate, which were also created in the computer on January 8 or January 9, 2007, and which were also back dated, this time to April 2006. (T. 147; TFB Ex 31).

On cross examination, Mr. Miranda acknowledged that there is no way he could say whether or not a letter was actually sent to the IRS on December 16, 2005. (T. 149-150). However, there was no evidence of same on the computer. (T. 150).

In his case in chief, Respondent presented the testimony of his own computer forensic analyst, Mr. William Nicholas Crane, who was accepted as an expert in these proceedings. (T. 182). Mr. Crane reviewed the same forensic hard drive images that Mr. Miranda reviewed. (T. 183). Mr. Crane stated that he could not tell the court whether the letter was sent to the IRS in 2005. (T. 184). The forensic data showed that the letter in question was created in 2004, or at least some predecessor version of the letter. (T. 184). Mr. Crane indicated that Mr. Miranda was wrong to rely on the creation, modification and print dates listed on the properties pages, because these are easily changed and altered by any number of activities on the computer. (T. 185).

On cross examination, Mr. Crane made clear that his testimony was not related in any way to the contents of the document in question. He could not say

whether or not the words on the page were created in 2004 or 2007. (T. 187-190).

Respondent additionally presented the testimony of Mr. Samuel Charles Ulman, an expert in tax law. (T. 171-174). Mr. Ulman testified that the IRS is well known for making mistakes in record keeping. (T. 175). Further, it is not unusual for the Service to be missing documents. (T. 175-176). He opined that the fact that the Service did not have a document did not mean that it was not sent to them. (T. 176). Mr. Ulman did not venture an opinion as to whether Respondent actually sent anything to the IRS in 2005, and acknowledged on cross examination that there is nothing in the IRS records to indicate that he did. (T. 177-179). Mr. Ulman did not offer a specific opinion regarding any of the documents in this case. More significantly, Mr. Ulman did not venture an opinion that Respondent's interpretation of the significance of the IRS's erroneously issued refund check was consistent with IRS practice and procedure. (T. 171-181).

In addition to the above referenced impeachment testimony, Respondent took the stand in his own defense. (T. 198). After being sworn in, Respondent testified as to his education and experience. (T. 198). He stated that he does not really know how to type, but can only "hunt and peck." (T. 199). He basically works off of templates that a prior secretary created for him. (T. 199). He has no computer skills. (T. 200).

According to Respondent, Ms. Earl retained him to handle the estate

administration, and to handle the estate tax return if one was required. (T. 202-203). Respondent testified that Ms. Earl expected to pay no taxes on the estate. (T. 205).

Respondent testified that he did not ever "file" an estate tax return in this case. (T. 205-206). He explained, in order for a return to be considered "filed," it has to be signed by the tax payer. (T. 205-206). He reiterated this point by testifying that "filed" is a term of art with the IRS, and applies only when there is a taxpayer signature with verification. (T. 240). The return in this case was never signed by Ms. Earl, and Respondent knew that. (T. 206, 247) Respondent's testimony in this regard contradicts the written response he provided to Mr. Gabriel Bach, who was investigating the possibility of filing a malpractice suit against Respondent relative to this case. (T. 58). Mr. Bach requested a copy of the complete and executed tax return filed on behalf of the estate. (T. 58; TFB Ex 19). In his response, Respondent stated, "Per item 3 of your request, attached please find an unsigned copy of the Federal Estate Tax Return, Form 706. I have made a diligent search of my files and have not located a signed copy of the return." (TFB Ex 20). His direct implication that a signed copy of the tax return existed in the context of avoiding a malpractice suit is misleading and directly contradicts his testimony at the Final Hearing regarding the fact that no signed copy of the return ever existed, a fact of which he was fully aware. (T. 206, 247; TFB Ex 20).

At the Hearing, Respondent testified that there was no signed return because Ms. Earl simply never came into the office to sign it. (T. 206-207). He did not do anything to follow up. (T. 207). Respondent had *no communication* with his client between April 20, 2005 and April 2006. (T. 206-207). Respondent testified that when he received the Notice from the IRS in December 2005, indicating no tax return had yet been received, he simply sent the IRS the unsigned tax return because that was all he had. (T. 208). Significantly, Respondent testified that this was the first time he ever sent the tax return to the IRS. (T. 206). Thus, according to Respondent's version of events, despite the fact that he specialized in tax law since he began his career in 1977 (T. 198), and knew very well that an unsigned tax return was not considered to be "filed" with the IRS (T. 205-206), and knowing that the return was overdue and the IRS was asking for it to be filed (T. 208), Respondent did not contact his client (T. 207) to request she come in to sign the return, but instead simply sent the unsigned return to the IRS. (T. 208). Not only that, but, according to Respondent's testimony, he sent that unsigned return to the IRS, knowing that it had not been previously filed, but attached to a cover letter telling the IRS it was a *duplicate* copy. (TFB Ex. 12).

