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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ZANA HOLLEY DUPEE,

Respondent.

Supreme Court Case No. SC13-921
TFB No. 2012-00,429 (08B)

RESPONDENT'S REPLY BRIEF/ANSWER TO CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

RULES REGULATING THE FLORDIA BAR

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

SYMBOLS AND REFERENCES

The Florida Bar, Appellee, will be referred to herein as "The Bar" or "Complainant." Appellant, Zana Holley Dupee will be called "Respondent" or "Mrs. Dupee." The symbol "RR" will be used to designate the Report of Referee. The symbol "Tr" will be used to designate the transcript of the Final Hearing held before the Referee. The symbol "EXH" will be used to designate the Exhibit introduced into evidence at the Final Hearing herein.

SUMMARY OF THE ARGUMENT

The Referee's findings of fact and law are not supported by the evidence presented at the Final Hearing or by the law. The Bar now seeks a one-year suspension based upon the Referee's findings that Mrs. Dupee concealed assets from Mr. Steinberg during the dissolution of marriage. These findings are flawed. The evidence, testimony, and record reflects that: Mrs. Dupee took adequate remedial measures to remedy the client's misrepresentations; Mrs. Dupee did not commit fraud in the concealment; Mrs. Dupee did not commit fraudulent misrepresentation or any other act of dishonesty; and Mrs. Dupee notified a third party of holding disputed coins at the same time she understood they were the coins the third party was making a claim to.

First, no assets were concealed, and all assets were equitably distributed by the Family Law Judge. Second, the same allegations raised here were raised before the Family Law Judge. The Family Law Judge declined to find Mrs. Dupee concealed or attempted to conceal assets. Mrs. Dupee provided all financial disclosures to opposing counsel and the Court pursuant to the court's deadlines for disclosure.

There is not a scintilla of evidence to establish an intentional act by Mrs. Dupee. Because there is no direct evidence, any findings of complicity would have to be based on inferences from discovery disputes and Mrs. Steinberg's actions.

There is no evidence that Mrs. Dupee caused the discovery disputes or advised Mrs. Steinberg to do anything improper. Instead, the evidence at the Final Hearing showed that Mrs. Dupee became involved in a bitter and complicated divorce between two multimillionaires. Each spouse wanted to cause as much grief to the opposing spouse as possible.

In the end, the Steinbergs' marriage was equitably dissolved. Only Mrs. Dupee has suffered, due to Mr. Steinberg's allegations of complicity to conceal assets – despite all the assets being in fact disclosed due to Mrs. Dupee's efforts. To suspend a lawyer for the actions of the client without any intent or complicity flies in the face of all of the existing case law and standards for imposing lawyer discipline.

The errors in the financial disclosures were just that – errors. Not intention concealments by Mrs. Dupee. The assets erroneously omitted by Mrs. Dupee and her highly experienced paralegal, Mrs. Boyd, were subsequently discovered, corrected, and remedied. There was no loss to the husband in the divorce, and the assets were equitably distributed. This complaint generated by Mr. Steinberg was the act of a litigious individual who sought to gain an advantage in his divorce proceeding and placed his wife's lawyer as the scapegoat of this divorce.

Mrs. Dupee should not be found guilty based upon mere negligence or innuendos of "should have known better" findings.

ARGUMENT

REPLY TO ISSUES I & III

I. THE REFEREE'S FINDINGS AND RECOMMENDATIONS OF GUILT ARE NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE BECAUSE THE REFEREE IGNORED RELEVANT EXCULPATORY TESTIMONY AND OFTEN MISSTATED THE TESTIMONY AND EVIDENCE PRESENTED.

The Court should reject the Referee's findings of fact and guilt on each rule because they are not supported by the evidence presented at trial. A Referee's findings of fact carry a presumption of correctness. They will not be upheld if they are clearly erroneous or no evidence in the record supports them. See Fla. Bar. v. Vannier, 498 So.2d 896, 898 (Fla. 1986). If the findings are not supported by competent, substantial evidence, this Court will reweigh the evidence. This Court can substitute its judgment for the Referee's. See Fla. Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992).

A. The Referee's findings ignored relevant exculpatory testimony and often misstated the testimony and evidence presented.

In this case, the Referee's findings are not supported by competent and substantial evidence. The Referee ignored certain crucial testimony and misstated other important testimony. First, the Referee ignored several misstatements of highly relevant facts by Mr. Silverman during the final hearing. The Referee clearly erred when he placed great weight on Mr. Silverman's testimony, despite numerous inconsistencies:

1. Mr. Silverman told the Referee the Alarion account records were not in the box he brought to the September 28 deposition. Tr48:8-10; 84:16-25;85:1-3. The deposition transcript proves there were Alarion statements in the box: "Ok, well here's a statement from Alarion." Comp. EXH 11, 257:3-5. Later, while going through various other items in the box, Mrs. Steinberg said, "[i]t's another Alarion statement." Comp. EXH 11, 257.

