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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DANIEL GARY GASS,

Respondent.
_____/

Supreme Court Case
No. SC12-937

The Florida Bar File
No. 2011-51, 529(17I)

RESPONDENT'S ANSWER BRIEF

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RESPONDENT'S PRELIMINARY STATEMENT

The Respondent, Daniel Gary Gass, files this Answer Brief in opposition to the Complainant, The Florida Bar's Initial Brief seeking review of the Referee's recommended sanction of a sixty day (60) day suspension.

In this brief, the Complainant, will be referred to as either The Florida Bar, or as the Bar. The Respondent will be referred to either as Gass or the Respondent.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number. References to specific pleadings will be made by the title of the pleading.

References to the transcript of the final hearing will be by the symbol TT followed by the appropriate page number (e.g., TT __) and references to the sanction hearing held at a later date will be by the symbol ST followed by the appropriate page number (e.g., ST __).

References to exhibits will be by the symbol TFB Ex. or R Ex., followed by the appropriate exhibit number (e.g., TFB Ex. __ or R Ex. __).

STATEMENT OF THE CASE AND FACTS

The Florida Bar's Initial Brief contains an accurate recitation of the procedural aspects of this case and therefore the Respondent will not set forth his own Statement of the Case. However, the Respondent does take issue with the Statement of Facts submitted by the Bar and therefore sets forth his own version of same below.

Litigation Background

Florida Safety Equipment Company, Inc., (hereinafter the "Company") was a family owned and run business. ROR 2-3. John Bria, Sr. and Georgiann Bria (husband and wife) owned the Company for more than thirty years which business had "thrived" until approximately 2008 when the company faced severe financial challenges and ultimately legal challenges because of these financial challenges. ROR 3.

As a result of the aforementioned financial challenges, the Company borrowed funds from Mark C. Weldon (hereinafter "Weldon") and later defaulted on that obligation causing the first of two lawsuits by Weldon against the Company ROR3; TT127. The first lawsuit was settled amicably with a new payment schedule and personal guarantees by Mr. and Mrs. Bria and some of their children who worked in the business; but the Company defaulted on the new payment schedule resulting in a second lawsuit. TT127. The Company defaulted in the

second lawsuit and a substantial judgment was rendered against the Company and its guarantors, the Bria family members. TT127. The Plaintiff then began efforts to collect on this judgment.

It was well after the beginning of the post judgment collection efforts that the Brias (parents and some of the adult children) came to see the Respondent in April 2010. RR3. The Brias sought advice on their worsening financial position, which included foreclosure actions and the ongoing collection efforts in the Weldon case. TT66. At this meeting there was a discussion about bankruptcy as a final resolution of the foreclosures and the *Weldon* judgment. TT205.

At this initial meeting, or shortly thereafter, the Brias informed the Respondent that they had been served with a subpoena duces tecum in the *Weldon* case to attend a deposition and to produce documents on May 25, 2010 but John Bria, Jr., did not fax a copy of the actual subpoena to the Respondent until May 24, 2010. RR3 and TFB Ex. 1. All the witnesses that testified at trial agreed that there was a discussion about compliance with the referenced subpoena but there was a factual difference between the Brias' testimony that they believed the Respondent instructed them not to go to the deposition and the Respondent's testimony that he informed his clients of the potential adversities that could occur if they did not appear for the first scheduled depositions. RR3-4; TT207.

The Brias did not attend the above referenced May 25, 1010, deposition and as anticipated the Plaintiff served a Petition for Order to Show Cause. See TFB Ex. 2. The net distillate of this Petition was that the deposition was rescheduled by court order for June 22, 2010.

On June 22, 2010 the Brias attended the required deposition[1] and it is their testimony that they also provided documents to opposing counsel at that time. However, as the Referee's Report clearly reveals the Brias did not "provide all of the documentation demanded in plaintiff's request for document production." ROR5, para. 14.

The failure to fully produce all of the requested documentation led to further proceedings in the Weldon case. As the Referee notes Weldon's counsel filed a second Petition for an Order to Show Cause directed to the failure to bring all of the requested documents and the trial judge issued an Order to Show Cause on August 23, 2010. ROR5. The Order to Show Cause scheduled an October 4, 2010 hearing and required that the outstanding discovery documents be produced no later than five business days prior to October 4, 2010. ROR5, para. 19.

While there is divergent testimony in the record concerning communication between Mr. and Mrs. Bria and the Respondent regarding the October 4, 2010

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[1] The Respondent did not enter his appearance in the *Weldon* case until July 13, 2010. See TFB Ex. 3. He did not attend the June deposition due to a scheduling conflict and could not move the date of the June deposition as it was court ordered. TT208.

hearing, the Referee found that the Respondent did not attend the October 4, 2010 hearing and that he should have attended this hearing. RR6-7. The Respondent testified that he believed a bankruptcy was being filed by another attorney and that this would have obviated the need to provide documentation in the *Weldon* case. RR6-7.[2]

In January 2011, the trial court entered a Renewed Order Regarding Hearing on Order to Show Cause on October 4, 2010. See TFB Ex. 6. Prior to January 17, 2011, this Order was personally served by a Sheriff on Mr. and Mrs. Bria. RR7, para. 28. The Order specifically found that Mr. and Mrs. Bria had not complied with the production of a significant level of documentation[3] and the Order makes specific reference via an attached schedule regarding the documentation that was not provided and recited the history of the Brias' noncompliance with discovery. See TFB Ex. 6. More importantly, this order, which was personally served on Mr. and Mrs. Bria, provided an additional ten days to produce the requested documentation or be incarcerated. RR8. An Amended Renewed Order Regarding

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[2] By the time that this order was being entered, the corporation and the Bria children had filed bankruptcies through David Tangora, Esquire. TT179-180. Mr. Tangora had been specifically retained for this purpose on August 31, 2010. TT179. Further he had consulted with Mr. and Mrs. Bria at that same time but they decided to delay filing their individual bankruptcies until a later date. TT180.

