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)

RESPONDENT'S INITIAL BRIEF

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

RANDOLPH BRACCIALARGHE, #236403
Attorney for Respondent
Nova Southeastern University
Shepard Broad Law Center
3305 College Avenue
Fort Lauderdale, FL 33314
954-262-6169

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "The Bar" or "The Florida Bar." Howard Michael Scheinberg, 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 and "HT" will be used to designate the transcript for the motion to dismiss. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

STATEMENT OF CASE AND FACTS

The factual background for this case arises from the prosecution of Omar Louriero, who was charged with first degree murder for the gruesome decapitation killing of Robert Lentry. RR2; TT127. The guilt phase of the trial concluded on March 27, 2007, with a guilty verdict on the first degree murder charge. RR2. A sentencing hearing began in late April 2007, through May 2, 2007, and at the conclusion of this phase of the trial, the jury, on an 11-1 vote, recommended the death penalty. RR2; TT44. A *Spencer* hearing was held on May 24, 2007 and on August 4, 2007, the trial judge, Ana Gardiner, agreed with the jury and imposed a death sentence. TT3.

A. The Respondent.

The Respondent, Howard Michael Scheinberg, at all times material to this action, was a seasoned and highly respected homicide prosecutor for the Broward County State Attorneys' Office. TT42; TT84-86. He is 51 years old and is the father of two minor children. TT56. He was admitted to The Florida Bar in 1987 and prior to the matters referenced in this Report enjoyed a stellar reputation in the legal community. TT58; TT100; TT143-133; TT175.

For almost 22 years, the bulk of his legal career, Respondent was employed by the State Attorney's Office for the Seventeenth Judicial Circuit. TT58-59. The homicide unit is considered the elite unit in that office as only the best, brightest

and most seasoned attorneys are in that unit. TT85. Respondent was a homicide prosecutor for 11 years. TT59.

At different times during the course of his employment with the State Attorneys' Office, Respondent supervised other state attorneys and helped educate and mentor less seasoned members of his office. TT60-61. Respondent and his several witnesses testified at the final hearing that he ethically and professionally handled multiple high profile matters. TT62; TT137-138. Respondent's numerous contributions to the education of the bar and the public included: training new Assistant State Attorneys in trial advocacy; participation as a Florida Prosecuting Attorney's Association faculty member; lecturing law students at Nova Law School on capital litigation; annually speaking to local High School Students at prom time about drinking and driving; conducting in-house training at the Broward State Attorney's Office; and training law enforcement on the national level regarding investigating boating and DUI boating fatalities. TT61-62. Respondent's pro bono volunteer work for the Florida Bar included serving six years – two three-year terms – as a member of a Florida Bar Grievance Committee, finishing each term as Chair of the committee**.** TT104. The legal community's high regard for Respondent was shown when he was selected for a special assignment as a specially assigned Assistant United States Attorney on three federal murder cases. TT60.

After leaving the State Attorney's Office, Respondent was first employed at a large Broward County law firm where he developed a practice in employment and personal injury law, and he is currently self-employed in a one person law firm practicing commercial litigation, employment law, and criminal defense. TT63-64.

B. The Communication.

Other than having tried a murder trial before her six years earlier, Respondent had no relationship with Judge Gardiner before being assigned to prosecute the *Louriero* trial. Before March 23, 2007, Respondent had not talked with her on the phone and did not even have her phone number. TT64-65.

Late Friday evening, March 23, the weekend before the conclusion of the guilt phase of the *Louriero* case, Judge Gardiner telephoned the home of Judge Charles Kaplan, with whom Respondent was staying, and that was the first time Judge Gardiner and Respondent spoke on the phone. The phone conversation did not involve the *Louriero* case. TT28; TT66-67. Sometime Saturday, March 24, Judge Gardiner called and spoke to Respondent a second time, but he told her he could not talk as he was caring for his children. As with the first phone conversation, the second call did not involve the *Louriero* case.[1] TT66-67.

[1] The Respondent was present for these calls as he was visiting at Judge Kaplan's home. TT66. Unfortunately, Judge Kaplan passed away in early 2009 and did not participate in these proceedings. It should also be noted that prior to this evening, the Respondent did not have Judge Gardiner's cell phone number and the Judge did not have the Respondent's cell phone number either.

The guilt phase of the Louriero case concluded on March 27, 2007, and shortly thereafter there was a telephonic conversation between the Respondent and Judge Gardiner; this conversation also did not include any matter related to the *Louriero* case.

On the weekend after the guilt phase of the Louriero case, Judge Gardiner traveled to New York with some friends, and, coincidentally, Judge Kaplan also traveled to New York to visit with his family at the same time. While both judges were in New York, they had dinner together and Judge Kaplan called the Respondent and then put Judge Gardiner on the phone. TT68. There were no discussions about the *Louriero* case during this call. TT68. Several hours later that evening, Judge Kaplan called again to say that Judge Gardiner had just been informed of her father's passing and that they were trying to get her a flight to Puerto Rico to be with her family. TT68. Respondent called Judge Gardiner to offer her his condolences and did not discuss the *Louriero* case. TT68.

The foregoing is the context of the phone calls and text messages between Respondent and Judge Gardiner. The only testimony about these communications came from Respondent and he explained that the judge was a former family law attorney and single mother and that he had also lost a parent, had young children and was going through a divorce. TT66-70. Respondent's uncontroverted testimony was that the conversations covered topics related to children, how the

divorce affected children, and some pitfalls to avoid. TT69-70. They also discussed the loss of a parent and other matters that had no nexus whatsoever to the *Louriero* case. TT69-70.

