IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	Supreme Court Case No. SC14-1942
Complainant,	The Florida Bar File Nos. 2012-50,135 (17G);
v.	2012-50,157 (17G)
	2012-50,427 (17G)
BYRON GREGORY PETERSEN,	2012-50,637 (17G)
Respondent.	

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RESPONDENT'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

A lawyer prevailed on charging lien litigation (trial court and 3rd DCA) and the former client "appealed" to The Florida Bar. The Report of Referee does not even reference these rulings (a central portion of the Respondent's defense) and there is a nary a whisper of Judge Venzer's ruling in the Bar's Answer Brief.[1] This litigation/fee dispute, between the lawyer and his client, clearly and convincingly established a conflict of interest between lawyer and client, and even the former client's lawyer recognized this fact in agreeing to the Respondent's withdrawal in that action. The Bar and the Referee instead look to a different litigation file (that commenced after the Venzer consensual withdrawal) to claim that the Respondent created the conflict so he could withdraw from a case. However, if the parties (lawyer and client) had already agreed there was a conflict between them and consented to a withdrawal, how could it have been "created" for another matter when the adversity between lawyer and now former client had only increased?

While the Respondent respectfully contends that he should be found not guilty of all matters referenced in the Report of Referee, he also submits that the failure to conduct an evidentiary hearing on mitigation and aggravation was a due process denial of the right to be heard and that a remand would be appropriate prior to passing final judgment on this matter.

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[1] Ten lines found at page 19 of the Answer Brief.

ARGUMENT

I. THE RESPONDENT DID NOT VIOLATE THE ETHICAL RULES RELATIVE TO HIS REPRESENTATION OF ROBERT AND WENDY GIELCHINSKY OR THEIR CORPORATE ENTITIES.

The Respondent has already submitted a detailed analysis of why he believes the record below clearly and convincingly demonstrates that he did not violate the Rules Regulating The Florida Bar in the manner suggested by the Referee but will use this opportunity to file a Reply Brief to point out certain salient facts that continue to be ignored or misunderstood by the Bar.

A. Gielchinsky v. Vibo ("Vibo")

At the core of this dispute is a disagreement between the Respondent and his now former clients about the amount of his legal fees for a case that was settled. This dispute, along with his co-counsel, Ronald Weil, who had a similar retainer agreement, was presented to Judge Venzer at an evidentiary hearing conducted on September 12, 2011. Resp. Ex. 13. The Respondent and Mr. Weil, prevailed at that hearing and this ruling was reduced to a written order on January 26, 2012. TFB Ex. 14. This order was appealed by the former client and the Third District Court of Appeals affirmed Judge Venzer. Resp. Ex. 15. Notwithstanding claims to the contrary by the Bar, an expert witness, Robert Josephsberg,[2] testified at

[2] In addition to the customary examination on his qualifications, he was specifically referred to as an expert on p. 13, l. 22 and p. 53, ll.19-21. Further, he

length during that hearing and supported the claimed fees owed to the lawyers. See Resp. Ex. 13. p.48-67. Further, despite claims made to the contrary by the Bar in its Answer Brief, the former client, through counsel, raised some of the very same ethical rules found in this case as a defense to not paying legal fees. See for example Resp. Ex. 13 p. 23-24, 35, 61.[3] Uncontroverted testimony at the final hearing was that the record on appeal was supplemented by the *Aldar*[4] rulings referenced above, but that the Third District Court of Appeals affirmed Judge Venzer's ruling on March 26, 2014. TT 519-520.

Notwithstanding the importance of Judge Venzer's ruling,[5] the Report of Referee does not mention it or any of the related exhibits. In fact, the Answer Brief contains just one passing reference to Judge Venzer asserting that there was no expert and that the ultimate ruling did not resolve the ethical claims. However, this argument fully misses the mark as Judge Venzer's ruling, merely because her ultimate order did not reference these rules, clearly encompassed the fact that she listened to arguments based on both rules and found in the Respondent's favor.

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was specifically asked to render an opinion as to two alleged rule violations. Resp. Ex. 13, p. 61, ll. 15-24.

[3] Specific references were made to R. Regulating Fla. Bar 4-1.5 and 4-1.8.

[4] *Aldar Tobacco Group, LLC, et. al., v. American Cigarette Company, et. al.*

[5] As is noted in the Initial Brief, the *Aldar* case relates to a different fee agreement and a different settlement. The Bar's continued reliance on *Aldar* is misplaced as it has no relationship to Judge Venzer's ruling in *Vibo*.

