IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JEFFREY ALAN NORKIN,

Respondent.
_____/

Supreme Court Case
Nos. SC11-1356

The Florida Bar File
No.: 2010-51,662(17F)

RESPONDENT'S AMENDED ANSWER BRIEF

AND INITIAL BRIEF ON CROSS APPEAL

KEVIN P. TYNAN, #710822
RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

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PRELIMINARY STATEMENT

The Florida Bar, Appellant/Cross Appellee, will be referred to as "The Bar" or "The Florida Bar." Jeffrey Alan Norkin, Appellee/Cross Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held over five days in January 2012. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __. Finally, the symbol IR will refer to the Index of the Record.

STATEMENT OF CASE AND FACTS

The Florida Bar has served an Initial Brief wherein they set forth the procedural history of the case and their version of the facts.[1] As the Respondent seeks to overturn the factual findings of the Referee, the Bar's factual statement needs to be supplemented herein. In order to put the relevant events into proper context, the Respondent offers the following statement of the relevant facts.

A. THE UNDERLYING LITIGATION.

In October, 2007, Gary Brooks, Esquire, the individual who filed the instant Bar grievance, drafted and filed a lawsuit against David Beem, alleging principally that Beem had stolen a million dollars from his small company, FTD.[2] Resp. Exs. 2 & 7. Brooks' client, Gary Ferguson, owned one-third of FTD and Beem owned two-thirds of the company. Resp. Ex. 2, ¶5(e). Brooks and Ferguson did not hire an accountant to review FTD's books before filing the lawsuit. TT at 228, ll. 15-19. Almost immediately, the Court appointed a forensic accountant to investigate the allegations made in the lawsuit at FTD's expense, and in January, 2008, issued a 50-page report finding no theft by Beem. TT at 221. In fact, the court appointed accountant testified to Beem's innocence of any theft of corporate assets in court

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1 The Bar's procedural history is accurate and will not be restated herein.

2 This lawsuit will be referred to as "*Ferguson*" or "*Ferguson v. Beem.*"

on May 5, 2008. Resp. Ex. 42; TT at 208-10. Despite this clear indication that his suit was frivolous, Brooks continued to prosecute his client's unsupported claims.

The Respondent was not the initial attorney defending the case as he entered his appearance in July, 2008**.** TT at 210. After he was retained, the Respondent immediately prepared a counterclaim, alleging a multitude of malicious and dishonest acts by Ferguson to sabotage Beem and FTD. Resp. Ex. 3. He also drafted a motion for summary judgment on the original complaint, and as to liability on the abuse-of-process counts of the counterclaim. Respondent also made many efforts to convince Brooks to dismiss the lawsuit, some of which include passages which are charged acts of misconduct in this case.

On December 2, 2008, Kim Ferguson testified before Judge Trawick during a hearing that she had in a box all the proof of theft that the court's accountant testified did not exist seven months earlier. TT at 232. However, on January 7, 2009, Mr. and Mrs. Ferguson and Brooks appeared at the summary judgment hearing with no evidence of theft whatsoever. Resp. Ex. 21. Although they submitted an "Affidavit" signed by an accountant, it contained no final opinions and the sketchy opinions it contained were completely unsupported by any competent evidence. Judge Trawick granted summary judgment, finding that the Complaint was not supported by any competent evidence and also granted

summary judgment as to Ferguson's liability for abuse of process on the counterclaim.[3] Resp. Ex. 21; *see also* TT at 232-3.

Mr. Brooks and his clients' abuse went beyond the malicious prosecution of the sham complaint. The Fergusons, often with Brooks' help, initiated investigations against Beem by the Small Business Administration, the Internal Revenue Service, local government agencies, and an entity which gave FTD a grant to rebuild after a hurricane. Resp. Ex. 3. Brooks sent letters to FTD's suppliers and key customers accusing Beem and FTD of impropriety and requesting records of their business transactions with FTD. Resp. Exs. 11-14. Finally, in 2010, an anonymous caller falsely reported to the Florida Department of Children and Families that Mr. and Mrs. Beem were physically abusing their children.[4] In every investigation initiated by Brooks and the Fergusons, Mr. Beem was cleared of any and all wrongdoing.

Judge Trawick left the division immediately after the summary judgment proceedings and Hon. Ronald Dresnick presided over the case until he recused himself at the end of 2009. In 2009, Judge Dresnick denied numerous motions in

[3] Despite the unequivocal meaning of the January 7, 2009 order, Brooks denied during the Final Hearing that the Court had deemed his complaint and prosecution to be an abuse of process. TT at 110, ll. 9-13, *et seq*.

[4] The Department of Children and Families launched an unsuccessful investigation into the identity of the anonymous caller.

which Respondent sought monetary relief against Mr. Ferguson, including motions for a cost judgment for the reimbursement of the money Beem had paid the Court-appointed accountant. Resp. Ex. 4. Mr. Beem's financial situation had rapidly deteriorated, and FTD was sued in foreclosure in late January, 2009. As Respondent testified:

> Their whole -- their whole *modus operandi* throughout this case was to cost Dave money at every turn and to drain him of resources so he had to sell his business, which is what Ferguson wanted. TT at 277, ll. 19-23.

The strategy succeeded and Mr. Beem's and Respondent's stress and anxiety worsened. Respondent testified that handling this case without being paid, along with many other factors, including a pending divorce and unforeseen setbacks in other cases, led him into severe financial problems. TT at 258, 312.

The litigation drove FTD's real estate into foreclosure in early 2009 and the company into bankruptcy in June, 2009. Mr. Beem's home also went into foreclosure. TT at 257. Respondent was spending hundreds of hours on the case while being paid very little. TT at 263. As of January, 2011, Respondent had performed over $240,000 worth of work at a discounted rate, and continues to represent Beem in collection efforts, the appeal and cross-appeal of *Ferguson*, and in other proceedings. Id.

While he was trying to get the suit to trial for a jury to award damages, Respondent also appeared at several bankruptcy hearings. TT at 286. Ferguson,

and occasionally Brooks, appeared in the bankruptcy proceedings with an agenda of further disabling Mr. Beem and the company. See TT at 290.[5] Ferguson actually hired lawyers to oppose the interests of FTD in bankruptcy court, a company of which he was a part owner. TT at 292.

In mid-2009, after denying Mr. Beem any monetary relief, Judge Dresnick increased Mr. Beem's financial burden by appointing retired Judge David Tobin to act as a provisional director of FTD. Mr. Beem and Respondent hoped that Mr. Tobin would assist FTD in obtaining some funds from Mr. Ferguson or at least remove Mr. Ferguson's 50% voting interest in the company so that Mr. Beem could attract outside investors who did not want to invest with Mr. Ferguson.

Mr. Tobin rejected all of Mr. Beem's resolutions and adopted many of Mr. Ferguson's, including the changing of the company's accountant and cancelling the company's credit cards. See Resp. Ex. 34-5, TT at 272. Mr. Tobin also appeared at several hearings without Mr. Beem's or Respondent's agreement, and billed FTD and Mr. Beem for these appearances. TT at 161-2. Mr. Beem, who also did not have the money, refused to pay Mr. Tobin in full and moved to have him removed from his position. Id.

Without a motion or notice to Respondent, and without being a party in the suit, Mr. Tobin obtained a final judgment executed by Judge Dresnick against Mr.

[5] The Referee sustained an objection after Respondent began describing Mr. Fergsuon's efforts to hinder FTD's efforts to save itself through bankruptcy. Id.

Beem for his unpaid fees. TT at 271, 276-7. Shortly after he received this final judgment, Respondent received a writ of garnishment on FTD's bank account to satisfy the judgment. Resp. Ex. 36. In addition, Mr. Ferguson helped Mr. Tobin to execute a writ of garnishment. TT at 274-5. In essence, Mr. Tobin had sided with a person whom the Court had found acted to destroy the company for his own personal gain.

