IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

HOWARD MICHAEL SCHEINBERG,

Respondent.
_____/

Supreme Court Case
No. SC11-1865

The Florida Bar File
No. 2009-50,474 (17J)

THE FLORIDA BAR'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page No.

Cases

Other Authorities Cited:

Standards

Rules

Other Authorities

PRELIMINARY STATEMENT

Throughout this Answer Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be referred to as "RR" followed by a page number, indicating the referenced page number. The two volumes of transcript used in the Final Hearing have consecutively numbered pages and will be referred to as "T" followed by the page number, indicating the referenced page number. References to pages in respondent's Initial Brief will be designated "IB" followed by a page number. Respondent's Amended Motion to Dismiss will be referred to as "AMTD" and the transcript of the Amended Motion to Dismiss hearing will be referred to as "TMTD".[1] The Florida Bar will be referred to as "the Bar." Howard Scheinberg, Appellant, will be referred to as "Scheinberg" or "respondent."

[1] When the Amended Motion to Dismiss was filed, it replaced the original Motion to Dismiss. Although the transcript of the hearing on March 8, 2012 was titled as "Respondent's Motion to Dismiss", the hearing was actually on the Amended Motion to Dismiss as noted by the Referee in page 11 of the transcript.

STATEMENT OF THE CASE

The Florida Bar filed its Complaint against respondent, Scheinberg, on or about September 22, 2011, charging respondent with a violation of Rule 4-8.4(d) of the Rules Regulating The Florida Bar. On October 18, 2011 respondent filed his Answer, Affirmative Defenses, and a Motion to Dismiss. On January 20, 2012, respondent filed an Amended Motion to Dismiss. The final hearing on this matter took place on March 8, 2012 before the Honorable Sheree Davis Cunningham. During that day, respondent's Amended Motion to Dismiss was also heard.

In his Amended Motion to Dismiss, respondent claimed that the Bar, during its investigation of this matter at the grievance committee level breached the confidentiality of this matter by disclosing that character letters had been written in respondent's behalf. Said information appeared in a blog. During the hearing on the Amended Motion to Dismiss, the Bar argued that there was no evidence that the information came from the Bar and that, in fact, the information in the blog could have come from a number of sources, including those individuals who wrote the letters on behalf of respondent. The Bar also argued that any prejudice to respondent was eliminated when the Bar assigned the matter to an entirely new grievance committee for investigation.

The referee denied respondent's motion noting:

> Having listened carefully to the argument advanced on the Respondent's Motion to Dismiss and reference to this matter here, the Motion to Dismiss would be on the Amended Motion to Dismiss would be denied by this court and we will proceed to final hearing.

(TMTD: 11).

Judge Cunningham, after hearing testimony of all of the witnesses and considering the same found that respondent had violated R. Regulating The Florida Bar 4-8.4(d) in that he had engaged in conduct prejudicial to the administration of justice. She imposed a one year suspension as a sanction, along with payment of the bar's costs and stated:

> [P]rosecutors are held to the highest standard because of their unique powers and responsibilities. The United States Supreme Court observed over sixty years ago that a prosecutor has responsibilities beyond that of an advocate, and has a higher duty to assure that justice is served …

(RR: 8-9).

Judge Cunningham also considered the Standards for Imposing Lawyer Sanctions, and concluded that suspension was appropriate pursuant to Standards 5.22, 6.32, and 7.2.

In addition to finding that several standards were applicable given respondent's conduct, the referee found three applicable aggravating factors: (a) a pattern of

misconduct; (b) multiple offenses; (c) substantial experience in the practice of law. She also found four factors in mitigation: 9.32(a) absence of a prior disciplinary record; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (g) character or reputation; and (l) remorse. (RR: 9-10).

Finally, in recommending the one-year suspension, the referee also considered relevant case law and found that a one-year suspension was warranted. (RR: 5-6).

