IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MADSEN MARCELLUS JR.,

Respondent.

_____/

Supreme Court Case
No. SC16-1773

The Florida Bar File
No. 2015-70,289 (11G)

INITIAL BRIEF OF THE FLORIDA BAR

Jennifer R. Falcone, Bar Counsel
The Florida Bar
Miami Branch Office
444 Brickell Avenue
Rivergate Plaza, Suite M-100
Miami, Florida 33131-2404
(305) 377-4445
Florida Bar No. 624284
jfalcone@flabar.org

John F. Harkness, Jr.
Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390
jharkness@flabar.org

Adria E. Quintela, Staff Counsel
The Florida Bar
Lakeshore Plaza II, Suite 130
1300 Concord Terrace
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 897000
aquintel@flabar.org

Joshua E. Doyle
Executive Director Designate
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 25902
jdoyle@flabar.org

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SYMBOLS AND REFERENCES

For the purpose of this brief, Madsen Marcellus, Jr. may be referred to as "Respondent". The Florida Bar may be referred to as "The Florida Bar" or the "Bar". The referee may be referred to as the "Referee". Additionally, the Rules Regulating the Florida Bar may be referred to as the "Rules" and the Florida Standards for Imposing Lawyer Sanctions may be referred to as the "Standards".

References to the Report of Referee will be by the symbol "ROR" followed by the corresponding page number(s). References to the transcript of the final hearing held on April 24 and 25, 2017 will be by the symbol "TR." followed by the corresponding page number(s).

References to The Florida Bar's exhibits will be by TFB, followed by the exhibit number. References to Respondent's exhibits will be by R, followed by the exhibit number.

STATEMENT OF THE CASE AND OF THE FACTS

The Complainant, The Florida Bar, is seeking review of the sanction set forth in the Report of Referee, which recommends that Respondent be suspended for a period of one year. This Court's prior jurisprudence, and indeed the specific findings of the Referee in the instant case, require that a more severe sanction be imposed for Respondent's misconduct.

At the Final Hearing in this matter, the Bar presented documentary and testimonial evidence from three witnesses. The majority of the Bar's exhibits were admitted without objection prior to the parties opening statements. (TR. 9-11, 26, 37). The Florida Bar's exhibits 9, 14, and 20, were objected to, and were later either admitted in redacted form, and/or were admitted over Respondent's objection. (TR. 35-36, 41-46, 76-77). At the Final Hearing, Respondent testified in his own behalf, and also presented testimonial evidence from three witnesses.

Respondent's misconduct arose in his own divorce and post-dissolution proceedings, wherein he participated in the fraudulent execution and submission of a loan modification agreement; failed to obey court orders; obstructed the proceedings; failed to comply with discovery obligations; and made misrepresentations and/or lacked candor in his representations to the tribunal.

Moreover, Respondent's misconduct continued into the present disciplinary action, wherein the Referee made repeated findings that Respondent's sworn testimony was lacking in credibility, false, and/or wholly fabricated. (See ie., ROR 5, 9, 13-14, 15, 21, 24, 30, 31). Accordingly, Respondent's testimony was rejected by the Referee.

The evidence presented at the Final Hearing revealed:

Respondent was married to Ms. Kellie Peterson Gudger (hereinafter Gudger) for approximately eight years, and the couple had three minor children together. (TR. 52, 132). The couple separated in October 2008. (TR. 18). At the time of the separation, the couple had been residing in the marital home located at 1110 NW 166th Ave., in Pembroke Pines, Florida. (TR. 18, 54). Respondent vacated the marital home when the couple separated. (TR. 19, 54). In January 2009, the decision was made to sell the residence, as neither party could afford the home on their own salary. (TR.19). The couple sought and received approval to sell the home as a short sale. (TR. 19-20).

The marital home was under contract and scheduled to close in April, 2009. (TR. 20). The closing was to occur on a Tuesday. (TR. 20). On the Sunday prior to the closing, Ms. Gudger vacated the residence and removed all personal property.

(TR. 20-21). The closing was to occur by FedEx. (TR. 21). Ms. Gudger executed and returned all of her closing documents as instructed. (TR. 21). By contrast, Respondent refused to sign the paperwork to sell the home, and instead moved back into the residence himself prior to the scheduled closing. (TR. 21-22).

Ms. Gudger filed for divorce in April, 2009, which matter was styled *In Re: The Marriage of Kellie Peterson f/k/a Kellie P. Marcellus, v. Madsen Marcellus,* Case No. 09-0511-FMCE-37. (TR. 22). By the time the matter proceeded to trial in November 2009, the home was placed into foreclosure proceedings. (TR. 23). The circumstances concerning the aborted sale of the home, and the foreclosure were presented to the trial court. (TR. 23). At that hearing, the court ordered Respondent to either refinance the home in order to remove Ms. Gudger's name from the mortgage, or to place the property up for sale within thirty days of that hearing. (TR. 23; TFB Ex.1).

Respondent failed to comply with the court's Order concerning the marital property. (TR. 24; TFB Ex 18, para 6 and 12). He neither refinanced it out of Ms. Gudger's name, nor did he place the home up for sale. (TR. 24, 243-44). Indeed, up through the date of the Final Hearing in the instant disciplinary action, Respondent still was not in compliance with the court's Order concerning the

marital home, where he still resides with his current wife, despite the fact the home remains in foreclosure and he makes no payments on same. (TR. 247; TFB Ex 14 at 28-29; ROR 10, 23).