Respondent's above referenced testimony directly contradicted all of his prior written statements in this matter. (T. 206; TFB Exs 20, 22, 32; ROR 5-7). In his statement to Mr. Bach, Respondent directly implied that there was a signed and

properly executed copy of the tax return, but that he simply could not locate it in his file. (TFB Ex 20). In his first statement to the Bar, Respondent wrote that he aggressively sought out every deduction and he mailed the tax return to the IRS and the State of Florida. In October he received notice from the IRS that no tax return had been received. In December he received another notice, and replied on December 16, 2005. After that he did not hear anything further and began to prepare the documents to close the estate. (TFB Ex 22). He further wrote that he prepared and filed the tax return in a professional manner and to the best of his ability from the information available. (TFB Ex 22). He stated that the file documents evidence that his return was "*timely filed* and *accepted* by the IRS." (TFB Ex 22) (emphasis added). He further stated, "if the IRS had not received the *duplicate* estate tax return sent with my letter of December 16, 2005, then the IRS would have immediately followed up with another letter . . . ." (TFB Ex 22)(emphasis added). In his second statement to the Bar, he stated he did not realize the tax return was not signed, and inadvertently sent the unsigned tax return to the IRS three times, once prior to the IRS sending any notification of no tax return received, once in response to the October Notice of No Tax Return Received, and again in response to the December Notice of No Tax Return Received. (TFB Ex 32).

Respondent testified that his March 2005 tax return was the correct return,

and that Mr. Gordon's return simply caused Ms. Earl to pay unnecessary tax. (T. 208). He further testified that the IRS's mailing of the refund check to Respondent established that the IRS received and processed his unsigned estate tax return. (T. 210-211).

According to his testimony, Respondent compared the documents that were provided in response to Mr. Gordon's Freedom of Information Act request, to those documents which he knew to have been filed in this matter. (T. 214-224). According to the documents that Respondent believed should be in the file, including his purported December 16, 2005 cover letter and alleged March 2005 tax return, the IRS was missing 21 documents from this case. (T 216-224).

Respondent testified that the Request for Extension of Time to File the Income Tax Return could not serve as the basis for the refund check being issued to him because that document was not signed by the tax payer. (T. 227-228). Significantly, Respondent did not ask his expert tax witness to verify his interpretation of the refund issue, nor to opine on why the Service issued the refund care of Respondent and made out to Marjorie Earl. (T. 171-181).

Respondent testified that the March 2, 2005 date on the face of his purported tax return is irrelevant and has no meaning since the return was not signed. (T. 228-229).

Respondent further testified regarding The Florida Bar's exhibit three, which

contains a comprehensive estate tax affidavit. (T. 229). Of note, Respondent indicated that he prepares these to protect himself in the event a client later changes their story regarding the information provided to him. (T. 229). Respondent testified that he will not file a prepared return until a client signs this affidavit. (T. 229). However, in this case, he did not present the affidavit to Ms. Earl until April 10, 2006. (T. 20-22, 229, TFB Ex 3).

Respondent testified that Ms. Earl told him the cost of the demolition project was $30,000.00 for each of two buildings, for a total of $60,000.00. (T. 231). Respondent thought that putting $60,000.00 down for the costs would be too high, and could possibly trigger an audit, so he opted instead to place $30,000.00 on the line item when he prepared the return. (T. 231-232). He had no idea what the actual amount was, or when the project was completed until this became an issue in the instant proceedings. (T. 232). Respondent's testimony in this regard is directly contradicted by The Florida Bar's exhibit 8, containing the fax cover sheet, the invoice and canceled check that Ms. Earl faxed to Respondent demonstrating that the total cost of the demolition project was $30,000.00. (TFB Ex 8). His testimony at the Final Hearing regarding the $30,000.00 amount is also in direct contradiction of his June 22, 2010 written response to the Grievance Committee, which itself was also contradicted by the Florida Bar's Exhibit 8. At page 5, footnote 4, of his 2010 written response, Respondent indicated that Ms. Earl gave

him the estimated figure of $30,000.00 as early as July 2004, and confirmed the actual expense in February 2006. He indicated that she promised to fax him the receipt but failed to do so.