Prior to recommending the one-year suspension, the referee noted that great responsibility was reposed in respondent and that his disregard whether inadvertent or otherwise, for the sanctity of the legal process had to be addressed. (RR: 8). The referee also noted that respondent had served as a prosecutor in excess of twenty years and that he had presented no evidence or testimony establishing any actual basis for his lapse in judgment and misconduct. (RR: 7). She also noted that respondent did not reveal his additional contact with the presiding judge which culminated in 1,420 communications until much later into the bar's investigation. (RR: 6). Additionally, the undisclosed communications between the judge and the respondent prejudiced the system. (RR: 4). The communication should have been revealed to opposing counsel and failing to make such a disclosure was prejudicial to the administration of justice. (RR: 4).

STATEMENT OF THE FACTS

In 2007 the respondent was an Assistant State Attorney in Broward County, Florida, having served in that position since approximately 1987. As such, respondent was a career prosecutor and a very experienced one. The respondent was the lead state attorney in *State of Florida v. Omar Loureiro,* a first degree capital murder case. Former Judge Ana Gardiner was the presiding judge in the case. The jury returned a verdict of guilty of first degree capital murder on March 27, 2007. The jury recommended the death penalty on May 20, 2007. Former Judge Ana Gardiner imposed the death penalty on August 24, 2007. Between March 23, 2007 and August 24, 2007, and during the duration of the proceedings where respondent was the prosecutor representing the State in the same case former Judger Gardiner was presiding on, the judge and the respondent engaged in private ex parte communications which included 949 cell phone calls and 471 text messages. Neither former Judge Gardiner nor the respondent revealed *any* of their personal contact to the attorneys representing the defendant or to anyone else. As a result of the improper, undisclosed conduct between former Judge Ana Gardiner and the respondent, the defendant had to be retried. The respondent admitted to extensive private ex parte communications between himself and the presiding judge in his response to the Bar's Request for

Admissions. The respondent, however, alleges that there was not any discussion between himself and former Judge Gardiner about the pending case, thus concluding that his conduct was not therefore improper. The bar's position is that regardless of the nature of the discussions, it is clearly improper for a prosecutor to engage in 1,420 ex parte private communications with the judge presiding over the same first degree murder trial where he is the prosecutor and to not disclose these communications to anyone.

SUMMARY OF ARGUMENT

The referee's findings of fact and of guilt are clearly supported by competent, substantial evidence in the record. After considering all of the evidence in the record and assessing the testimony and credibility of all of the witnesses, the referee made proper findings and disciplined respondent accordingly. There is nothing improper or erroneous about these findings, and as such, they must be upheld.

The respondent has not met his burden to demonstrate that there is no record evidence to support the referee's findings, or that the evidence contradicts her findings of fact or conclusions of guilt. The referee properly found that the evidence was clear and convincing that respondent's willful and knowing actions in engaging in 1,420 improper communications with the presiding judge during a first degree murder trial and not disclosing these private communications to anyone both contributed to and resulted in prejudice to the administration of justice.

Additionally, a one-year suspension is the appropriate sanction for the serious misconduct of an experienced prosecutor who engaged in 1,420 ex parte and private conversations with a presiding trial judge in a first degree murder case over a five month period, and failed to disclose the same to anyone.

Finally, the referee did not err in denying respondent's Amended Motion to Dismiss when the alleged breach of confidentiality could not be ascribed to the Bar and respondent failed to demonstrate any prejudice from any alleged breach.

ARGUMENT

On review, the burden is on the party seeking review to demonstrate that a report of the referee sought to be reviewed is erroneous, unlawful, or unjustified. R. Regulating Fla. Bar 3-7.7(c)(5). A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *The Florida Bar v. Senton,* 882 So. 2d 997, 1001 (Fla. 2004); *The Florida Bar v. Vining*, 761 So. 2d 1044, 1047 (Fla. 2000). This Court's scope of review of a referee's recommended sanction is broader than that afforded to findings of fact because this Court has the ultimate authority to determine the appropriate sanction. *The Florida Bar v. Carlon,* 820 So. 2d 891, 899 (Fla. 2002). However, generally speaking, the Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See, The Florida Bar v. Temmer,* 753 So. 2d 555, 558 (Fla.1999). The Bar submits that the factual findings and disciplinary recommendation of the referee should be approved.