The Bar in its complaint notes that there were 949 cell phone calls and 471 text messages between the Respondent and the trial judge commencing on March 23, 2007 and concluding on August 27, 2007. RR3. In both his Answer to the complaint and in his testimony, Respondent acknowledged these texts and calls and pointed out that many were of a very short duration and were nothing more than a "good morning" or a similar message. TT69-70.

While the texts and calls occurred while the *Louriero* case was still pending, the un-contradicted evidence is that none had any nexus to Mr. Louriero or the pending criminal prosecution. TT65-71. The Florida Bar presented no evidence to contest this point.

In both his Answer and in his testimony, Respondent explained that he did not disclose these communications to opposing counsel[2] as the conversations were not related in any way to the *Louriero* case, they did not have to be disclosed as they were not related to the case, i.e., they were not ex parte communications. Obviously in hindsight, Respondent testified that he should have revealed even

[2] Michael Tenzer, one of the defense attorneys in the case, testified for the Bar and he confirmed that he was not aware of the communications.

these innocent communications to avoid even the appearance of impropriety, something he had assiduously tried to avoid all through his legal career. TT71-74.

The Retrial

After the criminal trial concluded and the sentence had been imposed, the required direct appeal to the Supreme Court of Florida was initiated. RR3. While the matter was pending before the Supreme Court, the Court relinquished jurisdiction to the trial court to consider the issue of the communications. A new judge was appointed to preside in the case. RR3. Ultimately, the Broward State Attorney's Office made the decision to retry the *Louriero* case. RR3; TT41-56.

Well before the decision to retry the *Louriero* case and prior to the communications becoming an issue in the case, Respondent retired from the Broward State Attorney's Office and went in to private practice. TT75.

During the final hearing of this matter, Respondent presented the testimony of Brian Cavanagh, a 35 year member of The Florida Bar, who was the Assistant State Attorney who took over the *Louriero* case after the Respondent went into private practice. TT43-44. Cavanagh testified at length about some of the merits of the case against Louriero, the initial proceedings and posture of the first trial and sentence, the decision to retry the case, the actions that occurred in the second trial, the results of that second trial and his impressions on the major differences in the two proceedings, inclusive of the fact that Louriero's family members testimony

was much more effective and compelling during the retrial than in the first trial when it appeared that they were afraid of their father.[3] TT43-55.

The Florida Bar has contended that the sole reason for the retrial was the communication between the trial judge and the Respondent. Cavanagh explained that, while the appearance of an impropriety due to the undisclosed communications and how they would be viewed on appeal[4] was of important, that there were other reasons for the state to agree to a retrial at that point in time, inclusive of (a) the vagaries of appellate practice in a death sentence case; (b) the availability of all witnesses (one of whom was in his 90's); and (c) the fact that at least one appellate issue related to a questionable admission[5] that had been introduced in the first trial. TT44-51; There were professional differences of opinion in regard to the introduction of an additional aggravating circumstance that Respondent introduced, as well as an admission made by Louriero, and these were not introduced in the later trial done by Cavanagh. This circumstance was an

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[3] He also testified regarding the Respondent's stellar career, trial abilities, and impeccable reputation held by the Respondent within the Broward Courthouse community. TT51-52.

[4] The Florida Bar introduced an excerpt of Respondent's deposition during the remand to the trial court and in such deposition the testimony included a comment that the Broward State Attorney, Michael Satz, did not believe that "the appearance of impropriety wasn't a reversible error." See TFB Ex. 2, P. 67. L19-23.

[5] Post-trial more evidence was adduced concerning said admission that was not available at the first trial. TT46.

additional conviction for a prior crime of violence that included the shooting of an elderly woman in Nicaragua; however Cavanagh did not introduce said conviction in the second trial. TT50-51.

The final hearing in this case was held on March 8, 2012. Just prior to the commencement of the trial, the Referee considered and denied a Motion to Involuntarily Dismiss the Bar's complaint due to a breach of confidentiality during the grievance committee review of this case, a breach which resulted in "a courthouse gossip blogger" publishing information that was only known to the Bar, the Respondent, his counsel, and members of the grievance committee. The Referee denied the motion to dismiss. On April 11, 2012, the Referee entered her Report of Referee wherein she found the Respondent guilty of having violated R. Regulating Fla. Bar 4-8.4(d) entered her recommendation of a one year suspension, notwithstanding significant and compelling mitigating factors. This appeal followed.

SUMMARY OF THE ARGUMENT

It is well settled that a lawyer cannot engage in *ex parte* communication with a judge concerning the merits of a pending matter. In this case the Bar seeks to discipline an attorney for having personal telephonic communication with a judge wherein *none* of the communication concerned the merits of any matter pending before that judge. The Bar takes this position notwithstanding that long established precedent is that lawyers and judges may communicate with each other without the other side being present, as long as there are no discussion of the merits of a pending matter.

The Bar has asserted that because the communication at issue in this case was at least part of the reason that a homicide case was retried, there has been a violation of R. Regulating Fla. Bar 4-8.4(d) [conduct prejudicial to the administration of justice.] Respondent, while fully understanding that the more prudent course of conduct would have been to disclose the communication with opposing counsel, verily believes that the appearance of an impropriety does not establish, by clear and convincing evidence, that there has been a violation of said rule.

