IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JEFFREY ALAN NORKIN,

Respondent.
_____/

Supreme Court Case
No. SC11-1356

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

THE FLORIDA BAR'S REPLY BRIEF
and
ANSWER BRIEF ON CROSS APPEAL

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INTRODUCTION

For the purposes of this brief, The Florida Bar will be referred to as "The Florida Bar" or as "The Bar." Jeffrey Alan Norkin, Respondent, will be referred to as "Respondent" or as "Mr. Norkin." Other persons will be referred to by their respective surnames.

Reference to the Appendix attached to the Bar's Initial Brief which contains the Report of Referee shall be set forth as A. followed by the page number.

Reference to the transcript of the final hearing will be set forth as TR. followed by the page number.

Reference to the Respondent's Amended Answer Brief and Initial Brief on Cross Appeal will be referred to as RAB. followed by the page number.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar would rely on the Statement of the Case and of the Facts as set forth in its initial brief as a complete recitation of the events.

SUMMARY OF THE ARGUMENT

The respondent in his initial brief is essentially arguing that the referee erred by finding in favor of the Bar. The respondent points to his own testimony and version of events as the basis for that conclusion. The referee relied on the competent, substantial testimony of a 47-year member of The Florida Bar, Gary Brooks, now deceased, and a retired judge, David Tobin, also a member of The Florida Bar since 1961. Additionally, the Bar presented transcripts in which the respondent is shown to have disrupted the tribunal multiple times. Respondent's position completely ignores the case law which this Court has repeatedly promulgated requiring a showing that the findings lack evidentiary support for the respondent to be successful on appeal.

The respondent continues to maintain on appeal that his outrageous and unprofessional behavior is justified by his belief in his client's cause and his perception that the opposing parties' attorney's position on behalf of his client was frivolous. The respondent misunderstands that professionalism requires that challenges may only be made through our system of courts and laws and not by personal attacks and public outbursts.

ARGUMENT

(On Reply Brief)

A 1-YEAR SUSPENSION AND PUBLIC REPRIMAND IS APPROPRIATE GIVEN THE REFEREE'S FINDINGS OF INSULTING AND DISPARAGING CONDUCT TOWARD OPPOSING COUNSEL, FALSE ACCUSATIONS AGAINST A RETIRED JUDGE, AND BELLIGERENT CONDUCT CALCULATED TO DISRUPT THE TRIBUNAL.

The Bar did not prosecute Jeffrey Alan Norkin "for annoying or irritating a judge by pressing his case too firmly" and the referee did not so find. (RAB. 39). Instead, the referee found that the respondent would scream in court, behave in an angry, antagonistic, disrespectful manner which resulted in termination of proceedings, referral to a general magistrate and multiple warning to cease his behavior. Despite those warnings, the respondent persisted until the proceedings were disrupted. (A. 16)

> As the direct result of Respondent's lack of professionalism and self-control, both judges were forced to admonish Respondent. Respondent's actions made it impossible for the judges to conduct hearings. Judge Manno Schurr was forced to terminate a hearing and to refer all discovery matters for consideration to a general magistrate. It is clear that Respondent was unable to manifest appropriate courtroom demeanor during multiple court appearances.
>
> * * *
>
> 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.
>
> (A. 17)

The respondent correctly states that the Report of Referee does not cite to any case in which "a lawyer is prosecuted for annoying or irritating a judge by pressing his case too firmly" since that description is not consistent with the Bar's charges.

