IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant,

v.

MADSEN MARCELLUS, JR.,

Respondent/Appellee.
_____/

Supreme Court Case
No. SC16-1773

The Florida Bar File
No. 2012-70,012(11E)

RESPONDENT'S ANSWER BRIEF AND INITIAL BRIEF ON CROSS APPEAL

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "The Bar" or "The Florida Bar." Madsen Marcellus, Jr., Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the Final Report of Referee. The symbol "TT" followed by a page number will be used to designate the transcript of the final hearing which is contained in three volumes but consecutively numbered. The symbol "RT" followed by a page number will be used to designate the transcript of the hearing wherein the Referee delivered his ruling. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

STATEMENT OF CASE AND FACTS

General Overview

On September 28, 2016, The Florida Bar filed a twelve-paragraph complaint, against the Respondent, Madsen Marcellus, Jr., wherein they alleged two basic allegations, discussed in more detail below. First, at paragraphs 4 through 8, the Bar alleges that the Respondent failed to follow a court directive regarding the disposition of the marital home and a related claim relative to a Loan Modification Agreement. At paragraphs 9 through 11, the Bar makes a generalized allegation that the Respondent failed to comply with discovery requests resulting in discovery sanctions being imposed against him. Finally, at paragraph 12, the Bar alleged that five distinct ethical rules were violated. A timely answer was served, and the case was ultimately tried for two days, commencing on April 24, 2017 and concluding on April 25, 2017.

During the Final Hearing, seven members of The Florida Bar were the only witnessed that testified for either party. The Florida Bar called Kellie Petersen Gudger, Israel Reyes, and Christian Rodriquez and the Respondent presented testimony from Christopher Brown, Adrien Nunez, Lonnie Richardson, and the Respondent. In addition to the foregoing The Florida Bar submitted a total of 20 exhibits and the Respondent introduced one additional exhibit.

At the conclusion of the final hearing, the Referee made preliminary findings of guilt (TT343-352) and asked the parties to submit proposed Reports of Referee. The Referee executed his Report on May 26, 2017 wherein he found the Respondent guilty of seven rule violations and not guilty of one alleged rule violation.[1] After commenting upon aggravating and mitigating factors, the Referee recommended a one-year suspension from the practice of law his sanction recommendation. The Bar filed a timely appeal of the sanction recommendation and the Respondent filed a cross-petition seeking reversal of certain factual findings and recommendations of guilt, as well as the sanction recommendation.

Factual Synopsis

The Bar's case centers around two matters that arose during the Respondent's divorce from Kellie Petersen Gudger ("Gudger"). ROR3. The couple were married for approximately eight years and had three minor children together. Gudger filed for divorce in January of 2009 and a Final Order on Petition for Dissolution was entered on April 23, 2010 which noted that the final hearing in the case had been conducted in November of 2009. See TFB Ex. 1 (Final Order of Dissolution). The Respondent filed a Petition for Modification of certain financial obligations in November of 2010, but the record indicates that he did not actively pursue that claim and his petition has yet to be resolved. See TFB Ex. 7 (docket of

[1] R. Regulating Fla. Bar 4-3.3(a)(2).

divorce proceeding). Gudger, likewise sought post-dissolution relief from the court in June of 2013 which was finally disposed of by a May 27, 2014 Order Granting, in Part, Former Wife's Motion for Civil Contempt. TFB Ex. 18.

A. The Loan Modification.

Prior to the divorce, the couple and their family resided in a home located in Pembroke Pines, Florida. ROR4. The Respondent and his now ex-wife, Gudger, had executed the note and mortgage and they were both co-owners of the property at the time of the divorce. During the pendency of the divorce the couple ceased making mortgage payments. ROR 4.

The Final Order on Petition for Dissolution (TFB Ex. 1), at paragraph 25, required the Respondent to either refinance or sell the home, so that Gudger was removed from title and from the financial responsibility relative to the home.

The Respondent testified that he made attempts to seek the refinancing of the home, but he was unable to refinance the home on his income alone. He then sought to secure a mortgage modification from the mortgage holder in an effort to restructure the loan payments, so he could prevent a foreclosure. TT164; 178-179.

The Respondent, in March of 2010, pursued the loan modification with the assistance of Curt Francis, an individual with mortgage experience and who, at that time, was assisting individuals with the loan modification process. TT178-179. Francis had been a friend of the Respondent for several years, had participated in

family events with the Respondent and Gudger and he was therefore also known to Gudger. TT185.