ISSUE I

I. THE REFEREE'S FINDINGS ARE CLEARLY SUPPORTED BY THE RECORD, ARE NOT CLEARLY ERRONEOUS, AND SHOULD THEREFORE BE UPHELD. EX PARTE COMMUNICATIONS WHICH INCLUDE 1,420 PRIVATE COMMUNICATIONS BETWEEN A JUDGE PRESIDING OVER A FIRST DEGREE MURDER TRIAL AND THE PROSECUTOR IN THE CASE ARE CLEARLY INAPPROPRIATE AND PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, REGARDLESS OF THE NATURE OF THOSE COMMUNICATIONS.

In considering respondent's argument and evaluating the referee's findings of fact, the Court will recall the principles articulated in *The Florida Bar v. Dubbeld*, 748 So. 2d 936, 940 (Fla. 1999):

> A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *Florida Bar v. Beach*, 699 So. 2d 657, 660 (Fla. 1997). If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Florida Bar v. Bustamante*, 662 So. 2d 687, 689 (Fla. 1995). The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *Florida Bar v. Miele*, 605 So. 2d 866, 868 (Fla. 1992).

Accordingly, it is respondent's burden to prove that there is no record evidence to support the referee's findings, or that such evidence contradicts her conclusions. He has met neither burden in his Initial Brief. To the contrary, the record is replete with evidence to support both the referee's findings that respondent is guilty and that a one year suspension is the appropriate sanction. Respondent's Initial Brief essentially raises factual arguments that were previously made at the final hearing and rejected by the referee. Respondent was found guilty of violating Rules Regulating Fla. Bar 4-8.4(d). The evidence clearly established this rule violation.

The referee specifically found that respondent's extensive and private ex parte communications (1,420) with the presiding judge during a first degree murder trial prejudiced the administration of justice:

> Conduct that prejudices our system as a whole is encompassed by Rule 4-8.4(d) of the Rules Regulating The Florida Bar. *The Florida Bar v. Frederick*, 756 So. 2d 79 (Fla. 2000). The prosecutor, Mr. Scheinberg, in a murder case had private communications (1,420) with the presiding judge and told no one. Said conduct was not fair to the defendant. Said conduct was not fair to the defendant's counsel, whose goal it was to protect the rights of his client. Said conduct was not fair to the integrity of the process, when proceedings were required which led to a new trial. Based upon all of the evidence presented to me during the final hearing, I find the Respondent guilty of having violated Rule 4-8.4(d) of the Rules Regulating The Florida Bar. The undisclosed communications between the judge and Respondent prejudiced the system. The

> communication should have been revealed to opposing counsel and failing to make such a disclosure was also prejudicial to the administration of justice.

(RR: 4).

Respondent claims that a communication between a judge and an attorney that does not involve the merits of a pending case can never be prejudicial to the administration of justice. (IB: 12). Respondent errs in this claim since as the referee noted above and other courts have found, an ex parte communication not dealing with the merits of the case is nonetheless prejudicial since it creates an appearance of impropriety.

In *Pearson v. Pearson*, 870 So. 2d 248 (Fla. 2d DCA 2004), the court citing to The Code of Judicial Conduct noted the following:

> The Code of Judicial Conduct in Canon 3(B)(7) states that: [A] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." "Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.

Pearson at 249.

Ex parte communications are fraught with peril because of their ability to subtly influence judges and thereby destroy the impartiality of the judiciary and create an

inference of unfairness. In *Rose v. State*, 601 So. 2d 1181 (Fla. 1992), this Court noted the following:

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts.

Rose at 1183.

Although this Court in *Rose* noted that ex parte communications dealing with strictly administrative matters not dealing with the merits of the case were the exception to the rule, the Court did not say all matters not on the merits were okay, but only those *administrative matters* [emphasis added] that did not deal with the merits:

> Obviously, we understand that this would not include strictly administrative matters not dealing in any way with the merits of the case.

Id.