In regards to the claim for the need for independent counsel to execute a fee agreement the Bar provides no case law for this contention and the use of R. Regulating Fla. Bar 4-1.8(a) (business transactions with a client) has never been applied in this fashion. Judge Venzer's resolution of the Respondent's and Weil's charging liens, gave both lawyers a percentage of the intellectual property rights as security for the fees to be paid them, which ownership interest was to revert to the Gielchinskys after the lawyers were paid in full. TFB Ex. 14 at para. 5. It is important to note that any possessory interest (no matter how transitory) came by court order (which should exonerate the Respondent by itself) and well after the Respondent was no longer representing the Gielchinskys.

What the Bar continues to miss in this analysis is that the fee agreement requested a percentage of the "value" of all of the recovery and not the "res" (stock, ownership interest, intellectual property rights, etc.) that the Bar seems to believe. Judge Venzer clearly understood this while making her oral ruling found that the law firms were to receive a percentage of the total recovery and that at a later time, if necessary, would hold a hearing to determine the dollar value of the noncash portion of the settlement. Resp. Ex 13 p. 116-117. It is also clear that Judge Venzer's ruling uses the brand rights as security for the payment of fees. TFB Ex. 14.

B. Gielchinsky v. The Pool People Construction Company ("Pool People")

All matters referenced to the Respondent's representation in the *Pool People* case are fully briefed in the Initial Brief. However, there are several matters that must be briefly addressed.

The Bar contends that the Respondent let the *Pool People* case go "stagnant" and then after a successful appeal of a dismissal for a lack of prosecution and then failed to take any action after that successful appeal. Answer Brief, p. 7. However, this claim fails to take into account that the *Pool People* docket was introduced as TFB Ex. 5 and it shows that the case was filed on March 9, 2005 and indicates that there was record activity through October of 2007. The Respondent testified that he was directed by Robert Gielchinsky to focus his attention on the *Vibo* case, as well as the other more important matters that were pending. TT 387. While the Gielchinskys testified that they did not instruct the Respondent to cease work on *Pool People*, Robert Gielchinsky admitted on cross examination that his priority was the *Vibo* case. TT 323. Further, at the time the appeal was successfully resolved in late February of 2011, the Respondent and his clients were not getting along due to the fee dispute in *Vibo* and that ultimately the Respondent withdrew from all matters for these clients.

The Bar continues to allege that the Respondent "lost" documents and other property that related to the *Pool People* case. However, the Referee, the Bar and

the Bar's witnesses do not delineate what was lost. The Respondent introduced the cover letter for a Federal Express package wherein the Respondent forwarded three binders of materials to the Gielchinskys. Resp. Ex. 20. These materials were forwarded to his now former clients even though he could have exercised a retaining lien due to the ongoing dispute over the unpaid *Vibo* legal fees. While there was a generalized discussion about what the Gielchinskys believed they were "missing", the Respondent testified that he provided everything in his possession and that if the Gielchinskys were truly missing something it could have been recreated from the court file or the building department. TT 544-545.

The Bar continues to make a generalized claim of a lack of communication regarding the Gielchinskys. However, as the testimony at trial proved, there were in person meetings, telephone calls and a plethora of e-mails between the Respondent and his clients. TT320-321. Further, there was testimony that correspondence and pleadings were shared with the clients before they were sent and that the client normally attended hearings. As is noted in the Initial Brief, the Gielchinskys admitted to all of the foregoing at trial.

The major assertion from the Bar that needs to be addressed relative to *Pool People* is the mistake made in the language of the order of withdrawal that incorrectly mentions that there was no objection to the withdrawal when in fact the

Gielchinskys appeared telephonically for the hearing and did object to the withdrawal.

Prior to the hearing at issue, the Respondent had prepared a typed order granting his motion and when the hearing concluded he gave this same draft to the trial judge. See TFB Ex. 6. TT 537. The trial judge made some handwritten additions to the order setting forth a time frame to retain new counsel and allowing for no discovery during the referenced 30-day time frame. However, both the Respondent and the trial judge failed to change the language that the hearing had been contested by the client.

Post the hearing, the Gielchinskys mailed a letter/motion to attempt to rehear the order of withdrawal and further complained about two passages in the order. The Respondent testified that he offered on several occasions to submit a revised order to the court if the Gielchinskys would specifically request how they would like the order amended but they never specifically advised how they wanted the order to read. TT 540-541.

***C.* Response to Broder Grievance.**

This matter was fully addressed in the Initial Brief. However, the Bar continues to claim they did not timely receive an initial response to the Broder complaint but they continue to distance themselves from the fact that the Respondent (and his counsel) provided written responses to the member of the

grievance committee who was assigned to investigate the Broder complaint. The Respondent introduced several of these responses dated September 26, 2012, October 22, 2012, and an undated response. Resp. Ex 22, 23 & 24.

