Filing # 55855076 E-Filed 05/02/2017 01:20:10 PM

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant,

v.

ROBERT JOSEPH RATINER,

Respondent/Appellee.
_____/

Supreme Court Case
No. SC13-539

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

RESPONDENT'S REPLY BRIEF ON CROSS APPEAL

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RECEIVED, 05/02/2017 01:23:29 PM, Clerk, Supreme Court

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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. __.

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. More importantly, none of the conduct at issue in this case, or the Respondent's

prior disciplinary matters related to the quality of legal services being given to a client but the prior cases were generated by opposing counsel in heated litigation.

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. The Bar seeks to elevate this case to a disbarment case by use of aggravating factors that did not warrant disbarment in prior cases and do not warrant disbarment in this case. This Court should exercise its broad discretion and if a suspension is to be ordered, to order same be run concurrent 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.

The Respondent fully briefed this position in his previous brief and will use the opportunity of a Reply Brief to point out the salient differences matters glossed over or ignored by The Florida Bar in their quest to see the Respondent disbarred because he is gruff and not always genteel. However, in this case, as in the Respondent's prior disciplinary matters, there has been no challenge to the quality of his legal work.

As is noted in the Respondent's previous brief, 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. It has been and continues to be the Respondent's position that 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.

In its Reply/Cross Answer Brief ("Reply Brief), the Bar asserts that the Referee's generalized commentary, that had no supporting foundation or reference to the record, should be accepted. See ROR at 11. However, in a referee's finding

of guilt that was approved by this Court, both the *Norkin* Referee and this Court went into great detail to support its finding of violation. *The Florida Bar v. Norkin*, 132 So. 3d 77 (Fla. 2013). The Court, in *Norkin*, goes to great length to document and delineate the exact misconduct at issue (*Id.* at 82-83) and provided the following details:

> 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 Norkin called his opponent dishonest or engaged in other name calling. *Id.* at 85. Thus, the generalized commentary of the Referee should not be used to establish a violation of the rules.

Rather the discussion should be focused on the specific misconduct that was alleged by the Bar.

The first specific issue raised by the Bar in its Reply Brief was the discussion/disagreement over how much time the Respondent had left in his closing argument.[1] See Reply Brief p. 6. The Bar makes no reference whatsoever, to Resp. Ex. C 9 (p. 3439-3446 of the same June 7, 2011 transcript referenced by the Bar) that clearly denotes that the Respondent had another 14 minutes to complete his closing and that the Clerk had mistakenly calculated the time. Judge Donner reluctantly admitted as much during her trial testimony in this case. TT 161-165. While the Bar points to certain comments made by Judge Donner contemporaneously with this timing question, the Respondent's apology to the jury for the interruption of yet another side bar during his closing argument was not disrespectful to Judge Donner[2] or anyone else in the courtroom. Lastly, the

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[1] Please note that while the Referee, at page two of his Report, makes some general comments about this allegation, his Findings do not include a violation of the rules for this particular matter.

[2] Interestingly, the Bar makes no counterargument regarding the fact that its case rests heavily on Judge Donner's testimony and that the Referee stated that in order to have found the Respondent not guilty he would have needed to find, a fellow judge was lying and he was not inclined to make such a finding. RT16, l.12-16. The unhesitating reliance on Judge Donner is misplaced as the Bar had to refresh her recollection during her direct testimony (TT126-128), wanted to ask questions of defense counsel during cross examination rather than answer questions (TT 145) and had a poor recollection of events at her deposition just weeks earlier. Res. Ex. F.

Respondent's comments after Judge Donner accused him of not following "any of her orders" were fully addressed in the Respondent's Answer Brief, but in short, the Respondent's testimony was that he unartfully explaining that certain things could not be done, rather than he was challenging the court's authority in any manner.

The Reply Brief also addresses the Respondent 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.[3] In its Reply Brief, the Bar does not address the legal and factual arguments advanced by the Respondent regarding the rule violations but instead repeats its factual assertions as raised in their Initial Brief.

It is respectfully contended that the Respondent did not violate the rules in reference to his conduct while sitting at counsel table. First, his testimony was clear that the remark in question was meant for his assistant who he was sitting

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[3] 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) but does not reference a violation for the paper tearing issue.

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. The "paper tearing" is also easily explained. It was Respondent's testimony that to avoid duplication of documents, when an opposing counsel hands him documents that he already has in his possession this is his usual practice to avoid confusion of duplicate documents. TT 373-377. While this might have been potentially distracting to opposing counsel it was not intended 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" and the Bar never really addresses this issue in its Brief. 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 (a point

conceded by the Bar and Judge Donner) and wanted the hearing to reach a successful conclusion without interruption. TT 383.