However, in the instant matter, respondent does not claim that the matters discussed were regarding administrative matters. Nor does respondent claim that the ex parte communications were simply an infrequent "Good morning, Judge" as might occur as an attorney walks by a judge in a hallway. Nor does respondent claim that these 1,420 ex parte communications were communications made in a public forum or social event where others could attest that the communications were regarding non case

related matters. Instead, the record demonstrated that the 1,420 ex parte communications were non-administrative, frequent and private.

In *Rose*, this Court noted the evils of ex parte communications, namely they create an appearance of impropriety and call into question the impartiality of the judiciary and the ability to receive a fair trial:

> The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:
>
> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge…. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> … The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

Id.

Engaging in over 1,400 ex parte communications with the trial judge during the case was sufficient evidence that respondent prejudiced the administration of justice by calling into question the impartiality of the judge. In *Deren v. Williams,* 521 So. 2d 150 (Fla. 5th DCA 1988), the court noted that a manifestation of friendship between a

judge and an attorney along with ex parte communications called into question the fairness and impartiality of the trial judge:

> … the manifestation of a close friendship with opposing counsel, coupled with ex parte communications during trial, would reasonably cause a litigant to be apprehensive of the fairness of the trial judge.

Deren at 152. *See* also *Robbins v. Robbins*, 742 So. 2d 395, 396 (Fla. 2d DCA 1999) (where litigant has been seen socializing with the trial judge on numerous occasions; and that litigant's former counsel had an ex parte communication with the judge about the case).

There is no requirement that communications have to be regarding the merits of the matter to establish prejudice to the administration of justice. As the court noted above in *Deren*, the fear of a lack of impartiality was established based upon the friendship between the judge and attorney coupled with ex parte communications. Similarly in the instant matter, prejudice was established by the excessive number of continuous communications demonstrating an ongoing relationship and the ex parte nature of the communications. Therefore, in the instant case, the referee did not err in finding respondent guilty.

Next, respondent claims in his Initial Brief that the referee erred in finding him guilty of prejudicing the administration of justice because his actions did not *cause* the

state's decision to retry the case, but only *contributed* to it. (Initial Brief at 15). Respondent errs in this claim.

The record testimony contradicts respondent's claim. Mr. Cavanaugh, the second prosecutor on the case, testified that but for respondent's improper communications, the state would not have had to retry the case:

> Q: Would you agree with me that but for the contact between Judge Gardiner and Mr. Scheinberg, there would have been no need for a new trial?
>
> A: Unfortunately, yes.

(T: 54).

ISSUE II

II. A ONE-YEAR SUSPENSION IS THE APPROPRIATE SANCTION FOR THE SERIOUS MISCONDUCT OF AN EXPERIENCED PROSECUTOR WHO ENGAGES IN 1,420 EX PARTE PRIVATE COMMUNICATIONS WITH THE PRESIDING JUDGE IN A MURDER TRIAL AND FAILS TO DISCLOSE THOSE COMMUNICATIONS TO ANYONE RESULTING IN THE CASE HAVING TO BE RETRIED

While a referee's findings of fact should be upheld unless clearly erroneous or without support in the record, this Court's scope of review is broader when it reviews a referee's recommendation for discipline because this Court has the ultimate responsibility of determining the appropriate sanction. *The Florida Bar v. Rue,* 643

So. 2d 1080 (Fla. 1994); *The Florida Bar v. Grief*, 701 So. 2d 555 (Fla. 1997). In *The Florida Bar v. Pahules*, 233 So. 2d 130 (Fla. 1970), this Court held three purposes must be held in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter others attorneys from similar conduct. This Court has further stated a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. *The Florida Bar v. Sweeney*, 730 So. 2d 1269 (Fla. 1998); *The Florida Bar v. Lecznar*, 690 So. 2d 1284 (Fla. 1997). In the instant case, the referee found support for her suspension recommendation in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

In reviewing a referee's recommendations for discipline, this Court's scope of review is broader than afforded to findings of facts because it is this Court's responsibility to order the appropriate punishment. *The Fla. Bar v. Anderson*, 538 So. 2d 852, 854 (Fla.1989).