[3] In fact the trial judge specifically finds that the only documents produced by Mr. and Mrs. Bria were two years of tax returns and they did not produce any documents corresponding to twenty-two other requests for documents. See Resp. Ex. 7 at para. 3 and Ex. A.

Hearing on Order to Show Cause on October 4, 2010 was also personally served on Mr. and Mrs. Bria. See Resp. Ex. 7. This amended order is dated February 8, 2011.

As no further documents were provided to the Weldon's lawyers, a capias and a bench warrant was issued on February 8, 2010 for both Mr. and Mrs. Bria. See TFB Ex. 4. Both warrants were executed on Tuesday, February 22, 2011,[4] and both Mr. and Mrs. Bria were placed into custody at that time. RR9.

Prior to being taken off to jail the police allowed Mr. Bria to reach out to the Respondent's office telephonically. TT63-64. While Mr. Bria was not able to personally talk to the Respondent, as he was not in the office at the time of the phone call, the Respondent's office was advised that Mr. and Mrs. Bria had been arrested. TT63-64. Armed with the knowledge that his clients had been arrested, the Respondent immediately tried to secure the release of his clients from jail. TT-227-232. The most significant action taken by the Respondent on February 22, 2011 was to draft and then file a petition for bankruptcy for both Mr. and Mrs. Bria after visiting both of them in jail that same day to personally apologize for their predicament, get them to execute the bankruptcy petitions and to explain what steps he was taking to get them out of jail. TT229-230. As the Respondent had

[4] The Report of Referee misidentified the date of the arrest as February, 20, 2011, which is a Sunday. RR9, para.39. However, the uncontroverted testimony was that the arrest occurred on a Tuesday which would have been Tuesday, February 22, 2011. TT87, l. 9; TT102, l.9-13.

met with both of the Brias at the jail on Tuesday, February 22, 2011, these petitions were filed the next day. However, also on Tuesday, February 22, 2011, the Respondent drafted and filed the Defendant's Emergency Motion to Strike Capias and Bench Warrant and tried to set same for an Emergency Hearing. See Resp. Ex. 10. The hearing on this motion was held on Thursday, February 24, 2011 and an Order Lifting Capias and Bench Warrant was executed by the trial judge that same day. See Resp. Ex. 11. Unfortunately, Mr. Bria spent two nights in jail and Ms. Bria spent three. TT64; TT103-104.

Rule Violations

As a result of the foregoing conduct, the Referee found the Respondent guilty of having violated R. Regulating Fla. Bar 4-1.3 [A lawyer shall act with reasonable diligence and promptness in representing a client.]; R. Regulating Fla. Bar 4-1.4(a) [A lawyer shall: (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.] and R. Regulating Fla. Bar 4-8.4(d) [A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice.].

Further, the Referee as to Count I of the Bar's complaint found that the Respondent did not violate R. Regulating Fla. Bar 4-3.2 [A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client]. RR12. In addition as to Count II of the Bar's complaint, the Referee found the Respondent not guilty of some of the subsections of communication rule and in particular subsections (1) and (2) of R. Regulating Fla. Bar 4-1.4(a). The Bar does not appeal these two findings.

Sanction

After having found the Respondent guilty of the rule violations set forth above, the referee scheduled a separate hearing to consider the appropriate sanction. She considered the mitigating and aggravating factors presented by the parties and reviewed the appropriate precedent as is noted in her Report. RR 16. It is the Referee's Recommendation to this Court that the Respondent receive a sixty (60) day suspension from the practice of law and be ordered to pay the Bar's costs.

The Florida Bar has appealed this sanction recommendation and the Respondent has cross appealed on the Referee's findings of guilt and recommended sanction.

SUMMARY OF THE ARGUMENT

At issue herein is whether a lawyer should be found guilty of a lack of diligence, a lack of effective communication and for conduct prejudicial to the administration of justice and suspended from the practice of law for sixty (60) days as was recommended by the Referee. It continues to be the Respondent's respectful position that he did not fail to act diligently in that he was not retained to file a bankruptcy to avoid a contempt proceeding for his client's willful failure to provide post judgment discovery or fail to inform his clients of potential adverse consequences of such actions when he had specifically discussed with his clients at the initial consultation and in later consultations that they could avoid any dire consequences by producing documents and/or filing corporate and personal bankruptcies. The clients partially followed that advice by retaining another lawyer to file the corporate bankruptcy, as well as personal bankruptcies for other family members. However, they admittedly procrastinated on their own personal bankruptcies and they were held in contempt of court and incarcerated for two days (the husband) and three days (the wife).

The lawyer herein after being called by one of the clients attempted to prevent the incarceration through the cooperation of opposing counsel which was not forthcoming and then he immediately, without charge to the client for fee or cost, drafted a bare bones bankruptcy proceeding, filed same as well as an

emergency motion with the trial court, set the motion for hearing and convinced the judge that had entered the contempt order to release them from jail, not because the clients had produced records but only because of the bankruptcy filing.