As is noted in detail in the Respondent's Answer Brief, trial judges have had their authority challenged by a lawyer or that lawyer has engaged in conduct that disrupted the tribunal and that lawyer has been disciplined. Examples previously given included *The Florida Bar v. Morgan*, 938 So. 2d 496 (Fla. 2006) [In a several minute exchange 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.]; *The Florida Bar v. Wasserman*, 675 So. 2d 103 (Fla. 1996) [The lawyer screamed at the judge after an adverse ruling]: *Norkin* [The lawyer engaged in repeated disrespectful and offensive conduct over multiple hearings and court proceedings.]. Most respectfully, the conduct found herein was not intended to disrupt a tribunal and the Respondent should be found not guilty of an ethical violation.

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

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

[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, standing alone, warranted a public reprimand (or at worse a short suspension) and that the Referee should balance all of the mitigating and aggravating factors, inclusive of the Respondent's two prior suspensions, and then consider to what degree he should increase the recommended sanction.

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). Most respectfully, the clear and convincing evidence present in this case is that the Respondent, is not beyond redemption and in fact to the contrary is a good

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proposition that disbarment was not appropriate. *The Florida Bar v. Ratiner*, 46 So. 3rd 35 (Fla. 2010). The Bar cites to this Referee's Report in its Reply Brief even though they know said Report was not accepted as to sanction.

and valuable member of our community who should be given an opportunity in the future to restore his good name and one day have the possibility of seeking reinstatement.

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 Bar in its Reply Brief points to a later hearing where the Referee admitted to struggling with his sanction recommendation in light of the prior conduct but what the Bar does not include in its Brief is the following comment by the Referee, notwithstanding his "struggle": "I still believe that he can change his ways . . . but I do believe he should be given the opportunity to practice law again . . ." See October 4, 2016 Hearing Transcript at pages 8 through 9.

The Bar contends that it is the repeated conduct that supports their sanction position and cites to three cases. *Walkden*, *Heptner*, and *Vining*, that have no application herein. In *Walkden*, the Court disbarred a lawyer for practicing law while suspended a second time wherein the newer charges came on the heels of a

one-year suspension for the same conduct. *The Florida Bar v. Walkden*, 950 So.2d 407 (Fla. 2007). In *Heptner*, the Court increased a suspension to disbarment for repeated criminal acts (soliciting delivery of cocaine) and for knowingly practicing law while suspended. *The Florida Bar v. Heptner*, 887 So.2d 1036 (Fla. 2004). Lastly, in *Vining*, the Court disbarred a lawyer finding that:

> . . . Vining has exhibited a pattern of disregard and contempt for his clients and the opposing counsel during the course of the three-year disciplinary proceedings; is currently serving a three-year suspension; has another pending disciplinary proceeding; and has refused to admit any wrongdoing in his conduct with this client or in refusing to respond to the Bar's requests for information. *The Florida Bar v. Vining*, 761 So.2d 1044, 1047 (Fla. 2000).

There are no client complaints in the current matter or in the prior disciplinary cases. There has been no issue regarding contempt of a prior disciplinary order and there has been no criminal misconduct. Accordingly, the cases cited by the Bar do not point to disbarment herein.

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. This issue was fully discussed in the Respondent's Answer Brief but the Bar continues to contend that the Respondent has not learned from his past discipline and continues to cite to conduct that occurred more than ten years ago and ignore the Referee's specific

finding that the Respondent can be rehabilitated. The Bar also continues to ignore the mitigation found by the Referee and only attempts to refute the age of this case, blaming the Respondent's Court approved stay of the matter for the delay when the question presented was why did the Bar allow a year and three months to elapse from the date of the conduct through the filing of its formal complaint on March 22, 2013. See *The Florida Bar v. Wolf*, 930 So. 2d 574 (Fla. 2006) [One-year delay in advancing case.].

The only precedent presented by the Bar in both of its Brief that discusses similar misconduct is *Norkin* and it does not support their position that disbarment is warranted herein. Rather, *Norkin* stands for the proposition that a two-year suspension is warranted for repeated abusive treatment of the judiciary and other litigants. The Referee, without distinguishing *Norkin* is recommending a three-year suspension for the conduct herein which is longer than the suspension in *Norkin*.

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via electronic mail only on this 2nd day of May, 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.

By: _____
KEVIN P. TYNAN, ESQ.