However, a referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. *The Fla. Bar v. Lipman*, 497 So. 2d 1165, 1168 (Fla.1968).

The one-year suspension given by the referee was based upon competent substantial evidence. First, the referee noted that Standards for Imposing Lawyer Sanctions 5.22, 6.32 and 7.2 all requiring suspension were applicable. The referee did not err in this finding since the standards clearly support a suspension. Standard 5.22 applies when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or the integrity of the legal process. In the instant case, respondent, a lawyer who had been practicing law for over 20 years, knew that an attorney should not engage in ex parte communications with a judge while appearing before the judge in an ongoing matter. Although respondent claims that he did not believe he was violating the rules because the communications were not regarding the merits of the matter, such an explanation is unreasonable given his twenty-two years as a career homicide prosecutor and the testimony of his numerous character witnesses that testified that respondent was very smart. In fact, respondent was clearly aware of the rules regarding ex parte communications and the appearance of impropriety. One character witness, Judge Horowitz, even related the anecdote that respondent would not even get on the same elevator with him when respondent had cases in front of him. (T: 134). Thus, it would not be unreasonable to conclude that respondent knew his conduct was improper but chose to engage in the improper communications anyway. His conduct clearly

impacted the integrity of the legal process. In fact, the referee stated "The undisclosed communication between the judge and Respondent prejudiced the system." (RR: 4). Therefore, the referee did not err when she found this standard requiring suspension applicable.

Standard 6.32, requiring suspension is likewise applicable in that respondent engaged in communications with the presiding judge when he knew this communication was improper. His 1,420 ex parte and private communications caused harm to the legal proceedings. Judge Cunningham found that:

> …the State incurred the expense of hiring Attorney Bruce Rogow to investigate and recommend whether a new trial should be granted and, in fact, the State so agreed. Brian Cavanaugh, the successor state attorney and one of Mr. Scheinberg's witnesses, when asked by Bar Counsel on cross-examination "would you agree with me that but for the contact and lack of disclosure, a new trial would not have taken place"? Mr. Cavanaugh responded, "Unfortunately yes". The system was further impacted when a new trial was held. (RR: 7)

Finally, Standard 7.2 which also requires suspension is applicable as found by the referee.[Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.]

Next, the one-year suspension was clearly appropriate and supported by case law. In citing to *The Florida Bar v. Mason*, 334 So. 2d 1 (Fla. 1976), the referee stated

"there can be no temporizing with an offense the commission of which serves to destruct the judicial process." (RR: 6; *Mason* at 6).

The referee also noted that the only excuse respondent presented regarding his lapse in judgment for his misconduct was that he thought he was doing no wrong since their discussions were regarding personal matters and not the *Loureiro* case. (RR: 7). The referee correctly concluded:

> Mr. Scheinberg presented me with no evidence or testimony of a psychological or medical nature establishing any actual basis for his lapse in judgment and misconduct. Rather, he simply stated that he thought that he was not doing anything wrong since he and former Judge Gardiner never discussed the Louriero case and spoke only of personal matters. Every lawyer is charged with knowledge of our Code of Ethics.

ISSUE III

III. THE REFEREE DID NOT ERR IN DENYING RESPONDENT'S AMENDED MOTION TO DISMISS SINCE ANY ALLEGED BREACH OF CONFIDENTIALITY COULD NOT BE ASCRIBED TO THE BAR AND RESPONDENT FAILED TO DEMONSTRATE ANY PREJUDICE EVEN IF SAID ALLEGED BREACH OCCURRED.

Respondent claims that there was an alleged breach of grievance committee confidentiality by virtue of the fact that character letters provided on behalf of respondent were "leaked" to a local blog. Respondent alleges that this alleged breach should preclude the bar from bringing the instant complaint against him. The standard

of review for error not involving a matter of law is abuse of discretion. *See Stephens v. State*, 748 So. 2d 1028, 1036 (Fla. 1999). (The discretionary standard of review applies in this instance because there is no rule that makes this type of conduct either prejudicial or not prejudicial as a matter of law, and it is consequently within the trial court's discretion to determine whether the defective conduct of defense counsel in these circumstances prejudiced this defendant). *See also Ramey v. Haverty Furniture Companies, Inc.*, 993 So. 2d 1014 (Fla. 2nd DCA 2008) and *Hernandez v. City of Miami*, 35 So. 3d 942 (Fla. 3rd DCA 2010) (If dismissal is used as a sanction, the order is reviewable on appeal by the abuse of discretion standard).

