

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

KEVIN J. HUBBART

Respondent.

CASE NO.: SC09-1040

SC09-1218

TFB NOS.: 2008-11,146(6A)

2009-11,443(6A)

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as “The Florida Bar” or “the Bar.” The Respondent, Kevin J. Hubbard, will be referred to as “Respondent.”

"TR1" will refer to the transcript of the final hearing before the Referee in Supreme Court Case Nos. SC09-1040 and SC09-1218 held on August 21, 2009.

“TR2” will refer to the transcript of the final hearing held before the Referee in Supreme Court Case Nos. SC09-1040 and SC09-1218 on September 25, 2009.

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R Exh." will refer to exhibits presented by Respondent at the final hearing before the Referee.

The Report of Referee dated January 7, 2010, in Supreme Court Case No. SC09-1218 will be referred to as "RR (January 7, 2010)." The Report of Referee dated December 11, 2009, in Supreme Court Case No. SC09-1040 will be referred to as “RR (December 11, 2009).”

“Rule” or “Rules” will refer to the Rules Regulating The Florida Bar.

“Standard” or “Standards” will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS AND OF THE CASE

This proceeding involves two consolidated cases. In one case, Respondent committed felony misconduct by writing worthless checks. In the second case, Respondent appeared on behalf of a client while ineligible to practice law due to failure to pay costs owed to the Bar in a previous disciplinary matter. Respondent misrepresented his status to the court, the client, and the opposing party.

Supreme Court Case No. SC09-1040 (Felony Suspension):

On June 22, 2009, The Florida Bar filed a Notice of Determination or Judgment of Guilt, seeking Respondent's suspension pursuant to Rule 3-7.2(f). Respondent entered pleas of *nolo contendere* to charges of obtaining property in return for worthless checks in four separate criminal cases filed in Pinellas County Criminal Court. On December 15, 2003, the criminal court accepted Respondent's plea and withheld adjudication on one felony charge and one misdemeanor charge of obtaining property in return for worthless checks. The checks were written by Respondent to Publix grocery store in the amounts of \$245.92 and \$99.55. *See* Notice of Determination or Judgment of Guilt, with attached Exhibit A, dated June 19, 2009. On May 5, 2009, the criminal court accepted Respondent's plea and withheld adjudication on two felony charges of obtaining property in return for worthless checks. One check was written by Respondent to Publix in the amount

of \$220.68 on his personal checking account with his wife. TR1 38. The other check was written on the account of a business owned by Respondent in the amount of \$330.00 for landscaping services. TR1 39. *See* Notice of Determination or Judgment of Guilt, with attached Exhibit A, dated June 19, 2009. Respondent did not report these adjudications to The Florida Bar as required by Rule 3-7.2(c). TR1 19-20. Respondent made restitution for all of the worthless checks. TR1 37, 52.

On June 23, 2009, this Court entered an order suspending Respondent from the practice of law pursuant to Rule 3-7.2(f), effective July 23, 2009. A Referee was assigned and a final hearing was held on August 21 and September 25, 2009. At the August 21, 2009 hearing, Respondent testified that, in both the 2003 and the 2008 criminal cases, he did not learn of the dishonored checks until he was arrested. TR1 35, 40. Respondent testified that at the time of the second two dishonored checks, he was involved in a financially and emotionally stressful business venture and did not check his mail or balance his checkbook. TR1 47. Respondent stated he had been diagnosed with adult attention deficit disorder in or about 2004. TR1 49, 53. Respondent stated he was seeing a doctor for this condition and requested the opportunity to present additional evidence to the Referee. TR1 51, 53. The Referee agreed to continue the hearing until September

25, 2009. On September 25, 2009, Respondent failed to present any additional evidence concerning the claimed medical condition. RR 3 (December 11, 2009). The Referee issued a Report of Referee dated December 11, 2009, recommending that Respondent be found guilty of Rule 3-7.2 (Procedures upon criminal or professional misconduct; Discipline upon Determination or Judgment of Guilt of Criminal Misconduct). The Referee recommended that Respondent be suspended for three (3) years. The Referee found as aggravating factors Respondent's prior disciplinary history with extensive violations, and a pattern of misconduct over an extended period of time. In mitigation, the Referee cited personal problems as cited by Respondent without corroboration.

