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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant,

Supreme Court Case
No. SC13-539

v.

ROBERT JOSEPH RATINER,

Respondent/Appellee.

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

_________________________________/

RESPONDENT'S ANSWER BRIEF
AND INITIAL BRIEF ON CROSS APPEAL

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "The Bar" or "The Florida Bar." Robert Joseph Ratiner, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the Final Report of Referee. Unfortunately, the Referee did not place page numbers on his Report, but both parties have numbered the Report pages 1 through 13 to refer to the sequential numbering that should have been placed on such page. The symbol "TT" followed by a page number will be used to designate the transcript of the final hearing which is contained in three volumes but consecutively numbered. The symbol "RT" followed by a page number will be used to designate the transcript of the hearing wherein the Referee delivered his ruling. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

STATEMENT OF CASE AND FACTS

The Bar filed its complaint in this action on March 23, 2013 complaining about actions allegedly taken by the Respondent, Robert Joseph Ratiner, during and after the trial of *Claire J. Sidran, et. al., v. E.I. DuPont De Nemours & Co., Inc.*, (hereinafter "*Sidran*"), which trial occurred in June of 2010. ROR1. The Respondent represented the plaintiffs against DuPont concerning damages they had incurred from a fungicide manufactured and sold by DuPont called Benlate. ROR1.

The final hearing in this disciplinary matter was conducted before the Honorable Jorge Rodriguez-Chomat, on August 25, 26, and 29, 2016. On September 23, 2016 the Referee made an oral ruling relative to his findings and recommendations and provided the parties with his undated Report of Referee that day in open court.

The Referee begins his Report by making a generalized analysis of the Bar's complaint (ROR2-4); discusses the testimony of the five witnesses who testified at the final hearing (ROR4-9); and then sets forth his Findings of Fact (ROR10-11). In his Findings, the Referee determines that the Respondent was not guilty of certain matters and, as there is no appeal by the Bar on these issues, they will not be discussed herein. ROR1-11. However, the Referee does find the Respondent

guilty of certain ethical misconduct and in his Report specifically references two rule violations.

During a post-trial hearing conducted on December 14, 2011, the Respondent was seated at counsel table with another individual from his office and opposing counsel was conducting an examination of a witness wherein the Referee found that the Respondent "was overheard muttering the words, 'lie, lie, lie' in quick succession". ROR11. The Referee found that this conduct violated R. Regulating Fla. Bar 4-3.5(c) and it is believed he also found a violation of R. Regulating Fla. Bar 4-8.4(d).[1] ROR11.

At this same hearing, the Referee found that the Respondent was "kicking" the table where he sat and that the noise he was making was disruptive to the then pending judicial proceeding in violation of R. Regulating Fla. Bar 4-3.5(c) and it is believed he also found a violation of R. Regulating Fla. Bar 4-8.4(d). ROR11.

The Referee also makes a finding that "during the trial Respondent had been rude, overly aggressive, unprofessional and at time appeared to intimidate the witness." ROR11. However, the Referee does not ascribe any rule violations for

[1] The Report of Referee read R. Regulating Fla. Bar 4-8.4(c) which was not charged in the Bar's complaint and as he made a similar finding on a related issue a few lines down in his complaint wherein he identified a violation of both R. Regulating Fla. Bar 4-3.5(c) and 4-8.4(d).

this conduct or delineate which of Respondent's actions supported his conclusion in this regard.[2]

The Referee considered testimony and evidence related to mitigation and aggravation. The Bar presented no witnesses on this topic but did introduce the Respondent's prior disciplinary record. TFB Ex. 4 through 10. The Respondent, however, testified on his own behalf and presented, through a transcript from the last disciplinary proceeding (Resp. Ex. A), the testimony of four lawyers (Jose Mirabal, Elise Rodriguez, Jonathan David and Angel Reyes) two of whom were his law partners for several years and one who was a friend since elementary school; two of his current employees (Susan Machado and Sybil Fernandez); a prior employee and family friend that has known the Respondent since he was a child (Dolores Gutierrez); and the testimony of Eddie Lamas, a family friend and former client on a very sensitive and personal matter.