In order to complete the loan modification process, a loan modification agreement had to be submitted to the lender and it needed to be executed and notarized by both individuals who were on the note and mortgage (Respondent and Gudger). The Respondent testified that upon discovery of this requirement that he called Gudger to secure her signature on the document and that she declined to participate. Immediately thereafter, the Respondent told Francis what had occurred, and he promised to call Gudger and try and convince her to assist in the mortgage modification process by signing the form. Francis left the room, ostensibly to call Gudger, and when he returned he advised the Respondent that he had secured Gudger's permission to execute the application on her behalf. The Respondent did not personally verify this fact with Gudger and Gudger testified that she never gave that permission and denied the existence of either phone call.

To compound the problem further Francis notarized "Gudger's signature" knowing that he had affixed that "signature" and that it was not Gudger's true signature. Ultimately, Francis lost his notary commission over this event. See TFB Ex. 2, 3 & 4.

On December 8, 2011, the lender filed a foreclosure complaint and served same on the Respondent and Gudger. See TFB Ex. 2. It was Gudger's testimony

that when she reviewed the foreclosure complaint that was served upon her she discovered for the first time that someone had signed her name to the loan modification agreement. Five months later she filed an Affidavit of Forgery with the governor's office, which regulates notary public commissions and that Francis lost his notary commission. TFB Ex. 3 & 4. However, she did not pursue any claim against the Respondent until she filed, in June of 2013 (19 months after discovery of the issue), a motion for contempt relative to the Respondent's failure to remove her name from the note and mortgage, as well as other matters.

During the foreclosure process Gudger quitclaimed her interest in the home to the bank but remains a defendant in the foreclosure action as it has yet to be concluded due to a bankruptcy petition filed by the Respondent.

As is noted above, the issue related to the execution and notarization of the modification agreement was included in the matters raised by Gudger in her post-dissolution motions. The failure to remove Gudger from the mortgage, as was required in the original divorce decree resulted in the Respondent being required to pay Gudger the sum of $2,500.00, but no other action was taken against him relative to this particular issue. See TFB Ex. 18 at para. 12.

While the Respondent did testify that, in hindsight, even though Francis was the one who executed and notarized Gudger's signature, he should have insisted

that the document be personally signed by Gudger or not submit same to the bank. TT182-183.

B. Discovery Issues.

The second aspect of the Bar's complaint concerns the Respondent's failure to timely respond to discovery requests and court orders compelling discovery in the above referenced post dissolution proceeding.

At the outset of the post-dissolution proceeding the Respondent represented himself but shortly after Gudger filed, through counsel, her own post-dissolution motions, he secured the assistance of his partner, Peter Fellows, to represent him. Mr. Fellows was replaced as counsel by Christopher Brown at the height of the dispute over outstanding discovery. ROR18; TT143.

It should be noted that Gudger's counsel began complaining about the pace of discovery at the very first hearing held in the post-dissolution proceeding just 30 days after Gudger's counsel caused the file to be reopened. See TFB Ex. 8. The best recitation of the dispute over discovery is found in Petitioner's July 22, 2014 Verified Third Motion to Compel Discovery. TFB Ex 12. Gudger's counsel, Rodriguez, testified that said Motion was his attempt to encapsulate all pending discovery disputes into one pleading. A review of this motion reveals that there were outstanding requests from a Request for Production of financial records and tardy responses to four subpoenas duces tecum that had been served on the

Respondent as agent for certain entities and wherein the trial court had previously compelled compliance by a date certain. This motion formed the impetus for the trial court to enter an Order to Show Cause directed to the lack of discovery provided by the Respondent and for failing to comply with previous court orders directing compliance by a date certain. See TFB Ex. 15. A hearing was scheduled for Monday, September 15, 2014 at 10:00 a.m. at the Broward County Courthouse at which time the Respondent was to show cause why he should not be held in contempt.

Respondent testified that prior to this time frame he had put his head in the sand relative to anything having to do with the post-dissolution proceeding and that his partner, Mr. Fellows, had not alerted him to concerns about not providing full discovery. TT224-225. That changed just after normal business hours on the Friday prior to the scheduled September 15, 2014 hearing when Mr. Fellows, for the first time, revealed that there was a contempt the following Monday. TT224-225. The Respondent advised that he had to be in Miami-Dade County to commence a trial for a client and had other court matters to attend to that morning also in Miami-Dade County and Mr. Fellows said he would attend the hearing and advise the court of this fact. TT226-227. The Respondent also communicated with Gudger in the hopes of rescheduling the hearing but that was not successful. TT225-226.