The Referee and the Bar recommend to this Court that a previously undisciplined twenty-four year member of the Bar receive a one year suspension

for failing to disclose his personal communication with a trial judge.[6] This recommendation is completely without basis in precedent, especially when one considers that in past cases, actual *ex parte* communications on the merits of a case have resulted in no more than a public reprimand. Further, the Referee failed to give any weight to the compelling mitigation evidence that was presented by four very seasoned circuit court judges, six distinguished attorneys, two homicide detectives and one of Respondent's *pro bono* clients. It was error not to consider same in reaching a fair and balanced sanction.

[6] It is believed that the trial judge did not disclose these communications because she did not consider disclosure to be required under the Cannons of Judicial Conduct.

ARGUMENT

I. COMMUNICATION BETWEEN A JUDGE AND AN ATTORNEY THAT DOES NOT INVOLVE THE MERITS OF A PENDING CASE IS NOT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

The basic facts of this case are not in dispute. However, the conclusions that the Referee drew from these facts are "clearly erroneous and lacking in evidentiary support" and must therefore be overturned. *The Florida Bar v. Canto,* 668 So.2d 583 (Fla. 1996); *The Florida Bar v. Porter,* 684 So.2d 810 (Fla. 1996).

The Florida Bar carries a heavy burden in this prosecution, as it should when it seeks to discipline a lawyer for alleged acts of unethical conduct. In this case, the Bar must be able to prove by clear and convincing evidence that a lawyer who had personal communications with a trial judge during the pendency of a criminal trial should be found guilty of violating R. Regulating Fla. Bar 4-8.4(d) even where it is undisputed that those communications did not involve the facts of the case being tried. Rule 4-8.4(d) states that a lawyer shall not:

> **(d)** engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

Of great importance in the resolution of the case was the nature of the communications between a lawyer and a presiding judge. The undisputed evidence in the record is that the communications were not related to the then-pending criminal trial, but instead were of a personal nature regarding the passing of a parent and divorce-related topics between two single parents, one of whom had a background in family law prior to her service as a judge. TT65-70. The Florida Bar presented no evidence whatsoever to refute this point.

It is self-evident that a lawyer can talk to a presiding judge about matters unrelated to the merits of a pending case. This Court has repeatedly held that not all conversations with trial judges, without the other side present, are improper. For example, in *Rose v. State of Florida* 601 So. 2d 1181 (Fla. 1992), this Court specifically stated that:

> . . . a judge should not engage in *any* conversation about a pending case with only one of the parties participating in that conversation. Obviously, we understand that this would not include *strictly* administrative matters not dealing in any way with the merits of the case. (emphasis in original.)

In *Rose*, the Court noted that the conversation in question appears to have been[7] that the trial judge, in a death penalty case, had communicated with the prosecutor and had directed that lawyer to prepare an order for the judge to sign. This Court

[7] The Court noted that they were making an assumption that this had occurred based upon the information that was available to them in the record. *Id.* At 1182-1183.

went on to discuss that this type of communication on the merits of the pending matter was improper but that procedural matters (the timing of a hearing, etc.) would not be considered improper. If communications about a pending matter that are "strictly procedural" are not prohibited, then how can the Bar (and the Referee) now claim that communications that had no nexus whatsoever to the pending matter are prohibited? Taken to its logical conclusion, the Bar's position would prohibit conversations between a judge and an attorney serving on a Bar committee, attending a Bar function, politely inquiring about health or family matters, or even discussing the results of a sport's game or the weather if the attorney had an open case in front of that judge. Neither the judiciary nor the organized Bar could function under the position advocated by The Florida Bar.[8]

The position that even *ex parte* discussions of procedural or administrative matters were not prohibited was affirmed in *Rodriguez v. State of Florida*, 919 So. 2d 1252 (Fla. 2006). *Rodriquez* was also a death penalty case wherein the communication was limited to a discussion that an upcoming hearing "was not a status hearing" but was "an evidentiary hearing" on a particular topic. *Id.* at 1275. If a lawyer can have a conversation with a judge about the type of hearing that was upcoming in a particular case, how does this support the Bar's position that

[8] It appears that the Bar is advocating for a cloistered judiciary. In essence what the Bar is arguing for is the equivalent of a medieval monastery with the judges as monks who could neither be heard nor seen by the rest of the world.

communication of a personal nature completely unrelated to the practice of law or the merits of a case that these later types of communication are prohibited between lawyers and judges? *Cf. Howell v. State*, 80 So. 3d. 441 (Fla. 4th DCA 2012) [Reversible error for a trial judge to tell one lawyer how he was going to rule on a matter]; *The Florida Bar v. Von Zamft*, 814 So. 2d 385 (Fla. 2002) [Prosecutor disciplined for seeking an *ex parte* continuance while having lunch with a judge].

The Florida Bar has presented no precedent to support the proposition that communications between a trial judge and one of the attorneys on a pending case which communications do not address the merits of said pending matter violates R. Regulating Fla. Bar 4-8.4(d) or is an *ex parte* conversation prohibited under the rules.