Respondent researched the issue to confirm that a non-party cannot obtain a judgment. TT at 271. He then sent Mr. Tobin a fax in which he threatened to sue him and investigate the "cozy, conspiratorial nature of [Mr. Tobin's] relationship with Mr. Ferguson." IR-1, Exh. S.

In December, 2009, just before Christmas, Mr. Ferguson withdrew $16,000 from FTD's bank account without any colorable right and in violation of a court order from a year before. TT at 283-4. Respondent moved the Court for emergency relief and Judge Dresnick ordered Mr. Ferguson to return the funds. TT at 284. However, Judge Dresnick denied Respondent's motion for sanctions. Id. When Respondent expressed discontent with that ruling, Judge Dresnick told Respondent to file a motion to recuse him; that he would grant it in "a heartbeat." Resp. Ex.10; TT at 240-1.

In early 2010, Respondent won the right to claim punitive damages and Judge Manno Schurr, in June, 2010, stated that the case would be tried in late

September. TT at 268-9, 294, ll. 20-23. In several hearings, Bankruptcy Judge, Hon. Robert Mark, advised that the case needed to be tried in order for a viable plan to be confirmed within the statutory deadline. Resp. Exs. 24 & 37; TT at 293-4.

On September 20, 2010, Judge Manno-Schurr presided over calendar call. IR-84(5). Mr. Brooks asserted that there were discovery issues outstanding, despite the fact that Mr. Beem had obtained summary judgment on all significant issues more than 20 months earlier. See generally, TT at 294-8. Judge Manno-Schurr passed the case over. Id. She then set several other cases for trial, meaning that this trial, which Mr. Beem, his family, his company, and its employees, desperately needed to happen as scheduled. Id. When Respondent realized the *Ferguson* case was being passed over, out of complete desperation for his client's position, he begged the judge to give him the trial date she had assured him of three months earlier. Id. Judge Manno-Schurr got angry with Respondent. TT at 297-8. She did not set the case for trial. Id. As Judge Mark warned, the failure of the case to go to trial in September, led to FTD's bankruptcy being converted to a Chapter 7, and Mr. Beem lost the company that he built and which had supported his family for 17 years. TT at 264. As Respondent testified, Beem's "future went up in smoke" when the trial was moved from September, 2010 to March, 2011. TT at 298.

All through the two-year period between January 7, 2009 and January, 2011, somehow Mr. Brooks avoided ever serving upon Respondent and Mr. Beem the evidence which Mrs. Ferguson alleged proved their initial allegation of $1 million in theft. Finally, just before trial, in or about January, 2011, Mr. Brooks finally produced this "Evidence," and finally, the full extent and egregiousness of the Fergusons' fraud on the court, and Mr. Brooks' complete failure to investigate prior to filing the suit, were revealed to Respondent and Mr. Beem. TT at 249.

The evidence, consisting of checks and tabulation sheets adding up the checks, showed ordinary business activity. Resp. Ex. 5.[6] Included in the checks were checks made out to Mr. Beem in repayment of loans, credit card payments, telephone, insurance, and cell phone payments, and checks to building suppliers that the Fergusons and Brooks confused with bank names. TT at 249-253. None of the checks evidenced theft or other wrongdoing. The entire case was finally revealed to be the fraud on the court that Respondent always believed, and Mr. Beem always knew it to be. TT at 267.

The case went to a damages trial in March, 2011. The jury awarded Mr. Beem, on damages claims extremely limited by court rulings, $118,025.00 in attorneys' fees and $200,000 in intangible damages. TT at 60. In every instance in

[6] Respondent presented the Referee with copies of all of the checks and thoroughly explained them to her. TT at 249-253. TT at

which Mr. Beem needed representation, Respondent provided it. (TT at 506, ll. 13-14) Mr. Beem testified:

> Well, considering you pretty much worked for free, or with a promise of hopefully someday getting something, then you devoted a tremendous amount of time. That was the way, you know, I can't repay you enough. I can't thank you enough for doing it. But you were there for every time that you needed to be there…

Id., ll. 7-14. Respondent represented Mr. Beem's company in the foreclosure proceedings; he represented them in the IRS audit initiated by Ferguson; and he assisted bankruptcy counsel, helping prepare pleadings and attending and testifying at 4-5 hearings. TT at 286.

B. THE BAR GRIEVANCE.

On May 3, 2010, Respondent's opposing counsel, Mr. Brooks, submitted a Bar grievance in the midst of highly contentious litigation, just before it appeared to all involved that the case would go to trial. Most of the complained-of Acts occurred in 2008 and 2009, long before the submission of the Bar complaint.

As Mr. Brooks admitted, he and his clients used their grievance and this prosecution to their advantage in the *Ferguson* litigation. TT at 85-86. In particular, Brooks discussed the disciplinary action in a motion to stay execution of the judgment and discussed same at hearings to such an extent that the trial judge commented on same. Resp. Ex. 22 at 2. Mr. Brooks mentioned the Bar Complaint

in a hearing and thereafter, Judge Manno Schurr inquired of its progress in nearly every hearing. See Resp. Ex. 22 at p.2; TT at 515-516.

Mr. Brooks, the complainant, did not even decide what acts he would complain about. Rather, he admitted at trial that his client, Mrs. Ferguson, "gathered documents… identifying places and identifying transcripts" which would be included the Bar grievance. TT at 106, ll. 19-23.

C. THE PROCEEDINGS BEFORE THE REFEREE.

On July 7, 2011, The Florida Bar filed a Complaint against the Respondent. In four sections, the Complaint lists 20 distinct items. Most are Respondent's spoken or written words, but two solely consist of judges' spoken words. The Acts span a period of more than two years. The sole allegations in the three sections are:

- Misconduct in the Courtroom. …Throughout the progression of *Ferguson v. Beem*, the respondent behaved in a disruptive manner in court resulting in the following [four] exchanges with judges." (IR-1, ¶5)
- "Attacks on Opposing Counsel…. Throughout the progression of *Ferguson v. Beem*, the respondent made the following [nine] false and unprofessional statements attacking Gary Brooks; (Id. at ¶7)"
- "False Accusations Against David Tobin… The respondent falsely accused retired Judge David Tobin of corrupt conduct." (Id. at ¶13)

Following each of these summary allegations are short excerpts, snippets, from correspondence, pleadings, transcripts and two short verbal statements Respondent is also accused of "Shouting" in the Courthouse.

In its complaint the Bar alleged violations of R. Regulating Fla. Bar 4-3.5(c) [conduct intended to disrupt a tribunal.]; 4-8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; and 4-8.4(d) [conduct prejudicial to the administration of justice].

The Honorable Bronwyn Miller was appointed to serve as Referee. By order dated November 10, 2011, she entered partial summary judgment in favor of The Florida Bar as to sections I and III[7] of the Complaint, and denied summary judgment as to sections II and IV.

The final hearing was held over five days in January 2012. During the final hearing, Respondent testified about the abuses and hardships his client and he suffered at the hands of Mr. Brooks and the Fergusons. When asked why he wrote one of the critical passages about Mr. Brooks in an email, Respondent testified:

> I'm just trying to get him to stop what he's doing. My client was already in foreclosure. I was not making any money on the case. I was in divorce proceedings. I wasn't seeing my children. I was flat broke. I needed to work on other matters. And I was trying to get him to stop committing this fraud on the court. And he persisted and persisted and persisted. And it was just -- it was a nightmare. And I was just desperate. I was just trying to get him to stop.

TT at 258. Concerning the email in which he expressed suspicion of Mr. Tobin, Respondent testified:

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[7] During the Final Hearing, the Referee reversed this ruling as to Section III and held that Respondent was not guilty as to that section.