The correspondence introduced on this topic, and the testimony related thereto, evidences that several extensions were provided as the Bar had not secured copies of documents that were referenced in Broder's complaint and that the Bar was supposed to provide the Respondent with copies of these documents but never did. Notwithstanding this fact the Bar ultimately insisted on a written response and the Respondent drafted same and gave it to his lawyer. See Resp. Ex. 21.[6] In later correspondence with the Bar, the Respondent made reference to this earlier response but the Bar never commented on this misapprehension. Instead they filed a formal complaint alleging that he had ***never*** responded to the Broder complaint (a fact that was ultimately accepted by the bar as untrue).

D. **Conclusion on Alleged Violation.**

The Bar paints with a very broad brush in an attempt to avoid the specifics of the Respondent's representation of the Gielchinskys and that through the Respondent's efforts an extremely large settlement was received. It is respectfully, contended that the Respondent provided ethical representation to his clients and that he should be found not guilty of all rule violations alleged by the Bar.

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[6] This document was produced to the Bar during discovery.

II. A NINETY-ONE DAY SUSPENSION IS AN INAPPROPRIATE SANCTION UNDER THE FACTS OF THIS CASE, ESPECIALLY WHEN THE RESPONDENT WAS DENIED A HEARING TO PRESENT EVIDENCE OF MITIGATION.

As is noted in the Initial Brief, the Referee in this case has failed in her obligation to carefully consider all factors in reaching an appropriate sanction recommendation and has further failed to balance the severity of the alleged unethical activity against the mitigation and aggravation that was present in the record, which record is truncated because the Referee did not provide an opportunity for the Respondent to provide character testimony or other evidence related to mitigation. It is respectfully contended that the lack of an opportunity to present evidence on mitigation denied the Respondent due process.

The Bar points to *The Florida Bar v. Baker*, 810 So. 2d 876 (Fla. 2002) wherein this Court found that the failure of a Referee to hold an evidentiary hearing on sanction, under the following circumstances, was not a violation of due process:

> At the disciplinary hearing, Baker's counsel stated that since Baker's testimony was fully elicited by the Bar's case-in-chief and Baker's counsel was able to introduce all exhibits, Baker would rest his case without calling any witnesses. The proceeding moved to closing arguments, and the referee stated that he wanted to hear arguments from both sides regarding discipline. Bar counsel reminded the referee that proceedings could be bifurcated for purposes of conducting a mitigation hearing, but the referee decided this was unnecessary. Baker made no

> objection or indication to the referee that Baker needed more time to present additional evidence. At the conclusion of closing arguments, Baker's counsel voluntarily declined the opportunity to submit proposed findings to the court. *Baker* at 879.

This case is distinctly different. The case tried over four days and at the conclusion of the last day of the trial, the following exchange occurred on the record at the conclusion of the last day of trial:

> MR. TYNAN: . . . for closing on guilty (sic) or innocence and it's 2:30 and we could do it now or you could make us do it in writing, which was your initial inclination, but then we'd be pressed for.
>
> MR. RAMNATH: I think we've underestimated our time for the entire trial, Your Honor, so what I would request is written closing, we're not pressed for time thankfully. .

The Referee decided not to accept oral closing arguments at the conclusion of the trial and asked the parties to submit a proposed Report of Referee and any written closings they cared to make. The parties made their submission to the Referee and the Respondent limited his initial presentation as to guilt or innocence believing that the Referee would first make her decision on those issues and set a sanction hearing if one was needed. There was a telephonic hearing on September 7, 2016 (near the deadline for submission of a Report of Referee) wherein the Referee announced that she would be finding the Respondent guilty. There was no court reporter for that hearing. There was a discussion on what needed to be done to finalize the case, the Respondent through counsel requested a hearing for the

presentation of mitigation, inclusive of character witnesses, the Bar stipulated as to good character being a mitigating factor and convinced the Referee that a hearing was not necessary but the Respondent was allowed to present written argument on sanction but it was due by close of business on September 9, 2016. See Resp. Motion for Rehearing. The Respondent submitted a revised proposed Report of Referee with a recommendation on sanction. The Referee served her Report on September 15, 2016 and the Respondent served a timely Motion for Rehearing which was denied. Included in the Motion for Rehearing was a request for an evidentiary hearing on mitigation, which reiterated the Respondent's belief that there would be an evidentiary hearing on sanction if there was a finding of guilt.

The Bar contends that since the Respondent testified about his own personal background (inclusive of civic and bar activities) and that the Bar stipulated as to character being a mitigating factor the lack of an evidentiary hearing is not fatal and that any argument to the contrary was "disingenuous" (Answer Brief p. 29) However, due process requires more when it was understood by the Respondent that he would have a future opportunity, if needed to present further mitigation testimony. The fact that the Respondent's counsel was able to meet a short deadline to present additional argument and comment on a proposed sanction recommendation does not outweigh the fact that the Respondent was not able to present character testimony from the witnesses that had been previously disclosed

to the Bar but were not presented at trial due to the belief that the matters had been bifurcated. As the Bar points out in its brief,

> Due process in Bar disciplinary proceedings requires that an accused attorney be given a full opportunity to explain the circumstances of an alleged offense and to offer testimony in mitigation regarding any possible sanction. *Baker* at 879.