2. Mr. Silverman gave inaccurate testimony before the Referee about the central issue in this case: the date he first received notice of the PECT check and the amount in the Alarion account. He said it was October 14, 2011, when Mr. Steinberg alerted him after reviewing the tax returns. Tr55:11-16. However, five weeks earlier, Mrs. Steinberg disclosed the PECT check and Alarion account at her first deposition (September 9, 2011). Then, at her second deposition (September 28, 2011), she found two Alarion statements in the box of discovery documents Mr. Silverman's staff copied on September 19, 2011. Comp. EXH 11, 257. Also, Mrs. Dupee filed an updated Financial Affidavit with the full amount of the Alarion account on October 7, 2011. Comp. EXH 16, 1.

3. Regarding the discovery dispute, Mr. Silverman first testified Bogin Munns never asked him to prepay for copy costs. Tr74:20-25. Then, on cross-examination, he admitted the firm did ask him to pre-pay. Tr75. This allegation was at the heart of the discovery dispute in this case.

4. Mr. Silverman claimed Bogin Munns was refusing to deliver the box of documents because of its sheer size. Tr41:20-21. However, Mrs. Boyd's testimony confirmed it was not the sheer size – it was the cost of copying and the risk of losing the originals without supervision. Tr192-94. The Referee simply ignored Mrs. Boyd's testimony and did not discuss that it flatly contradicted Mr. Silverman's testimony.

5. Mr. Silverman originally testified Mrs. Dupee filed documents in the case before she filed her Notice of Appearance. Tr71:6-11. However, when challenged on cross-examination, he admitted she did not. Tr72:4-6. This was highly relevant to his argument that Mrs. Dupee never objected to the discovery requests. Mrs. Steinberg required her to object because the request was improperly served on Mrs. Dupee.

6. Mr. Silverman testified he was "blind-sided at trial" by the husband's failure to disclose a $105,536 ScottTrade account. Mrs. Dupee discovered the account by issuing trial subpoenas for third-party financial records. Tr79:21-23. Yet, when Mr. Steinberg was asked whether he had previously disclosed the account, he flatly contradicted Mr. Silverman. Mr. Steinberg answered, "It was disclosed on the financial affidavit and it was just an issue of which statement was used and the exact amount of the -- that was in the retirement account." Tr110:2-4.

At least one of them was giving inaccurate testimony. Yet, the Referee never discussed this inconsistency in evaluating Mr. Silverman's credibility.

The Referee did not mention the inconsistencies in Mr. Silverman's testimony and failed to explain why these inconsistencies do not impugn Mr. Silverman's credibility. Also, the Referee did not make any mention of Mrs. Boyd's clear, specific, and highly relevant testimony, despite the fact that Mrs. Boyd has over forty years of experience as a paralegal and legal assistant. Tr 181:21-23. Thus, this is not a case where the Referee examined her testimony and found it not credible. The Referee ignored inconsistencies in Mr. Silverman's testimony and also ignored Mrs. Boyd's highly relevant, exculpatory testimony. Accordingly, the Referee's credibility determinations were not based on competent, substantial evidence.

The Referee's Report is clearly erroneous when it states the following: "Then, on or about September 2, 2010, Mr. Silverman served a set of standard family law interrogatories on the Respondent. (Complainant's Exhibit 2). Respondent admits that she was Mrs. Steinberg's attorney of record for the dissolution proceedings." By juxtaposing these two statements, the Referee implies Mrs. Dupee was attorney of record on September 2, 2010. However, Mr. Silverman testified Mrs. Dupee did not file a Notice of Appearance until September 10, 2010. Thus, the requests were improperly served on Mrs. Dupee on

September 2, 2010. Mrs. Steinberg was within her rights to object to them on that basis. The Referee's Report is clearly erroneous when it says otherwise.

The Referee clearly erred in concluding "Respondent provided legal advice to Mrs. Steinberg in estate planning or asset protection." RR3. The testimony was that Mrs. Dupee prepared a simple Will for Mrs. Steinberg. Asset protection involves protecting one's assets from creditors, not determining where one's assets will go after death. No testimony supported the Referee's conclusion that Mrs. Dupee gave advice about asset protection.

No evidence supports the Referee's conclusion that "the marital estate had relatively low cash or liquid assets." The Final Judgment of Dissolution of Marriage ("Final Judgment") shows the marital estate included $1,103,106.00 of liquid assets. Comp. EXH 17, 4-6. Also, the Referee clearly erred in stating "both parties placed a premium on the allocation of liquid assets, as opposed to real estate holdings, inequitable distribution." The Referee offers no citation for this conclusion, and no evidence in the record supports this statement. The vast majority of the estate was 31 pieces of real estate. Comp. EXH 17.

Also, the following statement by the Referee does not reflect any evidence in the record: "After the September 19, 2011, delivery of documents, parties and counsel of record attended a mediation session. During that mediation session, Respondent voluntarily provided Mr. Silverman a spreadsheet description of the

parties' assets and liabilities; that spreadsheet listed an account at Alarion Bank 'in Wife's name,' said account contained approximately $450,000." There was no mediation after September 19, 2011. The last mediation was September 12, 2011, three days after Mrs. Steinberg's first deposition. Thus, she disclosed the Campus account and PECT funds before that mediation. The mediation was held before the September 19, 2011, delivery of documents. Moreover, at that mediation, the Respondent initially refused to give the other side her personal spreadsheet, and only relented after the mediator persisted. Thus, the Referee's Report is misleading when it says she "voluntarily provided" the spreadsheet. Lastly, the mediation spreadsheet did not list the Alarion account with a value of $450,000. Thus, the Referee's recommendations are inaccurate and cannot be relied on and are not supported by competent and substantial evidence.