Supreme Court Case No. SC09-1218:

By Order dated January 17, 2008, this Court directed that Respondent receive a public reprimand in Supreme Court Case No. SC07-835. Respondent was ordered to pay the Bar's costs in the amount of \$4,390.32. By letter dated January 29, 2008, The Florida Bar advised Respondent that his payment for costs was due no later than March 3, 2008. Included with the letter was a "Failure to Pay Notice," advising Respondent that if costs became delinquent, he would be deemed a delinquent member of The Florida Bar and not entitled to practice law in Florida until such time as the delinquency was cured. TFB Exh. 2. At the final

hearing, Respondent acknowledged that he received the letter and was aware of his obligation to pay the costs. TR2 63, 81-82. Respondent failed to pay the costs by the due date. By certified letter dated March 4, 2008, The Florida Bar notified Respondent that he was delinquent for failure to pay assessed costs and was no longer eligible to practice law in Florida. TFB Exh. 3. The certified letter was delivered to Respondent's office and signed for by his receptionist. TR2 91.

Respondent represented his client and employer, Daniel LaSalla, in a multi-party civil litigation matter scheduled for trial on Monday, March 10, 2008, in Pinellas County Circuit Court. On Monday morning, Respondent was doing some last minute research online on Fastcase, a research service available to members of The Florida Bar, and was unable to access the site. Respondent knew there could be a problem with his Bar status because he had previously been blocked from the site because of a dues delinquency. Respondent checked his status on The Florida Bar website and saw that he was listed as ineligible. TR2 77. Respondent testified that he called The Florida Bar that morning and was told he needed to pay the costs due to restore his eligibility. TR2 72-73, 77. Respondent also testified that he called The Florida Bar Ethics Hotline for advice. TR2 77-78.

Without curing the delinquency, Respondent appeared for trial at 9:00 a.m. on March 10, 2008. Respondent asked for, and was granted, a 24-hour

continuance for trial. Respondent knew he was ineligible to practice law when he appeared in court on March 10, 2008. TR2 84. At that time, Respondent did not advise the trial court or opposing counsel that he had become a delinquent member of The Florida Bar and was not authorized to practice law. TR2 16, 52-53.

Respondent told opposing counsel, Charles Barrett, that he had an “issue” with The Florida Bar that he needed to clear up. He did not inform Mr. Barrett, and Mr. Barrett did not understand at the time that Respondent was ineligible to practice law. TR2 56-57.

After the trial was continued, Respondent continued to practice law by representing his client in settlement negotiations and by disseminating pleadings and papers related to the case. TR2 22, TFB Exhs. 15, 16. Respondent participated in an email exchange with opposing counsel, Steven Wenzel, in which he engaged in settlement negotiations. TFB Exh. 15. On the afternoon of March 10, 2008, Respondent sent his exhibit list by email to Mr. Wenzel. TFB Exh. 16, TR2 22. By email, on the evening of March 10, 2008, Respondent notified opposing counsel that he would be asking for a continuance the next day. TFB Exh. 15, TR2 21-22, 94. Respondent failed to advise counsel at that time that he had become a delinquent member of The Florida Bar and was not authorized to practice law.

When trial was reconvened on the morning of March 11, 2008, Respondent informed the trial court and opposing counsel that he was unable to proceed because he was ineligible to practice. Respondent requested a continuance. TFB Exh. 6; TR2 86-87. Respondent represented that he was applying for a loan to raise the funds to pay the Bar. TFB Exh. 6, p. 5. Judge J. Thomas McGrady issued an order continuing the trial for one week. In the order, the court reserved “ruling on the amount of sanctions to be granted to Plaintiff and Defendant Subway Real Estate Corporation as a result of Mr. Hubbard’s conduct in this matter. Basic professionalism would have required Mr. Hubbard to advise counsel in advance of trial of his potential need for a continuance and the reason therefore.” TFB Exh. 5.