While the Respondent seeks to overturn the findings of guilt he also respectfully contends that the recommended sixty (60) day suspension or the one (1) year suspension being sought by The Florida Bar is not warranted under the facts of this case or existing precedent, especially in light of the mitigation found by the Referee.

ARGUMENT

I. THE RESPONDENT PROVIDED ETHICAL REPRESENTATION TO HIS CLIENTS WHO, IF THEY HAD TIMELY ACTED ON THE RESPONDENT'S ADVICE, WOULD NOT HAVE BEEN JAILED FOR CONTEMPT OF COURT.

At issue in this appeal is whether a twenty year member of The Florida Bar should be found guilty of having engaged in unethical conduct for failing to protect his clients from an adverse result which the clients could have avoided by filing individual bankruptcies and not just the corporate bankruptcy that they did in fact file through a different lawyer. Notwithstanding this fact, a Referee has found the Respondent guilty of failing to provide diligent representation, failing to adequately communicate with a client and having engaged in conduct prejudicial to the administration of justice.

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

The factual underpinnings of this case arise well before the Respondent meets and consults with the Bria family in April 2010. All parties to this action

agree that Mr. and Mrs. Bria ran a successful decorative metal work business for more than thirty years but that the downturn in the economy made it necessary to borrow funds from Weldon and when they were unable to pay Weldon back he successfully sued the Bria family (twice), secured a substantial judgment against the Brias' corporation and individual family members and initiated collection efforts on that judgment. The downturn in the economy and the Brias' inability to pay all outstanding financial matters also caused foreclosures to be filed against them (personally and corporately) and to have a problem with unpaid payroll taxes. TT66.

It is with this background that the Brias came to consult with the Respondent. At that very first meeting the above referenced financial and litigation problems were discussed. TT41-42; TT65-66; TT152-153. The Respondent agreed to assist the Brias with some of their financial problems that had legal overtones. He was specifically retained to defend two personal foreclosure actions and there was a written retainer evidencing such retention. TT206. Further, the Respondent agreed to assist the Brias in creditor defense of the other outstanding financial problems. TT152-153. At the conclusion of the first meeting the Respondent was paid $1,000.00 to begin work on these matters.[5]

[5] The total fees paid by the Brias during the course of the foreclosure actions, the *Weldon* case, two personal bankruptcy filings and the other matters wherein the

TT69. The only issues raised by The Florida Bar concern the *Weldon* judgment and the related collection efforts and therefore it must be presumed that all other legal services were properly and ethically performed for the Bria family.

A. The alleged lack of communication.

The Referee has found the Respondent guilty of certain portions of the communication rule. In particular the Referee has found the Respondent guilty of the following subsections of R. Regulating Fla. Bar 4-1.4:

> **(a) Informing Client of Status of Representation.** A lawyer shall:
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> **(b) Duty to Explain Matters to Client.** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

These findings are inconsistent with the evidence in this case and the Referee's own findings that the Respondent did not violate R. Regulating Fla. Bar

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Brias consulted with the Respondent were two thousand five hundred dollars ($2,500.00). TT69.

4-1.4(a) (2) which states that a lawyer shall: "reasonably consult with the client about the means by which the client's objectives are to be accomplished."

When discussing the communication between Mr. and Mrs. Bria it is important to note that of the three Brias (their adult son who was a key employee in the business also testified) each of them had a different viewpoint as to which of them was the primary contact person for communication purposes with their lawyer and each of them admitted to personal meetings and some telephonic communication with the Respondent and his office.

The first witness called by the Bar was John Bria, Jr. who testified that he attended four distinct personal meetings with the Respondent but that once he filed his personal bankruptcy and the corporation did the same there was no need for him to communicate with the Respondent. TT51-52. While he did complain about the Respondent's office policy of scheduling telephone calls, he did not testify that he was unable to talk to the Respondent on the telephone. TT52.

On direct, Mr. Bria was not asked about phone calls or office meetings with the Respondent. However, on cross he admitted that his wife, daughter and son (John Bria, Jr.) were the primary contacts for communication with the Respondent. TT77. Also in evidence was a letter from Mr. Bria (written by Mrs. Bria) with Mrs. Bria's handwritten notes of her conversation with a member of the Respondent's staff, Dorciane "Dee" Polito about said letter (Resp. Ex. 5) and two

e-mails sent by Mr. Bria (Resp. Ex. 3 and 4) but Mr. Bria denied sending the e-mails. TT78-79; TT81-83.

As its third witness the Bar called Mrs. Bria but also did not ask her questions about meetings or phone calls with the Respondent or his office. However, on cross she admitted to being present for two office consultations (TT113-114), sending a letter and getting a telephonic response from the Respondent's staff (TT100-101; TT111). Further, upon their arrest she admits that her husband was able to talk to the Respondent's staff via telephone as they were being arrested and then meeting later that night with the Respondent at the jail. TT102-103.

The Respondent called his assistant Dee Polito as she was the individual in his office who had regular contact with the Bria family and that she recalled Mr. Bria being the individual who she talked to more often than other family members.[6] TT137-138. Further, Polito testified that she had e-mail contact with the Brias and identified these e-mails as having been sent and received as she personally searched her e-mails for same when the Brias initiated the Bar grievance against the Respondent. TT138-143.

[6] Polito also provided very important information about a phone call she personally had with John Bria confirmed by a note to the file that she wrote on a letter received from opposing counsel that she had discussed with Mr. Bria that the family had hired a new attorney for the bankruptcy actions. See Resp. Ex. 9.