During his testimony on this point the Respondent recognized that he had a Hobson's choice – attend the Rule to Show Cause hearing to protect himself from further harm but subject more than one client to potential harm by not appearing in court on their behalf or attend to the client matters in Miami-Dade County to protect those clients and expose himself to further sanction in the divorce proceeding. TT225-227. Ultimately, he chose to attend to his client matters with the hope that Mr. Fellows would be able to reschedule the hearing. That did not happen; and the Trial Court issued a Writ of Bodily Attachment. TFB 16.

Upon being informed of the Writ of Bodily Attachment, the Respondent retained two counsel, a criminal defense attorney to resolve the contempt order and writ and a second counsel, Brown, to correct the discovery deficiencies. Brown testified that upon his retention he did the best he could to serve the required responses to outstanding discovery and prior court orders regarding same. TT143-145.

A hearing was held on October 2, 2014, wherein the Respondent appeared and personally apologized to the trial court and Brown advised the trial court as to his efforts at compliance. TT147-148. An Order Dissolving the Writ of Bodily Attachment was entered on October 2, 2014. TT147-148. Shortly thereafter, Judge Cohen, the original trial judge on this matter granted a Motion to Disqualify

himself and the case was assigned to a new judge who resolved Gudger's post-trial motions. See TFB Ex. 18.

The Respondent's testified that he relied upon his counsel, Mr. Fellows, regarding his discovery obligations. TT221-223. Admittedly, the record shows that at the early stages of the proceedings he knew there were court orders compelling compliance, as to at least one or two matters and that as a lawyer he needed to be more fully aware of his discovery obligations, especially when it appears that this was an item of friction between himself and Gudger. However, it has been the Respondent's position in this case that he relied upon his friend and lawyer, Mr. Fellows, and that they failed to properly communicate concerning what he believed Mr. Fellows was doing for him regarding pending discovery requests. Nonetheless, after the favorable resolution of the contempt proceeding, Mr. Brown endeavored to bring the Respondent's discovery responses into compliance and further testified that upon withdrawal of the Reyes law firm, discovery requests that Brown believed to have been unduly burdensome or frivolous were abandoned by the wife and her counsel. TT147-152

As of the date of the final hearing the Respondent and his ex-wife were still in litigation, but the case had become somewhat dormant.

SUMMARY OF THE ARGUMENT

At issue in this case are the facts and circumstances that arose during the Respondent's personal post-divorce proceedings, wherein the Referee, to some extent, agrees that the Respondent's decision making was clouded by those proceedings. This Respondent has never previously been disciplined and, yet a Referee wants to impose a year suspension; that the Bar seeks to enhance to an eighteen-month suspension which does not fit any of the relevant case law, including a matter resolved by this Court earlier this year.

As this Court will see, this Respondent, who was represented by counsel, for most of the period under review, got in trouble with a trial court for not timely complying with discovery but escaped serious sanction by the trial court. Further, we have a significant lapse in judgment, in allowing a friend to sign a document for his ex-spouse, with the friend then notarizing that signature. The testimony at trial, as supported by one other witness, but denied by that ex-spouse was that she had given permission for the signature. That would still not forgive the notary issue and the Respondent admitted same at trial and does so herein.

Respectfully, however, these transgressions warrant less than a rehabilitative suspension and the Court is asked to reject the year suspension recommended by the Referee and instead impose a suspension of 90 days or less.

ARGUMENT

I. THE RECORD IS DEVOID OF CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT SHOULD BE FOUND GUILTY OF ALL RULE VIOLATIONS REFERENCED IN THE REPORT OF REFEREE.

In this case the Bar seeks to discipline a lawyer for actions taken in his own personal divorce proceeding, wherein he was represented by other counsel during part of the proceeding. While the Respondent has candidly admitted and accepted responsibility for certain actions, he respectfully disagrees with other findings made by the Referee and firmly believes that the clear and convincing evidence in this case does not support the Referee's factual findings relative to all of the violations of the Rules Regulating The Florida Bar found by the Referee.

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 findings below are "clearly erroneous and lacking in evidentiary support" and that a careful review of the evidence and the testimony at the final hearing clearly and convincingly demonstrate that the Respondent should have been found not guilty of the charges in the Bar's complaint.