The respondent's reliance on The Florida Bar v. Clark, 528 So.2d 369 (Fla. 1988), The Florida Bar v. Ray, 797 So.2d 556 (Fla. 2001), and The Florida Bar v. Weinberger, 397 So.2d 661 (Fla. 1981) to convince this Court that a public reprimand is the appropriate discipline is misplaced. In 1985 and 1986, Clark made false accusations against a circuit judge and pursued his speeding ticket to the United States Supreme Court. In 1988, he received a public reprimand. This Honorable Court has recently stated that it has moved toward stronger sanctions and a greater degree of professionalism. As such, this 24-year old case would undoubtedly result in greater discipline today. Beyond that, the Clark case is inapplicable. Mr. Norkin committed a multitude and variety of misconduct with findings of mostly aggravation, including a previous public reprimand for similar misconduct. Michael Ray, in letters to the Chief Judge, accused a judge before whom he appeared regularly of mishandling his courtroom, unfair rulings and suspicious conduct. Ray did not have a disciplinary history nor did he engage in all of the other misconduct committed by Jeffrey Norkin. As such, that case is likewise inapplicable. David Weinberger, a newly admitted member of The Florida Bar made "irresponsible and intemperate" attacks on the

judiciary. Although the referee recommended a one-year suspension because of the misconduct together with his intemperate personality and psychological makeup, this Honorable Court in 1981 publicly reprimanded Weinberger. It was noted that Weinberger had apologized to the judges involved, expressed remorse, and acknowledged that his actions fell below the expected standards. Mr. Norkin, a member of The Florida Bar for 19 years, maintained his vitriolic conduct toward Gary Brooks throughout the final hearing, as well as in his brief. He did not exhibit any remorse or apologize for his misconduct. Instead, Mr. Norkin has continued to make excuses and justify his unprofessional conduct in the name of zealous advocacy. Thus, the Weinberger case is likewise inapplicable.

The respondent alleges that the referee erred by giving "so much weight" to his prior disciplinary history of a public reprimand. The report, however, not only refers to the previous discipline before the Honorable William Stafford, a federal court judge, but sets forth a pattern of cumulative misconduct which includes the prior discipline. The report of referee references the record concerning the public reprimand and continues to reference other incidents; to wit - - being asked by a North Dade judge whether he liked baloney sandwiches and being threatened by the Honorable James Lawrence King, a federal court judge, with jail for arguing with the court. This Court has consistently held that cumulative misconduct of a similar nature should warrant an

even more severe discipline than might dissimilar conduct. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982). Here, the previous public reprimand involved a finding of contempt for misconduct in the courtroom and unprofessional conduct toward the respondent's adversaries. That same misconduct has been repeated in the present case.

This Court also recently held in The Florida Bar v. Knowles, 2012 WL 2848806, 37 Fla. L. Weekly S508, Fla., July 12, 2012 (NO. SC10-1019) that an escalating pattern of misbehavior warrants a more severe suspension. In the case *sub judice*, there is evidence that in 1994 or 1995, the respondent was threatened by a North Dade judge. Thereafter, federal court judge King threatened to imprison Mr. Norkin. In 1999, Federal Judge Stafford held Mr. Norkin in contempt and despite being reprimanded in 2003, Mr. Norkin engaged in a litany of misconduct in the present case beginning in 2008 of which "he is devoid of insight as to the lack of professionalism he exhibits." (A. 32).

The respondent's claim that the referee ignored the evidence of mitigation presented is difficult to comprehend. (RAB. 43). The referee did find the existence of several mitigating factors, together with giving "tremendous weight" to the respondent's mental and emotional issues. (A. 32 – 33). It is the Bar's position, nonetheless, that the findings in aggravation, far outweigh the findings in mitigation warranting an enhancement of the recommended discipline.

The respondent takes issue with the referee's recommendation that he must submit to an evaluation by a mental health professional and undergo any recommended counseling. This position is somewhat baffling. The respondent testified concerning his history of mental health issues over the past 17 years and the variety of medications taken. (TR. 551 – 552). He presented Dr. Hoffman, a licensed psychologist, who attested to his diagnosis that Mr. Norkin suffers from an attention deficit hyperactivity disorder and a generalized anxiety disorder. (TR. 632). It is the respondent who presented this issue to the referee. The referee was persuaded that it should be considered in mitigation. The respondent's complaint about the referee's recommendation should not be countenanced by this Honorable Court.