The abuse of discretion standard is accorded great deference by the reviewing court. In *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980), this Court noted:

> We cite with favor the following statement of the test for review of a judge's discretionary power:
>
> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.
> …
> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the

> propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

In this matter, the referee's decision in denying the motion was not arbitrary, fanciful or unreasonable. It was not unreasonable for the referee to deny respondent's Amended Motion to Dismiss the complaint because: 1) respondent failed to demonstrate that the alleged source of the leak was The Florida Bar or a grievance committee member; 2) The Florida Bar in good faith took steps to ameliorate any prejudice by assigning the matter to a different grievance committee; 3) respondent failed to demonstrate any prejudice from the *de minimus* comments made in the blog; and 4) had the referee granted the motion, respondent would not have been able to answer for his misconduct.

Respondent failed to prove that the Bar or any committee member was the source of the leak other than to make a conclusory allegation. It would not be unreasonable to conclude that any of these letter writers provided the information regarding the letter writing campaign directly to the blog or to a third party who passed it on to the blog. During the hearing on the Amended Motion to Dismiss, bar counsel even noted:

> And in reading the blog, there is no reference to the actual letter. We are not even sure that whoever wrote this blog had the actual letter.

> So it's quite possible that any one of those people had provided information to the blog writer. There is no actual evidence that either The Florida Bar or any member of that grievance committee committed any wrongdoing.

(TMTD: 9-10).

It was also not unreasonable for the referee to deny the Amended Motion to Dismiss since the Bar subsequently reassigned the matter to a new grievance committee that would start fresh in reviewing whether or not any rule had been violated.

During the Amended Motion to Dismiss hearing, bar counsel averred that any prejudice to respondent was resolved by presenting the case to a new grievance committee as occurred in the *Berthiaume* matter. (TMMD: 9-10).

In *The Florida Bar v. Berthiaume*, 78 So. 3d 503 (Fla. 2011), this Court noted that the appointment of a new grievance committee removed any taint from a previous committee:

> As that case was jointly dismissed by the Bar and Respondent, and thereafter a different grievance committee considered the investigation, Respondent has already been provided with the appropriate relief. Any possible taint or bias that might have created a conflict during the first proceeding was removed.

Berthiaume at 507.

Although respondent claimed in the Amended Motion to Dismiss hearing that *Berthiaume* was not applicable because the Bar was the cause of the leak (TMTD: 8), respondent errs in this claim since as noted above, there was no evidence demonstrating that the Bar leaked any information.

Thus, any prejudice from a possible committee member of the original grievance committee being the source of the leak was attenuated by the assignment of the matter to the new committee to review the facts de novo and determine whether probable cause of a rule violation existed. Therefore, the referee did not err in denying the Amended Motion to Dismiss.

The one-year suspension was clearly supported in light of the referee's recognition that as in *Mason*, respondent's conduct in the instant matter served to destroy the judicial process. Further, the one-year suspension was clearly appropriate given the referee's recognition that the matter involved a first degree murder case [a matter in which a man's life was at stake]. Finally, the one-year suspension was clearly supported given respondent's extensive experience as a prosecutor and his reputation for intelligence, juxtaposed with his allegation that he did not believe he was violating the rules by engaging in the ex parte communications with the judge presiding over his trial.