The Respondent's testimony is rife with examples of his communication with the Bria family, either in person or on the telephone and while he recalls Mr. Bria being the primary person that he talked to about the pending matters, he recalls talking to Mrs. Bria and John Bria, Jr. See for example TT223-225; TT240-242.

It is on this record that the Referee makes her finding of a violation of R. Regulating Fla. Bar 4-1.4 and the referenced subsections of that rule. Most respectfully there is no evidence whatsoever that the Respondent failed to "promptly comply with reasonable requests for information"[7] as there was no testimony or exhibit that evidences an unreturned phone call, letter or e-mail or even a question posed by a client that was not responded to in some fashion. Further, there was no testimony or evidence directed to R. Regulating Fla. Bar 4-1.4(a)(5) which reads that a lawyer shall:

> . . . consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law

As there is no testimony or evidence in the record that the Brias were requesting assistance with potential conduct that would have violated the R.

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[7] R. Regulating Fla. Bar 4-1.4(a)(4).

Regulating Fla. Bar this Court should find the Respondent not guilty of this rule violation.

This leaves the third subsection of R. Regulating Fla. Bar 4-1.4(a) and its requirement of keeping the client reasonably informed about the status of their matter and R. Regulating Fla. Bar 4-1.4(b) and the similar obligation of explaining a matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The real issue in regards to communication is not a lack of communication but perhaps a lack of effective communication which can be focused on the advice given by the Respondent at the outset of the representation that the family had three options relative to the *Weldon* matter. They could (a) pay the judgment (which was not possible based on their financial condition); (b) produce ***all*** of the documents requested by Weldon's lawyers and continue to defend post collection efforts on the judgment; or (c) file for bankruptcy and there would be no need for either of the first two options. TT158.

While John Bria, Jr. initially conceded on cross examination he had heard such advice (TT50) but receded from that testimony on re-direct. TT54. Both Mr. and Mrs. Bria testified that they did not understand that a bankruptcy would resolve the *Weldon* matter. However, their actions speak much louder than their testimony in that their family members followed that advice and filed personal

bankruptcies through David Tangora, Esquire. Mr. and Mrs. Bria followed that advice when they hired Mr. Tangora to file a corporate bankruptcy and also consulted with him about personal bankruptcies well prior to the events at issue in this case. Further, the Respondent's office was aware that the Brias had secured the services of a different law firm to go forward with bankruptcies and the Respondent had his staff follow up with the clients to discern who that lawyer was and that someone else would be doing the actual bankruptcies as he had not been paid yet to complete that task. See Resp. Ex. 2, 3 and 4. In addition to the foregoing, that other lawyer, Tangora, testified that he was initially retained in August of 2010 for the corporation and that it was contemplated that Mr. and Mr. Bria would also be filing personal bankruptcies. TT179-180.

The Respondent's trial testimony relative to the nature of his retention was very specific wherein he stated as follows:

> Q. When you were first approached by the Bria family for assistance in their financial morass, what did you agree to do for them?
>
> A. I agreed to help them through their issues, mostly it was to ultimately file a bankruptcy, is what my opinion was.
>
> Q. That's what you thought you'd be doing for everybody?
>
> A. That's what they were contemplating hiring me for. They gave me a thousand dollars in April to apply toward

what I ultimately was hired to do. TT205, l.18 to TT206, l.3

As to the professed lack of knowledge that the continued failure to resolve the *Weldon* discovery issues could result in incarceration all one need do is to look at the Petitions for Orders to Show Cause that were in their possession and make specific requests to hold Mr. and Mrs. Bria in contempt of court and that the orders to show cause were personally served upon them and contain clear and precise language that a failure to produce the requested records would lead to incarceration of no more than 170 days in jail. See the final paragraphs of Resp. Exhibit 6 and 7. Mrs. Bria acknowledged that she read these documents and knew that a continued failure to comply could lead to incarceration. TT110. Mr. Bria also confirmed that he was personally served with an order to show cause and that he was aware of the contents of same at the time he was served. TT82-85.

The following exchange occurred during the Respondent's testimony at the final hearing:

> Q. . . . Does this particular order inform the Brias, especially in paragraph three on the fourth page, that a failure to comply could lead to their incarceration?
>
> A. I think it's very specifically stating that, and that's why it needed to be served on them.
>
> Q. All right. In fact, it reads in that same third paragraph: In the event that any remaining defendant fails to comply with this order by providing said documents to plaintiffs' counsel within ten days of service of this order, plaintiffs'

counsel shall file with this court evidence of the service of said order upon the defendant, and shall file an affidavit attesting to defendant's noncompliance with this order. Do you see that?

A. Yes, sir.

Q. Did you ever see an affidavit of noncompliance?

A. I do not believe I had.

Q. Upon filing of said evidence of service and the affidavit of noncompliance, this Court will without further notice or hearing issue a capias and a bench warrant directing the sheriff of Broward County, Florida to the offending defendant into custody?

A. Yes.

Q. All right.

A. However, I still felt that they shouldn't continue to push it. I've never seen defendants push this level of violation of the court orders before.

Q. In January, in particular after January 10, 2011, what conversations, if any, did you have with the Brias relative to the threat of incarceration?

A. I don't recall offhand exactly what type of conversations I had with them. I do know that they were calling my office stating that they understood that incarceration was on the table, and that they were told the same thing by myself and by my staff that they either needed to comply or file bankruptcy.