In closing argument, The Florida Bar asserted that the Respondent be disbarred and the Respondent contended, if the Referee found guilt on any of the matters alleged by the Bar, that the Referee recommend a suspension that ran concurrent with the Respondent's current suspension from the practice of law. After making a specific finding in his Report and in his oral ruling the Respondent

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[2] In his oral ruling, the Referee did specifically reference an incident involving the crumbling of documents that had been handed to the Respondent by opposing counsel during the hearing. RT7-8.

was not beyond redemption, a necessary perquisite to recommend disbarment, he recommends to this Court that the Respondent be suspended for three years and that such suspension be consecutive to his first three-year suspension that was ordered by this Court on September 2, 2015.

SUMMARY OF THE ARGUMENT

The Respondent fully understands the delicate balance between being a zealous advocate for a client and the need to be professional and respectful to the court and those involved in the legal process. The Referee believed that the Respondent was too aggressive in his representation of a client at a trial conducted in the summer of 2011 and in a post-trial hearing held in December of that year. The Respondent respectfully disagrees that his actions were unethical or meant to improperly disrupt a court proceeding.

In this case the Bar once again attempts to convince this Court to disbar him for conduct that does not warrant such an extreme measure. The Referee was passionate about the fact that he believed that the Respondent is not beyond redemption, but to impose a second three-year suspension to run consecutive to a prior three-year suspension is almost the functional equivalent of a disbarment, as a lawyer who is suspended for more than five years needs to pass the Bar Examination prior to being reinstated. As will be demonstrated fully below, the conduct at issue is from the same rough time frame as the other disciplinary matters that have arisen in his years of litigation with DuPont, and the conduct herein is different than that found in his prior disciplinary actions and do not contain the aggressive behavior that the Court found improper in those cases.

While the Respondent believes that he should be found not guilty relative to the allegations of the case before the Court, he understands that the Court may affirm the Referee on his factual findings. However, this Court should exercise its broad discretion and if a suspension is to be ordered, to order same be run consecutive to the current three-year suspension previously imposed against the Respondent.

ARGUMENT

I. THE RECORD IS DEVOID OF CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT INTENTIONALLY ENGAGED IN CONDUCT THAT INTENTIONALLY DISRUPTED A TRIBUNAL OR WAS CONTRARY TO THE ADMINISTRATION OF JUSTICE.

In this case the Bar seeks to discipline a lawyer for the interaction between a trial judge during a trial on certain documented occasions and certain other conduct by counsel that allegedly interfered with a court proceeding. The clear and convincing evidence in this case does not support the Referee's factual findings relative to a violation of the Rules Regulating The Florida Bar concerning these matters.

It is well settled that a referee's findings of fact and guilt are presumed to be correct and the appealing party has the burden to demonstrate that these findings are "clearly erroneous and lacking in evidentiary support." *The Florida Bar v. Canto*, 668 So.2d 583 (Fla. 1996); *The Florida Bar v. Porter*, 684 So.2d 810 (Fla. 1996). It is the Respondent's position that the findings below are "clearly erroneous and lacking in evidentiary support" and that a careful review of the evidence and the testimony at the final hearing clearly and convincingly demonstrate that the Respondent should have been found not guilty of the charges in the Bar's complaint.

The Preamble to the Rules of Professional Conduct includes the following commentary: "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Further guidance in this regard is found in the commentary to R. Regulating Fla. Bar 4-1.3 (diligence):

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

It is freely understood that there is a balance that must be maintained between zealous representation and offensive and rude conduct. The rules do not require a lawyer never to raise his voice or simply take no for an answer from an opposing litigant or opposing counsel but it is clear that they do require a certain modicum of respect and civility between counsel and litigants and the bench.