Regarding the dates contained in the fee statement, Respondent testified that he did not bill for any hours in March 2006. (T. 238). He indicated he used the date at the end of that month to signify to the client that there would be no more bills coming. (T. 238).

The Florida Bar filed its Notice of Intent to Seek Review of Report of Referee on July 10, 2012. The Florida Bar's Initial Brief on Appeal follows.

SUMMARY OF THE ARGUMENT

The Referee's findings of fact, that the Respondent did send an unsigned tax return to the IRS for the first and only time on December 16, 2005, is not supported by competent and substantial evidence and should not be accepted by this Court. The only evidence in the Record to support this finding of fact is Respondent's own testimony, and the Referee has found Respondent not to be credible in regard to this issue. Rather, the overwhelming weight of the evidence demonstrated that Respondent did not in fact send an estate tax return to the IRS. The Florida Bar respectfully requests this Court to make such a factual finding in this case.

The Referee's recommendation of probation for a period of two (2) years with special conditions to include completion of a Professional Responsibility Course and eight (8) hours of CLE Courses (CLE), and correction of the record in the underlying probate case, is contrary to existing case law and has no support in the Florida Standards for Imposing Lawyer Sanctions. Relevant case law and the Florida Standards establish that disbarment is the appropriate discipline for Respondent.

ARGUMENT

I. A PORTION OF THE REFEREE'S FINDINGS OF FACT ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL RECORD EVIDENCE, AND THEREFORE SHOULD NOT BE ACCEPTED BY THIS COURT.

In the instant case, the Referee recommended a finding of guilty as to each of the charged rule violations, based primarily on Respondent's numerous misrepresentations throughout these proceedings. However, the Referee specifically found that the The Florida Bar did not prove by clear and convincing evidence that Respondent failed to mail the estate tax return to the IRS, nor that he fabricated the December 16, 2005 cover letter to the IRS in order to cover up same. Rather, the Referee accepted as true Respondent's testimony that he did mail the estate tax return to the IRS for the first time on December 16, 2005. This specific finding is the subject of the instant appeal. This finding is not supported by competent and substantial record evidence, and should not be accepted by this Court.

In Florida Bar disciplinary proceedings, 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. *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 reweighing the evidence and substituting its judgment for that of the referee. *The Florida Bar v. MacMillan*,

600 So.2d 457, 459 (Fla.1992). 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. *The Florida Bar v. Miele*, 605 So.2d 866, 868 (Fla.1992).

In the case *sub judice*, the Referee accepted as true Respondent's testimony that he did in fact send an unsigned tax return to the IRS for the first and only time on December 16, 2005. (ROR 5-7). This finding is the subject of the instant appeal. The only substantive evidence in the record to support this finding of fact is the Respondent's own testimony, and the Referee found that Respondent was not credible on this specific issue. (ROR 5-7). Indeed, the Referee specifically found that Respondent employed knowingly false statements in order to deliberately mislead the Florida Bar and the probate court regarding the filing of the tax return. Therefore, the Referee's findings of fact that are established only by Respondent's own testimony are not supported by competent and substantial record evidence, and should not be accepted by this Court.

At the final hearing in this cause, the Florida Bar presented documentary and testimonial evidence to prove the assertions contained in the Complaint. There was overwhelming evidence of Respondent's failure to file any tax return with the IRS, and also of his fabrication of the December 16, 2005 letter in order to cover

up same. First and foremost, the IRS has no record of receiving anything from the Respondent following his request for an extension of time to file in September 2004. Perhaps more significantly, because it is possible for the IRS to lose a document, the Florida Department of Revenue likewise did not receive Respondent's purported estate tax return, as indicated in its assessment of penalties for failure to file. While Respondent may be able to successfully argue that the IRS makes mistakes, it is inconceivable that both the IRS and the Florida Department of Revenue both made the same mistake with respect to the same tax return.