Q. All right. Why didn't you reduce those conversations in writing?

A. They were consistent from beginning to end. It never changed, that they were either to provide the discovery or file the bankruptcy. And I was aware that Mr. Tangora had been hired by the family as their bankruptcy attorney, and that he had been filing all these bankruptcies, it was my impression that he was going to be filing the last two bankruptcies. I don't know why he did not. TT216, l.13 to TT218, l.10.

More importantly the Respondent testified about the specific conversations he had with Mr. and Mrs. Bria on the possibility of being arrested. This testimony included the following exchange on direct by the Bar counsel:

Q. Did you ever tell the Brias that they are at risk of being arrested?

A. Yes.

Q. When did you first tell them that?

A. Every consult that we had, if they asked it. As a matter of fact, Ms. Bria had expressed extreme concern that she could be arrested for such a thing. I had told her that I never had anybody arrested for this type of issue. I said simply if they provided the documents or filed bankruptcy, that that would avoid ill repercussion.

Q. So you said, every time you met with them, you told them that there was a risk of them being incarcerated?

A. When, I specifically remember meeting not with the group family, but with Mrs. Bria and Mr. Bria in my office, in which she had expressed that concern, and I told her that I never seen anything like that, that was four months before they were incarcerated, and that if they just simply gave the documents or filed bankruptcy there

would be no such ill repercussion. TT156, l. 7 to TT157, l. 2.

Based upon all of the facts and evidence in the record it is clear that Mr. and Mrs. Bria were fully apprised of the fact that a bankruptcy would stop the *Weldon* collection proceedings and that their procrastination[8] of filing that bankruptcy is the root of the problem herein and not any communication from the Respondent.[9]

B. The alleged lack of diligence.

The Referee also found the Respondent guilty of R. Regulating Fla. Bar 4-1.3 which simply reads that: "A lawyer shall act with reasonable diligence and promptness in representing a client."

The Referee in her Report at page 12 to 13 provides a list of examples of why she found the Respondent guilty of Count I of the Bar's complaint but the great majority of her comments are directed to the communication issues described above and do not specifically relate to a lack of diligence by the Respondent.[10]

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[8] See Mr. Bria's testimony at TT62.

[9] The Brias consulted with two different bankruptcy lawyers and it strains credulity that neither lawyer would have told them that filing bankruptcy would avoid the *Weldon* collection efforts.

[10] Both counts of the Bar's complaint include a charge related to R. Regulating Fla. Bar 4-8.4(d) but in the Respondent's view if the Court finds that the Respondent did adequately communicate with his clients and did act with reasonable diligence then he should also be found not guilty of this particular rule violation. As such no separate argument is being advanced herein on this potential rule violation.

At issue herein are really two distinct matters. The first has to do with responding to the *Weldon* request for documentation and the second having a bankruptcy timely filed to prevent an adverse action against the Bria family.

As to the production of records the Bar's position seems to be that the Brias did in fact produce what records they had and that therefore the Respondent should have been able to convince opposing counsel that they should not continue with the contempt proceedings. However, it is evident on the record in this case that the Brias did not fully comply with the *Weldon* record production. All one need do is look to the Renewed Order Regarding Hearing on Order to Show Cause on October 4, 2010 to see that the Brias had not produced records in compliance with subpoenas that had been served upon them prior to the Respondent's retention. See Resp. Ex 6 at para. 2. In fact said Order even relates that of the tax returns actually produced by Mr. and Mrs. Bria these returns were missing key schedules that should have been attached to those returns. See Resp. Ex 6 at para. 2. Also in the record is the testimony of Gary Gibbons, Esquire, who had represented Weldon during the majority of the time frame when the record production was at issue and it was his testimony that the Brias initial production "was willfully inadequate" (TT132, l. 20.) and, during the course of the time that he represented Weldon, had not fully produced records. TT131.

In discussing the production of records none of the Brias wanted to assume responsibility in their testimony before the Referee to being the person who was supposed to be the person to locate and produce these records. John Bria, Jr. said he was not responsible for gathering corporate documents and that his parents were responsible for that task. See TT47. However, Mr. Bria testified that he did not remember producing any corporate documents and that his son would have been responsible to complete this task. See TT76.

It is also important to note that the Respondent had been informed that the Brias' accountant had some records that had not been produced to Weldon's counsel and that the Respondent had not received same from his clients. TT154. Further, the only documents his clients provided to him relative to the *Weldon* discovery was copies of the two tax returns that had already been produced. TT154. Mrs. Bria appears to confirm that fact in her testimony on cross examination. TT116. It was the Respondent's testimony that with specific knowledge that the Brias did in fact have other documents that should have been produced he could not represent to the court or opposing counsel that there were no more documents to produce. TT155.

The testimony at trial was that Mr. and Mrs. Bria had in fact retained Tangora to ultimately do personal bankruptcies for them and that Tangora had in fact filed bankruptcies for all the other family members and the corporation which

ended their involvement with the *Weldon* litigation. Tangora also testified that Mr. and Mrs. Bria made a conscious decision to delay the filing of their own personal bankruptcies as they wanted to see if any new claims arose after the corporate bankruptcy. TT189. When asked why she delayed filing a personal bankruptcy, Mrs. Bria responded as follows:

> I don't know. We were just --we weren't under pressure for foreclosure. We were taking care of all the other bankruptcies. We were taking care of our corporate bankruptcy, which was very difficult and long with all the paperwork that they had to put through and give to our attorney. I honestly don't know. We just never went to our personal bankruptcy. TT112, l.24 to TT113, l.5

Mr. Bria's response was less enlightening but more profound. He testified in response to why he and his wife had not filed a personal bankruptcy at the time of the corporate bankruptcy as follows:

> Well, I still don't know. We were just procrastinating for some reason or other not to file personal bankruptcy, I don't know why. TT62, l. 18-20

Prior to the important October 4, 2010 hearing on Weldon's request for an Order to Show Cause, the Respondent was aware that the corporate bankruptcy had been filed, that the adult children had filed their personal bankruptcies and that a new lawyer, Tangora, had been hired by Mr. and Mrs. Bria to do their personal bankruptcies. See Resp. Ex. 2, 3 and 4. It is also important to note that while the Respondent upon his initial consultation with the Bria family believed that he

would be specifically retained to complete all the required bankruptcies, he was not ultimately retained to do so.