Finally, the Referee was recklessly inaccurate when he said this case involved "a long term marriage, filled with infidelities on both sides." RR 18. While the record is clear Mr. Steinberg was a serial adulterer, there has never even been no testimony or evidence of any suggestion that Mrs. Steinberg was unfaithful to the marriage. The Referee does not cite to any testimony or record evidence to support this highly disparaging accusation.

B. <u>The evidence does not support the finding that Mrs. Dupee violated Rule Regulating the Florida Bar 3-4.3.</u>

The Court should reject the Referee's recommended sanction and his recommendation that Mrs. Dupee violated Rule Regulating the Florida Bar 3-4.3. A lawyer is not acting contrary to honesty and justice when she files an incomplete statement of material fact. When Mrs. Dupee learned of the errors, she corrected them. The case was fully and fairly tried before the tribunal. All of Mrs. Steinberg's assets were included in the equitable distribution in the Final Judgment. The equitable distribution was per curiam affirmed on appeal. Accordingly, the Court should reject the Referee's recommendation and find Mrs. Dupee's actions do not warrant any discipline.

C. The evidence does not support the finding that Mrs. Dupee violated Rule Regulating the Florida Bar 4-3.3

The Court should reject the Referee's recommended sanction and his recommendation that Mrs. Dupee violated Rule Regulating the Florida Bar 4-3.3 (a) & (b). In the instant case, it is uncontroverted that Mrs. Dupee corrected all the false or misleading statements of material fact that had been made by Mrs. Steinberg. Mrs. Dupee updated the Financial Affidavit to include the PECT funds. Mrs. Dupee made sure Mr. Silverman had copies of all the discovery documents before the deadline in the family law court's Pre-Trial Order. All of Mrs. Steinberg's assets, including the PECT funds, were fully and fairly tried in the family law court and included in the equitable distribution in the Final Judgment. Thus, Mrs. Dupee fulfilled her obligation under the Rules and properly corrected

the false statement of material fact previously made to the tribunal in the Wife's original Financial Affidavit. Accordingly, the Court should reject the Referee's recommendation and find Mrs. Dupee's actions do not warrant any discipline.

D. The evidence does not support the finding that Mrs. Dupee violated Rule Regulating the Florida Bar 4-3.4.

The Court should reject the Referee's recommended sanction and his recommendation that Mrs. Dupee violated Rule Regulating the Florida Bar 4-3.4 (a), (b), (c), and (d). In the instant case, Mrs. Dupee did not obstruct Mr. Silverman's access to the evidence. Instead, it was Mr. Silverman's refusal to cooperate with coordinating a date and time for production with Bogin Munns. Mrs. Dupee did not knowingly disobey an obligation under the rules of the tribunal. She had a good faith basis for objecting to Mr. Silverman's improper service of the discovery. Later, she followed the managing partner's direction on how to arrange for production of documents. The general rule is the requesting party is responsible for copy costs. Mrs. Dupee was obligated as an employee of the firm to follow their direction and enforce this rule. Also, Mr. Silverman is required by the Florida Rules of Civil Procedure to specify a reasonable time, place, and manner of production. His failure to do that is not a basis to hold Mrs. Dupee liable for an ethical violation. Accordingly, the Court should reject the Referee's recommendation and find Mrs. Dupee's actions do not warrant any discipline.

E. The evidence does not support the finding that Mrs. Dupee violated Rule Regulating the Florida Bar 4-4.1.

The Court should reject the Referee's recommended sanction and his recommendation that Mrs. Dupee violated Rule Regulating the Florida Bar 4-4.1. In the instant case, Mrs. Dupee did not know the Financial Affidavit was inaccurate at the time she filed it, and later updated it once she learned of the omission. She also disclosed the PECT check which was a part of the Campus USA documents which were included in the Response to the Request to Produce that was filed with the court in December 2010. The court-filed notice proves Mrs. Dupee had no intent to conceal the documents. If she had intent to conceal, she would not have referenced the Campus USA documents in the notice she filed with the court. The documents were compiled and ready for production, but Mr. Silverman failed to specify a time for production as required by the Florida Rules of Civil Procedure. Mr. Silverman also refused to pay for copies. Accordingly, Mrs. Dupee made the documents available to Mr. Silverman. His failure to cooperate with getting the discovery documents is not a basis to hold Mrs. Dupee liable for an ethical violation. Accordingly, the Court should reject the Referee's recommendation and find Mrs. Dupee's actions do not warrant any discipline.