While the Referee has made specific findings as to the conduct he found offensive at a post-trial hearing, discussed in detail below, he has not made such specific findings as to his generalized belief that the Respondent, "during the entire trial. . . had been rude, overly aggressive, unprofessional and at times appeared to

try and intimidate the witness." ROR11. Thus, we are left to look at the few examples in his general commentary on the allegations raised by the Bar.

As to the "intimidation" issue it appears that the Referee was considering the claim that the Respondent had threatened a witness with jail time. However, the Referee specifically found the Respondent not guilty of that charge because the hearing sought to impose a contempt citation for that lawyer and/or her client for fraudulent discovery practices that had resulted in DuPont having its pleadings struck. ROR10. There does not appear to be any other reference in the Report of Referee or even the Bar's complaint to support a finding of intimidation.

In his general comments, the Referee recites an exchange between the Respondent and the trial judge during his closing about the time that had been allotted and potentially elapsed for his closing argument. See TFB2 p. 3411-3415. However, later in the transcript, after a short break, the trial judge admitted the calculation was wrong and that he was in fact entitled to more time for said argument. Resp. Ex. C. During these exchanges the trial judge was certainly pointed in her remarks to the Respondent asserting that he had been rude and makes a statement that no matter what her order was she believed that the Respondent would violate it. The response to that statement by the Respondent was misunderstood as being rude as he stated: "And if you ordered me to jump five feet high, I will violate that also Judge, because I just can't." However, at trial the

Respondent explained was unartfully explaining that certain things could not be done, rather than he was challenging the court's authority in any manner.

It is evident that the Referee relied heavily upon the trial judge, Judge Donner's, testimony in reaching his conclusions. At the hearing wherein the Referee gave his oral ruling, he stated that in order to have found the Respondent not guilty he would have needed to find, a fellow judge, Judge Donner, was lying and he was not inclined to make such a finding. RT16, 1.12-16. This belief improperly discounts the fact that all the witnesses in the case were telling the truth based upon their own perspective and recollections and Judge Donner did not have specific recollections during her deposition (Resp. Ex F) but had them for the trial a few weeks later.

Trial judges have had their authority challenged by a lawyer and that lawyer has been disciplined but the conduct herein does not rise to that level. For example, a lawyer was suspended for being disrespectful to a trial judge during a felony trial. *The Florida Bar v. Morgan*, 938 So. 2d 496 (Fla. 2006). The Court in *Morgan* goes into great detail about the comments made by the lawyer, which included the lawyer telling the judge he was "out of line", that the judge was being "obnoxious" and also stated to the judge that "You don't talk to me like this." *Id.* at 498. This heated exchange lasted for several minutes and the judge gave multiple warnings that the lawyer needed to reign in his commentary. *Id.* at 496-

498. This is not the same conduct as that found herein. Also see *The Florida Bar v. Wasserman*, 675 So. 2d 103 (Fla. 1996), wherein the lawyer screamed at the judge after an adverse ruling and *The Florida Bar v. Norkin*, 132 So. 3d 77 (Fla. 2013), wherein the lawyer engaged in repeated disrespectful and offensive conduct.

The Referee does find that the Respondent violated two rules regarding his conduct at a post-trial hearing wherein he was sitting at counsel table and was "overheard" talking to someone at counsel table wherein he used the term "lie, lie, lie" concerning something that had just been said to the court. ROR11. It was also this hearing wherein the Respondent was accused of tearing papers that had been left on his desk by opposing counsel and then "throwing" them aside. ROR11. And lastly, this is this same hearing where the Respondent has allegedly kicked the table in a disruptive and loud manner. ROR11. The Referee's Report specifically finds that two of these actions violated R. Regulating Fla. Bar 4-3.5(c) and 4-8.4(d).[3] R. Regulating Fla. Bar 4-3.5(c) states that "(a) lawyer shall not engage in conduct intended to disrupt a tribunal" and Regulating Fla. Bar 4-8.4(d), the second claimed violation, states that a lawyer shall not:

> **(d)** engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference,

[3] The Report of Referee does not find a rule violation for the paper tearing issue.

> disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

It is respectfully contended that the Respondent did not violate either of these rules in reference to his conduct while sitting at counsel table. First, his testimony was clear that the remark in question (the exact language of which he did not recall) was meant for his assistant who he was sitting with at the table and that his voice unintentionally carried in the otherwise quiet courtroom, causing the trial court to address the statement after opposing counsel objected. TT379-381. Thus, his action was not intended disrupt the ongoing proceeding but was meant to only be heard by the person sitting with him. In fact, Judge Hogan Scola, sitting right next to Judge Donner, testified that she did not hear the comment. TT22 (l.10-17).

The "paper tearing" is also easily explained. Opposing counsel was providing copies of documents that the Respondent already had and the Respondent did not want to confuse these copies with his documents and therefore tore the corner of each document and slid it to the corner of his table away from him. TT 373-377. It was his testimony that this is his usual practice to avoid confusion of duplicate documents. *Id.* While this might have been distracting to

opposing counsel it was not intended as a distraction and was not meant to disrupt the proceeding. *Id.*

Lastly, we come to the kicking of the table incident. Two of the Bar's witnesses discussed their recollection of this event and both have the Respondent loudly and repeatedly kicking the table and that there was a discussion on the record about this incident. The Respondent testified that he did not have a recollection of any repeated kicking but that he may have struck the side of the table as he was moving at his desk and he affirmatively testified that he did not repeatedly kick the table. TT 382-384. Interestingly, the transcript of the hearing does not contain the word "kick" or "kicked". See TFB Ex.1; TT384.

As to each of these issues the Respondent also added that he had no reason to disrupt this hearing whatsoever as he was prevailing on the issue and wanted the hearing to reach a successful conclusion without interruption. TT 383.

The Respondent understands his burden on appeal but also points out that the Bar likewise had a burden at trial – to prove each of its charges by clear and convincing evidence and it failed in that burden. Most respectfully, the Respondent should be found not guilty of the rule violations found by the Referee.

II. A CONSECUTIVE THREE YEAR SUSPENSION IS AN INAPPROPRIATE SANCTION UNDER THE FACTS OF THIS CASE.

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

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

There is no precedent to support the Bar's request for a disbarment[4] but this will be the second time that they have attempted to urge the Court to disbar the

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[4] Interestingly in the prior disciplinary action with this Respondent a Referee was reversed in his recommendation for disbarment or a two-year suspension because there was no precedent to support his position and the Bar agreed with that

Respondent notwithstanding this fact. The Respondent argued that the conduct in this case warranted a public reprimand and that the Referee should balance all of the mitigating and aggravating factors, inclusive of the two prior suspensions, and then consider to what degree he should increase the recommended sanction.

A. Mitigation

As in all disciplinary matters it is important to evaluate aggravating and mitigating factors, but prior to discussing same it is important to look at the significant character testimony presented by the Respondent.

By agreement of the parties, the Respondent presented testimony, via a transcript (Resp. Ex. A) from the prior disciplinary action from four lawyers (Jose Mirabal, Elise Rodriguez, Jonathan David and Angel Reyes) two of whom were his law partners for several years and one who was a friend since elementary school. Mr. Reyes, an ex-partner, in describing the Respondent testified as follows:

> I think Mr. Ratiner has a heart of gold. I think Mr. Ratiner is a zealous advocate for his clients. I think he's loyal to his clients. I think he does wonderful work on behalf of his clients, and is very loyal to them. Resp. Ex. A: 42, l. 16-20.

Mr. David added the following testimony on the Respondent's character:

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proposition that disbarment was not appropriate. *The Florida Bar v. Ratiner*, 46 So. 3rd 35 (Fla. 2010).