The Florida Bar also contends that the Respondent engaged in conduct prejudicial to the administration of justice because the ***sole reason*** the *Louriero* case was retried was due to the undisclosed communications between the trial judge and Respondent. The Referee disagreed and stated that the communication:

> . . . contributed to the decision by the State of Florida, through its Broward State Attorney to agree to a new trial in State of Florida v. Omar Loureiro to dispel any public misconception that there was any denial of due process. RR3(para. j)

Brian Cavanagh, the person who retried the case, testified that while the appearance of an impropriety due to the communications was a central focus of the

decision to retry the case, there were other reasons (set forth above) that culminated in the decision to retry the case.[9] Mr. Cavanagh's comments on the decision for a retrial included the following:

> Rumors take a life of their own, and we wanted it to be clear and apparent that this man got a fair trial and he was properly adjudicated and convicted and got a sentence that he deserved that is really reserved for only the most aggravated first degree murders.
>
> And the second part of that was, as Your Honor knows, death cases are given hyper scrutiny on appeal. And any insinuation that would dog the case might cause it come back, and we wanted to try it again as soon as possible while we knew where all of the witnesses were. TT46, l.15-TT46, l.1.

The Bar presented no expert testimony on the reasons for the retrial, and Mr. Tenzer, the Bar's sole witness, did not discuss the issue.

Based upon all of the foregoing the Bar has failed to prove that the communications at issue were the sole reason for the retrial. In fact, there is no evidence provided by the Bar that the state may have opted for a retrial or that this Court would not have required a retrial without these communication issues.

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[9] The Bar introduced a partial transcript of Respondent's deposition testimony during the *Louriero* remand proceedings wherein he stated that he understood there was an appearance of an impropriety and believed that "due to the magnitude of the sentence" that Louriero should be retried. See TFB Ex. 2. However, Respondent's agreement that there should be a retrial does not constitute an admission that Respondent violated R. Regulating Fla. Bar 4-8.4(d).

The Bar cited cases below whose facts are completely inapposite to this case. For example, in *The Florida Bar v. Machin*, 635 So. 2d 938 (Fla. 1994), the lawyer was found to have attempted to purchase, through the creation of a trust for the victim of a crime, the silence of a witness and this clearly was conduct prejudicial to the administration of justice but not similar in any way to this case. While the Bar has also pointed to a situation where a lawyer was found guilty of the operable rule violation pled in this case because he had attempted, among many other things, for trying to secure a release to keep a former client from filing a Bar complaint. *The Florida Bar v. Frederick*, 756 So. 2d 79 (Fla. 2000).

The Bar presented below two cases where a lawyer had engaged (or attempted to engage) in *ex parte* conversations with a judge. In the first case a prosecutor had lunch with a friend, who was a judge and while at lunch tried to convince the judge to grant a continuance for a different prosecutor in his office. *VonZamft*. In *VonZamft* the Supreme Court noted that a judge need not have actually have been influenced by the *ex parte* conversation to secure a conviction for a violation of R. Regulating Fla. Bar 4-8.4(d). However, the distinct difference in this case is that there were no *ex parte* conversations on the merits of the *Louriero* case. Similarly, with the second case regarding *ex parte* conversations a lawyer, among many other things, had *ex parte* communications on the merits of a pending case with members of the Supreme Court of Florida and tried to conceal

that fact. *The Florida Bar v. Mason*, 334 So. 2d 1 (Fla. 1976). This case was decided under the Rules of Professional Conduct and not the Rules Regulating The Florida Bar and unfortunately makes no direct reference to which rule(s) had been violated. However, there is a comment that the lawyer's actions were "an offense the commission of which serves to destruct the judicial process." *Id*. at 6. Notwithstanding this fact, a comparison of the egregious facts found in *Mason* when compared to the instant case clearly shows that the lack of an *ex parte* communication on the merits of a pending matter is a distinction the Bar is unable to overcome in this case.[10]

[10] The last example referenced by the Bar concerned, a JQC prosecution of a trial judge for ruling on matters wherein one of the litigant's counsel was someone with whom he had an ongoing personal relationship that was undisclosed to the other side. *Inquiry Concerning a Judge: Re Adams*, 932 So. 2d 1025 (Fla. 2006). The Court found that there was an appearance of impropriety and a violation of the Cannons of Judicial Conduct. However, the Cannons of Judicial Conduct do not apply to the Respondent and the "appearance of impropriety" is not the standard that applies to the rule violation pled by the Bar in this case. Further, even when there was an "appearance of impropriety" rule, the prohibited conduct in that rule did not apply to this case. See Fla. Code of Prof. Resp., D.R. 9-101. Interestingly, the judge in *Adams* received a public reprimand for not disclosing an ongoing "romantic relationship" with a particular lawyer and the Bar seeks a one year suspension herein for undisclosed telephonic communication between non-romantic friends.

II. A ONE YEAR SUSPENSION IS AN INAPPROPRIATE SANCTION FOR FAILING TO DISCLOSE COMMUNICATIONS WITH A JUDGE THAT WERE NOT ON THE MERITS OF THE PENDING CASE BEFORE THAT JUDGE.

The Referee in this case has failed in her obligation to carefully consider all factors in reaching an appropriate sanction recommendation and has further failed to balance the severity of the alleged unethical activity against the mitigation and aggravation that was present in the record. 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.