F. The evidence does not support the finding that Mrs. Dupee violated Rule Regulating the Florida Bar 4-8.4.

The Court should reject the Referee's recommended sanction and his recommendation that Mrs. Dupee violated Rule Regulating the Florida Bar 4-8.4 (a) and (c) because no evidence supports the conclusion Mrs. Dupee knowingly assisted Ms. Steinberg in her incorrect statements. Also, no evidence supports that Mrs. Dupee knowingly or intentionally engaged in dishonesty, fraud, deceit, or misrepresentation.

Here, no evidence supports a finding Mrs. Dupee knew Ms. Steinberg still had the PECT check. No evidence supports a finding Mrs. Dupee counseled or assisted Mrs. Steinberg in making a false statement. No evidence supports a finding Mrs. Dupee knowingly or intentionally withheld material information. Moreover, the Bar's argument employs circular logic on this point. In response to the argument that the Referee's findings were flawed because there was no evidence of knowledge or intent on the part of Mrs. Dupee, the Bar responded, "Such an argument is misleading in that the Report of Referee found specifically that Respondent's conduct involved deceit and misrepresentation." Bar Brief 30. In other words, the Bar argues there is evidence on the record to support the Referee's finding simply because the Referee made the finding. Because no evidence supports the conclusion Mrs. Dupee engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation or assisted another to do so, the Court should reject the Referee's finding that she violated Rule 4-8.4.

G. The evidence does not support the finding that Mrs. Dupee violated Rule Regulating the Florida Bar 5-1.1(e) and (f).

The Court should reject the Referee's finding that Mrs. Dupee violated Rule 5-1.1(e) & (f). No evidence supports the conclusion Mrs. Dupee knew before the hearing that the coin collection claimed by Mr. Steinberg was the same as Mrs. Steinberg's coin collection. Mrs. Steinberg disclosed that her coin collection was kept in her jewelry box and was received from her mother in 1984.

The Bar's argument in this regard is incomplete and misleading. The Bar discusses that Mr. Steinberg declared certain coins to be his and that they were kept in a safe in the study. The Bar argued, "Respondent argues only how reasonable it was for Respondent to assume the coins were her client's property." The Bar thus misstates the argument of Mrs. Dupee.

Mrs. Dupee did not state only one coin collection existed and then argue it was reasonable to believe that it was Mrs. Steinberg's. Instead, she testified Mrs. Steinberg also had a coin collection and that Mrs. Steinberg feared that Mr. Steinberg would use his claim to one coin collection to seize both coin collections. Rather than address this two-coin-collection argument directly, the Bar simply declined to mention that Mrs. Steinberg also declared a coin collection, kept with her jewelry. The Bar further omits Mr. Steinberg claimed the coins were from his childhood although many of Mrs. Steinberg's coins were dated well after his 18th birthday. Tr159:11-21. The Bar also omits the Final Judgment gave husband's

coin collection to him and wife's coin collection to her. Comp. EXH 17, ¶ 6. These facts were exculpatory. Respondent reasonably believed husband was searching for a different coin collection than the one wife gave Mrs. Dupee.

Furthermore, during the divorce trial, Ms. Dupee warned the divorce court, and the divorce court agreed that such confusion could occur. The husband never filed a Pre-Trial Catalogue and never updated his Financial Affidavit. Instead, during the divorce trial, he submitted makeshift lists, including one containing the top twenty items he wished the Court to award him, Petitioner's Exhibit 6 ("Exhibit 6") at the divorce trial. Mrs. Dupee warned the Court the cursory, thirteenth-hour list would cause problems:

> MS. DUPEE: ... he fails to clarify which of these items are marital and non-marital. And he doesn't reference the catalog numbers, so it's hard to tell what this list is referring to compared to the other list he's already prepared with a list of items from wife's catalog the husband wishes to retain.
> ****
> As it's drafted now, I feel it's confusing. There's no way to tell when it says, knives inherited from father, well, what item on this list is that referring to? There's no way to kind of cross-reference the list.

Comp. EXH 21, 287:18-22.

The Family Law Judge recognized the lack of specificity in Mr. Steinberg's list would likely cause the exact type of confusion that eventually happened with the coin collection: "THE COURT: That's just gonna present a problem for me, if somebody doesn't clarify it. It's sort of inviting a mistake to happen, if it's not. But it will be Number 6." Comp. EXH 21, 288:1-4.

Thus, the Family Law Judge acknowledged it was confusing to know for sure exactly which items husband was asking for in the list in Exhibit 6 to the divorce case. Mr. Steinberg never clarified his request. Mrs. Dupee did not realize until the hearing that the coins she held for Mrs. Steinberg were in fact property in which a "third person has an interest" under Rule 5-1.1(e).

Also, neither the Referee nor the Bar define or specifically explain how Ms. Dupee treated this property as anything other than "trust property." Mrs. Dupee did not act as if the coins were hers. She did not hide the composition of the coins. Instead, the moment that she realized at the hearing that Mr. Steinberg was making the remarkable argument that the coins in Mrs. Steinberg's jewelry box were actually the ones he claimed to have collected in his childhood (despite many of the coins being dated after he turned 18), she disclosed exactly what the coins were and where they were being held.