Ms. Gudger did not learn that Respondent failed to comply with the Order until she was served with foreclosure papers in 2011. (TR. 24; TFB Composite Ex 2). At that time, Ms. Gudger received for the first time a copy of a fraudulent mortgage modification agreement, submitted by Respondent to the bank in March 2010, which purported to bear Ms. Gudger's signature. (TR. 26-27; TFB Ex. 2C).

Ms. Gudger hired an attorney to represent her in the foreclosure action. (TR. 27). Her lawyer contacted the bank's attorney and informed him that she had not agreed to the loan modification agreement, nor did she sign same. (TR. 28). The signature on the document was not hers. Ms. Gudger filed an affidavit of forgery, and also a complaint against the notary who notarized her forged signature. (TR. 28; TFB Ex. 3, 4). During the ensuing investigation, the notary, Mr. Kurt Francis, who is a lifelong friend of Respondent, admitted that Ms. Gudger was not present and did not sign the document in his presence at the time he notarized her signature. (TR. 28-29, 125; TFB Ex. 4). Mr. Francis was required to relinquish his notary commission as a result of this incident. (TFB Ex. 4). At the bank's request, Ms.

Gudger quitclaimed her interest in the home to Respondent. (TR. 27, 29). The bank ultimately agreed to absolve Ms. Gudger of financial responsibility in the foreclosure action, but refused to remove her as a defendant in that case. (TR. 29).

As a result of the forged loan modification agreement, as well as Respondent's non-compliance with other provisions of the dissolution order, Ms. Gudger hired counsel and filed a motion to enforce the court's prior dissolution Order. (TR. 30, 72-73, TFB Ex 8). In addition to Respondent's failure to comply with the Order concerning the marital property, Respondent had also failed to comply with the child support provisions of the Order. (TR. 33, 72-73).

Following initiation of the post dissolution proceedings, on or about June 5, 2013, Ms. Gudger's counsel, Mr. Christian Rodriguez and Mr. Israel Reyes, filed requests for production, requests for admissions, and interrogatories. (TR. 36, 73; TFB Ex 8). These requests were served on Respondent at his record bar address, his place of business, as well as at his home address and by email. (TR 72-73). Respondent confirmed these addresses were correct at a hearing held on July 24, 2013. (TR 73, 77-78; TFB Ex 8). Respondent, who was then *pro se*, did not respond to either the pleadings or the discovery requests within the time provided by the Rules of Civil Procedure. (TR. 73, TFB Ex 8). Consequently, at the July 24,

2013 hearing, the court ordered Respondent to file responses to all of the discovery requested within ten days of that hearing. (TR 73-74; TFB Ex 8 at 16-17).

Despite the specific order of the court, Respondent did not provide any discovery responses within ten days, nor at any time within the ensuing year of litigation. (TR 74; TFB Ex 10, 11, 18). Thereafter, Mr. Rodriguez filed the first motion to compel in the post dissolution proceedings. (TR 74). On August 12, 2013, the court granted the motion to compel, and ordered Respondent to pay opposing counsel's fees within thirty days of the order. (TR 74, TFB Ex 10, 11). Despite the specific order of the court, Respondent did not provide the discovery responses, nor did he pay the sanction within thirty days. As of the date of the Final Hearing in the instant disciplinary matter, Respondent remained in violation thereof. (TR 70, 84, 93, 105).

Mr. Peter Fellows, Respondent's law partner, entered an appearance in the case. (TFB Ex 7). Notwithstanding the appearance of counsel, Respondent's pattern of failing to comply with court orders, and obstructing the discovery process, continued unabated throughout the ensuing year. Mr. Rodriguez and Mr. Reyes, were required to file multiple motions to compel and for sanctions. (TFB ex 11, 12, 18). In addition to the discovery requests discussed *supra*, Mr. Rodriguez

and Mr. Reyes served six subpoenas directly on Respondent, as either officer or agent of each of his known business entities, none of which were complied with. (TR 78-80, 83, 88). The court entered additional orders compelling responses to discovery requests, and production of the subpoenaed documents, on September 24, 2013, July 1, 2014, and September 11, 2014. (TFB Ex 10, 11, and 13). The third motion to compel set forth in great detail the procedural history of the case, highlighted Respondent's own obstructive conduct, and detailed all of the orders from which Respondent was in violation for non-compliance. (TR. 75-76; TFB Ex 12). In granting the third motion to compel, the court entered an order which provided for a daily fine of $50.00 for each day until such time as Respondent provided proof of compliance. (TFB Ex 13). Respondent did not comply with this order, as he did not provide proof of compliance within the time frame mandated by the court, nor at any time thereafter. (TFB Ex 13, 15, 18).

Ms. Gudger's counsel kept her informed of the proceedings, and the difficulty counsel was encountering in obtaining any substantive responses to discovery requests, despite numerous motions to compel being granted by the court. (TR. 36; see also TFB Ex 11, 18). Accordingly, Ms. Gudger made contemporaneous attempts to speak to Respondent and obtain his cooperation with

the discovery process. (TR. 36-38, 80). Respondent told Ms. Gudger that he simply was not going to comply with his discovery obligations in the case. (TR. 38; TFB Ex 6). With respect to the court's orders concerning his child support obligations, as well as his discovery obligations, Respondent indicated he did not care what the court had to say, that he would not do something just because the court said so. He stated that he did not care if they took his bar license or put him in jail, he was not going to comply. (TR. 38-41, 80, 85-86; see also TFB Ex's 5, 6, and 17 at pp 83, 86, 87-89, 93). Respondent sent contemporaneous text messages to Ms. Gudger confirming his stance. (TR 39-40, 80, 85; TFB Ex. 5, 6, 17).