A. Mitigation.

The Referee in her Report does find four distinct mitigating factors from the Standards for Imposing Lawyer Sanctions. They were: (a) an absence of a prior disciplinary record; (b) full and free cooperation with The Florida Bar; (c) an otherwise good character and reputation and (d) remorse. RR9-10. While making these findings, the Referee fails to discuss them except for the extent that she rejected the "impressive character witnesses" (RR8) as having any value to her

resolution of the case and cited to *The Florida Bar v. Whitney*, 237 So. 2d 745 (Fla. 1970), for the proposition that she could reject this character testimony out of hand.

In *Whitney* the lawyer was convicted of stealing funds from a guardianship and a different account wherein he was a receiver over a two year period of time (even after he was appointed to the bench). *Id.* at 746-747. As part of his defense Whitney presented thirty-two character witnesses. *Id.* at 747. The Referee's reliance on *Whitney* is misplaced and as the quoted portion of this opinion in the Referee's Report noted, the character testimony, while impressive, had "little relevancy in arriving at a conclusion concerning . . . guilt or innocence." *Id.* at 748. The character testimony in this case, described below, was not presented on the issue of guilt but on mitigation of sanction. Respondent's telephonic communications with a judge about matters unrelated to a pending case bears no relation to stealing client money; especially when that theft was by a judge.

The record below supports that the following mitigating Standards have been established:

9.32(a) absence of a prior disciplinary record (RR9-10);

9.32(b) absence of a dishonest or selfish motive;[11]

[11] There was no benefit to Respondent at all for the conduct at issue, other than the ability to talk about family issues with someone who understood the stress of a divorce with minor children.

9.32(c) personal or emotional problems occasioned by Respondent's then-pending divorce (TT112-113);

9.32(d) good faith effort to rectify consequences of misconduct in that Respondent espoused that Louriero should receive a new trial (TT115-116);

9.32(e) full cooperation with the Bar (RR9-10);

9.32(g) abundant and compelling character testimony (RR9-10);

9.32(j) unreasonable delay in the prosecution of this matter but only to the extent that the conduct at issue dates back to 2007 (TT116);

9.32(l) Respondent has expressed sincere remorse for what has occurred and many of his witnesses confirmed that this issue has affected him deeply (RR9-10).

Respondent presented a compelling and impressive array of character witnesses[12] that were collectively able to document his first steps as a legal intern

[12] Respondent also attempted to introduce twenty two distinct character reference letters but the Referee sustained the Bar's objection to their admission and had to be proffered into the record. TT106-111. The Respondent believes that the Referee's ruling was reversible error in that this Court has made reference to character letters and affidavits as being accepted and considered by a Referee and has also routinely accepted same in Board of Bar Examiner and Judicial Qualification Commission proceedings. See for example, *The Florida Bar v.* Colclough, 561 So. 2d 1147 (Fla. 1990); *Fla. Board of Bar Examiners: Re MBS,* 955 So. 2d 504 (Fla. 2007); *Inquiry Concerning a Judge: Re Henson*, 913 So. 2d 579 (Fla. 2005). The Referee's reliance on an old concurring opinion in *The Florida Bar v. Prior*, 330 So. 2d 607 (Fla. 1976), is misplaced in that the lawyer in *Prior* attempted to submit character reference letters with his appellate brief and in this case the character letters were being submitted during the trial. Finally, as the

through his growth into a young and competent prosecutor; to him becoming an experienced and well respected member of the homicide unit at the Broward State Attorney's Office. These witnesses came in several categories. First, there were four circuit court judges who appeared pursuant to subpoena. They were Judge Paul Backman, Judge Susan Lebow, Judge Fred Horowitz and Judge Elijah Williams. While they all had a compelling story to tell about this respected and ethical prosecutor, Judge Williams explained in some detail about a difficult high profile case that was resolved before him, wherein it was Respondent's honest approach to justice that provided the defense counsel[13] with the ultimate defense for his client and that there was serious public clamor for significant jail time for this particular defendant and that the sentencing guidelines would have justified such a sentence. TT139-142. However, Respondent, after securing an open plea, spoke from the heart and did not argue for incarceration. TT141. Judge Williams testified that to seek jail time would have been the "politic" thing to do but that he was compelled by Respondent's position not to impose jail time. Judge Williams concluded his commentary on this particular criminal case by stating: "But to have

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Bar is more than fond of arguing when it seeks to introduce affidavits during trial, the technical rules of evidence are relaxed in Bar disciplinary matters. See for example *The Florida Bar v. Vannier*, 498 So. 2d 896 (Fla. 1986) [Hearsay is admissible in Bar proceedings and there is no right to confront a witness.].

[13] Interestingly, Michael Tenzer, the Bar's witness in this action, was the defense attorney in this case also.

a lawyer step out on his own, particularly a prosecutor, to make sure that a poor defenseless woman, I had never seen that in my entire life." TT142, l.5-8.

Judge Backman testified that he first met Respondent as a brand new prosecutor, tried his first DUI before him and then watched him grow as a consummate professional and found Respondent to be "highly ethical," highly professional" and a very good lawyer. TT79. Judge Lebow added that the Respondent was of the "finest character" and with a "fine reputation" in the legal community. TT100. Lastly, Judge Horowitz opined that Respondent's "integrity is beyond reproach" and that he was "a straight up guy who would not do anything inappropriate." TT132-125.