The failure to allow the Respondent to present "testimony in mitigation regarding any possible sanction" was therefore a violation of due process.[7]

The Bar also contends that the overall age of the case should not serve as a mitigating factor. The lack of an evidentiary hearing on mitigation presented this point from being fully developed. However, the record reveals that the representation commenced in 2005 and that the first Bar complaints were filed in the Fall of 2011;[8] probable cause was found two years later in September of 2013 and the Bar did not file its formal complaint until a year later in October of 2014. While Both parties sought and secured continuances of trial dates due to the change in Bar counsel and discovery issues, and that this case has aged significantly because of it. However, it is the age of the actual conduct at issue

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[7] A stipulation as to a mitigating factor as a shortcut to testimony might be helpful in some circumstances, but here it prevented the Respondent from showing any depth or quality to that mitigating factor that might have swayed the Referee and ultimately this Court by its compelling nature.

[8] Filed at the time of the Venzer hearing in *Vibo,* in our view, to secure leverage in that proceeding.

(being approximately six or more years from today's date) and the length of time it took the Bar, three years from receipt of grievance through filing of formal complaint, to bring this matter before a referee, that is similar to the mitigating factor found in *The Florida Bar V. Wolf*, 930 So. 2d 974 (Fla. 2006) [one-year delay from a trust account audit to the formal complaint being filed.].

While the Respondent's Initial Brief addressed the case law previously referenced by the Referee in her Report, it is important to distinguish three cases relied upon by the Bar in its brief. The first is a six-month suspension from the practice of law when the lawyer in that case "double-pledged" a security interest in a certificate of deposit causing his client serious financial harm and significant financial benefit for the lawyer. *The Florida Bar v. Brown*, 905 So. 2d 76 (Fla. 2005). The second case resulted in a 91-day suspension, and in approving this sanction the Court discussed the misconduct as follows:

> Here, the referee found that Russell–Love violated rule 4–8.4(c) in several ways: she misrepresented that she was the attorney for USTA; she misrepresented that USTA was petitioning for the P–1 visa on behalf of the client; and she printed the name of a USTA employee on both amended forms I–129 and G–28. We conclude that the referee's recommendations are well supported by the facts. Russell–Love has admitted that, in submitting the amended form I–129, she listed the USTA as the "Company or Organization" filing the petition, a knowingly false statement. She also admitted that she hand wrote Ms. Pierre–Louis's name in the signature portion of the form. That section requires the signer to "certify, under penalty of perjury under the laws of the

> United States of America, that this petition and the evidence submitted with it is all true and correct. If filing this on behalf of an organization, I certify that I am empowered to do so by that organization."
>
> Similarly, in submitting the amended form G–28, Russell–Love has admitted that she listed the USTA as the "Principal Petitioner, Applicant, or Respondent." She also admitted that she hand wrote Ms. Pierre–Louis's name in the signature portion of this form, indicating to USCIS that Russell–Love was appearing on behalf of the USTA. Russell–Love signed the amended form and, in so doing, she declared that the information provided on the form was true and correct. *The Florida Bar v. Russel-Love*, 135 So. 3d. 1034, 1038 (Fla. 2014).

Lastly the Bar cites to a theft case wherein the lawyer was disbarred. *The Florida Bar v. Valentine-Miller*, 974 So. 2d 333 (Fla. 2008). As the Court can clearly see each of these matters are much more significant misconduct than that found herein.

CONCLUSION

The Respondent, verily believes that this Court should find him not guilty of the matters set forth in the Report of Referee and that therefore the Court will not have to reach the issue of whether he is entitled to an evidentiary hearing on sanction. Because of the adversity created over payment of a legal fee the Respondent hired ethics counsel to assist him in navigating the conflicts that had arisen in an effort to act in accordance with all of his ethical obligations and Respondent believes that he met these obligations.

The Respondent, Byron Gregory Petersen, respectfully requests that he be found not guilty and in the alternative if found guilty that this case be remanded to the Referee for a sanction hearing.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served electronic mail only mail on this 11th day of May, 2017 to Frances R. Brown-Lewis & Navin Ramnath, Bar Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 (fbrownle@flabar.org; smiles@flabar.org; nramnath@flabar.org); Adria E. Quintela, Staff Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 (aquintel@flabar.org).

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 ESET Nod 32.

Respectfully submitted,

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