> That Ferguson should pay his bills. Ferguson is the one who was destroying the company. Ferguson is the one who created the situation which led Judge Dresnick to decide that a provisional director would be useful. Ferguson should have paid from the beginning. Ferguson should have paid Robert Steinberg's bills. Their whole -- their whole *modus operandi* throughout this case was to cost Dave money at every turn and to drain him of resources so he had to sell his business, which is what Ferguson wanted. And the misuse of the law was obtaining a judgment when he was not a party. And it's just flat out illegal.

TT at 277-8. He submitted to the Referee a decision stating this simple rule of law that only parties can obtain judgments. Resp. Ex. 37.

Concerning the charge that he argued in an inappropriate fashion during hearings, Respondent testified:

> A. I never tried to disrupt the court. I only tried to get judges to listen to me.
> Q. What were you trying to do at this time at this hearing?
> A. … I was trying to get my piece heard. It was my belief and feeling that Mr. Brooks' tactic in these hearings…, he high-jacked hearings. He has this persistent, calm way of speaking. And judges just listen to him as if he were Moses himself. … And when I would try to say, judge, he's taking up the whole hearing, they would say don't interrupt. And I would be so frustrated, I was never able -- I felt like I was never able to speak. I felt that I was completely impotent to fight this man. Even though I had this order in my pocket that said that he had basically wasted this court's time to the tune of like hundreds of dollars (sic). I mean, I couldn't believe it. I was unable to get these -- to get Judge Dresnick to listen to me. And sometimes maybe my voice got a little bit louder. And Judge Dresnick was extremely intolerant of that. I was in

> bankruptcy court for [Mr. Beem]… and I gave these passionate, loud speeches about what was going on in the trial court proceedings. And Judge Mark never said one word to me, like lower your voice. TT at 284-286.[8]

Respondent and five witnesses, David Beem, Adam Friedman, Jonathan Drucker, Esq., Dr. Jonathan Hoffman, and Murray Norkin, also testified that Respondent's voice is extraordinarily loud, even in normal conversation. Dr. Hoffman, Respondent's psychologist, testified that Respondent realized his voice level was a problem and had been working on it with him for about eight months:

> Mr. Norkin has a very loud voice, which I think he wasn't realizing just how loud it appeared to other people, that it could even appear quite hostile, when he was not intending that, that his voice modulation was very poor. So he is trying to self-monitor and speak in a lower tone. So the awareness helps him in also trying some strategies to just, you know, just simply put, to actually keep his voice - keep aware of his voice being lower as a basic procedure for himself And reminding himself of that when he's in a courtroom with other people." TT at 637-638.

Respondent also demonstrated to the Referee how loud his voice can be and all the ways in which his voice was a benefit and hindrance in his life. TT at 310-11.

While the Complaint charges Respondent with violating Rules 4-3.5(c), 4-8.4(c), and 4-8.4(d), the Report recommends finding Respondent guilty of violating Rules 4-3.5(c), 4-8.2(a), 4-8.4(a), and 4-8.4(d) of the Rules of Professional Conduct." Thus, the Referee recommends finding Respondent guilty

[8] The above was corroborated by Mr. Beam. TT at 511, ll. 7-13.

of violating two Bar Rules not charged, 4-8.2(a), 4-8.4(a), and exonerates Respondent as to violations related to two Rules he was charged with violating, 4-3.3(a) and 4-8.4(c).[9] In addition to finding him guilty of violating Rules not charged, the Referee recommends findings of guilt for acts not set forth in the Complaint.

There is no finding or evidence that the Charged Acts caused any tangible harm or injury. There is no finding that any of the Acts were committed for an improper purpose, with knowledge that they violate a Bar Rule, or for selfish motive. Nonetheless, the Referee is recommending a lawyer who has only a minor discipline from an incident which occurred 14 years ago, to be suspended from the practice of law for 90 days, be placed on probation for 18 months and as part of that probation be evaluated by a mental health professional and follow any required treatment plan, and to provide letters of apology to Mr. Brooks (who passed away after the trial of this case), retired Judge Tobin, Judge Dresnick and Judge Manno Schurr. As the Respondent believes the guilty findings and the recommended sanction are not supported by the record, he has filed this appeal.

[9] Neither party appeals the not guilty findings.

SUMMARY OF THE ARGUMENT

The Florida Bar seeks to suspend a lawyer for one year for (1) sending pointed correspondence to an opposing counsel and a court appointed director for corporation that was in litigation and (2) raising his voice during several hearings wherein the presiding judges took no action to sanction that lawyer. It is respectfully contended that when the Court examines each piece of correspondence and commentary made to the trial court in light of the background of the litigation where the Respondent verily believed that his client was the victim of frivolous litigation and was able to prove that fact by securing a summary judgment on the initial claim brought against his client and on successfully securing a judgment for malicious prosecution, that he will be found not guilty of the rule violations plead in the Bar's complaint.

If the Court disagrees with this proposition then it must find an appropriate sanction for such conduct. As is set forth fully below, it is the Respondent's position, supported by case law, that a suspension is not warranted herein and that at most this court should impose a public reprimand.

ARGUMENT

I. THE RESPONDENT SHOULD BE FOUND NOT GUILTY OF ENGAGING IN CONDUCT INTENDED TO DISRUPT A TRIBUNAL; CONDUCT THAT IMPUGNED THE INTEGRITY OF A JUDICIAL OFFICIAL AND CONDUCT THAT WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

At issue in this appeal is whether a nineteen year member of The Florida Bar should be found guilty of having engaged in certain conduct during that lawyer's successful defense of a lawsuit and prosecution of an abuse-of-process counterclaim. Many of the matters set forth in the Report of Referee evidence a hard fought litigation between two lawyers, with the lawyer who was not prevailing in the litigation filing a complaint with the Bar and using that fact in the ongoing litigation in an attempt to secure some form of advantage.

It is well settled that a referee's findings of fact and guilt are presumed to be correct and the appealing party has the burden to demonstrate that these findings are "clearly erroneous and lacking in evidentiary support." *The Florida Bar v. Canto*, 668 So.2d 583 (Fla. 1996); *The Florida Bar v. Porter*, 684 So.2d 810 (Fla. 1996). It is the Respondent's position that the findings below are "clearly erroneous and lacking in evidentiary support."

A. THE UNCHARGED MISCONDUCT.

In this case a Referee has found the Respondent not guilty of a significant portion of the matters set forth in the Bar's complaint but reaches outside the issues raised in the complaint and finds the Respondent guilty of rule violations and of certain actions that were not set forth in the Bar's complaint.

This Court has taken up the issue of whether or not it was a violation of a lawyer's due process rights for a Referee to find that lawyer guilty of matters not charged in the Bar's complaint. See for example *The Florida Bar v. Vernell*, 721 So. 2d 705 (Fla. 1998) [uncharged misconduct disallowed reversing prior court precedent]. Since *Vernell* this Court has refined when a Referee can consider conduct not charged in the Bar's complaint. *The Florida Bar v. Fredericks*, 731 So. 2d 1249 (Fla. 1999). The standard today is that:

> Specific findings of uncharged conduct and violations of rules not charged in the complaint are permitted where the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint. *Fredericks* 1253.

Further, R. Regulating Fla. Bar 3-7.6(h) and fundamental principles of due process afford those accused of wrongdoing the right to be put on notice of the specific charges against them. R. Regulating Fla. Bar 3-7.6(h), discussing the charging document in Bar matters, provides: "The complaint shall set forth the particular act or acts of conduct for which the attorney is sought to be disciplined."

Without being afforded specific notice of charged acts, a respondent is deprived of the right and ability to defend himself.

As to "Misconduct in the Courtroom" and "False accusations against David Tobin," the Report recommends that Respondent be found guilty of actions that are not set forth in the Complaint, and violating two Bar Rules not charged. This Court should reject all such recommendations of guilt on the grounds that if adopted, they would violate Respondent's due process right to be put on notice of the charges against him as codified in R. Regulating Fla. Bar 3-7.6(h). *Fredericks, supra*.