Two experienced homicide detectives, Gabe Carmichael and Timothy Duggan, testified that Respondent went above and beyond his obligations as a State Attorney to assist them in their investigations, no matter the time of day or if it was a weekend. TT146; TT151. They also testified to Respondent's empathy with the victim's families and his willingness to keep them fully informed about the ongoing proceedings. TT151-152. Detective Carmichael discussed Respondent's actions in assisting a victim's mother not to have to take possession of (or finish paying for) an automobile in which her daughter was brutally murdered by convincing the automobile dealership to have compassion for the mother under the circumstances. TT146-148.

Also there was heart wrenching testimony by Adriane Broussard, a mother of a disabled teenager who had a twin brother scheduled to graduate from South Plantation High School. TT167-169. The family made numerous requests to the Broward School Board to simply allow the disabled child to be wheeled in his wheelchair across the graduation stage with his graduating brother. TT168-170. At every turn, the family was denied their request. TT169. Respondent learned about the family's negative treatment, and even though never having met the family, upon learning of their situation, with the approval of the State Attorney, Respondent began a mission of advocacy for the family with the Broward County School Board. TT169-170. After writing and speaking with the Board members and initially receiving the same negative response, Respondent finally prevailed upon the members of the Broward School Board, and the Broussard family learned only 24 hours before the graduation ceremony that their disabled son would be permitted to cross the stage with his twin brother. TT169. Their disabled son died within 2 years of the event, however the Broussards were extremely thankful for Respondent's successful efforts and believe this graduation ceremony was a highlight in the life of their now-deceased son. TT171. The Broussards found it remarkable that Respondent would make such efforts on behalf of a family that he never met. In concluding her testimony, Ms. Broussard testified as follows:

> And when I told him, I said Howard they're going to walk together, he started crying. Now I never met him. I

> mean I could pass him at Publix and wouldn't know what he looks like. And he was just so compassionate and so happy for someone he didn't even know.
>
> And when I told him they didn't know if they had a wheelchair ramp, he said to me, find out right away. If not I'll call a few of my buddies from BSO and we will carry him up on the stage. You don't find many people like that. TT171, l. 14-24.

Current state attorneys and former co-workers of Respondent, Jeff Marcus[14], Anthony Loe, Brian Cavanagh and Deborah Zimet, criminal defense attorneys Chris Pole[15] and Bruce Lyons, all testified that Respondent was a good and honorable man, an exemplary prosecutor, who deeply cared about right and wrong and believed that it was incumbent on him, as a prosecutor, to do the right thing at all times.

Brian Cavanagh's commentary about Respondent's empathy for the victims and their family was very telling. After discussing his daily interaction with Respondent, Cavanagh testified that:

> And we have complicated evidentiary issue and also moral issues about what is right and what is an appropriate punishment even among murders. They are all different.
>
> And sometimes there are extenuating circumstances and in the heat of passion things and there is conflicting

[14] Marcus is the Chief of the Felony Division for the Broward County State Attorneys' Office.

[15] Pole was Respondent's adversary in prior capital murder cases.

> evidence, and we talk about these things. And of course whether or not a human being deserves a death penalty, that's a very high and might decision and we don't take that lightly.
>
> So all of these things we would discuss routinely about different facets of the case. One thing that sticks in my mind and impressed me, was the depth of empathy that Howard felt for the families of these murder victims. And I knew how much he took it to heart, and I know how much it hurt him that the Lentry family was going to have to revisit this although they took it well.
>
> I talked to . . . (Mr. Lentry's brother and his family) . . . they were still grateful for Howard's work in the first case, and they understood and accepted the fact there we were doing this to make sure the conviction stuck and nobody thought that it wasn't just. TT51, l.19 - TT52.l19.

Ms. Zimet expressed her heartfelt compassion for Respondent's friendship and assistance when she was struggling with the sudden death of her fiancé. She noted that she had "two very rough periods in (her) life where Howard's friendship was extremely, extremely helpful." TT91. L. 18-20.

Chris Pole, a thirty plus year member of the Bar and criminal defense attorney who has tried more than one death case with Respondent had this to say when he was asked for comments on how Respondent behaved as an adversary:

> Excellent. I found Howard to be of high moral character. And what I mean by that, he was always completely and totally honest and open with me. We tried some very, very difficult cases including where the State was asking for death. . . . I could rely on his word. TT163, l. 23 – TT164, l.6.

Bruce Lyons, a 45 year member of the Bar, testified about his close friendship with Respondent, the mentor/mentee relationship he has with Respondent, and numerous conversations about difficult issues, including the matters before the Court. TT172-175.

Many of the witnesses also discussed the toll this case has had on Respondent. The questioning of Respondent's once golden reputation has had damaging effects on Respondent, his belief in himself and feeling of self-worth. Mr. Loe, who worked with Respondent for more than ten years in the homicide division, testified:

> You know, as I see Howard this morning, I haven't seen him much since he left the office a couple of years ago, and he is almost a shadow of the man he was. This has weighed so heavily on him.
>
> And I know just from being around him, if he could take a clock and set back the hands of time, we can't do it, but if we could, he would and we wouldn't be here today. TT161, l. 4-11.

Mr. Lyons further explained:

> Howard was one of the star prosecutors in Broward County, well thought of by everybody, outward sure of himself, gregarious, social.
>
> Since this incident, he is obviously depressed, he's upset, he stays to himself other than taking care of two beautiful children that he cares so much about. As a divorced dad having been there myself, I understand the dynamic.