REPLY TO ISSUE II

II. THE REFEREE'S FINDING THAT MRS. DUPEE ACTED WITH INTENT TO DEFAUD, DECEIVE, OR ACT CONTRARY TO HONESTY OR JUSTICE IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The Referee's finding that Mrs. Dupee acted with intent to defraud, deceive, or act contrary to honesty or justice is not supported by competent, substantial evidence. As described more fully above, no evidence shows Mrs. Dupee knew her client failed to negotiate the PECT check until August of 2011. When she learned the truth, Mrs. Dupee took adequate remedial measures to remedy her client's misstatements. Also, no evidence shows that Mrs. Dupee intended to withhold any material information and, instead, she took great efforts to disclose all material facts.

Also, the Referee consistently applied a "should have known" standard rather than finding clear and convincing evidence of intent. To find an attorney acted with dishonesty, fraud, deceit, or misrepresentation, the Bar must prove intent. The Fla. Bar v. Burke, 578 So.2d 1099, 1102 (Fla.1991). Further, in The Bar v. Dougherty, 541 So.2d 610 (Fla.1989), and The Bar v. Lumley, 517 So.2d 13 (Fla.1987), the Florida Supreme Court found an attorney's lack of intent to defraud supported a finding that the attorney's conduct did not constitute dishonesty, misrepresentation, deceit or fraud. Here, no evidence in the record directly shows Mrs. Dupee intended to defraud anyone.

For these reasons, the Referee's recommendations of guilt on all claims in the complaint are not supported by competent and substantial evidence. The Court should decline to follow the Referee's recommendations and should find Respondent not guilty of any of the claims.

ANSWER TO THE BAR'S CROSS-APPEAL/REPLY TO ISSUE IV

In its Brief, the Bar said it would address Issue IV and its cross-appeal together because they deal with identical issues. Bar Brief, p. 40. Likewise, Mrs. Dupee relies on her arguments in her answer to the Bar's cross-appeal to support the conclusion that any sanction in this case that involves suspension is improper. The evidence does not support a finding that Mrs. Dupee knew that false statements or documents were being submitted to the court or that material information was improperly being withheld, and took no remedial action. Mrs. Dupee should receive no sanction for violating any of the Rules Regulating the Florida Bar.

III. THE SANCTION RECOMMENDED BY THE BAR IS NOT SUPPORTED BY THE EVIDENCE, CASE LAW, OR THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS.

The Court should reject the sanction suggested by the Bar in its cross-appeal because the sanction is not supported by the evidence and does not have a reasonable basis in case law. Under the Florida Standards for Imposing Lawyer Sanctions, suspension is only appropriate when the attorney "knows that false

statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action." Fla. Stds. Imposing Law. Sancs. 6.12. Instead, if the attorney is merely negligent, or the attorney took remedial measures but did so negligently, then a Public Reprimand under 6.13 or admonishment under 6.14 is more appropriate.

Here, no evidence supports the conclusion that Mrs. Dupee had actual knowledge the PECT check had not been negotiated. Also, Mrs. Dupee took reasonable remedial measures when she discovered the PECT check was not negotiated in August 2011. Because she had no actual knowledge that Mrs. Steinberg still had the PECT check when the Financial Affidavit was filed, Mrs. Dupee should receive no sanction for violating any of the Rules Regulating the Florida Bar.

The Bar in its Brief omits several pieces of exculpatory information, which is "exceedingly troubling." See Fla. Bar v. Lobasz, 64 So.3d 1167 (Fla. 2011) (Justice Pariente stating in dissent, "Bar counsel's inaccurate representations concerning the record are exceedingly troubling. All sides in bar proceedings must conduct themselves according to the applicable rules, without misleading the opposing party or this Court.") First, the Bar stresses the importance of Mr. Silverman's failure to inspect the box for nine months. The Bar's Brief omits Mrs. Boyd's efforts to coordinate with Mr. Silverman to inspect and copy the

documents. By omitting unfavorable facts, the Bar inaccurately represents the facts on the record, which is misleading to this tribunal.

Also, the Bar's Brief omits the evidence that the Response to the Request to Produce listed records from Campus USA. Mrs. Dupee filed this response with the divorce court back in December 2010. That fact is exculpatory because it shows a lack of intent to deceive, but the Bar's brief omits it. Indeed, the Bar references the mis-numbering of the Response to Request to Produce # 6 but failed to disclose Mrs. Boyd's testimony that it was a mistake by her. "I have a 1 instead of an A, so it looks like I have my numbering out of whack." The Bar also omits Mrs. Boyd's testimony that the numbering error occurred because she was typing the response from Mrs. Steinberg's handwritten notes which omitted 6.C. Despite these errors, the Campus USA account was still disclosed. When asked, "[a]nd whatever mistake you may have made, 6A or whatever, does that reflect the 2010 records for Campus USA?" She answered, "That's what I have down there, but from what I can recollect and what I can tell from this, is I don't have my numbering sequence correct." Counsel then asked, "Okay. But my question was, was there disclosure for Campus USA?" Mrs. Boyd replied, "Yes, I believe there was." The Bar completely omits this exculpatory testimony from its Statement of the Case.