1. **Allegations of misconduct in the courtroom.**

The Complaint solely alleges that "Throughout the progression of *Ferguson v. Beem*, the respondent behaved in a disruptive manner in court resulting in the following [four] exchanges with judges." IR1., ¶5(A)-(D). However, the Report finds Respondent guilty of many acts not charged and of conduct far more egregious than that charged.

For example, while the Complaint solely alleges that Respondent's behavior was "disruptive" (IR-1, ¶5) causing judges to express irritation four times, the Report cites a fifth hearing, on July 13, 2009. The Referee concludes that Respondent acted disruptively in "numerous hearings," not four hearings. RR at 9.

The recommendations of guilt continue, with uncharged conduct emphasized, as follows:

> The Referee concludes that Respondent's behavior was calculated. When Respondent felt he was not winning a particular hearing, he would raise his voice, and behave in an angry, disrespectful manner…. As a result of this behavior, Judge Manno Schurr was forced to terminate proceedings and refer all discovery matters to a general magistrate. Moreover, on multiple occasions, Judge Dresnick had to warn Respondent regarding his behavior. This is a violation of Rule 4-3.5(c).
>
> Further, it is important to note that the transcripts reveal that both Judges Dresnick and Manno Schurr were not merely concerned with Respondent's voice level, but rather his antagonistic style towards the bench, which made it difficult for each judge to continue the proceedings. Despite Respondent's explanations during the course of the final hearing concerning the natural volume of his voice, the Referee remains convinced that Respondent engaged in conduct intended to disrupt the tribunal by exhibiting rude behavior and yelling during courtroom hearings.
>
> This Referee finds that Respondent has violated R. Regulating Fla. Bar 4- 3.5(c). His explanation concerning his volume of voice was patently unbelievable. It is clear in the context of the transcripts and through the testimony of Mr. Brooks that each time Respondent felt the tribunal was not persuaded by his argument, he began to shout and behave in a disrespectful, belligerent manner. This resulted in the termination of proceedings as the tribunal was unable to conduct court. RR at 16-17.

The Referee found Norkin's statements that his voice is normally extraordinarily loud despite undisputed corroboration from Murray Norkin, Adam Friedman, Jonathan Drucker, and David Beem, who was in chambers for every hearing and testified as follows:

> To me, it's not yelling. I mean, what I was hearing was your normal voice 'cause I have known you for a long time. And that you just speak very loudly and that's what I remember, you know, there was frustration certainly, but never anything that I would consider to be out of hand…" TT at 381.

The subjective nature of the term "yelling" is clear from Judge Dresnick's language, in which, for example, he says "I am a low-volume, low-key guy until I get pissed off." IR1. Ex. B, page 19. While Referees are given discretion over credibility issues, the Referee's acceptance as true all of Brooks' unsupported testimony, and rejection of all or most of Respondent's testimony, is an abuse of discretion, especially in light of the fact that the Referee disregards and finds the evidence non-credible without providing any reasoning for those credibility determination.

The Report recommends that Respondent be found guilty of the following acts, which are not alleged in the complaint:

1. That "Respondent's behavior was calculated." RR at 16.
2. "On multiple occasions, Judge Dresnick had to warn Respondent regarding his behavior." Id.
3. "Respondent was warned by both judges numerous times to stop this behavior…." Id.
4. "Antagonistic style toward the bench." Id.
5. "Discourteous and disrespectful behavior." Id.
6. "Antagonistic style towards the bench, which made it difficult for each judge to continue the proceedings." Id.
7. "Rude behavior …during courtroom hearings." Id. at 17

8. "Respondent was unable to manifest appropriate courtroom demeanor during multiple court appearances." Id.
9. "[E]ach time Respondent felt the tribunal was not persuaded by his argument, he began to shout and behave in an angry, disrespectful manner…. As a result of this behavior, Judge Manno Schurr was forced to terminate proceedings and refer all discovery matters to a general magistrate." RR at 17
10. "This resulted in the termination of proceedings as the tribunal was unable to conduct court." Id.
11. "Behave in a disrespectful, belligerent manner…" Id.

Respondent was not charged with being rude, disrespectful, calculated, antagonistic or belligerent toward the Court. He was only charged with being "Disruptive." Respondent also was not charged with acting disruptively "each time [he] felt the tribunal was not persuaded by his argument." Id.

Had he been notified that he was accused of the level of misconduct that the Referee found him guilty of, he would have prepared his defense accordingly. For example, he would have insisted that the judges who interacted with him testify to explain why, if he acted rudely or disrespectfully, or if he acted badly so frequently, they never sanctioned him or threatened to sanction him. He did not do so because he was not so charged. He did not contemplate such accusations until he was found guilty of them in the Report. These recommendations of guilt should be disregarded and any discipline must be reduced accordingly.

2. **Alleged Accusations against David Tobin.**

The Referee addresses Respondent's two statements related to Mr. Tobin in section III(1), on pages 5-9, of her Report. The Referee concludes that the two statements violated Rules 4-8.2(a) and 4-8.4(a). RR at 5-9. The Bar Complaint does not charge Respondent with violating Rule 4-8.2(a) or 4-8.4(a). It only charges Respondent with violating Bar Rules 4-3.3(a)(1), 4-3.5(c), 4-8.4(c), and 4-8.4(d). IR-1 at 13-14. As a result, all recommendations of guilt in Section III(1) are the product of fundamental error and should not be implemented by this Honorable Court. *Fredericks, supra.*

The Referee did not find that the two writings to or about Mr. Tobin violated any of the charged Rules. Therefore, this Honorable Court should not accept any of the charges arising out of the two written comments Respondent delivered regarding Mr. Tobin. All such findings must be dismissed and rejected.

The Referee's findings of misconduct also departed factually from those alleged in the Complaint. The finding that Respondent violated Rule 4-8.2(a)[10] is highly significant. In drawing that conclusion, the Referee found that Respondent made an "Improper threat solely to "berate retired Judge Tobin into dissolving the

[10] While David Tobin is a retired judge, his status as a retired judge acting solely as a court appointed third director in a corporation does not rise to the level of the particular status required for violations of R. Regulating Fla. Bar 4-8.2(a).

writ of garnishment … [and] improperly threatened retired Judge Tobin with a personal lawsuit." RR at 9.

The Referee completely departed from the Complaint to find that:

> Respondent's Motion to Recuse Judge, as well, contained statements alleging that Judge Dresnick acted at the "beck and call" of the plaintiff, and insinuated an improper relationship between counsel for the plaintiff, Mr. Brooks, and the court. Respondent's motive was to obtain the disqualification of Judge Dresnick, thus a more favorable forum for the litigation of his client's claim. However, his statements were devoid of any basis in the record. Thus, his statement violates Rules 4-8.2(a) and 4-8.4(a). RR at 9

The above finds Respondent guilty of misconduct that is totally different from any charged conduct. The Complaint alleged **only** that Respondent's letter to Mr. Tobin and motion to recuse "falsely accused David Tobin of corrupt conduct as being part of a conspiracy." IR-1, ¶13. The Complaint did not accuse Respondent of making efforts to "obtain the disqualification of Judge Dresnick, thus a more favorable forum for the litigation of his client's claim." RR at 9. Had he known of this allegation (prior to service of the Report of Referee), Respondent could have easily disposed of it by showing the Referee that Judge Dresnick spontaneously offered to recuse himself, saying, "Just don't do -- you want another judge? I'll be happy to give you another judge in the case, believe me….I would be happy to, somebody file a motion. I would be off this case in a heartbeat. … I've just given you enough basis to do it." 12/22/09 hearing transcript, IR-84(3), p. 16.

This Court should disregard all recommendations related to acts not charged in the Complaint.