After speaking with his client, and reviewing Respondent's text messages, it became apparent to Mr. Rodriguez that Respondent did not intend to ever comply with the court's orders. (TR 80). Accordingly, Mr. Rodriguez filed a Motion for a Rule to Show Cause against Respondent. (TR 80). The court issued an Order to Show Cause, and ordered Respondent to personally appear before the court on September 15, 2014. (TR 81; TFB Ex 15).

On the Sunday night before the hearing on the Order to Show Cause, Respondent called Ms. Gudger and told her that his lawyer had just informed him of the hearing on the Thursday or Friday before, and indicated that he had to be in

court in Miami on Monday, at the same time he was supposed to be at the hearing on the Order to Show Cause. (TR 49). Respondent requested that she ask her lawyers to reschedule the hearing or to take some other action to alleviate his need to attend. (TR 49-50). Ms. Gudger informed Respondent that he had been ordered by the court to attend and she had no authority to alter or modify that. (TR 63, 81).

Respondent did not notify the court of the conflict himself, and instead simply failed to appear. (TR 50). Respondent's lawyer appeared on his behalf, however the court issued a writ of bodily attachment. (TR 50, 95; TFB Ex 16). Rather than turn himself in, Respondent took evasive measures to ensure that he would not be arrested on same. (TR 50). He exchanged vehicles with his wife so that he would not be found driving the car identified in the writ, and he told his children and Ms. Gudger that he would not be attending any of the children's activities for fear of being arrested. (TR 50-51, 82).

Respondent did appear, along with new counsel Mr. Christopher Brown, at the next scheduled hearing on the substantive issues in the case. (TR 64, 82). At that time, he told the trial court that his previous attorney, who was his own law partner, did not tell him about the order to show cause until the Friday evening preceding the hearing. (TFB Ex 17, p. 12-14). However, despite being aware of the

hearing, Respondent elected not to appear, but instead chose to attend hearings at another court house. (TFB Ex 17, p. 12-13). While the trial court made clear its profound skepticism of the proffered explanation, the court chose to go forward with the scheduled proceedings, rather than to enforce the writ of bodily attachment, due to considerations of judicial economy. (TFB Ex 17, p. 10-16).

On May 21, 2015, upon completion of the post dissolution proceedings, the court issued an Order granting in part Ms. Gudger's petition for civil contempt and enforcement of final order. (TFB Ex 18). The court's Order required Respondent to pay Ms. Gudger a sanction in the amount of $2500.00 for her attorney's fees in the foreclosure action. (TR 69-70; TFB Ex. 18). As of the time of the instant disciplinary Final Hearing, Respondent had not complied with the court's order and had not paid the court ordered sanction to Ms. Gudger. (TR 70).

Additionally, throughout the proceeding, in the numerous orders to compel and in the Order granting in part civil contempt, the court awarded sanctions, fees and costs to Ms. Gudger's counsel. (TR 103, 118; TFB Ex 10, 11, 12, 13, 15, 18). None of the court awarded sanctions were paid, and Respondent remains in violation of the court's orders, as those fees, costs and sanctions remain outstanding. (TR 70, 84, 93, 105, 113).

In addition to his blatant violation of the court's express orders, his systematic obstruction of the legal proceedings, and his participation in presenting a fraudulent mortgage modification agreement to the bank, Respondent was also less than candid with the court in the underlying proceedings. For instance, in his efforts to avoid responsibility for child support, Respondent attempted to convince the court that he made only approximately $13,000.00 a year as a partner in a law firm. (TR 104, TFB Ex 14 at 27). The deception inherent in Respondent's testimony was apparent, especially where there were numerous cash expenditures, including large amounts of money being spent at strip clubs and in locations like Las Vegas. (TR 104; TFB Ex 14).

The trial judge expressed his profound disbelief of this testimony, stating he may have been born at night, but not last night. (TR 105; TFB Ex 14 at 55-56). The Referee found that Respondent's testimony in the underlying proceeding, "was evasive and deliberately misleading concerning his finances for purposes of avoiding child support. At best, he was engaged in fraudulent conduct by remaining deliberately underemployed." (ROR 30, discussing aggravating factors). Ultimately, the court below imputed income to Respondent based on prior record evidence. (TFB Ex 18).

As a result of Respondent's misconduct throughout the post dissolution proceedings, Circuit Court Judge Dale Cohen referred this matter to the Bar. (TFB Ex. 11). Respondent has provided multiple contradictory responses to the instant grievance and subsequent investigation. For instance, when Respondent was questioned by the Investigating Member regarding the allegations, Respondent stated that his failure to comply with his discovery obligations occurred because he had been negotiating directly with Ms. Gudger regarding the discovery, and he thought they had everything worked out, but then ultimately the issues were not resolved. (TFB Ex 20, p 4-5). By contrast, in his written response to the Grievance Committee and the Investigating Member's Report, Respondent asserted that his discovery obligations were not complied with because of miscommunications with his lawyer, who also happened to be his law partner. Respondent claimed that each thought the other was taking care of the responses. (TFB Ex 19). At the Final Hearing in the instant disciplinary case, Respondent provided yet another explanation, casting all blame on his lawyer, and indicating he put his head in the sand, and was not kept informed of what was happening in the case. (TR. 215-223).

Each of Respondent's contradictory excuses for his discovery violations were refuted at the Final Hearing, by direct testimony and/or the documentary evidence.

As to the first excuse that the discovery violations were due to failed negotiations with his former spouse, Ms. Gudger testified that she had never engaged in any such negotiations with Respondent. (TR 47-48). As to the second excuse contained in Respondent's written response to the Bar, that the failure to provide discovery was the result of miscommunications with his lawyer, Ms. Gudger testified that, based on her contemporaneous communications with Respondent, same was false. (TR 38). During her conversations with Respondent about the motions to compel, Respondent never indicated that he was unaware of the outstanding discovery, or the motions to compel; but rather Respondent indicated to her orally and in writing that he simply was not going to comply. (TR. 38-41, 80, 85-86; see also TFB Ex's 5, 6, and 17 at pp 83, 86, 87-89, 93).

At the Final Hearing in this cause, Respondent presented evidence from three witnesses: a friend and business associate of Respondent, Mr. Adrian Nunez; his successor counsel in the underlying proceedings, Mr. Christopher Brown; and Mr. Lonnie Richardson, a friend and colleague of Respondent. Respondent also testified in his own behalf.

Mr. Nunez testified that early on his career Respondent was a mentor to him, and then they became close friends. (TR 121-123). Now they have a P.A. together.

(TR 122). They speak daily, and assist each other with cases. (TR 122-123). When Respondent first started getting divorced, it affected him badly. (TR 124). He lost weight, withdrew, became depressed, and needed more assistance with cases. (TR 124). Mr. Nunez believes Respondent is a good lawyer, that he is a man of integrity and he is honest. (TR 126-127). He believes Respondent is dedicated to his children. (TR 127). Mr. Nunez remembered a conversation in which Respondent told him that Ms. Gudger gave Kurt Francis permission to sign her name to the loan modification document. (TR 128).

Mr. Christopher Brown testified that the case was in disarray when he entered his appearance. (TR 143). In Mr. Brown's opinion, the court had entered discovery orders requiring production of irrelevant information, opposing counsel was overreaching and too aggressive, and Respondent was not required to appear personally at the Hearing on the Order to Show Cause and a writ should not have been issued. (TR 143-146). Mr. Brown did not believe Respondent took evasive action to avoid being arrested on the writ, and believed Respondent to be fully cooperative. (TR 147). Respondent told Mr. Brown that his former wife gave him permission to sign her name to the mortgage modification. (TR. 159).

Mr. Lonnie Richardson testified that he is a very close friend of Respondent. (TR 200). Respondent is a talented lawyer. (TR 201). He is an honest, hard working professional. (TR 202). Respondent was a mess during the divorce. (TR 204).

Respondent also testified in his own defense at the Final Hearing in the instant disciplinary action. The Referee found Respondent's testimony to be false, lacking in credibility, and in some cases wholly fabricated. (See ie., ROR 5, 9, 13-14, 15, 21, 24, 30, 31).

At the Final Hearing, Respondent testified that after the divorce proceedings were initiated, he did not vacate the marital home, but rather the couple still resided in the home together during the initiation of the proceedings. (TR 169). He testified that Ms. Gudger is the one who ultimately vacated the residence, and that he never moved out of the house. (TR 170, 171).

The Referee found Respondent's testimony on this point to be not credible. (ROR 5). The Referee based his finding on Ms. Gudger's contradictory testimony, as well as the underlying court docket. Ms. Gudger's testimony made clear that the divorce proceedings were not amicable. She stated that Respondent was the one to actually vacate the residence. (TR 19). The Referee found that this testimony was

corroborated by the underlying court docket, wherein Ms. Gudger petitioned the court on an emergency basis on two occasions for exclusive use of the marital home and a stay away order, which petition was granted. (ROR 5, TFB Ex 7).

Respondent admitted he had an obligation to remove Ms. Gudger's name from the mortgage. (TR 173). He stated that he tried to get the mortgage modified. (TR 174, 176-177). He asked Ms. Gudger to sign the modification (TR 176-177), but she refused to do so (TR179). According to Respondent, Mr. Kurt Francis then called Ms. Gudger, and she gave him permission to sign her name on the modification agreement. (TR 179-180). Mr. Francis signed Ms. Gudger's name, notarized the document, and gave it back to Respondent. (TR 180). Respondent indicates that he then presented the document to the bank (TR 180), but that the bank declined to modify the mortgage (TR 183).

By contrast, Ms. Gudger vehemently denied Respondent's assertions, and indicated that she never did, and never would, consent to her signature being placed on the mortgage modification document. (TR 41, 58; TFB Ex 3, 4). The Referee found Respondent's assertions in this regard, "[o]n the whole, … not to be credible," and specifically rejected same. (ROR 9, 13-14). Similarly, the Referee rejected Respondent's "incredible" assertion that the bank did not actually accept

the mortgage modification. (ROR 12-13). It is apparent from the pleadings and documents filed in the foreclosure action that the mortgage was modified pursuant to the fraudulent modification agreement, and that the bank and court did in fact rely upon the fraudulent modification agreement to Ms. Gudger's prejudice. (ROR 12-13).

Respondent also testified that, during the relevant time period his whole world crashed (TR 171), that he was like a walking zombie (TR 172), and that he never would have allowed the mortgage modification to be signed outside Ms. Gudger's presence if he had been in his right mind (TR 182). The Referee found this testimony to be lacking in credibly and outright rejected same. (ROR 15). The mortgage modification was executed and notarized on March 31, 2010, just a few weeks before the Final Order of Dissolution, and Respondent was remarried within a few weeks of the Final Order of Dissolution. (TR. 64; TFB Comp Ex 2). Accordingly, the Referee found it not credible that Respondent was simultaneously out of his mind with grief over the divorce, while at the same time wooing and making plans to marry his current wife. (ROR 15-16).

Respondent testified that he does not know if any depositions occurred in the case, does not know anything about what happened with the subpoenas, and simply

gave all the subpoenas he received to his lawyer, Peter Fellows. (TR. 215-221). Mr. Fellows did not tell him when a document would come in on the case. (TR 222-223). Respondent stated that he buried his head in the sand, he didn't want to know anything about the case. (TR 223). Respondent also testified that Mr. Fellows did not inform him of the Rule to show Cause until they were leaving the office on Friday night. (TR 224). He admitted he was aware that he could be arrested for failing to appear on a Rule to Show Cause. (TR 225, 249). He went to Miami because he had a matter set for trial there, and he did not think it would be right to not show up for his client. (TR 225-226). The Referee found Respondent's testimony, indicating his attorney was responsible for the discovery violations, to be inconsistent and not credible. (ROR 21, 23).

Respondent further testified that he was actually in compliance with the various sanctions orders because he gave checks for payment of same to his successor counsel Mr. Brown. (TR 238-39, 240-41, 250, 251-52). Respondent could not recall specifically what payments he had made. (TR 250). Notably, he did not question Mr. Brown about these alleged payments when Mr. Brown testified at the Final Hearing, and he did not provide any documentary evidence in support of same. (TR 252).

The Referee rejected Respondent's testimony concerning the payment of sanctions in this matter. (ROR 24). The Referee weighed Respondent's credibility, which was found to be lacking, against the credibility of Ms. Gudger, Mr. Rodriguez, and former Circuit Court Judge Israel Reyes, all of whom the Referee noted were respected attorneys and officers of the court who had not been impeached in the instant proceedings, and who testified that not a penny of the sanctions had yet been paid. (ROR 24).

On cross-examination by the Bar, Respondent admitted that he never placed the marital home up for sale, nor did he ever try to refinance the home using his current wife's salary and financial information. (TR 243-45). Respondent continues to reside in the marital home with his current wife, and they do not make any payments on the home, which has been in foreclosure since 2011. (TR 247).

Following presentation of all the evidence and the argument of counsel, the Referee made findings that Respondent is guilty of violating Rules 3-4.3, 4-3.4(a)(b)(c) and (d), and 4-8.4(c) and (d), of the Rules Regulating the Florida Bar. (ROR 25-26). In his findings of fact and conclusions of law, the Referee specifically made a finding that Respondent is also in violation of Rule 4-3.3 for his failure to notify the foreclosure court that the mortgage modification was not

executed by Ms. Gudger. (ROR 14-15). Notwithstanding same, the Referee also indicated a finding that Respondent was not in violation of this Rule, Rule 4-3.3(a)(2), which requires disclosure when same is necessary in order to avoid assisting a criminal or fraudulent act by a client. (ROR 26).

The Referee found the following aggravating factors in this case: 9.22(b) a dishonest or selfish motive; 9.22(c) a pattern of misconduct; 9.22(d) multiple offenses; 9.22(f) submission of false statements, false evidence, or other deceptive practices during the disciplinary process; 9.22(h) the vulnerability of the victim; 9.22(i) substantial experience in the practice of law; and 9.22(j) indifference to making restitution. The Referee also cited as an aggravating factor Respondent's fraudulent and deceptive actions in the underlying matter, wherein he attempted to convince the court he earned only $13,000.00 per year as a partner in a law firm, in order to avoid child support. (ROR 30-31).

In mitigation, the Referee found: 9.32(a) the absence of a prior disciplinary history; 9.32(c) personal or emotional problems; and 9.32(g) character or reputation. However, the Referee noted that he gave 9.32(c), personal or emotional problems, only slight consideration. (ROR 31-32).

The Bar urged the Referee to recommend an eighteen (18) month suspension. Respondent argued that Respondent should be found not guilty.

The Referee recommended that Respondent be suspended for a period of one year. The Bar appeals the Report of Referee as to the recommended sanction. The Florida Bar's Initial Brief on Appeal follows.

SUMMARY OF THE ARGUMENT

Based on the significant aggravating factors found by the Referee in the instant case, which far outweighed the minimal mitigation, the Referee's recommendation of a one year suspension in this matter is contrary to the Referee's own specific findings, as well as to existing case law. A suspension of at least eighteen months is required where Respondent participated in the fraudulent execution and submission of a mortgage modification agreement, blatantly violated numerous court orders, obstructed the proceedings, failed to comply with discovery obligations, and made misrepresentations and/or lacked candor in his representations to both the tribunal in the underlying matter, as well as to the Referee in the instant disciplinary proceedings.

ARGUMENT

THE REFEREE'S RECOMMENDED SANCTION OF A ONE YEAR SUSPENSION HAS NO REASONABLE BASIS IN EXISTING CASE LAW, NOR THE FLORIDA STANDARDS FOR IMPOSING LAWYER DISCIPLINE, AND THEREFORE SHOULD NOT BE ACCEPTED BY THIS COURT. THE APPROPRIATE SANCTION IN THIS MATTER IS SUSPENSION FOR A PERIOD OF AT LEAST EIGHTEEN (18) MONTHS.

The Referee in this matter recommended a sanction of a one year suspension from the practice of law. The Referee's recommendation is contrary to his own specific findings contained in the Report of Referee, as well as to existing case law, and is not supported by the Florida Standards for Imposing Lawyer Discipline, and as such should be rejected by this Court. Rather, a suspension for a period of at least eighteen (18) months is the appropriate sanction for Respondent where he participated in the fraudulent execution and submission of a mortgage modification agreement, blatantly violated numerous court orders, obstructed the proceedings, failed to comply with discovery obligations, and made misrepresentations and/or lacked candor in his representations to both the tribunal in the underlying matter, as well as to the Referee in the instant disciplinary proceedings.

"The Supreme Court shall have exclusive jurisdiction to regulate…the discipline of persons admitted [to the practice of law]." Art. V, §15, Fla. Const.

Therefore, "unlike the referee's findings of fact and conclusions as to guilt, the determination of the appropriate discipline is peculiarly in the province of this Court's authority." *The Florida Bar v. O'Connor*, 945 So.2d 1113, 1120 (Fla. 2006).

As ultimately it is this Court's responsibility to order the appropriate punishment, this Court enjoys broad latitude in reviewing a referee's recommendation. *The Florida Bar v. Anderson*, 538 So.2d 852 (Fla. 1989). The Court usually will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Berthiaume*, 78 So.3d 503, 510 (Fla. 2011); *The Florida Bar v. Temmer*, 753 So.2d 555 (Fla. 1999).

Here, the recommended discipline is contrary to the Referee's own specific findings contained in the Report of Referee, as well as to existing case law, and is not supported by the Florida Standards for Imposing Lawyer Discipline, and does not accurately reflect the seriousness of the misconduct at issue. Accordingly, the Referee's recommendation should be rejected.

This matter arose during the pendency of Respondent's own dissolution of marriage action. Respondent engaged in extensive misconduct during the post

dissolution proceedings, resulting in the trial court referring Respondent to the Florida Bar. Thereafter, Respondent continued his pattern of misconduct into the present disciplinary proceedings, wherein the Referee found his testimony to be incredible, false and in some instances wholly fabricated.

The Referee specifically found that Respondent violated numerous orders of the court in the underlying proceedings. This included an order to either refinance the marital home to remove Ms. Gudger's name from the mortgage, or to place the home up for sale within thirty days of the dissolution hearing. Respondent did not comply with this order within the thirty days prescribed, nor at anytime within the ensuing eight years leading up to the instant disciplinary proceedings. Ms. Gudger's credit was negatively affected and she was sued in foreclosure as a result of Respondent's failure to comply with the court's order.

Not content to merely ignore the court's order concerning the marital home, Respondent thereafter exasperated his misconduct by participating in the execution of a fraudulent mortgage modification agreement, purportedly signed by Ms. Gudger, and legally obligating her to the modified mortgage. Such actions not only defied the specific intent of the order of the court, which was to remove Ms. Gudger from any obligation for the property, it also constituted deceitful and fraudulent

conduct by Respondent. Based on these facts, the Referee found Respondent guilty of fabricating evidence that was later used in a legal proceeding.

Significantly, Respondent then compounded his misconduct when he testified falsely, to both the Florida Bar and to the Referee at the final Hearing, concerning the execution of the modification agreement. Respondent asserted Ms. Gudger had agreed to her signature being placed on the document. The Referee found this to be entirely fabricated testimony. The Referee found that Respondent knew Ms. Gudger refused to sign the document, that he knew the signature on the document was not hers, and that it was notarized outside of her presence. As a result, the Referee found that his testimony concerning her alleged agreement to the modification was entirely fabricated.

Despite his knowledge concerning the fraudulent execution of the modification agreement, Respondent submitted same to the bank, who relied on the fraudulent document to modify the mortgage. Ms. Gudger learned of this when she was served with a foreclosure action attaching the modified mortgage. Ms. Gudger was required to hire counsel in order to resolve her legal issues with the bank. Although Respondent was specifically ordered to pay Ms. Gudger's attorney fees in the foreclosure case, in the amount of $2500.00, Respondent has failed to do so.

Ms. Gudger filed a post dissolution motion to enforce the court's prior dissolution Order and to find Respondent in civil contempt, based in part on his misconduct related to the marital home, as well as other issues. The Referee found that Respondent obstructed the post dissolution legal proceeding. Respondent failed to comply with up to six orders compelling him to file discovery responses in that case, over a period of one year in which no discovery was provided.

Respondent has proffered several conflicting explanations for his discovery failings throughout the course of the instant disciplinary proceedings. Each of the stated reasons, including that his attorney was the one actually responsible for the discovery violations, was refuted by the record evidence, and rejected by the Referee as not credible. Indeed, the record demonstrated that Respondent not only knew about the discovery violations and the litigation surrounding same; but that rather than comply with the court's orders, he simply thumbed his nose at the court, and stated that he did not care what the court did or said. He averred that the court could take his Bar license or put him in jail, he still was not going to comply. Respondent's contemporaneous statements and text messages with his former wife in this regard are compelling evidence of his willful and deliberate violation of the court's orders.

As a result of Respondent's numerous violations of the court's orders, the court imposed sanctions, attorney fees, and costs. Respondent is similarly in violation of those sanctions orders issued by the court, as up through the instant proceedings he has not paid a single penny of same.

Respondent further failed to appear at a hearing on an Order to Show Cause issued to him by the trial court. The court issued a writ of bodily attachment, and rather than turn himself in on same, Respondent took deceptive and evasive actions in order to avoid being arrested on the writ.

Such significant misconduct as that committed by Respondent in the instant matter requires imposition of significant discipline. This Honorable Court's case law indicates that the appropriate sanction for Respondent's misconduct, before consideration of the aggravating factors found in this case, is suspension for a period of one year.

In *The Florida Bar v. Rosenberg*, 169 So.3d 1155 (Fla. 2015), *reh'g denied* (July 7, 2015), this Honorable Court held that a one-year suspension was the appropriate sanction for conduct similar to that at issue in the instant proceedings. Rosenberg represented the defendants in a civil action. He was found guilty of failing to respond to the plaintiffs' request for production for over a year, and for

failing to comply with several court orders directing him and his clients to produce requested documents. Rosenberg was accordingly sanctioned for bad faith conduct and required to pay attorney fees. Thereafter, Rosenberg failed to comply with the sanctions order.

It is significant to note that this Court imposed a one year sanction in the *Rosenberg* case, simply based on the violation of the court's discovery orders and sanctions order. By contrast, in the case at bar, Respondent's actions encompass the same conduct as that at issue in Rosenberg; however, our Respondent has also been found guilty of multiple acts of fraud, deception, dishonesty and deceit, both in the underlying case, as well as in the instant disciplinary proceeding. Respondent fabricated evidence, provided false and/or fabricated testimony to the Referee and to the Bar, and misled the court below concerning his finances in order to avoid his child support obligations. Respondent also took deceptive and evasive action in order to avoid arrest on the writ of bodily attachment issued following his failure to appear for the order to show cause hearing in the underlying matter. Moreover, Respondent's conduct can only be seen as a deliberate snub to the authority of the court, where he expressed in writing his complete lack of care or concern for any order issued by the court. He stated that he did not care what the court said or did,

or even if the court took his Bar license or put him in jail, he was still not going to comply with the orders of the court.

Similarly, in the case of *The Florida Bar v. Bischoff*, 212 So.3d 312 (Fla. 2017), this Court followed its prior precedent in *Rosenberg*, and held that a one-year suspension was the appropriate sanction, where Mr. Bischoff obstructed the discovery process, refused to comply with court orders, filed frivolous pleadings and objections to the magistrate judge's rulings, and made false statements to the federal court. Bischoff did not timely comply with any of the defendants' requests for production of documents or motions to compel written discovery, and he refused to produce his client for a deposition until the last possible day. After producing his client for the depositions, he refused to comply with the magistrate judge's order requiring her to respond to certain questions. Bischoff failed to appear for a discovery hearing, and then gave the court inconsistent reasons for his absence. Respondent was sanctioned by the federal court.

In imposing a one year sanction, this Court noted that although Bischoff's misconduct was in some ways worse than Rosenberg's, the same sanction was imposed because some of Bischoff's misconduct was attributable to his client, and unlike Rosenberg, Bischoff had paid in full the sanctions ordered by the judge.

Respondent's misconduct in the instant disciplinary proceedings encompasses essentially the same misconduct as that which was at issue in the *Bischoff* case. However, a more significant sanction is required in the instant case. Although, Bishcoff was also found guilty of making misrepresentations to the trial court, he was not found to have engaged in fraudulent conduct, nor to have fabricated evidence and to have testified falsely in the disciplinary action, as did Respondent Marcellus. Moreover, respondent Bischoff paid in full the sanctions ordered against him, whereas Marcellus has not paid a single penny of the numerous sanctions orders imposed against him.

Accordingly, the relevant case law demonstrates that a sanction of one year or more, is appropriate for Respondent's conduct in the instant case, even before consideration of the aggravating and mitigating factors. However, the Florida Standards for Imposing Lawyer Sanctions require that a Referee weigh the aggravating and mitigating factors before recommending discipline in a case.

The Referee found seven factors in aggravation of the offenses, and only three mitigating factors. The Referee found the following aggravating factors: 9.22(b) a dishonest or selfish motive; 9.22(c) a pattern of misconduct; 9.22(d) multiple offenses; 9.22(f) submission of false statements, false evidence, or other

deceptive practices during the disciplinary process; 9.22(h) the vulnerability of the victim; 9.22(i) substantial experience in the practice of law; and 9.22(j) indifference to making restitution.

The Referee expounded on some of the aggravating factors that he found. For instance, in reference to Standard 9.22(f), submission of false statements, false evidence, or other deceptive practices during the disciplinary process, the Referee found:

> I specifically find that Respondent's repeated testimony that the fraudulent mortgage modification was not accepted by the bank was false, as clearly same was the basis for the foreclosure lawsuit identified at TFB Composite Exh. 2; further, I find that Respondent's testimony concerning any alleged conversation between Ms. Gudger and Mr. Francis regarding her consent to the execution of the mortgage modification to be wholly fabricated and false.

(ROR 30). Such findings must clearly be given great weight, considering this Court's prior holdings that "basic, fundamental dishonesty . . . is a serious flaw, which cannot be tolerated [because] '[d]ishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members.'" *The Florida Bar v. Berthiaume*, 78 So.3d 503, 510 (Fla. 2011) *quoting The Florida Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2002).

In addition to those specifically mentioned in reference to 9.22(f), the Referee in the instant case made numerous findings of Respondent's dishonest and deceitful conduct, including that Respondent engaged in specific acts of fabricating evidence, and presenting false testimony to the Referee and the Bar. This Court treats each individual instance of dishonesty as a separate offense. *See The Florida Bar v. Orta*, 689 So.2d 270 (Fla. 1997)(holding that disbarment is the appropriate sanction for an attorney who was found guilty of multiple instances of dishonesty). Indeed, in *The Florida Bar v. Senton*, 882 So.2d 997 (Fla. 2004), this Court held that lying in the disciplinary proceeding alone is worth disbarment. This Court has also stated that "[t]his Court typically imposes the severe sanction of disbarment on lawyers who intentionally lie to a court. An officer of the court who knowingly seeks to corrupt the legal process can expect to be excluded from that process." *The Florida Bar v. St. Louis*, 967 So.2d 108, 122-23 (Fla. 2007)(*citing Fla. Bar v. Kickliter*, 559 So.2d 1123 (Fla.1990) (disbarring attorney who committed a fraud on the court)).

Furthermore, the Referee considered additional evidence presented by the Bar as aggravation in the instant case. Same included a transcript of a hearing that

took place in the post dissolution case, in which Respondent presented evidence to the court that he made only $13,000.00 per year. (TFB ex 14). The Referee found,

> Respondent was evasive and deliberately misleading concerning his finances for purposes of avoiding child support. At best, he was engaged in fraudulent conduct by remaining deliberately underemployed. His testimony that he earned $13,000 per year as the partner in a law firm was incredulous. The underlying court made clear its disdain for such testimony and tactics.

(ROR 31).

By contrast, in mitigation, the Referee found only three factors: 9.32(a) the absence of a prior disciplinary history; 9.32(c) personal or emotional problems; and 9.32(g) character or reputation. Such factors cannot possibly outweigh the significant aggravation found in the instant case. Moreover, the Referee specifically found that only slight weight should be afforded factor 9.32(c), personal or emotional problems. The Referee stated,

> While Respondent may have been understandably depressed following his initial separation, the Record evidence demonstrates that he was planning a wedding to his future spouse at the time he tendered the fraudulent mortgage modification agreement to the bank, and thereafter throughout the post dissolution proceedings. Thus, while I find some basis for mitigation, such mitigation is deserving of only slight consideration in this instance.

(ROR 31).

This position, concerning giving only slight weight to this mitigating factor in the circumstances of this case, is further supported by this Court's case law. In *The Florida Bar v. Cibula*, 725 So.2d 360 (Fla. 1998), this Court held that,

> While we recognize that dissolution of marriage proceedings present an emotional time for both parties, when lawyers are litigants they do not cast aside the oath they take as an attorney or their professional responsibilities. Lawyers have an ethical responsibility as officers of the court to rise above the tactics that all too often permeate a dissolution proceeding. Not only does the law demand truthfulness under oath, but the obligations of our profession demand it.

Accordingly, the Referee's findings in aggravation are more significant and clearly outweigh the minimal mitigation found in the instant case. Such severe findings in aggravation, establishing a pattern of deceptive behavior that was displayed throughout the proceedings, as well as complete disregard for the authority of the court, and a lack of care or concern for the consequences of his actions, require that the sanction imposed in this case be more severe than that which would ordinarily be imposed for just the misconduct standing alone.

Indeed, the Referee himself reached a similar conclusion. In his Recommendation as to Disciplinary Measures to be Applied, the Referee found:

> I make this recommendation based on the numerous aggravating factors present in this case, which outweigh the minimal mitigation presented, and ***which mandate imposition of a***

> ***sanction more severe tha[n] the misconduct standing alone***. It is clear from the case of *The Florida Bar v. Bischoff*, and *The Florida Bar v. Rosenberg*, that ***at least a suspension for a period of one year is appropriate for the discovery related misconduct, failure to abide by court orders, and failure to appear for an order to show cause in the underlying matter***. The submission of a fraudulent mortgage modification is equally offensive, and requires a significant sanction. The case of *The Florida Bar v. Cibula*, demonstrates that Respondent's conduct cannot be justified, rationalized or excused by the fact that it occurred in his own divorce proceedings.

(ROR 29)(emphasis added). The Referee reiterated this point in his discussion of the aggravating factors. In relation to Respondent's attempt to mislead the court concerning his finances in order to avoid his child support obligations, the Referee stated, "These actions, coupled with his deliberate violation of discovery orders, *mandate an increase in the sanction* to be imposed in this case." (ROR 31)(emphasis added).

Based on the Referee's specific findings, it is clear that a suspension of at least eighteen months is required in this case. It is inexplicable that the Referee would engage in such specific analysis, and then recommend imposition of the same sanction which would ordinarily be imposed for only some of the misconduct present in the case, without regard to the significant conduct not addressed in the prior precedent, or to the significant aggravation found in his Report of Referee.

Irrespective of same, the analysis enunciated by the Referee is accurate. This case requires imposition of a sanction more significant than a one-year suspension.

Based on the seriousness of the misconduct at issue, the relevant case law, and the Standards for Imposing Lawyer Sanctions, as well as the proper weighing of the aggravating and mitigating factors found by the Referee, it is clear that at least an eighteen (18) month suspension is the appropriate sanction in this case.

CONCLUSION

In consideration of this Court's broad discretion as to discipline and based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Court reject the Referee's recommended discipline of a one year suspension and impose instead a suspension of at least a period of eighteen (18) months.

Jennifer R. Falcone, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal; and that a copy has been furnished to Keven P. Tynan, Attorney for Respondent, via email at ktynan@rtlawoffice.com; and to Adria E. Quintela, Staff Counsel, The Florida Bar, via email at aquintel@flabar.org on this 27th day of September, 2017.

Jennifer R. Falcone, Bar Counsel
The Florida Bar
Miami Branch Office
444 Brickell Avenue
Rivergate Plaza, Suite M-100
Miami, Florida 33131-2404
(305) 377-4445
Florida Bar No. 624284
jfalcone@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 this brief has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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Jennifer R. Falcone, Bar Counsel