In his Initial Brief, respondent cites to several cases regarding sanctions. Said cases are distinguishable from the instant case. *In Inquiry Concerning a Judge: Re Adams*, 932 So. 2d 1025 (Fla. 2006), respondent noted that Adams received only a public reprimand for failing to disclose his amorous relationship with an attorney to opposing counsel. The instant matter is significantly distinguishable from *Adams*. In *Adams,* the inappropriate behavior committed by Adams was the granting of several continuances to his paramour without disclosing the relationship to opposing counsel. In the instant matter, the offending behavior was the involvement of respondent with the trial judge in extensive ex parte communications which served to put into question the fairness of the first degree murder trial and the defendant's conviction. As a result of respondent's behavior in the instant matter, the murder case had to be retried. In *Adams*, no first degree murder cases had to be retried, no investigation had to be conducted, no direct appeal had to be relinquished to a lower court, and no new judge had to be appointed. Although the administration of justice had been prejudiced in both matters, in the instant matter it had been prejudiced to a much greater extent.

Respondent also cited to *Mason*, noting that the prejudice in that matter was similar to the instant matter since it too involved the destruction of the judicial process, and the facts in *Mason* were egregious with the distinction being that the communication in *Mason* was on the merits of the pending matter.

The instant matter, however, has characteristics that make respondent's conduct even more unethical in several ways. First, respondent was a prosecutor of over twenty-two years. He simply should have known better. Second, respondent knew (or certainly should have known) that 1,420 ex parte communications with the presiding judge were improper. Third, respondent's case involved charges of first degree murder with the possibility of the imposition of the death penalty. Someone's life hung in the balance. This was not a case regarding utility rates. To engage in ex parte communications with the presiding judge while he was the prosecutor on the case and to not disclose it to anyone clearly harmed the administration of justice and was fraught with impropriety. Fourth, respondent had the opportunity to admit his behavior early on but failed to do so until he was compelled to by the production of a subpoena.

In his Initial Brief, respondent claimed that the referee erred in her sanction because she failed to include a number of mitigating factors in her Report of Referee. (Initial Brief at 20-21). Particularly, respondent alleges the following should have been considered:

1. 9.32 (b) absence of a dishonest or selfish motive.
2. 9.32 (c) personal or emotional problems occasioned by Respondent's then pending divorce.
3. 9.32 (d) good faith effort to rectify consequences of misconduct.

4. 9.32 (j) unreasonable delay in the prosecution of this matter since it dates back to 2007.

Respondent errs in this claim. First, as to his claim of an absence of a dishonest or selfish motive, it should be noted that respondent did receive a benefit from these improper communications. Although not monetary in nature, it would not be unreasonable to conclude the benefit received was a close professional and emotional relationship with a sitting judge. Over this five-month period, the communications between respondent and the judge were ongoing. It would not be unreasonable to conclude that if the communications were not benefitting respondent, then they would have ceased long before the five-month period. Thus, the referee did not err in rejecting the absence of a selfish motive as a mitigating factor because this factor was not supported by the record.

As to the mitigation factor regarding emotional problems, the referee noted the following:

> Although the respondent presented impressive character witnesses, none served as any guidance for me to understand what the respondent represents as an aberration in his career and of his ethical barometer.

(RR: 8).

The referee heard testimony from respondent regarding the breakup of his marriage. Clearly, however, the referee rejected divorce as a reason to overcome twenty-two years experience as a prosecutor and to compromise his ethics. Respondent was charged with the duty to represent the State of Florida in a first degree murder prosecution and to bring justice to the victim and his family. The referee clearly rejected the idea that a divorce or undergoing emotional stresses gives one an excuse to violate one's obligation as an attorney. Thus, the referee did not err in not recognizing respondent's divorce as a mitigating factor. *See The Florida Bar v. Shapiro*, 413 So. 2d 1184 (1982) (where respondent claimed the mitigating factor of an unwanted divorce and the referee recommended a public reprimand; however, this Court imposed a 91-day suspension).

As to the mitigating factor of good faith effort to rectify consequences of misconduct, the referee did not err in rejecting this as a mitigating factor because it is refuted by the record. Respondent claims entitlement due to the fact that he advocated that Loureiro should receive a new trial. However, the record notes that respondent failed to initially disclose his communications until a much later date. Specifically, the referee found

> The improper communications between former Judge Gardiner and Mr. Scheinberg came to the public view when a dinner at a restaurant in which they participated with others was revealed. An investigation and

> inquiry ensued both by The Florida Bar and in the underlying criminal case concerning Omar Loureiro. Mr. Scheinberg did not reveal to The Florida Bar the additional contact culminating in 1,420 communications since, according to his testimony, he was only asked by the Bar to respond concerning allegations surrounding the dinner. It was only later that the communications were revealed. (RR: 6).