B. THE CHARGED MISCONDUCT.

In the Bar's complaint the Respondent was charged with, and guilt is recommended for, violating R. Regulating Fla. Bar 4-3.5(c) [conduct intended to disrupt a tribunal]; and 4-8.4(d) [conduct prejudicial to the administration of justice]. The Referee recommends a finding that Respondent's in-court conduct be found to violate Rule 3-3.5(c) and that Respondent's letters and statements about Mr. Brooks violate Rule 4-8.4(d).

1. **Allegations of misconduct in the courtroom.**

The Bar's complaint states that Respondent engaged in disruptive conduct due to four distinct "exchanges" with a trial judge. IR-1, ¶5. The Respondent appeared at approximately 34 pre-trial hearings in *Ferguson v. Beem*.[11] From these 34 appearances, the Bar cites four instances in which judges expressed unhappiness or irritation with Respondent's demeanor.

For example, the complaint includes portions of September 20 and 28, 2010 hearings. Id. ¶¶5(C, D). However, what is not discussed in the Report is

[11] In addition to these 34 hearings, Respondent attended hearings or conferences in the FTD foreclosure case, in the IRS audit initiated by Ferguson, at approximately 5-7 hearings in Bankruptcy Court, and was Beem's sole counsel during an eight-day jury trial.

Respondent's September 28th apology to Judge Manno-Schurr for his September 20th behavior, which Respondent read to the Referee during the Final Hearing:

> MR. NORKIN: Last week we had a calendar call and Your Honor declined to set the case based on several matters outstanding. And you and I -- and I didn't say this, but the transcript says I said, you and I had a question all along about whether or not the case was properly at issue and it didn't get set. It was the court had that question.
> I got upset at the time, I apologize for that. I was stressed, I don't know. I think that --
> THE COURT: Is this at issue now?
> MR. NORKIN: It is at issue.
> THE COURT: It is?

TT at 299-300; Resp. Ex. 20 at 3. Judge Manno Schurr's reaction to the above apology shows that she did not consider Respondent's upset of the previous week to be significant. She heard the apology, basically accepted or ignored it and moved on. Respondent's apology, his second for the same conduct, indicates his appreciation for the importance of showing proper respect to the tribunal.

As mentioned above, Judge Dresnick and Judge Manno Schurr did not testify in this case. Yet, the Referee bases her findings on their emotions and state of mind. For example, the Referee concludes that "On multiple occasions, Judge Dresnick ***had to warn*** Respondent regarding his behavior" and "his antagonistic style towards the bench, which ***made it difficult for each judge to continue*** the proceedings." RR at 16, 17. Even if these emotions could be inferred from the cold record, implications cannot be said to be "Clear and convincing evidence."

Here, without any evidence to support such a conclusion, the Referee apparently concluded that Respondent's conduct is comparable to *The Florida Bar v. Morgan*, 938 So. 2d 496, 498-499 (Fla. 2006) (upholding a violation of Rule 4-3.5(c) premised upon an attorney's inappropriate courtroom behavior, including antagonism toward the bench); *The Florida Bar v. Abramson,* 3 So. 3d 964, 966 (Fla. 2009) (upholding a violation of Rule 4-3.5(c) premised upon discourteous and disrespectful behavior towards a judge)." RR at 17. In those two cases, the outrageous language used by Mr. Morgan and Mr. Abramson in court, often in front of juries, speaks for itself. Those lawyers verbally abused judges. Nothing in the record suggests that Respondent was disrespectful toward the court at any time. Judges simply found him abrasive due to his tone of voice in his efforts to protect the interests of his client. There is no similarity between the conduct here and that of Mr. Morgan or Mr. Abramson.

By deciding that Respondent's in-court behavior warrants a suspension, the referee substitutes her judgment of Respondent's behavior for the judgment of the judges who witnessed the conduct. Two judges observed Respondent in about a dozen hearings each and never sanctioned, or threatened to sanction him.

Further, to sanction a lawyer for in-court conduct when he did not violate any court order or disregard a warning has no basis in precedent, the Rules, or the Standards. *Cf. Morgan, supra* (Judge warns attorney and threatens him with

contempt and even jail, to no avail.) To sanction Respondent for his unsanctioned in-court conduct would chill all attorneys who would passionately and ardently argue on their clients' behalf.

2. **Allegations related to statements to and about Mr. Brooks.**

The sole allegation in the second section of the Complaint is that Respondent "made the following false and unprofessional statements attacking Gary Brooks." IR-1 at ¶7. Significantly, the allegation is that each statement is "false ***and*** unprofessional," not "false and/or unprofessional" or "false or unprofessional." Id. The following passages, which follow this single allegation, are expressions of opinion or speculation. They are not statements of fact, and therefore cannot be "false."

> August 27, 2008 email: "You will join the many attorneys who have done so and lived to regret their incompetent, unethical and improper litigation practices."
>
> August 27, 2008 email (2nd): "Again, I would not write I have a trial period if I did not. You must really lie a lot to even think I would. Liars, in general, not you necessarily, are so suspicious of others lying. Just an observation I have come to."
>
> September 22, 2008 email: "I think I have never litigated with an attorney who is as disingenuous as you. This really is fun, and so from that standpoint, I thank you."
>
> September 22, 2008 email (2nd): When is your unprofessional, ludicrous, downright unintelligent conduct going to stop? Before or after you are directed to pay my bills?"
>
> September 23, 2008 email: I don't say many kind words to those I consider dishonest such as yourself.
>
> January 7, 2009 in-court statement during argument: "What more do we have

to do, your honor, to show you this is the honest man [his client] and this is a dishonest man [Complainant].[12]

February 4, 2009 letter: "This is to formally notify you that a motion for sanctions against you personally and your firm will be filed in three weeks. I believe that you committed malpractice by allowing your client to file this lawsuit and judging by your client's nature, I have no doubt he will be suing you in the near future . .. you have committed malpractice ... Show the evidence or you are about to have a very massive problem."

April 16, 2009 letter: "I also believe that you should be very worried about this situation. By deceiving the court so many times and prolonging this matter, which has been formally declared an abuse of process, your client might have a suit against you, for your poor advice and other misconduct ... I would respectfully suggest you put your carrier on notice."

The Bar also took issue with these two other statements made by the Respondent:

A. "In or about July of 2010" statement in chambers: "Mr. Brooks is a liar."

B. "In or about September, 2010, the respondent approached Mr. Brooks in the hallway of the Dade County Courthouse and, in the presence of several other attorneys, shouted that he had spoken to another attorney and that Mr. Brooks was underhanded and a scumbag."

The communications to and about Mr. Brooks are not alleged to have been prejudicial to the administration of justice, and private emails concerning the subject matter of litigation, and in which an attorney is trying to protect his client from litigation the court found as a matter of law to be abusive, cannot be said to be so.

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[12] The Complaint includes the bracketed word which is not contained in the transcript. Respondent testified that he was referring to Mr. Ferguson as the dishonest man and his own client as the honest man. The Complaint accurately reflects the transcript's erroneous use of a period instead of a question mark at the end of this passage.

Respondent explained all of the core facts and circumstances of *Ferguson v. Beem*, and supported his testimony with documentary evidence. However, unlike the Referee in *Martocci*, below, these facts and evidence do not appear in the Report.

> While the court cannot condone the actions of Mr. Martocci in this case, in reviewing the totality of the circumstances including, but not limited to, the personal circumstances of the respondent at the time of the alleged actions, the health of the respondent including his physical and mental health, and, *most importantly, the conduct of opposing counsel in this case,* the Referee finds that it has not been proven by clear and convincing evidence that the conduct rises to a level of violation of Rule 4-8.4(c) and 4-8.4(d).