> He is not close to what he used to be. He suffers emotionally. There are times when he says he will call me, and he forgets to call me. I mean he is depressed, and he's obviously sad and embarrassed. And I can't tell you any more adjectives. He's just in a bad shape that way. TT175, l. 6-19.

Each character witness believed that Respondent has true remorse for what has occurred and that this incident has deeply affected his psyche for years to come, no matter the outcome of this Bar prosecution. TT86. This true remorse was evident throughout Respondent's testimony. When asked if he had remorse for what had occurred, Respondent's testimony was that:

> Words just don't describe. They don't do justice to what this - - - how I feel about the decision I made. And now I feel like I ruined what I worked so hard to put together in terms of a reputation. TT116, l. 13-16.

Respondent concluded his direct testimony with the following statement:

> I have lived this day and night since its inception, and I am not the same person I was. When I used to walk through the courthouse door as an Assistant State Attorney, I was very proud of what I did for people, and it has affected me physically. If you were to look at me before this, I lost thirty pound. I think I get on a good night maybe four hours of sleep. And the last thing I think of is this and the first thing as I wake up is this. And the only time I hit the delay switch in my mind is when I have to fake being happy in front of my girls because I don't want them to see this. TT116, l. 25 – TT117, l. 12.

B. Aggravation.

The Referee has found three aggravating factors, the first of which (substantial experience in the practice of law) is not contested. However, a comment must be made regarding the other two aggravating factors which were (a) a pattern of misconduct and (b) multiple offenses. While these are two distinct concepts, the Bar, and some Referees, blend them into one concept. A pattern of misconduct is just that a pattern of doing the same thing over and over again. For example the theft in *Whitney* discussed above, would be a pattern of misconduct. Multiple offenses is normally reserved for those cases where there are multiple rule violations. Respondent disagrees that there are multiple offenses as he has only been charged with the violation of one rule.

C. Sanction.

In reaching a proper disciplinary sanction the Supreme Court of Florida, has been consistently guided by the following precepts set forth in *The Florida Bar v. Pahules*, 233 So. 2d 130 (Fla. 1970), which include the judgment being fair to society and to Respondent as well as "be severe enough to deter others who might be prone or tempted to become involved in like violations." Also see Fla. Standards for Imposing Lawyer Sanctions (hereinafter "Standard"), Standard 3.0. In applying these standards to the case at hand it is evident that the recommended sanction is too harsh of a sanction under the circumstances.

In terms of sanctions the Referee only points to one case, *Mason*, and some of the Standards to support her position that the Respondent should be suspended for one year.

As is noted above, the facts of *Mason* are strikingly different than the case at hand. In *Mason*, the Court summed up the facts of the case as follows:

> This cause concerns admitted ex parte communication upon the merits of a pending case with Justices of this Court, and respondent's subsequent intentional concealment of the fact of the communications from opposing counsel. *Id.* at 1.

The *ex parte* submission was a memorandum and was personally delivered to two Justices without providing copies to the other side and that Mason had personally discussed the merits of the case with two of these justices. *Id.* at 2-3. The Court noted that:

> The record also shows that the Respondent acted intentionally in all that he did. He chose to have discussions with the two justices, and he chose to prepare and deliver the memorandum. The evidence clearly shows that he sought out Justice Deckle. . . His unspoken motive was to obtain and advantage over his adversaries. *Id.* at 6.

The facts of this case are in stark contrast to *Mason*. There is no evidence whatsoever that there were conversations on the merits of the pending case and at most the Bar has demonstrated an appearance of impropriety by not disclosing these personal communications near the conclusion of the litigation.

The Standards provide a little guidance in resolving the correct sanction herein. Standard 5.22 states that a suspension (no length described) is warranted for a lawyer in a governmental position to knowingly fail to follow proper rules and procedures and Standard 5.23 states that a public reprimand would be warranted if this conduct is negligent. Similarly Standards 6.32 and 6.33 turn on whether the improper communication with a judge was intentional or negligent. While it must be conceded that the communication between the judge and the lawyer was knowing, the fact that the personal communication with no nexus to a pending legal matter, was going to be considered a violation of the Rules does not equate to an intentional violation in that this type of communication had never, heretofore, been a violation of the Rules.[16] As such both Standards 5.23 and 6.33 establish that this is not a suspension case and that a public reprimand is the appropriate sanction for a lawyer who has never been disciplined, and who presented a significant mitigation case.

The other case presented by the Bar during the final hearing was *VonZamft*, wherein a seasoned prosecutor sought out a judge, who was presiding on a case for his office (but not VonZamft's case), went to lunch with the judge and tried to get him to grant a continuance without the other party being present. VonZamft

[16] R. Regulating Fla. Bar 4-3.5 (b) states that a lawyer cannot communicate on the merits of a pending matter without the other side being made aware of such communication or being present for same and the Respondent herein never discussed the merits of a pending matter.

received a public reprimand for this *ex parte* communication on the merits and Respondent in this case should receive no more than a public reprimand for his undisclosed conversations with a judge that did not involve the merits of the case.

III. THE REFEREE SHOULD HAVE GRANTED THE MOTION FOR INVOLUNTARY DISMISSAL DUE TO THE BREACH OF CONFIDENTIALITY DURING THE GRIEVANCE PROCESS.

Respondent, in his Answer and later in an Amended Motion to Dismiss, moved the Referee to dismiss the Bar's complaint due to a significant breach of the confidentiality rules. The grounds for such motion are set forth below and were significantly supported by admissions the Bar made in Response to a Request for Admission served by Respondent.