Respondent cured his delinquency and became eligible to practice law again on or about April 24, 2008. TR2 69. The civil case ultimately resolved and did not go to trial. TR2 32.

A final hearing was held on September 25, 2009. The Florida Bar presented the testimony of Steven Wenzel and Charles Barrett. Mr. Wenzel and Mr. Barrett were opposing counsel in the civil matter in which Respondent appeared while ineligible to practice law. Respondent testified on his own behalf. The Referee issued a Report of Referee dated January 7, 2010, recommending that Respondent

be found guilty of Rule 3-4.3 (committing act that is unlawful or contrary to honesty and justice); Rule 4-5.5 (unlicensed practice of law); Rule 4-8.4(a) (violating or attempting to violate Rules of Professional Conduct); Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 4-8.4(d) (conduct in connection with the practice of law that is prejudicial to the administration of justice). The Referee recommended that Respondent be permanently disbarred. The Referee found as aggravating factors Respondent's prior public reprimand with extensive violations in Supreme Court Case No. SC07-835, and the recommended findings of guilt in Supreme Court Case No. SC09-1040. The Referee also found in aggravation a pattern of misconduct over an extended period of time. In mitigation, the Referee cited personal problems as testified to by Respondent without corroboration. RR 11-13 (January 7, 2010).

Petitions for Review and Consolidation of Cases

On February 11, 2010, in Case No. SC09-1040, Respondent filed a Petition for Review of the Report of Referee, seeking review of the Referee's findings of guilt and the recommended sanction. On March 11, 2010, in Case No. SC09-1218, Respondent filed a Petition for Review of the Report of Referee, challenging the Referee's findings of guilt and the recommended sanction. On April 20, 2010, this Court entered an Order consolidating the two cases for all appellate purposes.

Respondent filed his Initial Brief on June 4, 2010. Respondent failed to file the transcript of the final hearing on September 25, 2009, and the Bar filed a Motion to Dismiss Respondent's Petition for Review. On September 28, 2010, this Court ordered Respondent to file the transcript on or before October 28, 2010.

Respondent filed the missing transcript on October 27, 2010.

Respondent's Prior Discipline:

Respondent was publicly reprimanded by Order of this Court dated January 17, 2008, in Supreme Court Case No. SC07-835. This proceeding included four separate cases with numerous Rule violations. TFB Exh. 14. The misconduct can be summarized as follows:

a. TFB No. 2004-10,651(6A): Respondent failed to comply with the Bar's continuing legal education requirements (CLER) for the reporting period June 1, 2000 to May 31, 2003, and became ineligible to practice law because of his CLER delinquency. While he was ineligible to practice law, he provided legal services to one or more clients. Respondent also violated advertising Rules by using misleading letterhead stating he had associates when he was a sole practitioner.

b. TFB No. 2005-11,186(6A): In 2004, Respondent was hired to create a trust and to assist in the recovery of assets allegedly misappropriated by a family

member. Respondent failed to prepare and execute a written contingency fee agreement for the representation. The assets recovered by Respondent included an automobile, which the client wanted to sell. Respondent purchased the vehicle on a promissory note. He failed to explain to the client the conflict of interest posed by his purchase of the vehicle. Respondent failed to make the payments on the vehicle and entered into a compromise settlement agreement. He breached the agreement and returned the vehicle to the Trust. Respondent also violated advertising Rules by using misleading letterhead stating he had associates when he was a sole practitioner.

c. TFB No. 2005-11,578(6A): In 2005, Respondent acted as closing agent for the sale of a Subway Sandwich Shop franchise. In connection with the transaction, Respondent received \$36,685.21, representing the payoff of a Bank of America loan. Respondent failed to promptly disburse the payoff funds to Bank of America. The Bar served Respondent with a subpoena duces tecum for his trust account records. The records produced by Respondent were incomplete and revealed that Respondent did not maintain his trust account in compliance with the Rules. Respondent also violated advertising Rules by using misleading letterhead stating he had associates when he was a sole practitioner.

d. TFB No. 2006-11,326(6A): In or about 2004, Respondent represented

clients with adverse interests and did not disclose the conflict to the clients.