> Well, you have heard Susan and Angel say he has a heart of gold. He's a good person. Meaning, he is a zealous advocate, but if you're talking about the things that make a good attorney, I think he has them all. Meaning, he's competent. He's zealous. He has a heart of gold. He does work for clients, even when they can't pay him, and even when he might not have the financial wherewithal to fight against a million-dollar corporation, but he forges through it. As a friend, he's been an ideal friend. I mean, in terms of, you know, anything I ever needed in life, that is to say, he's the kind of person you do depend on. If you have that one phone call to make, you're going to make it to Bobby. Resp. Ex. A: 47, l.5-18.

Mr. David was also the attorney who acted as co-counsel at deposition during the probationary period referenced in the Respondent's first disciplinary matter and he opined that he never saw him act inappropriately towards opposing counsel during those depositions. Resp. Ex. A: 50, l. 10-12.

When asked if the Respondent could learn from any mistakes he made and could he be rehabilitated, Mr. Mirabal responded that: "If there's any question that Bobby -- if there's any doubt, that Bob has the ability to learn from circumstances and to become a better person, well, that's who Bobby is." Resp. Ex. A. 54, l. 7-10.

Two of the Respondent's prior employees (Susan Machado and Sybil Fernandez) also testified at the prior sanction hearing. Ms. Machado was asked a question about remorse and how this proceeding had affected the Respondent and her response was that it affected the Respondent:

> In every aspect of his life. It's affected his business. It's affected his family. It's affected his children. It's affected

> every single aspect of his life. Economically. Everything. Sentimentally. Everything. Every aspect of his life has been affected by this. Resp. Ex. A: 38, l. 24 – 30, l. 3.

Dolores Gutierrez, a prior employee and family friend that has known the Respondent since he was a child, stated that the Respondent was ". . . the most honest, thorough, competent, intelligent lawyer (she) had the pleasure of knowing." Resp. Ex. A: 69, l.23-24. Near the conclusion of her testimony she described the Respondent as follows:

> He is a man of honor. He's a man of dignity. He's an outstanding lawyer, son, father, and friend. I am so proud that I got an opportunity to share his life with him and his family and his friends. Resp. Ex. A: 69, l. 4-7.

The last character witness presented by the Respondent was Eddie Lamas, a family friend and former client on a very sensitive and personal matter who, on a more personal note, testified that:

> My father died when I was six years old, and I wish my father would have been like he is to his children, and to his family, and to his friends, and to his employees, and to anybody that crosses his path. Resp. Ex. A: 62, l. 3-6.

Each of these individuals spoke of their deeply held belief that the Respondent has a "heart of gold" and that he would help his clients before helping himself, no matter the personal hardship. Further, they spoke of the Respondent's legal abilities and his willingness to stand by a client and their cause no matter how long it takes and the adversities along the way. Lastly, the witnesses discussed that

the Respondent was an honest person and that he will not sugar coat the truth or avoid pointing out that truth to others.

The Respondent also testified on his own behalf and discussed his personal background (married with two children), his education (University of Miami for undergrad and law school) and his legal employment background wherein the bulk of his legal career has been representing victims of fortuitous events whose lives have been derailed as a consequence of those events. TT 337. Of significance to his practice (and to this case) he has been litigating Benlate cases with Dupont for more than twenty years. TT 341-342.

In addition to the foregoing it is believed that the following mitigation was present in the record presented to the Referee (All references are to the Florida Standards for Imposing Lawyer Sanctions (hereinafter "Standard."):

Standard 9.32(b) [absence of a dishonest or selfish motive]: None of the actions herein relate to honesty or to a selfish motive. ROR12

Standard 9.32(g) [character or reputation]: As is noted the Respondent presented the testimony of eight character witnesses and the Bar presented no contrary evidence. ROR12.

Standard 9.32(h) [physical impairment]: The Respondent was sick with flu like symptoms on the day of the closing argument at issue. ROR12.

Standard 9.32(i) [unreasonable delay in disciplinary proceeding]: The acts complained of occurred in the summer of 2011 and in December of 2011 but the Bar did not file its formal complaint until March 22, 2013. See *The Florida Bar v. Wolf*, 930 So. 2d 574 (Fla. 2006) [One-year delay in advancing case.].

Standard 9.32(m) [remoteness of prior offense]: As is noted above, the prior disciplinary actions concerned events that occurred in 2007 and 2009 are now nine and seven plus years ago and the misconduct in this case occurred approximately five years ago.

B. Aggravation.

The Referee in his Report found several aggravating factors which are not contested by the Respondent. Each item of aggravation is discussed below.

Standard 9.22(a) [prior disciplinary offense]: The Bar introduced into evidence as TFB Ex. 4 through 10 the documentation related to the Respondent two prior disciplinary orders. The violations in the 60-day suspension case concern the Respondent's overreaction to opposing counsel's attempt to place the Respondent's personal laptop computer into evidence at a May 2007 deposition in the same case wherein Dupont ultimately had their pleadings stricken for fraudulent discovery practices. The three-year suspension case relates to a short "tug of war" over a document that was handed to respondent and some related inappropriate comments directed to opposing counsel.

Standard 9.22(c) [pattern of misconduct]: The Bar argued that the Referee should consider the facts of the Respondent's prior disciplinary action.

Standard 9.22(g) [refusal to acknowledge wrongful nature of misconduct]. However, this Court has also held that this factor would not apply if the lawyer consistently, and in good faith claimed his innocence. See for example *The Florida Bar v. Karten*, 829 So. 2d 883 (Fla. 2002).

Standard 9.22(i) [substantial experience in the practice of law]: The Respondent was admitted to practice law in October 1990.

C. Sanction.

As in many disciplinary matters, there is no direct precedent that governs this matter. However, there are many similar fact patterns resolved by the Florida Supreme Court for which we can seek guidance. This Court has previously addressed the appropriate sanction for misconduct in the courtroom or at the courthouse. In each of these cases the Court was faced with a lawyer who had been disrespectful and confrontational with a judge during a hearing or a trial. For example, in *The Florida Bar v. Morgan*, 938 So. 2d 496 (Fla. 2006), a lawyer was suspended for being disrespectful to a trial judge during a felony trial. Part of the exchange between the lawyer and the judge was with the jury present. *Id.* at 497. The Court in *Morgan* goes into great detail about the comments made by the lawyer, which included the lawyer telling the judge he was "out of line", that the

judge was being "obnoxious" and also stated to the judge that "You don't talk to me like this." *Id.* at 498. This heated exchange lasted for several minutes and the judge gave multiple warnings that the lawyer needed to reign in his commentary. *Id.* at 496-498. This Court in *Morgan* found that there was a reasonable basis in existing case law and the Standards for the 91-day suspension being recommended by the Referee, especially when you took into account that this lawyer had been disciplined twice for similar conduct. *Id.* at 499. The first discipline was a public reprimand[5] and the second sanction was increased to a ten-day suspension.[6] Interestingly this Court noted in *Morgan* that Morgan's "repeated misconduct" warranted "the next level of available discipline – a rehabilitative suspension and warned that any future misconduct of the same vein could result in disbarment." Id. at 499.

This Court in the three *Morgan* cases took a measured approach to the lawyer's actions by starting with a public reprimand, moving to a ten-day suspension, concluding with a ninety-one-day suspension and then warning that any future conduct could result in disbarment. Unlike *Morgan*, the Respondent has been disciplined just twice.

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5 See *The Florida Bar v. Morgan* 717 So. 2d 540 (Fla. 1998) [making several intemperate or derogatory remarks to and about the judiciary].

6 See *The Florida Bar v. Morgan* 791 So. 2d 1103 (Fla. 2001) [making false statements about the qualifications and integrity of a judge].

This Court affirmed the *Morgan* sanction philosophy by imposing a ninety-one-day suspension for a lawyer who had been publicly reprimanded twice. *The Florida Bar v. Abramson*, 3 So. 3d 964 (Fla. 2009). The Court made the following comment on Abramson's misconduct:

> Abramson's misconduct was egregious. He was disrespectful and confrontational with the presiding judge in an ongoing courtroom proceeding in the presence of the pool of prospective jurors in a criminal case. Regardless of any perceived provocation by the judge, Abramson responded inappropriately by engaging in a protracted challenge to the court's authority. His ethical alternative, if he believed the trial court had erred, was by writ or appeal. He has also been publicly reprimanded twice before for serious misconduct.

The Court in *Abramson* also discussed the applicability of Standard 6.22 which states that a lawyer should be suspended when that lawyer "knowingly violates a court order or rule, and causes injury or potential injury to a client or party, or causes interference or potential interference with a legal proceeding." The Court found that Abramson's confrontation with the trial judge caused "interference with a legal proceeding" in that the conduct occurred in the court room and before the jury. In the case at hand, the conduct occurred during a records inspection and while it briefly interrupted same, the inspection continued immediately after the conduct and continued for two days thereafter.

In *The Florida Bar v. Wasserman*, 675 So. 2d 103 (Fla. 1996), the lawyer:

> . . . attended a hearing before Judge Bonnie Newton and lost his temper after a ruling by Judge Newton. He stood and

> shouted his criticism, he waived his arms, he challenged Judge Newton to hold him in contempt and displayed his arms as if to be handcuffed, he stated his "contempt" for the court, he banged on the table and generated such a display of anger that the bailiff who was present felt it was necessary to call in a backup bailiff. *Id.* at 104.

If that was not enough, the lawyer continued his tirade outside the courtroom where he instructed his client to disobey the judge's ruling and in a second case before the court the lawyer also engaged in another incident where he profanely berated a judicial assistant. *Id.* The lawyer in *Wasserman* had been previously disciplined on four occasions – an admonishment, two public reprimands and a sixty-day suspension. It is clearly evident that Wasserman's angry tirade in the court room was much more significant than the case at hand and warranted the six-month suspension that he received.

The only precedent presented by the Bar in its Initial Brief that discusses similar misconduct is *The Florida Bar v. Norkin*, 132 So. 3d 77 (Fla. 2013) and it does not support their position that disbarment is warranted herein.[7] In this case a lawyer received a two-year suspension for a lengthy pattern of disrespect of several judges, as well as a retired judge acting as a court appointed director of a corporation and was also significantly abusive and threatening in his relationship to

[7] While the Bar does cite to several cases where this Court has announced that it is sterner today than in the past, *Norkin* is a recent case from the Court and *Norkin* was that significant step up in sanction from the previous level of suspension that had been meted out for similar conduct.

opposing counsel. The Court, in *Norkin* goes to great length to document the fact that the lawyer yelled during hearings, would not accept direction from the Court to tone down his conduct and delineated several examples of same in the opinion. *Id.* at 82-83. The Court when on to note that:

> The referee concluded that Respondent's behavior was calculated. When Respondent felt he was not winning during a particular hearing, he would raise his voice and behave in an angry, disrespectful manner. Both Judge Dresnick and Judge Manno Schurr indicated Respondent was "screaming" at them. On multiple occasions, both judges found it necessary to warn Respondent regarding his behavior, but he persisted until the proceedings were disrupted. Judge Manno Schurr was forced to terminate proceedings and refer all discovery matters to a general magistrate. Respondent's lack of professionalism and inappropriate courtroom demeanor made it impossible for the judges to conduct hearings. Based on these facts, the referee found that Respondent engaged in conduct intended to disrupt tribunals by exhibiting rude behavior and yelling during courtroom hearings. The referee specifically noted that "the transcripts reveal that both Judges Dresnick and Manno Schurr were not merely concerned with Respondent's voice level, but rather his antagonistic style towards the bench, which made it difficult for the judges to conduct proceedings." *Id.* at 84.

Further, as to the abusive nature of his relationship with opposing counsel the Court delineated at least nine separate times that the Respondent called his opponent dishonest or engaged in other name calling. *Id.* at 85. When comparing the clearly unethical conduct in *Norkin* to the conduct in this case pales in

comparison and is not warranting of even the two-year suspension imposed in that case.

Both the *Morgan* and *Abramson* case, referenced above, resulted in a ninety-one-day suspension for engaging in serious misconduct which was then aggravated based upon the fact that both lawyers had been previously disciplined on several occasions prior to the act complained of in their respective cases. Both lawyers started their disciplinary history with public reprimands and in *Morgan* the public reprimand (and later ten-day suspension) was for the same type of misconduct. Accordingly, the appropriate sanction for a lawyer who engages in the conduct complained of herein by The Florida Bar, and found herein by the Referee to have existed, is a short term suspension up to a short rehabilitative suspension.

One of the significant matters that has to be considered is the Respondent's prior disciplinary actions and how it should impact the appropriate sanction recommendation for the violations found in this case in isolation. See *The Florida Bar v. Ratiner*, 46 So. 2d 35 (Fla. 2010); *The Florida Bar v. Ratiner*, 177 So. 3d 1274 (Fla. 2015). In the first case the Respondent was disciplined by his overly aggressive defense of his personal laptop that opposing counsel attempted to make an exhibit to a deposition and the Supreme Court imposed a sixty-day suspension and certain probationary conditions. As is noted elsewhere herein the conduct at issue in this case occurred prior to the 2010 Supreme Court Order and the

Respondent had successfully completed over two years of counseling in compliance with that Order. In the second disciplinary matter, the Respondent attended a records review with a DuPont lawyer and at one part of the inspection engaged in a short "tug of war" over possession of an index handed over to him by opposing counsel and was also found guilty of making certain inappropriate remarks about a different DuPont lawyer.

The Florida Supreme Court has consistently held that disbarment is an extreme measure of discipline that should be used only when that lawyer "has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards" and therefore there must be a showing that this person "should never be at the bar." *The Florida Bar v. Moore*, 194 So. 2d 264, 271 (Fla. 1967). In a more recent decision, the Florida Supreme Court affirmed that disbarment is "the extreme measure of discipline" that should "never be decreed where any punishment less severe . . . would accomplish the end desired." *The Florida Bar v. Shoureas*, 892 So. 2d 1002, 1006 (Fla. 2004). The Florida Supreme Court has even stated that disbarment is reserved for those individuals who are "beyond redemption." *The Florida Bar v. Turk*, 202 So. 2d 848 (Fla. 1967).

The Referee in this case specifically found that the Respondent is not beyond rehabilitation (ROR13) and made the following statement on the record confirming this belief:

> And I don't believe that Mr. Ratiner is beyond redemption. I don't believe that he's beyond being convinced that he needs to change his ways, and that you can be a very aggressive defense attorney or attorney representing your client's interest, but without crossing the line of violating rules --Florida Bar rules, so I am not going to disbar Mr. Ratiner. RT11.

The conduct in this case is not demonstrative of "an attitude or course of conduct that is wholly inconsistent with approved professional standards." Based upon the foregoing analysis it is evident that the Bar's suggested sanction of disbarment is not warranted on the facts of this case. Aggravation is not intended to elevate a misdemeanor to a capital crime.

CONCLUSION

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

WHEREFORE the Respondent, ROBERT JOSEPH RATINER, respectfully requests that he be found not guilty, that the Referee's sanction recommendations be rejected, or that the sanction imposed, if one is to be imposed, be no more than a

suspension that runs concurrent with the existing three-year suspension and that the Court grant any other relief that is deemed reasonable and just.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via electronic mail only on this 15th day of February, 2017 to Tonya LaShun Avery, Bar Counsel, The Florida Bar, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131 (tavery@flabar.org) and to Adria E. Quintela, Staff Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 (aquintel@flabar.org).

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that brief forwarded to the Court has been scanned and found to be free of viruses, by ESET Nod 32.

Respectfully submitted,

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