The Florida Bar v. Martocci, 699 So. 2d 1357, 1360 (Fla. 1997) (emphasis added)(*"Martocci I")*. Here, nothing in the Report or in the Bar's prosecution indicates that Mr. Brooks' own conduct and its devastating consequences to the Respondent's client were considered at all.

Again, the Complaint and the Report of Referee contain only short snippets of lengthy correspondence and hearings. By omitting all surrounding facts, the Complaint inaccurately portrays the subject events and acts. The Report of Referee does not include findings related to Respondent's state of mind, intent, or motive, nor does it conclude that any harm resulted from Respondent's conduct. Because it also omits all context, this Court has no information from which to determine any of these elements and Respondent has no way of defending himself.

This Court has addressed other cases wherein lawyers were prosecuted primarily for their language, including *The Florida Bar v. Morgan*, 717 So. 2d 540 (Fla. 1998); *Martocci I, supra*; *The Florida Bar v. Martocci*, 791 So.2d 1074 (Fla. 2001)("*Martocci II*"); *The Florida Bar v. Clark*, 528 So.2d 369 (Fla. 1988); *The Florida Bar v. Weinberger*, 397 So.2d 661 (Fla. 1981); *The Florida Bar v. Abramson*, 3 So. 3d 964 (Fla. 2009); and *The Florida Bar v. Uhrig*, 666 So.2d 887 (Fla. 1996).

In all of these cases, the referees and this Court examined *all* of the facts surrounding the alleged misconduct. Here, on the other hand, the Referee's Report omits all mention of Mr. Brooks' and his clients' conduct, and the consequences of that conduct, which caused Respondent to write the emails and become upset or frustrated in court. The Report omits all mention and analysis of Respondent's evidence as to why he performed the acts which are identified in the Complaint.

In finding Respondent guilty of misconduct as to the letters to Mr. Brooks, the Referee completely ignored the context in which, and purpose for which they were delivered. As to the two verbal "attacks," there was no testimony whatsoever about their context or surrounding circumstances, because neither Mr. Brooks nor the Respondent could recall those surrounding facts.

For example, in the September 22, 2008 email, Respondent criticized Mr. Brooks for his motion to strike Mr. Steinberg, the Court-appointed forensic

accountant, who had months earlier testified that Mr. Beem had stolen nothing from FTD. IR-1, ex. I. Ironically, in that motion, Mr. Brooks did the same thing Respondent is charged with: accusing a court-appointee of dishonesty. There were no grounds for this motion; it was frivolous. Respondent called the conduct "Unintelligent." Respondent was correct. The motion failed immediately and it elicited from Mr. Steinberg an affidavit in which he attested that Mrs. Ferguson had trespassed into his office and taken papers, incriminating her badly. TT at 352.

The Respondent is fully aware that his commentary to and about his opposing counsel could have been more respectful and polite and that in hindsight it should have been no matter the stressors in the Respondent's life or the Respondent's strong belief that Mr. Brooks and his client were reaping the benefits of a great injustice imposed on the Respondent's client. However, an examination of the current precedent indicates that the conduct at issue may be distasteful, but it is not unethical.

3. **Allegations against David Tobin.**

With regard to the fax to Mr. Tobin, in prosecuting an attorney for his improper uses of words, the prosecution should be based on the language itself, not on impermissible inferences. The section of the Complaint related to Mr. Tobin is titled: "False Accusations against David Tobin" and paragraph 13 states that "The respondent falsely accused retired Judge David Tobin of corrupt conduct as being

part of a conspiracy as set forth below." IR at 12-13. The two subject statements are as follows:

> The cozy, conspiratorial nature of your relationship with Mr. Ferguson and/or his counsel will be fully investigated in any lawsuit filed against you. Again, Mr. Tobin, your misuse of the law is unbecoming of a former judge and it will be addressed fully in the courts if you do not await the conclusion of this case and the order requiring Mr. Ferguson to pay you as a nonprevailing party.

and

> Mr. Tobin's efforts did nothing whatsoever to help the company and he, like Judge Dresnick, exclusively acted at the beck and call of Ferguson, whom the court has found filed this lawsuit solely to injure the company and Beem.

IR-1 at 13. Neither of the above are accusations "of corrupt conduct" as is alleged by the Bar. The first is a statement that the nature of Mr. Tobin's relationship with Mr. Ferguson will be investigated if Mr. Beem files a lawsuit against him for wrongfully obtaining a judgment for disputed fees. The second, contained in a motion, is an observation that Mr. Tobin did whatever Mr. Ferguson wanted him to do. Neither passage accuses Mr. Tobin of corruption.

As Respondent testified, this was not an accusation of conspiracy, it was an expression of his intent:

> So, I did not say -- I'm very, very particular and very precise in my language. I did not write that Judge Tobin had a conspiratorial relationship. I wrote that the cozy conspiratorial nature of your relationship with Mr. Ferguson and/or his counsel will be fully

investigated in any lawsuit against you.

TT at 275, ll. 14-21. Mr. Tobin, when asked to admit that there was no accusation in this letter, **admitted on the stand** that the email contained no such accusation.

> Q. In that letter I [Respondent] did not accuse you of being in a conspiracy with Mr. Ferguson, did I?
>
> A. The cozy conspiratorial nature of your relationship with Mr. Ferguson and/or his counsel will be fully investigated in any lawsuit filed against you. You don't consider that a threat?
>
> Q. Yes, a threat, yes, of civil litigation that would be highly unpleasant for you because I thought you acted improperly. That's illegal in some way?
>
> A. There is (sic) no facts stated in here. TT at 163, l. 25 – 164, ll. 1-12.

Without an assertion that someone has done something wrong, there can be no accusation. Mr. Tobin admitted in his testimony that there was no actual accusation.

Another example is the fax to Mr. Tobin. The Bar and the Report omit the following paragraphs from the Complaint and Report respectively:

> If you can show me another case where a non-party to an action obtains a judgment in his favor in that action, perhaps I will change my mind. But having performed research to find an answer I was already pretty sure of, since it is fundamental law, I cannot find such a case.
>
> I am sure you will immediately think: “Res judicata”. Incorrect. You are not a party. And, again, there was no due process and no ruling upon the evidence in this case. Really, I hope you will agree, it will not be worth fighting this battle over the small sum involved. Believe

> me, though, I do a lot of work just based on principle, and this will be one of those times.(IR-1, Ex. S; see, RR at 6)

These omitted passages provide the basis of Respondent's feeling that Mr. Tobin had acted improperly in obtaining his judgment against Respondent's client. By omitting these passages, the Bar gives Respondent's correspondence a less professional appearance.

Clearly, Respondent did not send the email to Tobin for any purpose other than to protect his client from what he perceived, correctly, was an illegal judgment obtained by Tobin without first becoming a party to the suit. Respondent showed the Referee that Tobin's actions were illegal, (E.g., TT at 166-67, TT. at 271-72), or at the very least, that he had a good-faith basis to believe that Tobin had acted improperly. He submitted to the Court the case *Rustom v. Sparling*, 685 So.2d 90 (4th DCA 1997), to prove this fundamental point of law. TT at 167, ll. 6-7.

The Respondent believes that Mr. Tobin's testimony showed that he knew that his obtaining a judgment against Beem's company, Floors to Doors, Inc., was improper. He first misnamed the judgment as an "Order," (TT at 166, l. 17) and when asked if he knew his conduct was wrong, he responded with: "Sir, Third District Court is out by FIU." Id. at ll. 12-13. He then said: "Tell Judge Dresnick what he did was wrong, don't tell me." TT at 167, ll. 12-13.

The Respondent verily believed that Mr. Tobin had overcharged Respondent's client and Respondent advised him of his intent to litigate his bills. Regardless of this knowledge, Tobin went to Judge Dresnick without notice, and without being a plaintiff in a lawsuit, obtained a judgment outside the Respondent's presence. Then, Mr. Ferguson, a party who should have no relationship with Tobin, delivered Tobin's writ of garnishment to Ferguson's own bank to garnish Ferguson's own company, on behalf of Tobin. TT at 274, ll. 23 *et seq.* This gave Respondent ample reason to "Investigate" Tobin's conduct in a contemplated lawsuit; an investigation that would obviously occur had a lawsuit been filed. Unfortunately, Beem and Respondent had neither the time, money, or energy to pursue that lawsuit and it was never filed. TT at 270-78.[13]

Overall, as to the emails and statements to Brooks, the two comments related to Tobin, and Respondent's in-court argument style, the Referee's Report overlooks all of Respondent's evidence and testimony, which supports a finding that Respondent's letters to both Brooks and Tobin, and his desperate arguments in court, were justified, or at least did not constitute any Rule violation.

[13] It is also apparent that Mr. Tobin was not in any way harmed by Respondent's fax. He did not know about the Bar Complaint or investigation until shortly before the final hearing, when he was called to testify. TT at 167, ll. 20 *et seq*. Clearly, he was not aggrieved by Respondent's conduct and the Bar did not ask him whether he felt harmed prior to finding probable cause.

In support of his defenses, Respondent submitted voluminous documentary evidence and highly detailed testimony, both his and his client's. However, the Report of the Referee omits all mention of Respondent's defenses, testimony, voluminous and powerful evidence, and all of the context and circumstances which surrounded and gave rise to the charged acts. Where a lower court decides to disregard a party's entire case, that court should instruct the reviewing court as to the reasoning for its decision to do so. Here, the Referee omits from her discussion Respondent's entire case, and does not give this Court any explanation for doing so. One reading the Report cannot know if the Referee inadvertently overlooked Respondent's case or if she omitted it from her analysis intentionally. Armed with neither the facts of this case, nor the rationale for disregarding those facts, this Court does not have sufficient factual grounds on which to find Respondent guilty of anything.

Thus, the Referee found Respondent guilty of misconduct he was not charged with and had no way to prepare to defend against, and found him guilty of charged acts without regard for the context in which those acts were carried out and without finding that Respondent acted with bad intent or that the charged acts caused any tangible harm. Accordingly, this Court should reject all recommendations of guilt and find that Respondent's acts in *Ferguson v. Beem* did not violate any Bar rule.

II. IF ANY RULE VIOLATION IS FOUND, NO MORE THAN A PUBLIC REPRIMAND SHOULD BE IMPOSED FOR THE ACTS SET FORTH IN THE REPORT OF REFEREE.

A Referee is recommending a 90 day suspension and an eighteen month probation with certain conditions. The Bar seeks to extend the suspension to one year suspension with a public reprimand. If this Court finds there is any rule violation at all in this matter, there is no basis in the Standards or in this Court's precedent for the imposition of any period of suspension for the alleged misconduct.

This Court has consistently held that it has a broad discretion when reviewing a sanction recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997). The Court should exercise its discretion in finding the Referee's proposed sanctions legally unsupported and too harsh under the facts of this case.

This Court in *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), stated that in selecting an appropriate discipline certain fundamental issues must be addressed. They are: (1) Fairness to both the public and the accused; (2) sufficient harshness in the sanction to punish the violation and encourage reformation; and (3) the severity must be appropriate to function as deterrent to others who might be tempted to engage in similar misconduct. *See also* The Standards for Imposing

Lawyer Sanctions, Standard 1.1. The Referee's sanction proposals do not meet these criteria.

Respondent has not found, and the Report does not cite any case in which a lawyer is prosecuted for annoying or irritating a judge by pressing his case too firmly. Two of the four charged in-court "Acts" do not include any of Respondent's words; and the words spoken in the other two instances as set forth in the Complaint have none of the offensiveness of the actions in *Abramson, supra, Morgan, supra, Martocci I or Martocci II* .

Respondent's communications to Brooks and his warning letter demanding action from Tobin, do not accuse sitting judges, nor do they approach or in any way resemble the level of accusations in the subject letters, public statements, and court filings involved in *Clark,* W*einberger*, or *The Florida Bar v. Ray,* 797 So.2d 556 (Fla. 2001). The letters did not implicitly threaten bodily harm, as did the respondent in *The Florida Bar v. Sayler,* 721 So.2d 1152 (Fla. 1998).

In all four of the above cases, the respondent lawyer received a written reprimand for misconduct similar in nature to, but far more egregious than any alleged here. Comparing the conduct here with that of these other cases, shows clearly that Respondent's acts do not justify suspension.

The facts of *Ray* are somewhat similar to the Respondent's letters and statements about Brooks and Tobin. However, Ray's conduct is ***far*** more

egregious than anything Respondent is accused of herein. In *Ray*, the Referee found that Mr. Ray sent three letters *to a Virginia federal judge,* which contained totally false and unfounded accusations that a sitting federal judge lacked "veracity and integrity." *Ray* at 557. Here, conversely, Respondent sent his comments about Mr. Brooks and Mr. Tobin, neither of whom were sitting judges, in private correspondence. Respondent did not accuse Mr. Tobin of misconduct; instead he stated his intention to investigate whether he was improperly biased based on concrete acts of Mr. Tobin.

The Bar appears to rely upon three distinct cases to support its sanction argument. *Morgan*; *The Florida Bar v. Ratine*r, 46 So.2d 35 (Fla. 2010); *The Florida Bar v. Adams*, 641 So. 2d 399 (Fla. 1994). None of these referenced cases support the position that any more than a public reprimand is warranted herein. For example, in *Ratiner*, a lawyer received a public reprimand and a sixty day suspension for a continued course of outrageous behavior at a deposition, inclusive of a video-taped screaming tirade directed to opposing counsel as that lawyer leaned over a deposition table, shredded an exhibit sticker and flicked it at opposing counsel. While the misconduct in *Adams* was not as personally abusive, that lawyer falsely, and with no cause whatsoever, accused several lawyers of the crime of suborning perjury and was suspended for ninety days. Finally, the *Morgan* case, which resulted in a 91 day rehabilitative suspension, was the

culmination of a several year pattern of misconduct directed against the judiciary, wherein the lawyer had previously been disciplined twice (a public reprimand and a 10 day suspension) for the same type of misconduct. In *Morgan* the Court goes to great pains to describe the disrespect directed to one particular judge during a trial. Mr. Morgan ignored direct court orders, insulted the judge and the court he represents. The conduct herein pales in comparison and Morgan does not support the position that any suspension, much less a one year suspension should be imposed.

A. AGGRAVATION.

It is always important to discuss the aggravating and mitigating factors present in any particular disciplinary matter. In this case the Referee has included several alleged aggravating factors that are not supported by the record and improperly weighs the Respondent's 2003 public reprimand for conduct that occurred in April of 1999.

The Referee erred by giving so much weight to the Respondent's public reprimand, even including unsubstantiated statements of opinion by Respondent's opposing counsel made in 1999. The single charge which formed the basis of the prior reprimand was that the Respondent was held in contempt for conduct during an April 1999 trial. This conduct occurred 13 years ago and bears no relevance in this matter.

The Report also cites other hearsay and incidents which did not involve any sanction and for which no reliable or competent evidence exists in the record. The Referee learned virtually nothing about these incidents, yet the Report dedicates several pages to them to support a finding of a "Pattern of misconduct." On the other hand, the Referee does not dedicate one sentence to Respondent's countless acts of generosity, diligence, perseverance, and success in the *Ferguson* litigation.

The Referee cites the public reprimand both as a prior incident of discipline and to support a "pattern of misconduct." This gives double emphasis to the same incident.

Similarly, as a "pattern of misconduct," the Referee alludes to a threat by Hon. James King, in which the judge said: "you see that little room back there, if you don't sit down, I'm going to have the marshal put you in there." TT at 360, l. 9. Respondent was simply trying to persuade the judge that he had granted a directed verdict on a count of his complaint which was not mentioned or argued in the defendants' motion. TT at 360-1.

Again, there is no evidence Respondent did anything in that incident other than to attempt to persuade the judge he had committed an error and the judge took offense. This incident also occurred in 1999, one month after the conduct referenced in the public reprimand. This incident is probative of nothing.

However, it is impossible to tell how the Court applied these factors, because, again, the Referee did not provide the analysis applied to arrive at the recommended discipline.

While the Referee ignored the mitigation that was present in this case, she improperly went out of her way to consider a variety of topics as aggravation. The Referee permitted the Bar to ask Respondent whether certain things had occurred in his past (but presented no other evidence of same). For example, the Bar asked Respondent, "Have you ever been threatened by a judge to be placed in jail?" TT at 356, l. 21. After the Referee overruled Respondent's objection, Respondent, wanting to be completely honest, described an incident that occurred in "1994 or 1995" where Respondent "pressed a point" and a judge asked him if he liked "baloney sandwiches?" TT at 357. Despite the lack of any indication Respondent had done anything wrong in that incident, and that it occurred 18 years ago, the Referee considered this an aggravating factor. RR 28. The Referee also includes, again redundantly, the Judge King incident as an aggravating factor. Existing precedent as well as the Florida Standards for Imposing Lawyer Sanctions state that a lawyer's prior disciplinary history can be used as aggravation. Standard 9.22(a). In fact, Standard 9.22(a) goes further and also states that certain findings "of minor misconduct should not be considered as an aggravating factor."[14] Here,

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

the Referee considered prior incidents in which there was no disciplinary proceeding or other sanction whatsoever.[15] The incidents occurred between 11 – 17 years before the actions referenced in this case. Clearly, the Referee erred in considering these incidents, and as indicated by the extraordinary length of her discussion of them, the Referee's consideration of them was severely prejudicial to the Respondent.

Finally, the Referee erred in considering Mr. Brooks' health as making him vulnerable.[16] RR at 29. Mr. Brooks, by continuing to practice law, represents to the Bar and to the public that his is fit to practice. This holding also assumes, with all evidence to the contrary, that Respondent knew of Mr. Brooks' health issues. Such a holding would be manifestly unjust.

B. MITIGATION.

The mitigation section of the Report reads in pertinent part:

> Absence of dishonest or selfish motive: However delusional, Respondent truly believed he was acting on behalf of his client in a zealous and appropriate manner. ….
>
> Character or reputation: At the highest levels, per Jonathan

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

[16] This finding appears to be fully contradicted by the fact that Mr. Brooks filed the instant Bar complaint to secure an advantage in the *Ferguson* litigation and in fact used the Bar complaint in motions and in hearings.

> Drucker. Scrupulously honest, per Murray Norkin.
>
> Physical or mental disability or impairment: Significant physical impairment relating to atrophied optic nerve, which prevents him from identifying nonverbal cues. Significant emotional problems based upon diagnoses and inability to properly medicate his depression due to issues relating to antidepressants. The Referee believes that Respondent's mental and emotional issues are the primary cause of his inability to conform to professional standards and gives tremendous weight to this mitigation in assigning an appropriate disciplinary message. …
>
> Any other factors that may justify a reduction in the degree of discipline to be imposed: None of the relevant judges took action against Respondent. Respondent contends he tendered an apology to Judge Manno Schurr. Respondent contends he tendered an apology to retired Judge Tobin while awaiting the Referee proceedings. RR at 32-34

Respondent acted without bad motive, fought selflessly for his client, and, if he was annoying in court or unrestrained in his criticisms of Mr. Brooks or Mr. Tobin, these actions are at least partially the product of defective vision and not "mental and emotional issues."[17] RR at 33.

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[17] The Referee's findings concerning Respondent's vision problem is correct and was fully supported by testimony. These visual problems often cause Respondent to fail to realize that a judge wishes for him to stop talking or is displeased by his delivery. This was as cause of some of the problems he had with Judges Manno Schurr and Dresnick. It further renders these incidents, in addition to the reasons stated above, insignificant and not worthy of any sanction.

On the other hand, the opinion that "Respondent's mental and emotional issues are the primary cause of his inability to conform to professional standards" is not supported by any record evidence whatsoever. Dr. Hoffman did not testify to this and in fact stated the exact opposite. TT 643-4. Dr. Hoffman testified: "I can't really see any reason why he would be unable to practice law. He has the education. Most of these things I can see why they would be more in the realm of

C. PSYCHOLOGICAL EVALUATION AS A SANCTION.

The Referee also errs in recommending that Respondent be subjected to a psychological evaluation as a prerequisite for return to work following a suspension.

There was lengthy testimony about the nature of Respondent's psychological issues, which mostly revolve around depression suffered as the result of Respondent's disappointment with the lack of integrity he has observed in many parties and individuals in the practice of law, and with his financial problems. Some of his financial problems were caused by his decision to continue representing Mr. Beem despite not being paid, and this stress led to his conduct which is complained of in this case. Despite an enormous amount of testimony on this subject, it is not mentioned in the Report.

During the Final Hearing, Respondent acknowledged that he has experienced several psychological issues almost all of which are related to the stress of his profession. However, he also showed that he has been diligent, proactive, mature, and effective in treating these issues. He also submitted the testimony of Dr. Jonathan Hoffman, partially to support the obvious and

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annoying behaviors or demeanor behaviors rather than his fitness to practice as an attorney." TT at 643.

undeniable fact that he is fit, competent, and more than able to carry out the duties required of him as a commercial litigator.

Respondent has proven his mental and professional competence by his body of work over a 19 year career, including trying 30 trials as lead counsel, prevailing in 24 of them. In *Ferguson*, he represented a defendant being sued for $1.3 million and obtained for him a judgment on a jury verdict worth over $380,000. No evidence supports the need for psychological assessment or treatment and no evidence supports a finding that Respondent is in any way "delusional" in thinking that he represented Mr. Beem competently, diligently, and with integrity and compassion. *Cf.* RR at 32.

Respondent also was not put on notice, as required, that such the requirement of psychological evaluation was sought or was under consideration. *The Florida Bar v. Centurion*, 801 So.2d 858, 863 -864 (Fla. 2000). Had he received such notice, Respondent could easily have asked Dr. Hoffman directly whether he felt such an assessment was needed or justified. Dr. Hoffman testified that Respondent is fit to be an attorney. *See generally*, TT at 643-644.

CONCLUSION

A lawyer does not violate any Bar Rule by writing emails criticizing or expressing suspicion of opposing counsel's or a provisional director's conduct;

especially when he is convinced by competent evidence that there has been potential or actual wrongdoing.

At the very least, under the Standards for Imposing Lawyer Sanctions, this is not a suspension case. There is no precedent that supports the Referee's or the Bar's sanction recommendations and at most support a public reprimand. Respondent respectfully requests that the Referee's recommendations of guilt be reversed and the Bar be awarded no costs. In the alternative, the sanctions being recommended by the Referee should be rejected and the Court should impose a public reprimand.

It is for this Court to consider all of the facts of this case and to find that in light of those facts, and the evidence supporting them, that Respondent did not violate any Bar Rule in his representation of David Beem in the *Ferguson* case.

WHEREFORE the Respondent, JEFFREY ALAN NORKIN, respectfully requests that he be found not guilty and in the alternative if found guilty of some of the rule violations in the Report of Referee that the Referee's sanction recommendations be rejected, that the sanction imposed in this case be a public reprimand and that the Court grant any other relief that is deemed reasonable and just.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail on this 27th day of July, 2012 to Randi Klayman Lazarus, Bar

Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 and to Kenneth Marvin, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

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

Respectfully submitted,

RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

By: _____
KEVIN P. TYNAN, ESQ.
TFB No. 710822