Opposing counsel filed a motion to disqualify Respondent, which was granted.

Respondent admitted to engaging in a conflict of interest.

Respondent was informed by letter dated July 31, 2009 from the Bar that he had complied with all conditions of the disciplinary order in Case No. SC07-835.

TR1 43-44.

SUMMARY OF THE ARGUMENT

Respondent has demonstrated a complete unfitness for the practice of law by engaging in a pattern of misconduct extending over at least six years, resulting in harm to his clients and the legal system. Respondent has shown a lack of respect for the judicial system and has failed to abide by court orders, causing a waste of judicial resources and financial injury to his clients and other members of the Bar. Respondent has repeatedly failed to complete the basic requirements of a member of The Florida Bar, including failing to follow trust accounting procedures, failing to pay disciplinary costs, and failing to complete continuing legal education requirements. Respondent has also demonstrated his unfitness for the practice of law by engaging in a pattern of financial irresponsibility that has affected his clients and resulted in criminal charges for writing worthless checks. In addition to demonstrating a dangerous pattern of financial and professional irresponsibility, Respondent has also engaged in dishonest conduct by attempting to cover up his misdeeds.

The Referee's findings and recommendations as to guilt in both cases should be approved. This Court should also approve the Referee's recommendation that Respondent be permanently disbarred from the practice of law.

STANDARD OF REVIEW

The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *Fla. Bar v. Nicnick*, 963 So.2d 219, 221 (Fla. 2007). If the referee's findings are supported by competent, substantial evidence, then this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Fla. Bar v. Porter*, 684 So.2d 810, 813 (Fla. 1996). Because the referee is in the best position to judge the credibility of witnesses, this Court defers to the referee's assessments. *Fla. Bar v. Forrester*, 916 So.2d 647, 652 (Fla. 2005).

A referee's recommended sanction in an attorney disciplinary proceeding is persuasive, but this Court has the ultimate responsibility to determine the appropriate sanction. *Fla. Bar v. Kossow*, 912 So.2d 544, 546 (Fla. 2005). Generally speaking, this Court will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw or in the Florida Standards for Imposing Lawyer Sanctions. *Id.*

ARGUMENT

I. RESPONDENT WAS NOT DENIED DUE PROCESS OF LAW BY THE APPLICATION OF RULE 3-7.2. RESPONDENT WAS GIVEN AMPLE OPPORTUNITY TO EXPLAIN THE CIRCUMSTANCES OF THE WORTHLESS CHECK CHARGES.

Respondent argues he was denied due process because the criminal charge against him was never heard on the merits. Respondent contends that since Rule 3-7.2(h) provides that a withhold of adjudication is conclusive as to guilt in the disciplinary proceeding, he was prohibited by the Rules from disputing whether the underlying facts constitute a disciplinary violation. Respondent argues that because there was an irrebuttable presumption of guilt, “no facts were even considered.” Respondent’s argument is without merit.

Rule 3-7.2, Rules Regulating The Florida Bar provides:

(b) Determination or Judgment of Guilt, Admissibility; Proof of Guilt. Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial or plea to any crime under the law of this state, . . . shall be admissible in proceedings under these rules and shall be conclusive proof of guilt of the criminal offense(s) charged for the purposes of these rules.

The Rules also provide that: “For purposes of these rules, “determination of guilt” shall include those cases in which the trial court in the criminal proceeding enters an order withholding adjudication of the respondent’s guilt of the offense(s) charged.” Rule 3-7.2(a) (2).

The Rules further state: “The respondent may not contest the findings of guilt in the criminal proceedings. A respondent who entered a plea in the criminal proceedings may be allowed to explain the circumstances concerning the entry of the plea for purposes of mitigation.” Rule 3-7.2(h).

At the final hearing on August 21, 2009, Respondent admitted entering pleas of *nolo contendere* to three felony charges and one misdemeanor charge.