A. The Respondent.

The Respondent, Madsen Marcellus, is 45 years old and was admitted to The Florida Bar in January of 2003. ROR3. He was also admitted for a short time in Minnesota but no longer maintains that license. Mr. Marcellus has never been disciplined in any jurisdiction. ROR31.

The Respondent testified when he began his college years he was a poor student and struggled to complete college. ROR3. However, he had a personal epiphany, rededicated himself to attaining a college degree and graduated, cum laude, from Florida International University and successfully secured a J.D. from the University of Florida. ROR3.

Respondent began his legal career as a public defender, first in Miami-Dade County (two distinct time periods) and also for a short time in Minnesota. ROR3. After leaving the Public Defenders' Office, he entered private practice and has been a partner in several small law firms, inclusive of a law firm with his now divorced spouse, Kellie Petersen Gudger. ROR3. His primary practice area is criminal defense. ROR3.

B. The mortgage modification.

As is noted above the Respondent was previously married to Kellie Gudger for approximately eight years but were divorced by an order dated April 23, 2010. Prior to said divorce the couple were delinquent on their home mortgage as they

had both ceased paying same. The Final Order on the Petition for Dissolution, at paragraph 25, required the Respondent to either refinance or sell the home so that Gudger's name would be removed from title and the mortgage. See TFB Ex. 1.

There was contrasting testimony between the husband and wife concerning the steps taken (or not taken to accomplish this fact) and who lived in the house when is not material to the resolution of the real issue – did the Respondent attempt to comply with the requirement to attend to the ownership issue of the home. This issue was fully litigated between the parties in their post-divorce litigation and an order was entered on this dispute. See TFB Ex. 18. While this order does find that the Respondent did not comply with paragraph 25 of the divorce decree (TFB Ex. 18, para. 6) there is no finding of a willful violation[2] of said requirement and while he was ordered to reimburse his ex-wife the $2,500.00 she spent on a foreclosure defense attorney, he was not held in contempt.

The next issue that must be addressed relates to the execution and use of a mortgage modification agreement. The Respondent testified that he secured the services of a friend, Curt Francis, to help him with the financing on the home and that ultimately a mortgage modification was agreed to by the bank. TT175-178. At that time, he discovered that Gudger, who would still be on the note needed to

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[2] The timing of this issue coincided with the real estate market collapse and the Respondent testified at trial as to the efforts he took to remediate the issue, inclusive of the modification to act as a stopgap to prevent foreclosure while the problem was being addressed. See for example, TT174-175.

sign the agreement. TT176. As such, the Respondent testified that he called Gudger to have her sign the document and she refused, which fact was conveyed to Francis. TT179. Being so informer, Francis told the Respondent that he would try and convince Gudger, also his friend, to execute the agreement. TT178-179. Ultimately, Francis informed the Respondent hat Gudger had agreed to let Francis sign the document for her. TT179-180. On March 31, 2010, Francis signed Gudger's name and then notarized both signatures. TT180-182. The executed agreement was then sent to the lender. See TFB Ex. 2C. Please note that all of the foregoing occurred prior to the service of the written divorce decree dated April 23, 2010. TFB Ex. 1.

As the Referee correctly points out, and the Respondent, in hindsight fully concurs, the Respondent, no matter his knowledge about whether or not his ex-wife had consented to her signature being affixed to a document by Francis, should not have allowed Francis to notarize this document and then submit same to the lender. ROR8-9; TT182-186.[3]

C. Discovery issues.

Intertwined in the post-divorce proceedings are disagreements over

[3] At page 10 of the Report of Referee there is a finding that the Respondent is still in violation of the divorce decree as he still lived in the home (at the time of trial). Putting aside the fact that there was a bankruptcy hold on the foreclosure at the time of trial, both the Respondent and Gudger testified that she had signed a quitclaim deed to the home to the lender and she was out of the foreclosure case, except perhaps as a technical defendant until the case was closed. TT186

propounded discovery and the responsiveness to same. As the Referee noted at the very beginning of the post-divorce litigation, the Respondent represented himself, later his then law partner, Peter Fellows, represented him and ultimately, through the date of the final hearing in this case, he was presented by Christopher Brown. ROR18; TT143.

As this court is painfully aware, discovery disputes frequently become a misdirection effort from the merits of a file and that some have used discovery as a tool to badger the other side. In this case, at the very first hearing after Gudger retained counsel, her lawyer tried to make a point that the Respondent was already engaging in discovery delay when, in reality, the case had only been reopened for 30 days at that juncture. See TFB Ex. 8. At this juncture, the Respondent testified he was overwhelmed defending himself, and had his partner, Peter Fellows, step in to provide assistance. Unfortunately, between the two of them, discovery compliance, even if the request was of a harassing or trivial nature, became a problem and motions to compel started to be filed. Gudger's counsel, Rodriguez, testified the best recitation of the dispute over discovery is found in Petitioner's July 22, 2014 Verified Third Motion to Compel Discovery. TFB Ex 12. A review of this motion reveals that there were outstanding requests from a Request for Production of financial records and tardy responses to four subpoenas duces tecum that had been served on the Respondent as agent for certain entities and wherein

the trial court had previously compelled compliance by a date certain. This motion formed the impetus for the trial court to enter an Order to Show Cause.[4]

Respondent has admitted that prior to his knowledge of the Order to Show Cause prior to this time frame he had put his head in the sand relative to anything having to do with the post-dissolution proceeding believing that his partner had it covered.

On the Friday prior to the scheduled September 15, 2014 hearing on the Order to Show Cause and just after normal business hours, Fellows advised the Respondent that there was a contempt hearing the following Monday. The Respondent knew that he had a client scheduled to commence trial that Monday in in Miami-Dade County (the hearing was in Broward County) and had other court matters to attend to that morning also in Miami-Dade County. The Respondent called Gudger to see if the hearing could get rescheduled, but she was disinclined to help, and Fellows agreed that he would attend and advise the Court of these conflicts and try and get the matter rescheduled.

During his testimony on this point, the Respondent recognized that he had a Hobson's choice – attend the Rule to Show Cause hearing to protect himself from further harm, but subject more than one client to potential harm by not appearing in

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[4] Each of these issues were discussed in detail by the Respondent at trial (TT213-224) and his later attorney, Brown, also explained how each of these matters were resolved or abandoned by Gudger or her counsel. TT148-152.

court on their behalf. He chose to attend to his client matters with the hope that Mr. Fellows would be able to reschedule the hearing, which did not occur, and a Writ of Bodily Attachment was issued. TFB 16. When he was advised of this fact

Upon being informed of the Writ of Bodily Attachment, the Respondent retained two attorneys, a criminal defense attorney to resolve the contempt order and writ and a second counsel, Brown, to correct the discovery deficiencies.

Prior to the scheduled October 2, 2014 hearing on the contempt issue, Brown endeavored to get the discovery completed and submitted as well as to respond to any prior discovery orders. The hearing was held on October 2, 2014 and the Respondent appeared; he personally apologized to the trial court and Brown advised the trial court as to his efforts at compliance. An Order Dissolving the Writ of Bodily Attachment was entered on October 2, 2014. Resp. Ex. 1. Shortly thereafter, Judge Cohen, the original trial judge on this matter, granted a Motion to Disqualify himself and the case was assigned to a new judge. Brown's testimony at the final hearing was that after Gudger's prior counsel withdrew and after his appearance that the discovery issues were either resolved or abandoned by the other side. TT148-152.

D. Alleged Rule Violations

The Report of Referee finds the Respondent guilty of all but one rule (R. Regulating Fla Bar 4-3.3(a)(2) plead by the Bar and the Respondent respectfully

contends that the conduct referenced above does not provide clear and convincing evidence of a violation of several of the notated rules.

In relation to the notarization issue, the Respondent must concede that his failure to act to stop Francis from submitting the mortgage modification agreement with a notarized signature he knew not to be his former spouse's, even if he thought it was authorized, can form the basis of a violation of R. Regulating Fla. Bar 3-4.3. We respectfully contend that there is no violation of R. Regulating Fla. Bar 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.] because this rule has an element of *scienter* and the Respondent certainly did not intend to mislead anyone as, at the time of the submission of the agreement, he believed his good friend, Francis, had in fact secured Gudger's consent to his execution of her signature.

At page 14 of the Report of Referee there is a finding that the Respondent violated R. Regulating Fla. Bar 4-3.3 (with no reference to a subsection) and does not include said rule in the restated violations on pages 25 and 26 of the Report, but at page 26 of the Report, he specifically finds the Respondent not guilty of violating R. Regulating Fla. Bar 4-3.3 (a)(2) [A lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.]. The argument made at page 14 of the Report is that the Respondent had an affirmative obligation to advise the trial court

in the foreclosure case about the tainted signature on the Modifcation Agreement. The Respondent respectfully disagrees in that he believed at the time the case was filed that his friend was truthful and had authorization to sign the document and that Gudger certainly raised the signature issue in many venues, inclusive with the lender.

The Report of Referee also discusses several rules concerning the discovery issues and they are:

> 1. R. Regulating Fla. Bar 4-3.4(a) [A lawyer must not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.].
>
> 2. R. Regulating Fla. Bar 4-3.4(c) [A lawyer must not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.].
>
> 3. R. Regulating Fla. Bar 4-3.4(d) [A lawyer must not in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party.].

Putting aside for the moment the contempt aspect of the discovery dispute, the Respondent certainly was late in complying with discovery, whether it was his fault, his lawyers fault or a combination thereof, he was late but that all of these various discovery issues were ultimately either responded to or were abandoned by

the other side and therefore compliance became unnecessary. See TT148-152. Further, regarding the contempt proceeding the Respondent was able to have the Writ of Bodily Attachment dissolved and he was not held in contempt for the delay in discovery responses.

As to R. Regulating Fla. Bar 4-3.4(a), as well as the other referenced rules, the Respondent during significant portions of time, especially when the discovery problem reached its hiatus, was represented by counsel. In particular, the Respondent did not (1) "unlawfully obstruct another party's access to evidence" or (2) "unlawfully alter, destroy, or conceal a document or other material" as all discovery is now current. See TT148-152.

As to R. Regulating Fla. Bar 4-3.4(c) the Respondent did not "knowingly disobey an obligation under the rules of a tribunal." The ultimate proof of that is the withdrawal of the Writ of Bodily Attachment and the lack of a contempt citation and to the extent that the Respondent, a represented party for most of the affected time frame, allowed his lawyer to deal with discovery process until he found out the problems that had developed.

Lastly, as to R. Regulating Fla. Bar 4-3.4(d), the Respondent did not "intentionally fail to comply with a legally proper discovery request" and at most he was seriously negligent but if he was unaware that the matter had reached the crescendo of a contempt proceeding he cannot be said to have intentionally ignored

his discovery obligations.

Regarding R. Regulating Fla. Bar 4-8.4(d) [conduct prejudicial to the administration of justice], there is no element of *scienter* and therefore the Respondent must concede a violation if this rule as it relates to these discovery issues and timely compliance with court orders.

E. Factual Summation.

The Respondent understands that the Referee (and the Bar) attempt to paint a bleak picture of the Respondent during one of the most difficult and trying times for any parent of young children – a divorce. While his actions were not demonstrative of a clear-thinking individual, they do not evidence a knowing and intentional violation of the Rules Regulating The Florida Bar.

II. A ONE YEAR SUSPENSION IS AN INAPPROPRIATE SANCTION UNDER THE FACTS OF THIS CASE FOR A FOURTEEN YEAR LAWYER, WHO HAS NEVER PREVIOUSLY BEEN DISCIPLINED.

This Court has consistently held that it has a broad discretion when reviewing a sanction recommendation, because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997). The Court should exercise its discretion in finding the Referee's proposed sanctions legally unsupported and too harsh under the facts of this case.

This Court in *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), stated that in selecting an appropriate discipline certain fundamental issues must be addressed. They are: (1) Fairness to both the public and the accused; (2) sufficient harshness in the sanction to punish the violation and encourage reformation; and (3) the severity must be appropriate to function as deterrent to others who might be tempted to engage in similar misconduct. *See also* The Standards for Imposing Lawyer Sanctions, Standard 1.1. The Referee's sanction proposal of a one-year suspension does not meet these criteria. Nor does the Bar's request for an eighteen-month suspension.

Prior to reaching any decision on the appropriate level of sanction it is always important to consider the aggravating and mitigating factors (all references are to the Florida Standards for Imposing Lawyer Sanctions) that might be found in a case.

The Referee found several aggravating factors and the Respondent must concede the following three factors based upon the evidence presented at the final hearing:

> Standard 9.22 (c) pattern of misconduct.
>
> Standard 9.22 (d) multiple offenses.
>
> Standard 9.22 (i) substantial experience in the practice of law.

However, the Respondent refutes the remaining aggravating factors found by the Referee. While we understand the deference given to a Referee's factual findings, the Respondent verily believes the evidence in this case demonstrates at most negligent activity and not intentional efforts to mislead anyone. While the Referee has specifically rejected the Respondent's explanation of his conversation with his ex-wife, he makes no reference to the corroboration of this conversation by one of the Respondent's witnesses, Adrian Nunez, Esquire, who discussed his conversation with Francis where he confirmed the conversation and the permission given to sign the document. TT128.

The Referee also found Gudger to be a vulnerable victim [Standard 9.22(h)]. However, the testimony adduced at trial was that Gudger was a practicing attorney and a litigator – certainly not the classic vulnerable victim which is usually reserved to someone with a particular difficulty or position (a senior citizen, someone under a disability or perhaps an immigrant who was removed from the country).

The Referee also reached back into the divorce litigation to take issue with the amount of income that the Respondent claimed to have earned during some of his testimony before the trial judge. Mr. Brown, the Respondent's second divorce attorney was asked if he believed that the Respondent was hiding income and he unequivocally denied same. TT159-160.

The Referee found three significant mitigating factors. First and foremost, he agreed that there was an absence of a prior disciplinary record. Standard 9.32(a). ROR31. The Referee also found Standard 9.32(c) [personal or emotional problems] due to the personal and emotional devastation from his divorce as documented by two of the Respondent's witnesses. ROR3. Lastly, he found Standard 9.32(g) (otherwise good character and reputation).

The parties have submitted different arguments on how this case should be resolved. Respectfully, the following Standards from the Florida Standards for Imposing Lawyer Sanctions:

> 6.2 ABUSE OF THE LEGAL PROCESS Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:
>
> 6.23 Public reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding

The parties presented similar precedent to the Referee and do so again in their Brief, but each side takes a different approach to how this precedent is applicable herein. The majority of the disciplinary cases presented by the Bar are more severe than the conduct found herein. For example, in *The Florida Bar v.*

Whitney, 132 So. 2d 1095 (Fla. 2013), a lawyer was suspended for one year after being found guilty of neglect of a client matter (and misconduct related to the client's representation) and for discovery abuses in his personal defense of a malpractice action, which included failing to timely respond to requests for production, failure to attend depositions and providing false answers during his own deposition. There are no client based complaints herein and there were no false discovery answers in this case (at most there were no answers).

The conduct in *The Florida Bar v. Rosenberg*, 169 So. 3d 1155 (Fla. 2015), is also dissimilar. In *Rosenberg*, the lawyer, while representing a client, aggressively litigated certain discovery issues and was repeatedly told that his position *vis-a-vis* the objections he was raising was incorrect and despite this fact he kept raising the same objection over and over without complying with the discovery request. After a sixth motion to compel on the same issue was resolved the Court issued a Rule to Show Cause resulting in a finding that the lawyer intentionally acted in bad faith and included a comment that the lawyer was "incapable of discerning when to yield a legally unsupportable position." *Id.* at 158. The Court went on to state that:

> For more than a year, Rosenberg refused to comply with numerous circuit orders requiring him to produce documents. He also continued to raise objections to production that had already been considered and ruled on by the circuit court. *Id.* at 1152.

Lastly, this Court considered the following passage from the Report of Referee in *Rosenberg*:

> The most egregious bad faith action which Mr. Rosenberg committed was re-stating in his June 28 written response the same objections which this Court already had overruled, without Mr. Rosenberg taking any further action to comply with Plaintiffs' requests for production or with this Court's orders. Mr. Rosenberg's explanation that he interpreted rule 1.350 as saying that he merely should repeat the overruled objections "as a zealous advocate" ... simply defies common sense. Such flouting of this Court's orders is the very definition of bad faith conduct. This Court finds Mr. Rosenberg to be an intelligent person, and this Court does not believe that the gravity of his repeated misconduct can be accepted as merely an error in judgment or ignorance of the rules. *Id.* at 1158.

In a more recent case *The Florida Bar v. Bischoff*, 212 So. 3rd 312 (Fla. 2017), the Court gave a detailed recitation of the facts which included the following comments:

> Following the December 2012 order, in early 2013, the defendants filed a motion to dismiss asserting that Bischoff either did not provide discovery materials by January 7, or that the material he did provide was incomplete or insufficient. The motion also asserted that Bischoff was proposing to schedule the client's deposition after the January 31 deadline. Ultimately, the client did sit for her deposition on January 31, 2013. However, she refused to answer any questions submitted by two of the three defendants. In a telephonic hearing, Magistrate Judge Otazo–Reyes clarified that her order of December 21, 2012, required the client to appear for questioning by all three defendants. Nonetheless, the client, counseled by Bischoff, continued to refuse

> questioning. Several days after the deposition concluded, Bischoff filed an objection to the magistrate judge's telephonic ruling. Judge Scola overruled the objection, finding that Bischoff's arguments, and his persistence in claiming that Magistrate Judge Otazo–Reyes's own order did not mean what she said it meant, showed a profound lack of respect for the court.
>
> On February 12, 2013, Magistrate Judge Otazo–Reyes held a second discovery hearing. During this hearing, the magistrate judge found, among other things: that there was no justification for the client's refusal to appear for her deposition in November 2012; that Bischoff and the client did not fully comply with the magistrate judge's order of December 21, 2012, setting discovery deadlines; that Bischoff's November 19, 2012, notice of serving responses to discovery, when in fact no discovery responses were provided, was misleading; and that Bischoff and the client had showed flagrant disrespect for the court. Based on these findings, Magistrate Judge Otazo–Reyes directed the defendants to submit affidavits documenting their attorneys' fees and costs. She allowed Bischoff and the client one week to respond to the affidavits; however, Bischoff and the client did not respond within the time allowed. *Id.* at 319.

In comparing *Bischoff* and *Rosenberg* (both suspended for one year) to the case at hand you see active resistance to comply with discovery orders coupled with bad faith and dishonest conduct and in the facts herein as it relates to discovery, the Respondent (and his counsel) while nonresponsive did not engage in fraudulent discovery practices.

The Florida Bar also point to two 91-day suspension cases that also contain conduct more severe than that found herein. The first, *The Florida Bar v. Baker*,

810 So. 2d 876 (Fla. 2002), contains some similar elements to this case because the lawyer in *Baker* forged his wife's signature on several real estate documents to affect the sale of a jointly owned home; had his secretary notarize these forgeries and then submitted the forged documents to the closing agent to complete the sale. However, in this case it was a third party who signed the document and caused it to be notarized and the Respondent herein believed his ex-wife had authorized this action. Further, the Respondent received the home in his divorce and he was not trying to deprive his ex-spouse of an interest in the home.

Secondarily, the Bar cites to *The Florida Bar v. Cibula*, 725 So. 2d 360 (Fla. 1988), a 91-day suspension case, wherein a lawyer, in his own divorce proceeding, lied under oath at hearings regarding his income. That did not occur in this case. The Referee in this case made the following specific finding:

> The Former Husband misrepresented his income in 1991 in order to induce the Former Wife to agree to modify the alimony. The true facts would have justified the modification in 1991. The Court finds that the Former Wife never really believed the Former Husband in any event. The Former Husband's misrepresentations have resulted in additional time and expense in attorney's fees for which he should be held responsible. *Id.* at 361-362.

There is no such finding in this case. At most you have testimony in the Bar hearing by opposing counsel stating that he believed the income was being understated and there is no underlying judicial finding by the divorce trial court were there was a full record developed. In fact, the hearing transcript (TFB Ex. 8)

introduced into evidence clearly shows that the Respondent, because the hearing did not finish, never presented his side of the case.

As is noted above this Court, in *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), provided criteria to select an appropriate discipline [Fairness to both the public and the accused; sufficient harshness in the sanction to punish the violation and encourage reformation; and the severity must be appropriate to function as deterrent to others]. In balancing all of these concerns, including the fact that these actions arise from personal conduct clouded by a matrimonial dispute and not while representing a client by a lawyer who has never previously been disciplined that a suspension less than that found in *Cibula* is warranted.

CONCLUSION

The Respondent strongly believes that the evidence in this case does not support a guilty finding on many of these charges and that if the Court approves some or all of the factual findings of the Referee these findings do not support the imposition of a rehabilitative suspension.

WHEREFORE the Respondent, MADSEN MARCELLUS, JR., respectfully requests that he be found not guilty, that the Referee's sanction recommendations be rejected and that any suspension that is order be for less than 91 days and that the Court grant any other relief that is deemed reasonable and just.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via electronic mail only on this 16th day of November, 2017 to Jennifer Falcone, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131 (jfalcone@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 brief forwarded to the Court has been scanned and found to be free of viruses, by ESET Nod 32.

Respectfully submitted,

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