Third, the Bar's brief fails to address the September 28, 2011, deposition testimony by Mrs. Steinberg that she found Alarion documents in the box brought

to the deposition by Mr. Silverman. This is exculpatory because if Mrs. Steinberg disclosed the Alarion account information in the box, what would it benefit her to not include the Campus USA account information? The Bar misrepresents the record by omitting this evidence and argument.

Mrs. Dupee took reasonable steps to inform Mr. Silverman of the Campus USA account and PECT check. Mr. Silverman bears some of the responsibility in the 9 month delay in getting the documents because of his refusal to pay for the copying costs. Also, Mrs. Dupee took reasonable remedial measures when Mr. Silverman claimed he did not have the PECT and Campus USA documents in his box of discovery at the second deposition on September 28, 2011. On the record during the September 28, 2011, deposition of Mrs. Steinberg, Mrs. Dupee told Mr. Silverman

> I would be happy to review the documents produced by my client and have her produce any supplemental documents if there are any missing. I also would be happy to check with Bogin, Munns & Munns because the documents for this case that were produced in response to the request to produce were in their file room for over nine months waiting for you to arrange to inspect and copy them.

EXH 11,258:17-25. Mr. Silverman did not dispute this statement by Mrs. Dupee. He also failed to take her up on her offer and actually try and get the information. Thus, Mrs. Dupee should receive no sanction for violating any of the Rules Regulating the Florida Bar.

Mrs. Dupee took reasonable remedial measures when her client failed to testify accurately at her deposition on September 9, 2011. The Bar's argument implies that Mrs. Dupee should have interrupted her client during the deposition and attempted to correct her. However, any attempt to correct her would likely have been construed by Mr. Silverman as an attempt to coach the witness. Given the adversarial nature of the deposition, Mrs. Dupee did the prudent thing and directed Mr. Silverman to get the documents from Bogin Munns. Those documents contained the requested information on the amount of the PECT funds. Mrs. Steinberg's 2nd deposition transcript confirms that the documents in Mr. Silverman's box included the Alarion account statements where the money was currently deposited. Accordingly, Mrs. Dupee adequately remedied Mrs. Steinberg's inaccurate deposition testimony by pointing Mr. Silverman to the accurate information. Thus, Mrs. Dupee should receive no sanction for violation any of the Rules Regulating the Florida Bar.

A. The evidence in this case does not support the sanctions recommended by the Referee and the Bar because no evidence shows that Mrs. Dupee acted intentionally or with knowledge.

No evidence shows Mrs. Dupee knew her client failed to negotiate the PECT check until August of 2011. When she learned the truth, Mrs. Dupee took adequate remedial measures to remedy her client's misstatements. To find an attorney acted with dishonesty, fraud, deceit, or misrepresentation, the Bar must prove intent. The Fla. Bar v. Burke, 578 So.2d 1099, 1102 (Fla.1991). Further, in

The Bar v. Dougherty, 541 So.2d 610 (Fla.1989), and The Bar v. Lumley, 517 So.2d 13 (Fla.1987), the Florida Supreme Court found an attorney's lack of intent to defraud supported a finding that the attorney's conduct did not constitute dishonesty, misrepresentation, deceit or fraud.

The Referee's findings sound in, at worst, negligence, opining that Mrs. Dupee should have known about the falsity of Mrs. Steinberg's financial affidavit and incomplete interrogatory response. Thus, Mrs. Dupee's case is different from The Florida Bar v. Nicnick, 963 So. 2d 219 (Fla. 2007), cited by the Bar in its brief. Bar Brief, p. 15. In Nicnick, it was undisputed that the attorney intentionally failed to disclose a possibly forged settlement agreement to the counsel representing the party who allegedly signed the settlement agreement. Because Mr. Nicnick knew he was concealing a relevant fact, the Court found he had the requisite intent to deceive. Here, no evidence supports that Respondent knew her client had not done what her client said she was going to do--negotiate the PECT check. The evidence is nowhere near clear and convincing that she failed to disclose the PECT check and the Campus USA account information in the box of disclosures.

Mrs. Dupee did not know the PECT check was not negotiated when the initial Financial Affidavit was filed in December 2010. She did not learn that the PECT check was unnegotiated until August 2011. When she learned that the

original Financial Affidavit contained a misstatement of fact, she advised her client to remedy the misstatement by depositing the funds into a known account and updating her Financial Affidavit. Mrs. Dupee made clear to Mrs. Steinberg that the funds must be disclosed as a current asset of the marital estate. Mrs. Dupee followed up with the client to ensure that these steps were actually taken. Accordingly, Mrs. Dupee adequately remedied the failure to list the PECT funds as a current asset by filing an updated Financial Affidavit with the Pre-Trial Catalogue on October 7, 2011. Thus, Mrs. Dupee should receive no sanction for violating any of the Rules Regulating the Florida Bar.

The Referee failed to employ the correct standard of proof for finding intent in this case. For example, the Referee noted an interrogatory answer describing current assets said the only current assets were those listed in the Financial Affidavit. The Referee concluded "[t]he answer given to that standard interrogatory was false, as the Respondent should have known." RR 9. The standard for finding guilt in this case is not that Respondent "should have known." The correct standard is whether the conduct was deliberate or knowing; that is, whether Respondent actually knew of the falsity. Fla. Bar v. Nicnick, 963 So. 2d 219 (Fla. 2007).