The fact, Mr. and Mrs. Bria did not have a sense of urgency to complete their personal bankruptcies upon their personal receipt of the order to show cause informing them that a failure to produce the documents that had been outstanding for more than eight months from the initial date they should have been produced is regrettable, but the Respondent was not paid and/or retained to file such bankruptcy.

In conclusion, it is the Respondent's position that he acted with reasonable diligence in monitoring a collection action wherein he believed his clients would be timely filing a personal bankruptcy through a different law firm which when filed would have obviated the need to take any further action in defense of said collection efforts.

II. THE REFEREE'S RECOMMENDED SANCTION OF A SIXTY DAY SUSPENSION IS NOT APPROPRIATE FOR A LAWYER FOUND GUILTY OF A LACK OF COMMUNICATION, A LACK OF DILIGENCE AND FOR HAVING ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

The ultimate determination of an appropriate sanction in disciplinary matters rests with the Supreme Court of Florida and therefore this Court has consistently held that it has broad discretion when reviewing a referee's recommendation of a

sanction.[11] *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997); *The Florida Bar v. Gwynn*, 94 So. 3rd 425 (Fla. 2012). Further, a Referee's sanction recommendation that has a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions will not be disturbed by this Court. *Gwynn* at 432.

The Florida Standards for Imposing Lawyer Sanctions (hereinafter "Standards"), Standard 3.0 provides that in imposing a sanction after a finding of lawyer misconduct, this Court should consider: the duty violated; the lawyer's mental state; the potential or actual injury caused by the lawyer's misconduct and the existence of aggravating or mitigating factors. Further, in *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), this Court stated that in selecting an appropriate discipline the fundamental issues that must be addressed are: fairness to both the public and the accused; sufficient harshness in the sanction to punish the violation and encourage reformation; and that the severity of the sanction is appropriate to function as a deterrent to others who might be tempted to engage in similar misconduct. Also see *The Florida Bar v. Pahules*, 233 So. 2d 130 (Fla. 1970). It is respectfully submitted that it is evident that in applying these standards to the case at hand that the Referee's recommendation of sixty (60) day suspension is not

[11] While the Respondent has set forth an argument that he should not be found guilty of those matters set forth in the Report of Referee, this argument on sanction is provided in case the Court does not agree with that proposition.

reasonable under existing case law and The Florida Bar's request for a one (1) year suspension is not supported by any precedent of this Court.

A. Aggravation and Mitigation.

In every disciplinary proceeding it is important to discuss the aggravating and mitigating factors found in that case. The Referee found two aggravating factors. They were Fla. Standard for Imposing Lawyer Sanctions, Standard 9.22(a) prior disciplinary offenses[12] and Standard 9.22(i) substantial experience in the practice of law. The Referee found substantial mitigating factors and found by clear and convincing evidence that the following mitigation from the Fla. Standards for Imposing Lawyer Sanctions were established in this case:

> 9.32(b) absence of a dishonest or selfish motive;
>
> 9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
>
> 9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
>
> 9.32(g) character or reputation;
>
> 9.32(l) remorse. RR16.

During a separate hearing scheduled solely to consider mitigation and aggravation and argument on sanction, the Respondent presented four (4) character

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[12] The Respondent received a public reprimand in 2011 for failing to promptly interplead funds that were held in trust.

witnesses and he also testified about the above referenced mitigating factors. The first such witness was Marshall Platt, a semi-retired lawyer who has known the Respondent for more than eight years, worked on cases against him and with him and considers the Respondent a personal friend. ST10. Platt's opinion of the Respondent can be summed up from the following testimony:

> I find that Mr. Gass has been straightforward and at least honest with me. I have sent him clients because I can't do work anymore, that much, and my clients have been happy with him. I've had no complaints from them. I have been on the other side on contract negotiations, and he's a fair man as far as not trying to, you know, have more hours to charge for things. I have no problem sending him the type of cases that he practices that I'm aware that he practices. ST10, l. 23 to ST11, l. 6.

The next character witness, Marc Rohr, who is a law school professor at the Shepard Broad Law Center of Nova Southeastern University testified that he has known the Respondent since 1992, first as a student and later as someone who has done his yearly tax returns. ST14-15. His testimony included the following remarks:

> . . . I wouldn't be here if he was simply a former student. I don't think I'd be here today simply based on his being my accountant. I am here because of what I feel and know about him based on this personal relationship spanning over 20 years. ST15, l. 11-16.

In particular Rohr had this to say about the Respondent's character:

> I regard Danny as honest, conscientious, dependable, and I want to say unusually so, by which I mean that he has

> consistently made an impression upon me as someone who cares about truthfulness, dependability and doing the right thing, more than most people that I have met, including most attorneys that I met. He has made a very strong impression upon me as being an honest and conscientious person. ST16, l. 9-16.

