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 REPLY BRIEF

ON CROSS APPEAL

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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.

As for the parties' briefs, the Bar's Initial Brief will be referred to as BIB, the Respondent's Answer/Initial Brief on the Cross-appeal will be referred to as RB, and the Bar's Answer/Reply Brief will be referred to as BRB.

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 abuse of process, 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.

In his Answer/Initial Cross-appellate Brief, the Respondent set forth a detailed and fully cited history of the *Ferguson v. Beem* litigation, which also included foreclosure and bankruptcy proceedings and an IRS audit, all caused by the prosecution of unfounded claims against Respondent's client, David Beem. Respondent also described in detail the overwhelming stress and catastrophic consequences suffered by both the Respondent and his client as a result of the *Ferguson* litigation. The case drove Mr. Beem's company into foreclosure and then bankruptcy and then Chapter 7 liquidation, and in each proceeding, Respondent desperately tried to salvage his client's future.

The Bar petitioned this Court to review the level of sanction as did the Respondent in his cross notice of review, in which he also contests the Referee's

factual findings and findings of guilt. This Reply brief will focus on these factual issues but of necessity must touch upon the sanction issue also.

A. The uncharged misconduct.

In the Respondent's previous brief, at pages 19-24, the Respondent argues that the Referee improperly found him guilty of conduct and rule violations not charged in the Bar's complaint. As is explained in the Answer Brief, the Referee found the Respondent guilty of certain acts[1] and two rule violations[2] that were not pled or referenced in the Bar's complaint.

In its last brief the Bar conceded that *The Florida Bar v. Fredericks*, 731 So. 2d 1249 (Fla. 1999), set the requirements for a referee to go outside of the Bar's complaint and find additional misconduct only when "the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint." *Id.* at 1253. However, the only argument advanced by the Bar in regards to the uncharged misconduct is a naked assertion that these matters "were referred to in the Bar's complaint" but no references for where said factual allegations or conduct related to the rule violations can be found. Further, the Bar ignored the argument on whether or not a retired judge acting as a court

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[1] Set forth in detail at pages 21 through 22 of the Answer Brief.

[2] See pages 23 through 24 of the Answer Brief.

appointed director of a corporation is among the protected class referenced in R. Regulating Fla. Bar 4-8.2(a).

B. The charged conduct.

As is fully argued in the Respondent's Answer and Initial Brief on Cross Appeal, the Respondent verily believes that he should be found not guilty of the matters referenced in the Report of Referee and in such brief there is a detailed fully cited recitation of the facts of the case. The Bar's response to the foregoing was to make two points. The first was to refer the Court back to its own statement of the case and facts but without any discussion of the relevant facts set forth by the Respondent to assist this Court in resolving these factual differences. On the other hand the Respondent's Answer and Initial Brief on Cross Appeal does carefully discuss the Referee's findings and points to the record below to demonstrate how the Referee overlooked and/or outright ignored evidence and testimony that was presented during the final hearing. It is respectfully submitted that the Respondent has demonstrated that the Report of Referee and in particular its factual findings are "clearly erroneous and lacking in evidentiary support." *The Florida Bar v. Canto,* 668 So.2d 583 (Fla. 1996).

The second argument advanced by the Bar relies upon the following passage from *The Florida Bar v. Head*, 27 So. 3d 1, 7 (Fla. 2010):

> To successfully challenge a referee's factual findings, a party must show there is a lack of evidence in the record

> to support such findings or that the record clearly contradicts the referee's conclusions; this burden cannot be met merely by pointing to contradictory evidence when there is substantial competent evidence in the record supporting the referee's findings.

The Bar, in its brief just dismisses the factual arguments raised by the Respondent as pointing to contradictory evidence in the record. However, the Respondent does more than that in his last brief and would respectfully urge this Court to find that the factual arguments are not just contradictory evidence in the record but a demonstration that there is not "substantial competent evidence" in the record to support the Referee's findings.[3] Many of these findings are little more that the Referee's inferences about emotion and motive drawn from a cold transcript and nothing more.