No evidence shows Mrs. Dupee actually knew Mrs. Steinberg had not created an irrevocable charitable trust and placed the PECT check into it. If Mrs.

Steinberg had followed through, the check would no longer have been a current asset when the original Financial Affidavit was filed.

The Referee misstated Mrs. Dupee's testimony and failed to understand the implications of other testimony when he concluded: "No person ever registered, or attempted to register, Family Team Institute, 'Parenting Education Charitable Trust,' as a charitable organization under Florida law." Mrs. Dupee testified "Family Team Institute" was Mrs. Foli's already existing for-profit LLC which Mrs. Foli used to sell parenting books and courses. Tr121:23-25; Tr122:1-9. There was no testimony stating it would be the name of any non-profit entity.

More importantly, this statement misses the point. Mrs. Dupee testified that Mrs. Steinberg had said she would create a charitable trust, not a full-blown charitable organization. Mrs. Steinberg was instructed to retain a qualified trust attorney to create the irrevocable trust. She was then supposed to fund the trust with the PECT check. Tr143:9-13. The PECT funds would no longer have been considered Mrs. Steinberg's property at that moment.

The Referee also inaccurately described Mrs. Dupee's testimony about how she responded to Mrs. Steinberg's false deposition testimony. The Referee found "Respondent testified she advised Mr. Silverman of the true amount of the funds during a break at the deposition, [sic] Mr. Silverman doesn't remember this event." Mrs. Dupee did not testify she advised Mr. Silverman of the true amount at the

deposition. Instead, she testified, "[w]hen Mr. Silverman took a break from questioning her, I told him that the check was in the box of documents that he needed to get from the Bogin, Munns office and that it would have the correct amount on it. So, that would be the best evidence of what the amount was." Tr130:12-16. Because the Referee thus judged Mrs. Dupee's credibility based on testimony she did not actually give, his credibility determination cannot be relied on in this case.

Also the evidence shows that Mrs. Dupee did not intentionally withhold any discovery in this case. Instead, the opposite is true. The paralegal, Mrs. Boyd, took great efforts to try to arrange the delivery of the documents in a manner that satisfied Mr. Towers and Mr. Silverman. The Referee clearly erred in his findings about the discovery dispute when he concluded: "The evidence shows and its [sic] clear that the Respondent did not serve a timely answer to Mr. Silverman's first interrogatories and Respondent never objected to any of those interrogatories, nor did Respondent serve a timely response to Mr. Silverman's first request for production, and did not produce the documents as requested." The evidence shows Mrs. Boyd and other Bogin Munns' staff members timely assembled the documents. Mrs. Boyd repeatedly offered Mr. Silverman reasonable ways to coordinate inspection and copying, yet Mr. Silverman refused to pay for copies. He also refused any solution which did not allow him to have sole possession of

the originals. Thus, the Referee erred when he concluded that Mrs. Dupee failed to timely answer discovery.

Fla. Family Law Rule 12.285(a) (2) says copies may be produced in lieu of originals. Nothing in Fla. Family Law Rule 12.285 supplants the general rule that the requesting party bears the cost of copying. The Referee erred in ignoring Mrs. Boyd's testimony that it was Mr. Silverman's failure to specify a reasonable time, place or manner. Mrs. Boyd testified that Mrs. Dupee wanted to proceed and give him the documents. Mrs. Boyd testified the managing partner refused to allow production without a specified time or prepayment for copies. Tr192-194. Again, the Referee did not discount Mrs. Boyd's testimony; he simply ignored it.

Also, Mr. Silverman admitted before the referee that Mrs. Dupee did object to the requests in two ways. He admitted Mrs. Steinberg originally objected to the requests because he served Mrs. Dupee before she was retained. Tr73:6-8. Second, he eventually admitted her firm objected to copying the documents without prepayment. Tr75:6-15. He also admitted that his only proposed solution involved him having sole, unsupervised possession of the originals. Tr75:12-14. Thus, the Referee's recommendation that Mrs. Dupee 'never objected' to the production is not supported by the evidence.

The Referee never explored why Mr. Silverman would refuse to pay for copy costs he was responsible for. First, the only time he ever set a time for

production was after hours, via email the evening before Mrs. Dupee's reconstructive knee surgery. The email demanded production be done on May 26, 2011, the day after Mrs. Dupee's major surgery. Tr78:20-21. Mr. Silverman knew Mrs. Dupee would not be available because she previously filed a Notice of Unavailability. Id.

Second, the Referee also ignored crucial exculpatory testimony in concluding that "contrary to earlier representations by Respondent, the box of documents was not so voluminous as to require the production of documents at her office, rather than Mr. Silverman's office." Mrs. Boyd testified Bogin Munns was not concerned the box was physically large but rather did not want to make copies without prepayment and did not want to give Mr. Silverman unsupervised possession of the originals. Tr192-94. The Referee and the Bar do not address and discount this testimony, but simply ignore it. Because the Referee based his credibility determinations of Mrs. Dupee and Mr. Silverman on this misconception of Bogin Munns' motivation, his credibility determinations cannot be relied on in this case.

The Referee again revealed he was applying the wrong legal standard when he stated Mrs. Dupee's testimony that she included the PECT check in the box of disclosures was "probably not true." RR. 13. The Bar must present the Referee

with clear and convincing evidence of a rule violation. Fla. Bar v. Hopper, 509 So.2d 289 (Fla. 1987). "Probably not true" is not clear and convincing evidence.

Moreover, even under that standard, the Referee's finding is not supported by the evidence. The evidence just as likely supports a finding that the Campus USA and PECT check materials "probably" were in the box. First, Mrs. Boyd testified she put the check in the box. Tr195:17-18. Second, the Response to the Request to Produce showed that records from Campus USA were included. Mrs. Dupee filed this response in December 2010. This response gave notice of the account's existence to the court and the other side. Comp. EXH 6, ¶ 6. Third, the Alarion account information was in the box copied by Mr. Silverman's office. EXH 11, 257. Fourth, by September 19, 2011, Mrs. Steinberg had nothing to gain by not putting the records in the box. She had already disclosed the PECT check and the Alarion account's existence 10 days earlier at her deposition. Fifth, the only testimony supporting the idea that the documents were not in the box comes from Mr. Silverman. For all these reasons, the Referee could not point to clear and convincing evidence supporting his decision that Mrs. Dupee intentionally withheld evidence in this case.

For these reasons, the evidence does not support findings that Mrs. Dupee acted with knowledge that the PECT check had not been negotiated; that Mrs. Dupee failed to take reasonable remedial measures to correct her client's

misstatements in discovery and at her deposition; or that Mrs. Dupee intentionally withheld any material information in this case. Accordingly, the Referee's recommended sanction of a 90-day suspension is unwarranted and should be rejected. Instead, the Court should make a finding that Mrs. Dupee had no intent to deceive and should receive no sanction.

B. Suspension is not an appropriate sanction in this case because the evidence shows that Mrs. Dupee did not knowingly submit false statements or documents to the court, she did not knowingly cause material information to be withheld, and she took remedial actions.

Suspension is not an appropriate sanction in this case because Mrs. Dupee did not knowingly mislead the court or the opposing party. Also, she took adequate remedial measures to correct her client's misstatements. Under the Florida Standards for Imposing Lawyer Sanctions, suspension is only appropriate when the attorney "knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action." Fla. Stds. Imposing Law. Sancs. 6.12. Instead, if the attorney is merely negligent, or the attorney took remedial measures but did so negligently, then a Public Reprimand under 6.13 or admonishment under 6.14 is more appropriate.

For these reasons, the Court should reject the Referee's and the Bar's recommendation that Section 6.12 should apply. Instead, Respondent's actions do

not warrant any discipline and certainly do not warrant a 90-day suspension. If the Court concludes Mrs. Dupee was negligent, or took remedial measures but did so negligently, then a Public Reprimand under 6.13 or admonishment under 6.14 would be more appropriate. However, an honest lawyer can fail to realize that her client has supplied her with misinformation. This is not a violation of the Rules Regulating the Florida Bar. To comply with the Rules, a lawyer must correct the false statements of material fact. Mrs. Dupee corrected all of Mrs. Steinberg's false statements of material fact in this case.

Mrs. Dupee took reasonable remedial measures when she discovered the PECT check was not negotiated in August 2011. The testimony of Mrs. Boyd confirms Mrs. Dupee (1) discovered that Mrs. Steinberg had not negotiated the check before the issue appeared on Mr. Silverman's radar and (2) immediately required Mrs. Steinberg to disclose the information. Tr190:9-12. This included Mrs. Steinberg putting the funds in a known Alarion account and setting about to update the Financial Affidavit. Thus, the Bar is in error in asserting "[a] total view of Respondent's conduct shows that none of her referenced remedial actions were voluntary in nature." When she learned the truth, Mrs. Dupee took adequate remedial measures to remedy her client's misstatements. Accordingly, Mrs. Dupee adequately remedied the failure to list the PECT funds as a current asset by filing an updated Financial Affidavit with the Pre-Trial Catalogue on October 7, 2011.

Thus, Mrs. Dupee should receive no sanction for violating any of the Rules Regulating the Florida Bar.

CONCLUSION

Respondent respectfully requests that this Court find her not guilty of the Bar's complaints. The Florida Bar has failed to prove any violation of the Rules of Professional Conduct that requires the element of intent. Respondent's conduct may have been negligent, but not dishonest or deceitful.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this document has been furnished to the Supreme Court of Florida, Attn: Hon. Thomas D. Hall, Clerk of Court, 500 S. Duval St., Tallahassee, FL 32399 by e-filing and Federal Express; and by US mail to Karen Lopez, Asst. Staff Counsel for The Florida Bar, 4200 George Bean Pkwy, Ste 2580, Tampa, FL 33607; and Kenneth Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399, on April 8, 2014.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a) (2).

Respectfully submitted,

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