Additionally, the Florida Standards for Imposing Lawyer Sanctions provides that appropriate remedies may be imposed. Fl. St. Imp. L. Sanctions 2.8(g). In The Florida Bar v. Ratiner, 46 So.3d 35 (Fla. 2010), this Court required that the respondent undergo mental health counseling. Ratiner, like Norkin, could not control his behavior in a professional setting. The recommendation by this referee is appropriate.

ARGUMENT

(On Answer Brief)

THE RESPONDENT HAS FAILED TO ESTABLISH THAT ANY OF THE REFEREE'S FINDINGS OF FACT AND GUILT ARE CLEARLY ERRONEOUS AND LACKING EVIDENTIARY SUPPORT.

To begin, the respondent's argument that the referee found the respondent not guilty of a "significant portion" of the matters set forth in the Bar's complaint is unsupported by the record. The Bar charged the respondent with four categories of misconduct. They were misconduct in the courtroom: referencing four court hearings in front of two different judges; attacks on opposing counsel: concerning five e-mails, two letters, a court appearance and two incidents in the courthouse; false accusations against a retired judge serving the court: in one letter and in a motion and misrepresentations concerning a court order. The only conduct that the referee found to have not been proven concerned the misrepresentations of the court order. Thus, it is clear that the referee found the respondent guilty, rather than not guilty, of a significant portion of the Bar's charges.

Further, it appears that the respondent is confusing the referee's reasoning and bases for factual findings and findings of guilt, with the conduct charged. For instance, when the referee in her report stated that the respondent's behavior was calculated, she had observed and concluded that the respondent does not simply possess a booming

benign voice. Instead, despite multiple warnings to cease and desist, the respondent continued to behave in an antagonistic, disrespectful, discourteous, angry, and rude manner while he shouted at the court. That reasoning provided, in part, the basis for the finding of the various rule violations. Certainly, the respondent was on notice that he was not being prosecuted by The Florida Bar for being dramatic and loud as evidenced by the recitation of the events in the Bar's complaint.

The referee concluded that the respondent's conduct was not simply the product of a loud booming voice. One need only look to the respondent's testimony that he was frantic, flipped out and was a desperate man trying to save his client's future with extreme efforts. (TR. 292,295,298). Additionally, Gary Brooks testified that the respondent began to shout and behave in a disrespectful and belligerent manner when he was not winning. (TR. 69). The transcript excerpt exchanges with the presiding judges reflect that they were the recipients of screaming, rage and rudeness. (A. 10-14). The referee did not believe the respondent when he argued that he was simply theatrical and loud, rather than belligerent, angry, and disrespectful.

> 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.
> (A. 17)

David Beem, the respondent's client, is the only other witness presented at the final hearing to these events. Although Mr. Beem testified that Mr. Norkin was not yelling or out of hand, the referee did not so find. A respondent contesting factual findings cannot simply point to contradictory evidence when competent, substantial evidence supports the findings. The Florida Bar v. Committe, 916 So.2d 741 (Fla. 2005). Further, it is well established that since the referee is in the best position to evaluate the credibility of witnesses, this Honorable Court will defer to that assessment and resolution of conflicting testimony. The Florida Bar v. Mirk, 64 So.3d 1180 (Fla. 2011).

The respondent claims that had he known that his behavior was deemed rude, disrespectful, calculated, antagonistic, and belligerent toward the court, he would have insisted that the presiding judges testify. In fact, the respondent listed all judges involved in the Ferguson/Beem litigation as potential witnesses in discovery in the Bar case. The respondent elected not to present these witnesses despite being charged with disruption and prejudicial conduct by The Florida Bar.

The respondent correctly states that the referee found that respondent's misconduct violated two rules that were not charged in the Bar's complaint. Those rules are Rule 4-8.2(a) of the Rules Regulating The Florida Bar and Rule 4-8.4(a) of the Rules Regulating The Florida Bar. Rule 4-8.2(a) provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

That rule revolves around the presentation of false statements against a member of the judiciary. The respondent was charged with violating Rule 4-3.3(a)(1) which does concern making a false statement to a tribunal as in the motion to recuse referenced in the Bar's complaint in which Mr. Norkin accused Judge Tobin of acting at the beck and call of Judge Dresnick, who appointed him. The respondent was also charged by The Florida Bar with violating Rule 4-8.4(c) of the Rules Regulating The Florida Bar which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. As such, the respondent always knew that his truthfulness was at issue.