On or about April 12, 2011, Respondent personally delivered a written response to a notice letter provided by Bar Counsel so it would be considered by the grievance committee regarding the case that was then pending before Grievance Committee 17H and also personally delivered a copy of same to each member of the grievance committee. This letter included multiple attachments, inclusive of character reference letters provided by former co-employees from the Broward State Attorney's office. The Florida Bar in response to a Request for Admissions admitted both of these facts.

Within hours of Respondent's submission of his letter to The Florida Bar and its grievance committee, the following was found in a court house gossip blog[17] found at www.jaabblaw.com:

> ***Buzz Buzz Buzz*** - Smith isn't the only high profile trial on the horizon. The ***Gardiner***/***Scheinberg*** matters are reportedly close to becoming public record, if our sources have it correct. Gardiner's case has been shipped to an out of town *Grievance Committee*, while Scheinberg's is being handled locally. NSU's ***Randolph Braccialarghe*** has replaced Satz pal ***Bruce Lyons*** as Scheinberg's lawyer, while many of Scheinberg's old chums from the SAO have reportedly weighed in with letters of support, mixed messages to the community be damned. The word on the street has things looking pretty grim for both disgraced former judge and Scheinberg, who already was cleared once by a local *Grievance Committee* boasting at least one friend sitting in judgment. The second Scheinberg committee is supposedly meeting today, so stay tuned. All of this may become public record as early as next week… (emphasis in original).[18]

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[17] A blog is too dignified a term for the character destruction that occurs on such web site. TT74. Further, this web site should be no stranger to this court. See for example, *The Florida Bar v. Conway*, 996 So. 2d 213 (Fla. 2008) [Lawyer publicly reprimanded for post on www.jaablaw.com.].

[18] At or about the time the formal Bar complaint was filed, this very same blog published some or all of these character reference letters in attempt to hold the writer of said letter up to ridicule and scorn and it is believed to be in furtherance of the blog's mission to intimidate favorable witnesses for the Respondent. Further, the lawyer who is the main author of www.jabblaw.com, received a copy of the Bar's formal complaint at the same time, and in the very same e-mail, as Respondent's counsel. See Amended Motion to Dismiss.

The Florida Bar, in its response to Respondent's Request for Admissions, admitted this publication and the timing of same.

It has been respectfully submitted that the source of the information regarding character reference letters could only have come from The Florida Bar[19] or a member of its grievance committee. Accordingly, The Florida Bar, or more likely one of its agents on the grievance committee, breached the confidentiality of the pending Bar grievance and violated the provisions of R. Regulating Fla. Bar 3-7.1(a).

R. Regulating Fla. Bar 3-7.1(a) clearly provides that:

> All matters including files, preliminary investigation reports, interoffice memoranda, records of investigations, and the records in trials and other proceedings under these rules, except those disciplinary matters conducted in circuit courts, are property of The Florida Bar. All of those matters shall be confidential and shall not be disclosed except as provided herein. **When disclosure is permitted under these rules, it shall be limited to information concerning the status of the proceedings and any information that is part of the public record as defined in these rules.** (emphasis supplied).

In an attempt to remove the taint of this breach of the confidentiality rule the Bar did transfer the pending grievance to a new grievance committee for hearing

[19] The undersigned made clear during the hearing on this issue and reiterates same here that it is not Respondent's position that the Bar counsel in this case or her immediate staff breached the confidentiality rules.

and ultimate resolution. However, the taint still remains as the very rules the Bar crafted for approval by the Supreme Court of Florida have been abrogated.

While the Bar promised a full investigation into the breach, it has been approximately nine months from the breach of confidentiality without any information being imparted to Respondent to show that the matter had been investigated and the guilty party(ies) appropriately prosecuted. See TT5-6.

In *The Florida Bar v. Rubin*, 362 So. 2d 12 (Fla. 1978), the Court dismissed a potential disbarment case, for among other things, holding a press conference on the case that was still subject to these same confidentiality rules. In dismissing the case with prejudice the Court noted that:

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so. *Id.* at 16.

The Bar has failed to turn a "square corner" regarding the prosecution of this case by failing to prevent a "leak" of confidential information as defined by R. Regulating Fla. Bar 3-7.1(a) and therefore this case should be dismissed with prejudice or in the alternative this fact should be used as a further mitigating factor.

CONCLUSION

At issue in this case are communications of a personal nature which heretofore have not been considered violative of the Rules Regulating The Florida Bar. The Bar has contended that these undisclosed communications were the sole reason for a criminal matter having to be retried and that therefore the Bar contends there was a violation of R. Regulating Fla. Bar 4-8.4(d). Even though the Referee failed to find that these communications were the sole reason for the retrial, she still incorrectly found a violation of said rule.

Further, as to the proposed sanction, the Referee is recommending a one year suspension despite overwhelming character evidence and that prior precedent for an *ex parte* communication on the merits of a pending case (which did not occur herein) would warrant no more than a public reprimand.

WHEREFORE Respondent, Howard Michael Scheinberg, respectfully requests that he be found not guilty and in the alternative if found guilty 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,

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

Randolph Braccialarghe
TFB No. 236403
Attorney for Respondent
Nova Southeastern University
Shepard Broad Law Center
3305 College Avenue
Fort Lauderdale, FL 33314
954-262-6169