The Respondent also called retired Circuit Court Judge, Larry Seidlen, who has known the Respondent professionally because he appeared before him and Judge Seidlen had the following comments: "Well, I feel his abilities are excellent. If I needed a lawyer, and thank God I don't need one right now, but if I needed a fine lawyer I would pick Danny Gass" (ST24, l. 5-8) and "I have total faith in Danny Gass' integrity, and I believe that he would always handle a client in the best manner possible." ST24, l. 25 to ST25, l. 2.

The last character witness was James R. Scott, a retired charity director who has known the Respondent for twenty two (22) years on a professional basis and as a personal friend. ST29-31. His trial testimony included the following passage:

> Q. Do you feel that you have the ability to render an opinion as to Mr. Gass' character?
>
> A. Yes
>
> Q. And what is that opinion sir.
>
> A. Very very honest individual, very religious individual, family man, caring, dear friend.
>
> Q. During the course of your knowledge of him as your accountant, or as your attorney, has he ever evidenced a lack of diligence in the matters where he helped you?

A. Not at all. ST31, l. 15-22.

In its brief the Bar argues that the Referee should have found one more aggravating factor which was Fla. Standard for Imposing Lawyer Sanctions, Standard 9.22(h) [vulnerability of the victim]. The Referee in her ruling from the bench specifically rejected this argument by noting that:

> The Brias are seniors, but they weren't incompetent. They were just regular folks out there who needed representation of an attorney and relied on Mr. Gass to represent them. ST68, l. 4-7.

The Bar tries to add that the Referee's prior comment about a lack of legal sophistication should be sufficient to secure this additional aggravating factor. However, this argument ignores the fact that Mr. and Mr. Bria successfully managed a manufacturing company, with more than one location, for more than thirty years, which certainly counters any claim of a total lack of sophistication or vulnerability.

B. Sanction.

There appears to be two factors that were of concern to the Referee in reaching her recommendation of a sixty day suspension. First, the Referee discussed the fact that the Respondent had a prior public reprimand and that this should enhance the sanction being imposed and second there was a concern related

to the harm to the Brias in that they were incarcerated for a very brief period of time (2 days for Mr. Bria and 3 days for Mrs. Bria).

It is acknowledged that this Court has reserved significant enhancement when the lawyer has multiple prior sanctions and/or when that lawyer has repeatedly engaged in the same types of misconduct. For example in *The Florida Bar v. Maier*, 784 So. 2d 411 (Fla. 2001), the Court suspended a lawyer for sixty (60) days when that lawyer neglected a client matter, failed to properly communicate with the client and also failed to respond to the Bar notwithstanding a more extensive disciplinary record than that found in this case. The lawyer in *Maier* had a thirty (30) day suspension and two (2) admonishments for similar misconduct. The Court in *Maier* stated that: ". . . we do not believe that a public reprimand is sufficient in light of the fact that Maier's violations in the instant case involve the same type of misconduct that were the subject of her three (3) previous disciplinary actions." This Court has consistently noted that the "Court considers the respondent's previous history and ***increases the discipline where appropriate.***" *The Florida Bar v. Morrison*, 669 So.2d 1040, 1042 (Fla.1996) (emphasis supplied). A corollary to this tenet is that the Court also tries to place the right emphasis on the value of the prior sanction as it relates to the current disciplinary event. See for example *The Florida Bar v. Nunes*, 734 So. 2d 393 (Fla. 1999); Fla. Standard for Imposing Lawyer Sanctions, Standard 9.22 [Minor misconducts older

than seven years not considered as aggravating under certain circumstances.]. While the Respondent acknowledges that the Court must give some consideration to the 2010[13] public reprimand, it is respectfully contended that Respondent has learned from his one and only disciplinary order and has had no disciplinary action initiated against him prior to or since that time (other than the instant case).

The second concern of the Referee is that once she assessed blame for the incarceration on the Respondent, there certainly was harm established to Mr. and Mrs. Bria for having to spend two or three days in jail. While there can be no disagreement that there was harm it is not the same harm that the Bar attempts to point to in *The Florida Bar v. Scheinberg*, 129 So. 3rd 315 (Fla. 2013). In *Scheinberg*, the Court found significant harm in that the misconduct occurred in a capital murder case wherein the death penalty had initially been imposed. With all due respect to Mr. and Mrs. Bria the trauma they underwent was much less than that found in *Scheinberg*.

It is respectfully contended that the baseline for the misconduct found by the Referee is a public reprimand and there is compelling precedential support for this point. This Court has repeatedly noted that isolated acts of neglect and lack of communication or lapses in judgment warrant a public reprimand. See for example

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[13] While the public reprimand was administered in July 2010, the misconduct, a failure to promptly interplead funds held in trust, was several years prior to that date.