In addition, despite Respondent's written statements to the Florida Bar indicating that he timely filed the estate tax return, and sent duplicate copies upon request thereafter, no tax return was produced to the client until one year after the March 2, 2005 due date. On April 10, 2006, after numerous attempts to obtain same, Respondent finally produced the purported tax return dated March 2, 2005, to his client. He submitted this along with a note that read: "Attached please find the form 706 Estate Tax Return. *As expected* no tax." (emphasis added). The language employed clearly conveys that Respondent has just completed the preparation of the return, and, as he expected, no tax will be due.

Along with the April 10, 2006 correspondence, Respondent issued his fee statement for services rendered in connection with the preparation and filing of the

estate's federal and state tax return. As a sole practitioner, it is incredible to believe that Respondent would wait so long to bill for his services if he had truly prepared and filed the returns back in March 2005, or even December 2005, depending on which version of his story he is telling at the time. Further, the bill itself indicates that it is for services rendered in connection with preparation of taxes for the time period up to and including March 2006. Thus, his own fee statement supports the fact that he did not complete the preparation and filing of the tax returns prior to March 2006.

Further, the estate tax return, allegedly prepared and sent to the IRS by Respondent, contains a line item for the costs of demolition of properties owned by the Estate. Respondent placed the amount of $30,000 on the line for this item. However, at the time Respondent indicated to the Bar that he had prepared and filed this document with the IRS, he could not possibly have known the actual cost of the demolition. The cost was not determined until the actual demolition was completed in November 2005. Prior to that, only an estimated range could be provided. Respondent's employment of the correct figure is conclusive proof that the purported tax return was not created until at least November 2005, at the earliest. Because the Florida Bar's presentation of the above referenced evidence regarding the demolition project clearly demonstrated that Respondent could not possibly have filed the purported estate tax return in a timely manner, as he had

previously stated in his written responses to the Bar, Respondent changed his testimony on the stand at the Final Hearing to indicate that he sent the estate tax return to the IRS for the first time in December 2005.

To support his contention that he did in fact send the tax return to the IRS, Respondent produced a purported December 16, 2005 cover letter to his client's successor counsel, as well as to the Bar. The December 16, 2005 cover letter purports to attach a "duplicate" copy of the estate tax return. Respondent also used the word "duplicate" in his written responses to the Bar. This was meant to convey that Respondent previously filed the original estate tax return, and then submitted duplicate copies, up to at least two times, upon request of the IRS. However, the Bar's investigation revealed that the document purporting to be sent in December 2005 was not created on Respondent's computer until January 2007, just one day before Respondent finally provided a copy of his file to successor counsel.

Further, Respondent could not produce one piece of evidence to demonstrate that he actually sent any correspondence to the IRS following his request for extension. This was true despite his testimony that as a matter of practice he copies and keeps all the envelopes from his correspondence. Indeed, for each of the pieces of correspondence we know were actually sent, the Florida Bar's exhibits contain the copies of the envelopes Respondent retained for his file. However, he did not have a copy of an envelope or any other indication that he

actually mailed the December 16, 2005 letter.

In addition to each circumstance detailed above to demonstrate that Respondent did not send the tax return to the IRS, Respondent's own statements on the stand regarding his purported mailing of the December 16, 2005 letter along with the purported estate tax return were not credible. Respondent testified that he was an experienced tax law specialist, and that he had been practicing in this field since 1977. As such, he knew very well that an unsigned tax return would not be considered filed by the IRS, and would not be processed by the IRS. Further, he knew that his client did not sign the tax return, and he did nothing to follow up with her in that respect. Rather, after receiving repeated requests from the IRS for the returns to be filed, Respondent simply sent them the unsigned tax return, "because that was all he had." He did not call his client and ask her to come in to sign the return. He did not tell the Service that he needed to obtain a signature and would file a return shortly. Instead, he claims to have sent the December 16, 2005 letter, indicating that he was sending a "duplicate" copy, despite his knowledge that no original return had ever been filed. This story makes no sense, is not credible, and is further indication of Respondent's dishonesty in this matter.

Against the weight of all of the Florida Bar's evidence in this case, Respondent took the stand in his own behalf and denied the allegations contained in the Complaint. Respondent's denials were the only substantive evidence

produced to prove his version of the facts, and this is the only evidence that supports the Referee's finding of fact regarding the income tax return. Respondent did produce additional evidence, in the form of IRS documents, and a computer expert and an IRS expert. However, none of this additional evidence corroborated, and/or advanced, his version of the events. For instance, Respondent's computer expert did not testify that the forensic evidence established that Respondent's version of events was the truth. Rather, his computer expert merely testified that the forensic evidence is not sufficient to establish the issue one way or the other. As such, this, and the remainder of Respondent's evidence was more in the nature of impeachment evidence, introduced solely to undermine the case of the Florida Bar, and not to advance his own theory of the case. Thus, the only substantive evidence introduced by Respondent was his own testimony.