Respondent acknowledged that his pleas were accepted by the respective criminal courts and that adjudication of guilt was withheld. TR1 33-34. The Orders of Adjudication to the criminal charges were entered into the record and accepted by the Referee. TR 57. Under Florida law, a plea of *nolo contendere* constitutes a conviction, even where adjudication is withheld. *See Epstein v. Toys-R-Us Delaware, Inc.*, 277 Fl. Supp.2d 1266, 1274 (S.D. Fla. 2003), holding that under Florida law, a *nolo contendere* plea constitutes a “conviction” regardless of the withhold of adjudication, citing Fla. Stat. Section 960.29(3) (defining “conviction” to include “a guilty or *nolo contendere* plea by a defendant, regardless of adjudication of guilt”).

This Court has held that under the Rules Regulating The Florida Bar “a determination or judgment of guilt . . . shall constitute conclusive proof of the criminal offense(s) charged.” *Fla. Bar v. Dougherty*, 769 So.2d 1027 (Fla. 2000).

In that case, Dougherty contested the report of referee recommending that he be found guilty of violating Bar Rules and disbarred based on his felony conviction on several counts of wire fraud. Dougherty argued he did not commit the offenses and there was no proof of his alleged misconduct in the disciplinary proceeding other than his federal convictions. This Court rejected the argument and held that the conviction was conclusive proof of misconduct. This Court approved the report of referee recommending that Dougherty be disbarred.

In *Fla. Bar v. Lancaster*, 448 So.2d 1019 (Fla. 1984), the responding attorney argued that he could not be found guilty of two counts of the Bar's complaint because the only evidence presented in support of those counts was his plea of *nolo contendere* to the offenses for which adjudication was withheld. *Id.* at 1021. This Court disagreed, stating: "As for Lancaster's argument that the evidence was insufficient, this Court has previously held that a *nolo contendere* plea along with an adjudication of guilt is sufficient to sustain disciplinary action." *Id.* at 1022-22. This Court further emphasized that due process requires that the accused lawyer be given full opportunity to explain the circumstances and offer testimony in mitigation of the penalty. *Id.* at 1022.

At the final hearing, Respondent admitted writing the worthless checks. Respondent claimed he did not engage in "knowing" criminal conduct. He

claimed he did not know at the time he wrote the checks that there were insufficient funds in his accounts to cover the checks. Respondent was given ample opportunity to explain the circumstances surrounding the worthless check charges. TR1 35-49. The Referee granted Respondent a continuance so that he could present additional evidence concerning this condition. Respondent failed to present any additional evidence.

In his Report of Referee, the Referee stated that he considered the evidence presented and the caselaw. The Referee cited *Fla. Bar v. Kandekore*, 766 So.2d 1044 (Fla. 2000), in which this Court held that under Rule 3-7.2, a conviction serves as conclusive proof of guilt of the criminal offense charged, and that determinations or judgments of guilt shall constitute conclusive proof of the criminal offenses charged. *Id.* at 1007. *Kandekore* also holds that referees in disciplinary proceedings may not “go behind” a conviction to determine whether or not the attorney is actually guilty of the offense. RR 4 (December 11, 2009). The Referee also considered *Fla. Bar v. De la Torre*, 994 So.2d 1032 (Fla. 2008), in which an attorney pled nolo contendere to two felonies, failed to report them to the Bar, and continued to practice law.

In making his findings and recommendations, the Referee followed the Rules and the case law. Respondent was not denied due process of law and the

Referee's findings and recommendations as to guilt should be approved.

II. THE REFEREE'S FINDINGS AND CONCLUSIONS OF GUILT ARE SUPPORTED BY THE COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD AND SHOULD BE APPROVED.

Supreme Court Case No. SC09-1040:

Respondent argues that there is "a complete lack of facts to support the finding" of guilt in this case because no facts were considered. As discussed in Section I of this brief, Respondent's felony convictions constituted conclusive proof of guilt of the criminal offenses charged for purposes of the Rules Regulating The Florida Bar. *See* Rule 3-7.2(b). *See also Fla. