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. 2015-70,289(11G)

REPLY/CROSS ANSWER 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

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules Regulating The Florida Bar

Florida Standards for Imposing Lawyer Sanctions

Constitutional Provisions

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 Florida Bar adopts and reincorporates herein the Statement of the Case and Facts as set forth in its Initial Brief on Appeal. The Statement of the Case and Facts is appended below in pertinent part for the Court's ease of reference:

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.

SUMMARY OF THE ARGUMENT

Respondent's assertions that there was not competent and substantial evidence in the record to support the findings of fact and conclusions of law recommended by the Referee are without merit. Respondent does no more than point to contradictory evidence in the Record to support his position, most of which evidence was specifically rejected by the Referee as false, lacking in credibility, and in some cases wholly fabricated. The Referee's findings should be adopted by this Court, which gives great deference to such findings.

Additionally, Respondent's attempt to distinguish the cases cited by the Bar must fail. Respondent distinguished the applicable precedent based on his view that the Referee's findings were not correct, and accordingly, the cases cited were more egregious than Respondent's misconduct. As previously demonstrated, the Referee's factual findings and conclusions of law were proper in all respects and are given great deference by this Court. Respondent's argument must fail.

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 I (CROSS ANSWER)

I. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW RECOMMENDED BY THE REFEREE ARE SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE, AND ACCORDINGLY SHOULD BE ADOPTED BY THIS COURT.

Respondent contends that the findings of fact and conclusions of law found by the Referee are not supported by competent and substantial record evidence, and that this Court should refuse to accept the Referee's recommendations concerning guilt. Respondent's contention is without merit and must be denied. Contrary to Respondent's assertions, the Referee's findings are supported by competent and substantial record evidence, and should be adopted by this Court.

"A Referee's findings of fact carry a presumption of correctness and should be upheld unless they are clearly erroneous or there is no evidence in the record to support them." *The Florida Bar v. Centurion*, 801 So.2d 858, 861 (Fla. 2000). The burden is on the party challenging the Referee's findings to demonstrate that "there is no evidence in the record to support those findings or that the record clearly contradicts those conclusions." *Id*. "[A] party does not meet the burden of showing that a referee's findings are erroneous simply by pointing to contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings." *The Florida Bar v. Glick*, 693 So.2d 550, 552 (Fla. 1997). The

Referee is in the best position to evaluate the credibility of the witnesses, and as such his findings should be upheld if supported by competent evidence. *The Florida Bar v. Forrester*, 656 So.2d 1273 (Fla. 1995); *see also The Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007)("Germain's points concerning the other disputed factual findings are equally flawed and boil down to credibility assessments. As the referee is in a unique position to assess witness credibility, this Court will not overturn his judgment absent clear and convincing evidence.")

Respondent in the instant case cannot meet his burden of demonstrating that there is "no evidence in the record" to support the Referee's factual findings or conclusions of law. At best, in his Cross Initial Brief on Appeal, Respondent has only pointed to some contradictory evidence in the record. Same is clearly insufficient to overturn the Referee's findings of fact and credibility. *See The Florida Bar v. Glick*, 693 So.2d at 552.

Each of Respondent's attacks on the Referee's findings boils down to a credibility assessment. The Referee, who was present to observe the Respondent and the other witnesses during their testimony, was in the best position to weigh their credibility and to resolve any conflicts in the evidence. *See The Florida Bar v. Germain*, 957 So.2d 613. The Referee performed this function and resolved all

conflicts in the evidence in favor of the Bar's witnesses, finding that Respondent's testimony was false, lacking in all credibility, and in some instances wholly fabricated.

Moreover, in his Report of Referee, the Referee delineated his analysis and demonstrated how the documentary evidence presented by the Bar, and the circumstances of the underlying divorce action, supported the testimony of the Bar's three witnesses, each of whom were respected lawyers who had not been impeached in any way in the proceedings. These factual findings were more than sufficient to support the Referee's recommendation that Respondent be found guilty of violating the specified Rules Regulating the Florida Bar.

Respondent first attacks the Referee's factual findings concerning his violation of the court's Dissolution of Marriage Order, despite his concession that the trial court found him in violation of the Order for his failure to either refinance the marital home out of the wife's name, or if he could not successfully do that then to alternatively place the home up for sale. (Respondent's Initial Brief at 14; TFB Ex 18, para 6 and 12).

Respondent's attack must fail. The following competent and substantial Record evidence adduced at the Final Hearing clearly and convincingly supports the

Referee's findings that Respondent violated the Dissolution Order concerning the marital home: the credible testimony presented by the Bar's witnesses attesting to same; the underlying trial court docket; the fraudulent mortgage modification provided by Respondent to the bank; the subsequent foreclosure action filed by the bank against both Respondent and Ms. Gudger, which was based on the fraudulent mortgage modification agreement; and the trial court's finding that Respondent violated the Order and subsequent sanction imposed upon Respondent for Ms. Gudger's attorney's fees in the foreclosure action. Moreover, Respondent himself made admissions in the instant disciplinary case which support the Referee's findings, including that he had not ever refinanced the home out of Ms. Gudger's name, that he made no attempt to refinance the home using his second wife's financial information, that he never placed the home up for sale, and indeed that he still resided in the home at the time of the Final Hearing on Discipline despite making no payments on same since 2011.

Notwithstanding the overwhelming competent and substantial evidence in the Record that clearly and convincingly supports the Referee's finding that Respondent violated the trial court's order concerning the marital home, Respondent now points to the following "contradictory evidence" in his attempt to

discredit the Referee's findings: that the underlying trial court did not make a specific finding that such violation was willful, and did not hold him in contempt on that point.

The Referee's findings in this regard, that Respondent intentionally violated the Dissolution Order concerning the marital home, are amply supported by the record evidence, as noted above. The deliberate and willful nature of the violation is similarly clear, as demonstrated by Respondent's own admissions, including that he never even attempted to sell the home. The evidence demonstrated that Respondent wanted to keep the marital home "for his children," and accordingly he simply chose to ignore the court's order to sell the home if the mortgage could not successfully be modified.

Moreover, Respondent's deliberate act of providing a fraudulent mortgage modification to the bank, which bore his former wife's forged signature, further establishes his willful and intentional violation of the trial court's order. Ms. Gudger's testimony, which was found credible by the Referee, clearly and convincingly established the rationale for the court's order concerning the marital home. Ms. Gudger testified that neither she nor the Respondent could afford the home on their own salary and so they decided to sell the home when they separated.

They negotiated a short sale with the bank and the home was under contract for sale. Ms. Gudger moved her belongings out of the residence in anticipation of the closing, following which Respondent moved back into the home and refused to participate in the closing. Based on these facts, the trial court sought to make Respondent solely responsible for the marital home and ordered Respondent to either refinance the home out of the former wife's name, or to sell the home.

However, Respondent refused to comply with either option provided by the Court, and instead participated in the fraudulent execution of the mortgage modification agreement. Respondent's conduct willfully and deliberately violated both the spirit and letter of the court's order. The modification did not remove Ms. Gudger's name from the mortgage, in clear violation of the express language contained in the order; and further the forged modification agreement re-obligated Ms. Gudger to financial responsibility for the marital home, in clear violation of the intent of the order. Accordingly, Respondent's own admissions and actions regarding the marital home clearly and convincingly establish that he deliberately and willfully violated the court's order. *See ie., The Florida Bar v. Forrester*, 916 So.2d 647, 652 (Fla. 2005)(holding that circumstantial evidence may be used to

prove intent to violate a court order). Respondent's attempt to attack the Referee's findings in this regard are utterly without merit and must fail.

Respondent next challenges the Referee's findings that he knowingly participated in the execution of the fraudulent mortgage modification, and presented same to the bank. Respondent points to his own contradictory testimony in support of his attack, notwithstanding that same was unequivocally rejected by the Referee. Respondent also points to the contradictory testimony of his friends and successor counsel, who testified that Respondent told them the same story he told the Referee, that Ms. Gudger consented to her name being placed on the modification agreement.

As previously discussed, the Bar presented overwhelming competent and substantial record evidence that clearly and convincingly supported the Referee's findings concerning the fraudulent execution of the mortgage modification. Such evidence included: Ms. Gudger's testimony that she never would have entered into an agreement which re-obligated her to financial responsibility for the home after the trial court had relieved her of same, and that she was not even aware of the mortgage modification until she was served with the foreclosure complaint; that Ms. Gudger subsequently executed an Affidavit of Forgery and a complaint against

the notary; that the state investigated the circumstances of the fraudulent mortgage and the notary's actions relative thereto, that the notary made admissions during that investigation, and that the notary lost his notary license as a result of same; as well as the foreclosing bank's action of absolving Ms. Gudger of financial responsibility in the foreclosure action.

The Referee accepted and found credible Ms. Gudger's testimony, which was supported by the documentary evidence, as described above. By contrast, the Referee expressly rejected Respondent's testimony in his own defense. Respondent testified that his long time friend, Mr. Francis, informed him that Ms. Gudger gave permission for her signature to be placed on the modification agreement. Respondent claimed that he relied upon same when he presented the modification to the bank, despite knowing that Ms. Gudger had not signed the agreement. Respondent also claimed that he never would have allowed that to happen if he had been in his right mind, instead of out of his mind with grief over the divorce.

Respondent's testimony was rejected by the Referee as false and wholly fabricated on these points. Respondent himself admitted that when he personally asked Ms. Gudger if she would sign the agreement, she adamantly refused. The Referee did not find credible Respondent's contention that Ms. Gudger would

subsequently agree to re-obligate herself to the mortgage after the trial court relieved her of such obligation.

In further support of his findings about the fraudulent mortgage modification, the Referee found that Respondent made several misrepresentations regarding the marital home and the fraudulent modification. Respondent first attempted to convince the Referee that he never moved out of the marital home, that the couple resided in the home together during the separation and initiation of the divorce proceedings, and that it was actually Ms. Gudger who vacated the residence. The Referee found this testimony to be false based on Ms. Gudger's contradictory testimony, the fact that the separation and divorce were not amicable, and that the underlying court docket supported Ms. Gudger's testimony. The court docket demonstrated that Ms. Gudger petitioned for exclusive use of the marital home on more than one occasion, which motions were granted by the trial court.

Additionally, Respondent misrepresented to the Referee the status of the fraudulent mortgage modification agreement, and attempted to convince the Referee that same was rejected and not relied upon by the bank. The Referee found it incredulous that Respondent would even try to aver same, where the foreclosure

complaint and litigation conclusively demonstrated that the bank and court relied upon the fraudulent modification agreement, to Ms. Gudger's prejudice.

Furthermore, the Referee found Respondent's assertion, that he never would have allowed Mr. Francis to sign Ms. Gudger's name on the agreement if he had been in his right mind, entirely devoid of credibility. The Referee noted that Respondent was remarried just a few weeks after he participated in the execution of the fraudulent mortgage. As such it was not believable that he was wooing and making plans to marry his new wife while being simultaneously "out of his mind with grief" over the divorce.

Accordingly, the Referee's findings concerning the fraudulent mortgage modification agreement are abundantly supported by competent and substantial Record evidence.

Respondent next contests the Referee's findings that Respondent failed to provide discovery in accordance with the Rules of Civil Procedure and the Rules Regulating the Florida Bar, that he failed to comply with the court's orders regarding discovery, and that he withheld or concealed evidence. Respondent points again to his own contradictory testimony in his own defense, which testimony was rejected by the Referee.

Again, the Bar presented abundant competent and substantial evidence to support the Referee's findings regarding the discovery issues. Such evidence included: the testimony of the Bar's witnesses attesting to Respondent's knowledge and responsibility for the discovery violations; the fact that Respondent was representing himself *pro se* during the earlier stages of the post dissolution litigation; the numerous trial court orders in the underlying case granting motions to compel discovery, and imposing sanctions on Respondent for violations of same; and Respondent's contemporaneous conversations and text messages with Ms. Gudger in which he stated and affirmed his outright refusal to comply with the court's orders concerning discovery and child support.

By contrast, at the Final Hearing in the instant disciplinary action, Respondent testified that "he put his head in the sand" and had no idea what was happening with the discovery in the case until his lawyer told him about the Rule to Show Cause on the eve of the Show Cause hearing. The Referee rejected this testimony as not credible and inconsistent with prior statements by the Respondent on this issue. Throughout the Bar disciplinary proceedings, Respondent provided three inconsistent and contradictory rationales for his failure to provide discovery in

the underlying case, each of which were refuted by the evidence presented by the Bar.

Respondent's third explanation for the discovery violations, that he buried his head in the sand and was unaware of same, was demonstrably false. The evidence presented at the Final Hearing demonstrated that Ms. Gudger had contemporaneous conversations with Respondent and attempted to obtain his cooperation with the discovery process. During these conversations, Respondent told Ms. Gudger that he simply was not going to comply with his discovery obligations in the case. With respect to the court's orders concerning his discovery and child support 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). This evidence conclusively refutes Respondent's attempt to convince the Referee that his head was buried in the sand and he didn't know what was going on in the case with the discovery. Similarly, such evidence affirmatively proves Respondent's intent to

violate the court's orders concerning discovery in the case. As such, the Referee's findings that Respondent willfully violated the court's discovery orders, that he withheld or concealed evidence, and that he thereby obstructed the underlying proceedings are amply supported by the Record evidence.

Similarly, Respondent's contention that the underlying trial court accepted his explanation regarding his failure to appear at the Hearing on the Order to Show Cause and absolved him of responsibility for same, is without merit and must be rejected by this Court. In fact, the trial court expressed its continued skepticism of Respondent's explanations.

The Rule to Show Cause was issued by the trial court following numerous orders compelling discovery, and Respondent's ongoing refusal to comply with same. The court ordered Respondent to appear in person for the hearing on the Order to Show Cause. Respondent did not notify the court of any purported conflict with the date set for the hearing, but rather simply failed to appear. The court issued a writ of bodily attachment. Rather than turn himself in on the writ, Respondent took evasive measures to ensure that he would not be arrested on same. 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.

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). Specifically, the court enunciated that it could choose to enforce the writ, but that same would exponentially delay the proceedings. No where in the court's language can it be interpreted that the trial court accepted Respondent's explanation and dissolved the writ of bodily attachment on the merits of same.

Finally, Respondent challenges the recommended findings of guilt for the specified rule violations. First Respondent contends that he can not be found guilty

of violating Rule 4-8.4(c) for his submission of the fraudulent mortgage modification agreement to the bank, because, according to his testimony he "did not intend to mislead anyone as, at the time of submission of the agreement, he believed his good friend, Francis, had in fact secured Gudger's consent to his execution of her signature." (Cross Initial Brief at 19). As demonstrated *supra at pp. 29-32*, this testimony was specifically rejected by the Referee and such rejection is supported by competent and substantial evidence, including Respondent's numerous misrepresentations concerning the marital home and the mortgage modification agreement. Respondent's argument is without merit and must fail.

Respondent next contends that he cannot be found guilty of violating the court's orders concerning discovery issues and for failing to comply with his discovery obligations because a year later he provided some discovery responses and/or some of the requests for discovery were abandoned by Ms. Gudger's successor counsel. Respondent also disingenuously points to the dissolution of the writ of bodily attachment and the court's failure to hold him in contempt on same as a basis for a finding of not guilty on these rules.

Contrary to Respondent's assertions, neither of these factors negates his guilt in this matter. Respondent failed to comply with at least four specific orders of the

court compelling production and responses to discovery. These orders were issued over the course of a year, during which not one single request for discovery was complied with, and during which Respondent affirmatively stated, orally and in writing, his intent to disregard and/or ignore the orders of the court. Respondent similarly ignored the court's orders to pay sanctions arising from same, and remains in violation of these sanctions orders, as no monies have been paid to opposing counsel or Ms. Gudger. Any subsequent provision of portions of the discovery requested does not change the facts that these specific orders were violated, nor does it negate the harm arising from his misconduct and gamesmanship in relation to same. The proceedings were needlessly delayed, court resources were needlessly expended, and Ms. Gudger's attorney's fees were needlessly driven up.

Moreover, the fact that Respondent was obfuscating, attempting to hide his assets, and deliberately concealing his actual financial situation was made abundantly clear by his ludicrous testimony at a hearing in the underlying matter that he earned only $13,000.00 as a partner in a law firm, which testimony was rejected by the underlying trial court, ultimately resulting in the court imputing income to Respondent, and as well by the Referee in the instant disciplinary action.

Respondent's related contention that he cannot be found guilty of the discovery related violations because he was represented by counsel during the underlying proceedings is similarly without merit and must be rejected. As demonstrated *infra at pp. 32-36*, the Bar presented competent and substantial evidence to support the Referee's findings that Respondent himself was both aware of and responsible for the discovery violations in the underlying case.

Respondent's contention that the court's decision to dissolve the writ of bodily attachment in order to keep the proceedings moving forward somehow proves he did not knowingly disobey an obligation under the rules of a tribunal is also without merit, and must be rejected by this Court. The Bar presented competent and substantial evidence, in the form of the trial court's own words contained in the transcripts of the underlying proceedings, to refute this assertion, as described *infra at pp. 35*-36. Indeed, Respondent's continued attempt to make this argument demonstrates nothing more than his ongoing pattern of misconduct in these proceedings and his attempt to continue to obfuscate and mislead the Court on this point.

Lastly, Respondent concedes his violation of Rule 4-8.4(d) for engaging in conduct prejudicial to the administration of justice for his discovery related misconduct and for his failure to abide by the orders of the court.

Accordingly, it is clear that Respondent's challenges to the Referees findings of fact, and conclusions of law, must be rejected. Each factual finding was supported by competent and substantial evidence. The Referee's credibility assessments were similarly supported by competent and substantial evidence, and as such, are given great deference by this Court. The findings were sufficient to support each of the recommendations that Respondent be found guilty of the specified rule violations. In accordance with this Court's precedent, Respondent's arguments to the contrary are without merit and must fail.

ARGUMENT II (REPLY AND CROSS ANSWER)

II. 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.

Respondent now challenges the Referee's recommended sanction in this matter. Respondent concedes that the Referee outright rejected his testimony and version of events, as described above in Argument I. Notwithstanding same, Respondent requests this Court to disregard the Referee's findings, and to impose a much more lenient sanction in this matter, based on his view that his conduct was at most negligent.

Contrary to Respondent's assertions, and consistent with this Court's prior precedent, Respondent's actions in the underlying matter, as well as in the instant disciplinary action were intentional, willful, knowing and deliberate. The referee found, and the evidence clearly and convincingly proves, that 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. Such serious misconduct, coupled with the significant aggravation found in this case, requires imposition of a suspension for a period of at least eighteen months, and any other conditions as this Court deems appropriate.

"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).

As a preliminary matter, the Bar hereby adopts and reincorporates by reference the argument contained in its Initial Brief on Appeal in its entirety.

In his Cross Initial Brief on Appeal and Answer Brief, Respondent concedes that the case law cited by the Bar is the applicable case law to consider in this case. However, Respondent attempts to distinguish that case law from the facts in the instant case based on his perceptions that his conduct was not as egregious as that committed in the cited precedent. In so doing, Respondent cites to his own testimony, which was specifically rejected by the Referee as not credible, false, and/or entirely fabricated. As such, respondent's attempts to distinguish the applicable cases, and to diminish his own conduct must fail. A more lenient sanction is not appropriate in this case.

First Respondent attacks some of the aggravating factors found by the Referee. Respondent argues that Ms. Gudger does not fit the mold of the average "vulnerable victim," and accordingly avers that aggravating factor 9.22(h) should be rejected by the Court. Respondent's argument ignores other occasions in which this Court found legal professionals, and even law firms to be vulnerable victims. For instance, in *The Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003), this Court found that the law firm employing Arcia was a vulnerable victim because the firm

had no way of knowing that its employee, who it trusted, was stealing from it. Similarly, in the case at bar, Ms. Gudger had no means of learning of Respondent's deceitful and fraudulent conduct concerning the mortgage modification agreement until after she was served with the foreclosure action. Gudger had no means of preventing the forged document from being presented to the bank. As the beneficiary of the trial court's order requiring Respondent to either get her name removed from the mortgage via a modification, and/or to sell the property, Ms. Gudger was entitled to the presumption that the court's order would be obeyed, especially by an officer of the court. This aggravating factor is entirely proper in this case and should be upheld by this Court.

Respondent also attacks the Referee's finding as an aggravating factor Respondent's misconduct in the underlying case wherein he attempted to deceive the court concerning his income. Respondent testified in the case below that his second wife supported him, and that he only earned $13,000.00 per year as a partner in a law firm. When confronted with his significant cash expenditures at locations such as strip clubs and trips to Las Vegas, as well as his expensive monthly car payments, Respondent maintained his clearly deceptive position. In

response, the trial court stated "I may have been born at night, but it wasn't last night."

Respondent relies on the testimony of his successor counsel, Mr. Brown, in support of his position that he did not misrepresent his income to the court. Mr. Brown testified that he did not believe that Respondent was hiding income. Notwithstanding same, the Referee was entitled to reply upon the findings of the court below as to the incredulous nature of Respondent's testimony concerning his income. Indeed, the court below ultimately held that income would be imputed to Respondent based on prior tax returns. The Referee was similarly entitled to utilize his common sense in rejecting testimony that is patently ludicrous. S*ee The Florida Bar v. Cohen*, 908 So.2d 405, 411 (2005) (holding that a Referee may use common sense and logic to determine facts and to reject a respondent's clearly incredulous testimony).

Additionally, in rejecting Mr. Brown's testimony on this point as unpersuasive, the Referee was entitled to consider other incredible positions taken by Mr. Brown at the Final Hearing in this case, such as his opinion that Respondent was not required to personally appear at the hearing on the Order to Show Cause, and that the writ of bodily attachment should therefore not have been issued. Mr.

Brown's position on this issue was either disingenuous, or incompetent, considering that the trial court had issued an order that explicitly required Respondent to appear in person.

Respondent next attempts to distinguish the applicable case law by portraying his own misconduct as less egregious than that described in those cases. For instance, Respondent attempts to distinguish *The Florida Bar v. Whitney*, 132 So.2d 1095 (Fla. 2013), on the basis that there were no client complaints at issue in our Respondent's case, and there were no false discovery answers provided by Respondent in this case. Respondent's distinction is without merit. Respondent's own misconduct was more egregious than Whitney's in that Respondent was found to have made misrepresentations and/or lacked candor in both the court below and in the instant disciplinary proceedings. Additionally, as 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." Such deceptive and fraudulent conduct is at least as egregious as Whitney's misrepresentations concerning a deposition. In addition, our Respondent was also found guilty of fabricating evidence, and participating in the execution and submission of a fraudulent mortgage modification

agreement to the bank. Such serious and egregious misconduct requires a sanction more severe than the one year suspension imposed in the *Whitney* case.

Respondent's attempts to distinguish the cases of *The Florida Bar v. Rosenberg*, 169 So.3d 1155 (Fla 2015), and *The Florida Bar v. Bischoff*, 212 So.3d 312 (Fla. 2017), are also inapposite. The Bar demonstrated in its Initial Brief on Appeal how the conduct at issue in both matters was substantially similar to that engaged in by Respondent herein. The Bar also established how Respondent's conduct was in fact much more egregious than that at issue in both cases, where Respondent was also 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. This is a significant distinction from the *Rosenberg* case, wherein Rosenberg believed he was acting out of a duty to zealously represent his client, and not out of a lack of respect for the court. Moreover, as a further distinction that makes this case more egregious than the conduct at issue in the *Bischoff* case, it is significant to note that Bischoff paid in full the sanctions ordered against him, whereas our Respondent has not paid a single penny of the numerous sanctions orders imposed against him.

Respondent's efforts to distinguish the case of *The Florida Bar v. Cibula*, 725 So.2d 360 (Fla. 1998), are also misplaced. The Bar cited this case for the holding that an attorney's misconduct is not excused or diminished simply because it occurs in the attorney's own divorce. Specifically, this Court stated:

> 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, each of the three primary cases cited by the Bar demonstrate that a suspension of at least one year is appropriate solely for the discovery related misconduct in the underlying case, as well as the blatant violations of the court's orders. These cases cannot be successfully distinguished by Respondent, and indeed, the findings of the Referee demonstrate that Respondent's misconduct is actually more egregious than that at issue in *Whitney, Bischoff and Rosenberg*. As the Referee noted, when such misconduct is considered in conjunction with the significant aggravating factors at issue in the instant case, it is apparent that a suspension of greater than one year is required. A suspension of at least eighteen months should be imposed by this Court, along with any other conditions the Court deems appropriate.

CONCLUSION

The Referee's findings of fact and conclusions of law are supported by competent and substantial evidence, and should be adopted by this Court. 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 11th day of December, 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.

_____

Jennifer R. Falcone, Bar Counsel