Regardless, this Court has held that uncharged violations of rules not charged in the complaint are permitted where the conduct is specifically referred to in the complaint. The Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999). Here the Bar's allegations are consistent with the referee's findings and were referred to in the Bar's complaint. The Florida Bar v. Vaughn, 608 So.2d 18 (Fla. 1992).

The respondent's argument that he disrupted only four of the 34 hearings that he attended should not be considered as a factor in favor of the respondent. The referee

was not provided with evidence concerning the other 30 hearings. As such, whether the respondent disrupted other hearings is unknown. Moreover, respondent's unprofessional conduct in the hearings referenced before two of the presiding judges forms a sufficient basis for finding that the Rules Regulating The Florida Bar were violated and that the respondent is deserving of a disciplinary sanction.

Page 26 of the respondent's brief references a portion of the September 28, 2010 hearing before Judge Manno Schurr and states:

> 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.
>
> (RAB. 26)

This statement is misleading and not borne out by the record. Judge Manno Schurr continued to have a huge issue with Mr. Norkin's lack of professionalism. Any professed apology by Mr. Norkin was clearly meaningless in light of his behavior during the September 28, 2010 hearing. In truth and in fact, one of the acts of misconduct alleged by the Bar occurred at the conclusion of that very same hearing. Below is the excerpt:

> The Court: I don't remember having this issue in front of me.
>
> Mr. Norkin: Your Honor, there is the docket with the order overruling his objections.

The Court: I don't remember that. Did I do that?

Mr. Brooks: The problem with this –

Mr. Norkin: Your Honor, why are you asking Mr. Brooks? Do you believe him more than me?

The Court: No. Listen, do me a favor. I'm going to ask you to leave, you're doing it again.

Mr. Norkin: I just wonder why it is –

The Court: Oh my god, I'm done. Good-bye. Not doing this. Not going to be questioned by you. You do this to me every single time. All I did was ask him a question. I was going to ask him for the order if he had it. What do I get, I get rudeness and I get you asking me questions and insinuating things. I already made one ruling.

Tell you what I'm going to do. I'm going to send you to the general magistrate and I don't care if you don't want to go. You're going to go anyway. You don't have to pay for it. I want an order referring them to Judge Schwabedissen for these discovery matters. Maybe she'll have better luck with you because you're very rude to me, sir.

Mr. Norkin: Your Honor, you seem to question my word every single time I say something to you.

The Court: Not something – sir, I'm finished.

Mr. Norkin: Remember that seems like you're questioning my work every single time like I'm lying to you.

> The Court: I've had 30 hearings today I don't get this from any lawyers, I don't understand.
> (A. 14 – 15)

The respondent argues that the referee failed to examine "all" of the facts surrounding the alleged misconduct or the context in which they occurred. That argument is without any merit. The referee was meticulous. Extensive pretrial hearings were held on the respondent's Motion to Dismiss and the Bar's Motion for Summary Judgment with extensive findings being made. The final hearing spanned five days with voluminous exhibits containing lengthy transcripts being submitted by both parties.[1] The referee issued a 36-page report setting forth a recitation of the underlying litigation, as well as the proceedings before the referee. Additionally, the respondent testified for several hours explaining his rationale for his conduct. The referee neither omitted, ignored, or failed to comprehend the evidence. Rather, the referee found against the respondent and his version of events. In The Florida Bar v. Head, 27 So.3d 1 (Fla. 2010), that respondent made a similar argument.

> Head also challenges the referee's findings of fact by basically asserting that the referee should have believed him instead of relying on the bankruptcy court documents. The Court has a long-established and clear standard regarding a referee's credibility findings: The Court defers to the referee's assessment and resolution of conflicting testimony because the referee is in the best position to judge the credibility of the witnesses. *Fla. Bar v. Batista*, 846 So.2d 479 (Fla. 2003). The referee did not find

[1] The final hearing transcript is 692 pages long.

> Head believable on these points. Further, Head cannot prevail on review, when contesting the referee's findings of fact, merely by continuing to restate his arguments. A respondent cannot prevail on review by contesting factual findings and simply pointing to contradictory evidence, when competent, substantial evidence (such as the bankruptcy documents and orders) supports the referee's findings. *Fla. Bar v. Varner*, 992 So.2d 224 (Fla. 2008). In addition, the referee thoroughly supported his findings with competent, substantial evidence by over twenty citations to documents in the record, discussing the stipulations entered into by the parties, scrutinizing the testimony of witnesses, quoting and examining the findings from the bankruptcy court orders, and quoting the transcript from the bankruptcy court hearings. We conclude that Head has failed to meet his burden of proving that the referee's findings of fact are not supported by the record.
>
> Head, at 8.

Further, the respondent argues that his accusations against Judge Tobin of being in a cozy, conspiratorial relationship with one of the parties, misusing the law, conduct unbecoming of a former judge and exclusively acting at the beck and call of the appointing judge does not equate to an accusation of corruption, as described in the Bar's complaint. Again, the referee failed to so find. Instead, the referee found that the respondent, without supporting facts, alleged that Judge Tobin was involved in a conspiracy. (A. 9). A conspiracy, as referenced by this Court in Goldberg v. State, 351 So.2d 332 (Fla. 1977), consists of a corrupt agreement.

> The statutory 'definitions' are really no definitions at all; they merely describe broad categories of anti-social objections which make a 'conspiracy' punishable. The best that the courts have been able to say is that: **'The gist of the crime of conspiracy consists in a corrupt**

agreement between two or more individuals to do an unlawful act, unlawful either as a means or as an end.'

Goldberg, at 3. (emphasis supplied)

The respondent argues now, as he did to the referee, that he was justified in accusing Judge Tobin of engaging in illegal conduct and that his actions were in the best interests of his client. The referee, however, made a determination based on the credible testimony of Judge Tobin that there was not any evidence to support the accusation. "A respondent contesting factual findings in an attorney disciplinary action cannot simply point to contradictory evidence when competent, substantial evidence supports the findings." The Florida Bar v. Varner, 992 So.2d 224 (Fla. 2008).

The respondent concludes his point on appeal by arguing that since the Report of Referee did not adopt the respondent's theory of defense, it is possible that the referee "inadvertently overlooked Respondent's case or if she omitted it from her analysis intentionally." (RAB. 37). It is difficult to comprehend the respondent's position given the fact that, as to one portion of the Bar's complaint concerning misrepresentation of Judge Trawick's order, the referee's analysis led to a finding that the respondent had not committed misconduct. Also, the Report of Referee need only make findings of fact and recommendations of guilt. A referee is not required to address each finding not found. To require a referee to do so would be unduly burdensome.

Further, Rule 3-7.6(m)(1) of the Rules Regulating The Florida Bar sets forth the requirements for the contents of the Report of Referee. It need only include a finding of fact as to each item of misconduct, recommendations of guilt and disciplinary measure, and costs. The referee is not mandated to address each defense or version of events propounded by the respondent.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the referee's recommendation of discipline is too lenient and the respondent should receive a 1-year suspension and a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Bar's Reply Brief and Answer Brief on Cross Appeal regarding Supreme Court Case No. SC11-1356, The Florida Bar File No. 2010-51,662(17F) has been mailed by regular U.S. mail to Respondent's Counsel, Kevin P. Tynan, Esq., at Richardson & Tynan, P.L.C., 8142 North University Drive, Tamarac, FL 33321-1708, on this _____ day of August, 2012.

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

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

_____

RANDI KLAYMAN LAZARUS
Bar Counsel