More significantly for purposes of this appeal, Respondent's tax expert did not offer substantive evidence to verify Respondent's version of events, but rather was also only a general impeachment witness. Respondent's tax expert did not testify that Respondent mailed a tax return to the IRS. In fact, he indicated there was no evidence in the record of same. Further, he did not venture an opinion about any of the facts in this case, or the actual record before the IRS. Rather, he put forth only general comments and opinions regarding the IRS's reputation for sloppy record keeping. More importantly, he did not verify or corroborate

Respondent's testimony regarding the significance of the erroneously issued refund check. Respondent testified that the IRS could not have issued the refund check to him absent its receipt of the unsigned tax return that he mailed in December 2005. The Bar's expert tax witness, Howard Gordon, refuted this testimony and testified that the issuance of the refund check was based on the Request for Extension that was previously filed by Respondent. Significantly, in the face of this apparent stand-off, Respondent's own tax expert did not testify as to whether Respondent's interpretation of IRS procedures regarding the issuance of the refund check supported Respondent's version of events. He remained silent on this issue. As such, the only evidence that the refund check had any connection to the alleged estate tax return was Respondent's own testimony, and Respondent's testimony in these proceedings is simply not credible based on the Referee's recommendations of guilt.

In his own testimony, Respondent directly contradicted a multitude of written statements he previously submitted to the Florida Bar in this cause, and at least one written pleading previously filed in the Probate Court. Indeed, the Referee specifically found that Respondent made misrepresentations concerning the very issues presented in this case. Specifically, the Referee noted that, in Respondent's prior written responses to the Bar grievance, he claimed on multiple occasions to have sent to the IRS an original, no tax, estate tax return prior to

December 16, 2005. (ROR 5). In those written responses to the Bar, Respondent referred to his purported December 16, 2005 submission as a "duplicate" copy of the estate tax return. (ROR 5). Indeed, in the purported December 16, 2005 cover letter to the IRS, Respondent also identified the attached unsigned estate tax return as a "duplicate" copy. (ROR 5-6). However, in the Final Hearing in this cause, Respondent changed his story to indicate that he sent the unsigned, no tax, estate tax return to the IRS for the first time on December 16, 2005. (ROR 6). From this, the Referee found that Respondent's written responses to the Florida Bar were knowingly false statements, and that the Respondent employed language to deliberately mislead the Florida Bar regarding the filing of the unsigned estate tax return. (ROR 6). The Referee further found that the language employed in Respondent's December 16, 2005 letter to the IRS, in which he referred to the return as a "duplicate estate tax return" was dishonest and misleading and designed to convey to the IRS that the estate tax return had been sent to the IRS on a prior occasion. (ROR 6). Therefore, the Referee recommended a finding that Respondent is in violation of Rules 4-8.1 and 4-8.4(c).

The Referee further recommended a finding that Respondent made affirmative misrepresentations to the probate court when he filed a request for extension of time to close out the administration of the estate. In his pleading, he misrepresented the fact that any return had been filed and that the IRS was

conducting an audit or review. The Referee found that this provided additional clear and convincing evidence of a violation of Rule 4-8.4(c). (ROR 7). The Referee was more troubled by this finding, "in light of the courts' need to rely upon the statements of the lawyers practicing before it." (ROR 7).

In addition to those matters specifically cited by the Referee in his Report of Referee, there were numerous other misrepresentations in Respondent's written statements and final hearing testimony. For instance, in his written response to the inquiry by Gabriel Bach, Respondent directly implied that there was a signed copy of the estate tax return, but he simply could not find it in his file. Respondent contradicted this written response in his testimony at the Final Hearing when he testified that he knew Ms. Earl had not signed the estate tax return, and that he never actually "filed" a tax return on behalf of the estate.

Respondent's trial testimony concerning his knowledge that Ms. Earl had not signed the estate tax return also contradicted his previous written responses to the Florida Bar. In his first response to the Bar grievance, he claimed to have timely "filed" an estate tax return that was accepted by the IRS. As he testified on the stand at the final hearing, his use of the term "filed" indicated that the tax return had been signed and verified before it was submitted. In his second response to the Florida Bar, he indicated that he was unaware that Ms. Earl had not signed the tax return, and therefore he inadvertently submitted the unsigned tax

return to the IRS. However, at trial, Respondent testified that he knew Ms. Earl did not sign the tax return, but he did nothing to follow up with her, and simply submitted the unsigned tax return in response to the second IRS Notice of No Tax Return, "because that was all he had."

Additionally, Respondent's explanation for how he came up with the $30,000.00 figure at the final hearing directly contradicted the written statement he provided to the Florida Bar in this matter on June 22, 2010. At page 5, footnote 4, Respondent explained that Ms. Earl provided him with an estimated amount of $30,000.00 for the cost of the demolition as early as July, 2004. She confirmed the amount in February 2006 and promised to fax him the receipt but she never did. At trial, he told a vastly different story, explaining that he essentially made up the $30,000.00 figure because it sounded better and would be less likely to trigger an audit, than the actual amount Ms. Earl told him it would be. However, both of Respondent's versions of how he came up with this figure were directly contradicted by the record evidence. The Florida Bar introduced into evidence the actual fax that Ms. Earl sent Respondent relaying the invoice and canceled checks for the demolition project.

Based on the above argued facts and authority, it is clear that the Referee's specific finding of fact that Respondent did in fact send an unsigned estate tax return to the IRS, for the first and only time, on December 16, 2005, is not

supported by competent and substantial evidence, and same should not be accepted by this Court. Those facts are established solely by Respondent's testimony, which is inherently unreliable based on the findings of guilt in this case, and his numerous misrepresentations regarding this very issue. Rather, the overwhelming weight of the evidence clearly and convincingly establishes that Respondent did not send any tax return to the IRS or the Florida Department of Revenue on behalf of the estate, and that he fabricated the December 16, 2005 letter in order to cover up his failure to file the tax returns, and The Florida Bar respectfully requests this Court make such findings in this case.

II. THE REFEREE'S RECOMMENDED SANCTION OF PROBATION HAS NO REASONABLE BASIS IN EXISTING CASE LAW, NOR THE STANDARDS FOR IMPOSING LAWYER DISCIPLINE, AND THEREFORE SHOULD NOT BE ACCEPTED BY THIS COURT.

The Referee in this matter recommended probation with special conditions as the appropriate sanction in this matter. That recommendation is wholly unsupported by existing case law, and has no reasonable basis in the Florida Standards for Imposing Lawyer Discipline and as such should be rejected by this Court. Rather, the appropriate discipline, in light of the overwhelming evidence of guilt, is disbarment.

"The Supreme Court shall have exclusive jurisdiction to regulate…the discipline of persons admitted [to the practice of law]." Art. V, §15, Fla. Const.

Therefore, "unlike the referee's findings of fact and conclusions as to guilt, the determination of the appropriate discipline is peculiarly in the province of this Court's authority." *The Florida Bar v. O'Connor*, 945 So.2d 1113, 1120 (Fla. 2006). As ultimately it is this Court's responsibility to order the appropriate punishment, this Court enjoys broad latitude in reviewing a referee's recommendation. *The Florida Bar v. Anderson*, 538 So.2d 852 (Fla. 1989). The Court usually will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Temmer*, 753 So.2d 555 (Fla. 1999). Here, the recommended discipline has no reasonable basis in existing case law, or in the Florida Standards for Imposing Lawyer Sanctions, and the Referee's recommendation should be rejected.

In the instant case, the Respondent engaged in a pattern of dishonest conduct, and made knowing misrepresentations over a period of several years, beginning with his communications to his client and her successor counsel, malpractice counsel, the probate court in a legal pleading and ultimately the Florida Bar in the instant disciplinary proceedings. Indeed, it is apparent that truth for Respondent is whatever is expedient, and he will say whatever is needed depending on the person he is speaking to and the concern he is attempting to address. As such, even if this Court sanctions Respondent only for the conduct

upon which the Referee recommended a finding of guilt, the recommended sanction of probation is woefully inadequate.

Based on the totality of the circumstances and the overwhelming evidence presented by the Bar in this case, the appropriate sanction is disbarment. "This Court has clearly stated that 'basic, fundamental dishonesty . . . is a serious flaw, which cannot be tolerated' because dishonesty and a lack of candor 'cannot be tolerated by a profession that relies on the truthfulness of its members.'" *The Florida Bar v. Head*, 27 So.3d 1 (Fla. 2010) (citing *The Florida Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2002)). Dishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole. *Id*. The profession of the practice of law requires lawyers to be honest, competent and diligent in their dealings with clients, other lawyers, and courts. *The Florida Bar v. Varner*, 992 So.2d 224, 231 (Fla. 2008) (holding that a one year suspension was the appropriate sanction for an attorney who lied to opposing counsel, the court and his own client). Indeed, in *The Florida Bar v. Senton*, 882 So.2d 997 (Fla. 2004), this Court held that lying in the disciplinary proceeding alone is worth disbarment. In the instant matter, the Referee made specific findings that Respondent knowingly made false statements in order to deliberately mislead the Florida Bar and the probate court. As such, this Court must reject the Referee's recommendation of probation as the appropriate sanction. The appropriate

sanction is disbarment.

Further, in an analogous case, this Court entered an Order of Disbarment for an attorney's fabrication of documents in order to cover up her neglect of a client matter. *The Florida Bar v. Mazza-Martinez*, 939 So.2d 95 (Table), (Fla. 2006).

Thus, the Referee's recommendation of probation has no reasonable basis in existing case law. Additionally, the recommended sanction is not supported by the Standards for Imposing Lawyer Discipline. Standard 5.11(f) indicates that disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. In the instant case, Respondent was found to have employed knowingly false statements in order to deliberately mislead the probate court and the Florida Bar. His numerous misrepresentations and contradictory statements, which change depending on the person he is speaking to and the circumstances he is seeking to alleviate, demonstrate his fundamental dishonesty. Such inherent dishonesty simply cannot be tolerated in a community that relies on the truthfulness of its members.

Similarly, Standard 6.11 indicates that disbarment is appropriate when a lawyer, with intent to deceive the court, knowingly makes a false statement or submits a false document. In the instant case, the Referee found that the misrepresentation contained in Respondent's pleading in the probate court was

knowing and deliberately misleading, as such, disbarment is the appropriate sanction in this case.

Finally, there are numerous aggravating factors present in this case. Respondent clearly had a dishonest or selfish motive. Respondent engaged in a pattern of misconduct and multiple offenses, and this Court treats individual misrepresentations as separate offenses. Respondent engaged in bad faith obstruction of the disciplinary proceedings when he refused to comply with an instanter subpoena, and then later turned over the wrong computer for inspection by the Bar's forensic expert. Respondent has not acknowledged the wrongful nature of his conduct, and indeed has not taken responsibility for same. The victim in this case was a vulnerable lay person, grieving the loss of her mother, and simply trusting the professionals she hired to ensure that documents and pleadings were timely and properly filed. Respondent testified to his substantial experience in the practice of law.

By contrast, the only mitigating factors, per the Referee's findings, were Respondent's long membership in the Florida Bar without any prior disciplinary sanctions.

Therefore, based on the totality of the circumstances in this case, and the overwhelming weight of the evidence, the appropriate sanction for Respondent is disbarment. The recommended sanction of probation has no reasonable basis in

existing case law, nor in the Standards for Imposing Lawyer Discipline. Additionally, the aggravating factors far outweigh any possible mitigation in this case.

CONCLUSION

In consideration of this Court's broad discretion as to discipline and based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Court reject the Referee's finding of fact and find that Respondent did not mail an estate tax return to the IRS or the Florida Department of Revenue and that he fabricated evidence to hide the fact that he did not file the estate tax returns. Further the Florida Bar respectfully requests that this Court reject the recommended discipline of two years probation and impose instead disbarment.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief were sent via U.S. Mail (and a true and correct copy was sent via electronic mail at e-file@flcourts.org) to the Honorable Thomas D. Hall, Clerk, Supreme Court Building, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and a true and correct copy was emailed at rjosefsberg@podhurst.com and mailed to Robert C. Josefsberg, Attorney for Respondent, 25 West Flagler Street, Suite 800, Miami, Florida 33130; and emailed at kmarvin@flabar.org to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399; on this ___ day of September, 2012.

_____

JENNIFER R. FALCONE MOORE
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE

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

_____

JENNIFER R. FALCONE MOORE
Bar Counsel