As to the mitigating factor of unreasonable delay in the prosecution of this matter, the referee did not err in not including this as a mitigating factor. Respondent claims unnecessary delay because the issue dates back to 2007. However, during argument, respondent's counsel conceded that delay really didn't matter in the instant case since delay applied to cases seven years or older and this matter was only five years old. (T: 203-204).

Further, respondent is disingenuous in this claim because he fails to note that although the conduct occurred in 2007 and he had the opportunity to disclose it then, he failed to do so until April of 2009. Since respondent's failure to disclose information was the reason for the delay, respondent should not benefit from his failure to disclose information. Thus, the referee did not err when she did not include this factor as a mitigating factor in her report.

Respondent further claims that the referee erred in rejecting the testimony of his character witnesses. (Initial Brief at 19-20). This is simply inaccurate in that the referee

did consider said testimony, but citing to *The Florida Bar v. Whitney*, 237 So. 2d 745 (Fla. 1970), she stated the following:

> The evidence of these witnesses as to the good character of the respondent are impressive, but have little relevancy in arriving at a conclusion concerning his guilt or innocence.

(RR: 8, *Whitney* at 48).

Thus, it is self-evident that while the referee did consider the testimony of the character witnesses provided by the respondent, she did not conclude that said testimony was relevant in her determination of the guilt or innocence of respondent. In fact, the record demonstrates that the referee did take into consideration the testimony of the character witnesses when she noted in her report respondent's good character as part of her findings of mitigating factors. (RR: 10).

Additionally, with regard to character testimony, respondent claims that the referee committed reversible error when she sustained the bar's objection to the admission of approximately twenty-two character letters. (Initial Brief at 21). The referee, however, did not err when she sustained bar counsel's objection to the introduction of the letters pursuant to *The Florida Bar v. Prior*, 330 So. 2d 697 (Fla. 1976), because this Court noted the use of character letters in disciplinary proceedings was improper. In *Prior*, this Court stated the following:

> The procedural circumstances of this cause require us to consider the ethical and procedural use of character letters as evidence in disciplinary proceedings. In asserting his claim of good character, respondent filed with his brief character letters from twelve Palm Beach County officials consisting of six circuit judges, four county court judges, the state attorney, and the sheriff. Character letters are not proper evidence in any court proceeding.

Prior at 703.

It is noteworthy that the respondent did present live witnesses consisting of judges, prosecutors, defense attorneys and police detectives who testified regarding respondent's good character.

CONCLUSION

A Referee's findings should not be disturbed unless they are clearly erroneous. This referee's findings are not. Respondent, an experienced career prosecutor engaged in 1,420 private ex parte communications with the presiding judge while he was the prosecutor in a first degree murder trial. His conduct resulted in the matter having to be retried. His conduct was prejudicial to the administration of justice. He failed to disclose said communications to anyone during the pendency of the trial and until he had no choice. His conduct warrants a one year suspension as was recommended by this referee. The case law supports said sanction, the standards support said sanction, and this Court should uphold the same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of The Florida Bar's Answer Brief has been furnished by email to ktynan@rtlawoffice.com and by regular U.S. mail to Kevin Tynan Esq., Co-Counsel for Respondent, 8142 N. University Drive, Tamarac, FL 33321; by email to RB@Nova.edu and by regular U.S. mail to Randolph Braccialarghe, Esq., Co Counsel for Respondent, Nova Southeastern Law Center, 3305 College Avenue, Fort Lauderdale, FL 33314, and by email to kmarvin@flabar.org and by regular U.S. mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this _____ day of September, 2012.

_____
MICHAEL C. GREENBERG

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

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

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Michael C. Greenberg, Bar Counsel