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.

As was noted in the Respondent's Answer and Initial Brief on Cross Appeal, the Referee is recommending a 90 day suspension and an eighteen month probation with certain conditions and the Bar seeks to extend the suspension to one year suspension with a public reprimand and the Respondent on his Cross Appeal

[3] For example, nothing in the record suggests that the language used by the Respondent was disrespectful toward the court at any time. Judges simply found him abrasive due to his tone of voice. Further, there is at least one transcript entry in evidence that contains an apology for same. TT at 299-300; Resp. Ex. 20 at 3

submits that the appropriate resolution of this matter, should the Court affirm he findings of guilt, should be no more than a public reprimand.

In *The Florida Bar v. Morgan*, 938 So. 2d 496 (Fla. 2006), a lawyer was suspended for being extremely disrespectful to a trial judge during a felony trial. Part of the exchange between the lawyer and the judge was with the jury present. *Id.* at 497. The Court in *Morgan* goes into great detail about the comments made by the lawyer, which included the lawyer telling the judge he was "out of line", that the judge was being "obnoxious" and also stated to the judge that "You don't talk to me like this." *Id.* at 498. This heated and grossly inappropriate exchange lasted for several minutes and the judge gave multiple warnings that the lawyer needed to reign in his commentary. *Id.* at 496-498. This Court in *Morgan* found that there was a reasonable basis in existing case law and the Standards for the 91 day suspension being recommended by the Referee, especially when you took into account that this lawyer had been disciplined twice for similar conduct. *Id.* at 499. The first discipline was a public reprimand[4] and the second sanction was increased to a ten day suspension.[5] Interestingly this Court noted in *Morgan* that Morgan's "repeated misconduct" warranted "the next level of available discipline – a

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

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

rehabilitative suspension and warned Mr. Morgan that any future misconduct of the same vein could result in disbarment." *Id.* at 499.

This Court in the three *Morgan* cases took a measured approach to the lawyer's actions by starting with a public reprimand, moving to a ten day suspension and concluding with a ninety one day suspension. While the Respondent in this case does have an old public reprimand,[6] the Referee and the Bar want to jump over these intermediary measured steps.

This Court has recognized that the type of conduct found by the Referee was deserving of less than a suspension. For example a lawyer received a public reprimand for mailing an insulting and highly unprofessional letter to a client's former husband concerning a child support obligation. *The Florida Bar v. Uhrig*, 666 So. 2d 887 (Fla. 1996). Similarly in *The Florida Bar v. Buckler*, 771 So. 2d 1131 (Fla. 2000), a lawyer was publicly reprimanded for a criminal defense attorney's actions in sending a humiliating and intimidating letter to the victim of a crime in an attempt to have her drop the charges she had filed. Lastly, a lawyer's actions in sending a letter to opposing counsel in a workers compensation case in which he provided a copy of a newspaper article describing the recent murder of an

[6] The Court order on this reprimand is dated September 2003 but the conduct was four years earlier than the date of the order. See *The Florida Bar v. Norkin*, 858 So. 2d 332 (Fla. 2003). It should also be noted that the Referee agreed that this prior sanction was remote in time. RR34.

attorney at a deposition in a workers compensation case also resulted in a public reprimand. *The Florida Bar v. Sayler*, 721 So. 2d 1152 (Fla. 1998).

This Court has also been faced with evaluating misconduct during a discovery deposition. Just after the completion of a deposition a lawyer made demeaning and profane comments to opposing counsel. *The Florida Bar v. Martocci*, 699 So. 2d 1357 (Fla. 1997). In affirming a Referee's finding of no guilt this Court stated that it could not condone the conduct, but based on the totality of the circumstances, inclusive of the conduct of opposing counsel that no violation existed.[7] *Id.* at 1360.

In a case that combines some of the same themes of misconduct in the courtroom, as well as outside the courtroom during the course of litigation, a lawyer was suspended for ninety one days. *The Florida Bar v. Tobkin*, 944 So. 2d 219 (Fla. 2006). In *Tobkin*, the lawyer engaged in contumacious conduct before the trial court, knowingly violated a variety of discovery orders and created a disturbance "at a cancer center . . . when he tried to prevent defense counsel from obtaining his client's medical records." *Id.* at 222. The conduct at issue in *Tobkin* is much more egregious and not comparable to that found in this case and clearly does not support the Bar's proposition of a one year suspension. See also *The*

[7] It appears that the Bar believes the conduct of the Respondent's opposing counsel, Mr. Brooks, has no bearing on this case. This Court in *Martocci* has clearly found otherwise.

*Florida Bar v. Ratine*r, 46 So.2d 35 (Fla. 2010) [Sixty day suspension for a pattern of misconduct/aggressive behavior towards opposing counsel.].

The Fla. Standards for Imposing Lawyer Sanctions also do not support the Referee or the Bar's sanction argument. For example Standard 6.1 has some applicability to the instant matter and states in general that:

> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving *conduct that is prejudicial to the administration of justice* or that involves dishonesty, fraud, deceit, or misrepresentation to a court (emphasis supplied).

This Standard goes on to explain the difference between when a suspension should be ordered as opposed to a public reprimand but explains the conduct differently. Standard 6.12 and 6.13 read as follows:

> 6.12 Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action.
>
> 6.13 Public reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld.

One can clearly see that these standards talk in terms of fraudulent statements which are not present in this case, but they do make a distinction between intentional conduct and negligent conduct, neither of which is present in this case.

Standard 7.0, which is a more general catch-all Standard makes the same distinction between intentional and negligent actions and adds an element of harm or injury. Standard 7.4 reads as follows:

> Public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

The Standards define injury as:

> . . . harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

and potential injury is defined as:

> . . . the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct

As is noted in the Respondent's Answer and Initial Brief on Cross Appeal that the complainant herein is opposing counsel and that none of the judges, who were involved in the *Ferguson v. Beem* litigation filed a complaint with the Bar, held the Respondent in contempt or sanctioned him in any way for the conduct that is found offensive retrospectively by the Bar and the Referee based upon commentary made at certain hearings and the uncorroborated opinion of Mr. Brooks. It appears from the Report of Referee that the only comments on injury or

potential injury are nothing more than a series of quotes from two disciplinary actions (*Ratiner* and *Martocci*) with no explanation of how or why the Referee believed there was an injury or not in this case.

In every disciplinary action this Court must conduct a balancing of the conduct with the mitigating and aggravating factors found in that case. The Respondent's arguments on mitigation and aggravation are found at pages 41 through 46 of his prior brief, which argument is hereby referenced. It is the Respondent's position that he presented a strong mitigation case that was not properly considered by the Referee, even though she agreed that many of these mitigating factors were in fact present in this case. RR32-34.

On the other hand, Respondent has demonstrated that the Referee considered many past events as aggravating factors that should not have been considered. The Referee quoted from 14 year old opinion statements of Respondent's then opposing counsel and quotes from two judges from 14 and 18 years ago, without any evidence whatsoever to fully put those opinion statements into proper context. Based upon the multiple pages devoted to these topics in the Report of Referee, it appears that these long past and scantily understood events weighed heavily in the disciplinary recommendations in this case.

When properly considering the mitigation present in this case eliminating, the improper aggravating factors, and the uncharged or otherwise unfounded

violations found by the Referee, it is contended that the appropriate level of sanction, if one is to be imposed is a public reprimand.

CONCLUSION

The factual findings of the Referee are "clearly erroneous and lacking in evidentiary support" and therefore should not be upheld. That said the Respondent fully understands the significance of the matters raised herein and that others might take issue with some of his actions, however the facts of this case do not establish by clear and convincing evidence that the Respondent violated the rules referenced in the Report of Referee. Further, as is set forth in detail above, the Respondent should be found not guilty of conduct that was uncharged in the Bar's complaint.

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 ___ day of August, 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,

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