The Florida Bar v. Price, 569 So. 2d 1261 (Fla. 1990) [Failure to consult with client about dismissal of a bankruptcy action.]; *The Florida Bar v. Whitaker*, 596 So. 2d 672 (Fla. 1992) [Lawyer allowed a statute of limitation to expire and failed to communicate with his client]. Also see Fla. Standard for Imposing Lawyer Sanctions, Standard 4.43 [Public reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and cause injury or potential injury to a client.]. Further, a reasonable comparison can be made between this case and *The Florida Bar v. Barcus*, 697 So. 2d 71 (Fla. 1997), wherein the Court rejected that the lawyer needed to be suspended and instead imposed a public reprimand for misconduct that included failing to appear at a deposition, filing an appeal without client permission, and in failing to move for rehearing or to set aside a foreclosure. Of particular importance to the Court in that case was that there was "no evidence that he purposefully neglected their case or tried to disadvantage" his client and that the lawyers actions "reflected a concern" for his client's plight. *Id.* at 75. This last comment was not unlike the Referee's finding that the Respondent:

> . . . was remorseful for what happened to the Brias, and took immediate steps to correct it, which is what you're to do as a lawyer, so ... But I know you jumped on it, and he did everything he could to get them out of jail, and to get, you know, to prevent anything worse from happening. ST67, l. 23 to ST68, l.4

The Florida Bar points to a ninety one (91) day suspension case for misconduct related to multiple clients to support its position for a one year suspension. *The Florida Bar v. Batista*, 846 So. 2d 479 (Fla. 2003). The Bar's reliance on *Batista* is extremely misplaced in that the Court in that case reduced a two (2) year suspension recommended by a referee even though the Respondent in that case had multiple client complaints and a significant aggravating factor of that lawyer's attempt to have one of his former clients sign a false affidavit in exchange for a refund of the fees paid in the case. In particular the *Batista* Court noted as follows:

> As for the referee's recommendation of a two-year suspension, case law reveals that a much shorter suspension would have been warranted had Batista not engaged in the additional improper witness contacts. *See, e.g., Florida Bar v. Maier,* 784 So.2d 411 (Fla.2001) (suspending attorney for sixty days followed by three years' probation for failure to act with diligence in pursuing client's application for alien labor certification, failure to keep client reasonably informed about status of that matter, and failure to timely respond to inquiries made by Bar); *Florida Bar v. Morse,* 784 So.2d 414 (Fla.2001) (imposing ten-day suspension for lack of diligence concerning delays in probating estate); *Florida Bar v. Glick,* 693 So.2d 550 (Fla.1997) (suspending attorney for ten days for failure to provide competent representation, lack of due diligence, lack of communication, failure to abide by client's decision, dishonesty or fraud, and failure to disclose important facts in disciplinary matter); *Florida Bar v. Daniel,* 626 So.2d 178 (Fla.1993) (suspending attorney for thirty days for neglecting two separate client matters); *Florida Bar v. Golden,* 502 So.2d 891 (Fla.1987) (imposing ten-day

> suspension for lack of diligence concerning delays in probating estate); *Florida Bar v. Shannon,* 376 So.2d 858 (Fla.1979) (suspending attorney for ninety-one days where attorney neglected probate matter for over twelve years and charged excessive fees); *Florida Bar v. Zyne,* 248 So.2d 1 (Fla.1971) (suspending attorney for six months for neglect, failure to comply with court order, and previous failures to act diligently).

Thus the only two cases cited by the Bar for the proposition that a one year suspension is warranted do not support that claim. Not having precedent on point the Bar next attempts to distinguish the precedent set forth in the Report of Referee and that was relied upon by the Referee in making her decision. The *Maier* case relied upon by the Referee is discussed above and therefore the only additional comment that must be made in this regard concerns *The Florida Bar v. Byron*, 400 So. 2d 13 (Fla. 1981). The *Byron* decision does not provide any significant facts of the case other than the lawyer neglected a legal matter and that his client's case was dismissed because of that neglect. *Id.* However, there was a significant prior disciplinary sanction in that the lawyer had already been suspended for thirty (30) days for failing to file income tax returns. As such, the Respondent would agree that *Byron* does not support the recommended sixty (60) day suspension but would argue differently than the Bar that *Byron* supports the proposition that less than a sixty (60) day suspension is warranted due to the difference in prior records.

It appears that the Bar has abandoned their reliance on two cases cited to the Referee. *The Florida Bar v. Rolle,* 661 So. 2d 296 (Fla. 1995); *Morrison, supra.*

In *Rolle* the Respondent received a six (6) month suspension for neglect of a client matter but had a prior private reprimand and a prior ninety (90) day suspension. The lawyer in *Morrison* also had two distinct cases of neglect and a prior public reprimand with probation for the same type of misconduct. Both of these cases do not support the proposition that a sixty (60) day or one (1) year suspension is warranted on the facts of this case.

The Referee in making her sanction ruling stated as follows:

> . . . I do find that a suspension is appropriate. I don't find that a rehabilitative period is necessary. I think Mr. Gass is going to correct this, what happened here, and I would urge him to correct the conduct that caused all of the injury here. ST68.

The Respondent understands that he does have a prior public reprimand and that this is an aggravating factor as is the harm to Mr. and Mrs. Bria but that these facts coupled with this Court's prior precedent warrant no more than a ten (10) day suspension. See *Morse; Glick; Daniel; Golden.*

CONCLUSION

For all of the foregoing reasons, the Respondent respectfully contends that he should be found not guilty of a lack of communication, a lack of diligence and of having engaged in conduct prejudicial to the administration of justice. If the Court finds that he has engaged in some or all of the conduct referenced in the

Report of Referee it is urged that existing precedent supports the proposition that no more than a ten (10) day suspension be imposed.

WHEREFORE the Respondent, DANIEL GARY GASS, respectfully requests that he be found not guilty of the rule violations set forth in the Report of Referee or in the alternative that he receive no more than a ten (10) day suspension and that the Court grant any other relief that is deemed reasonable and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail only to: Ghenete Elaine Wright Muir, Bar Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 (gwrightmuir@flabar.org) and to Adria E. Quintela, Staff Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 (aquintel@flabar.org) on this 3rd day of March, 2014.

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

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

Respectfully submitted,

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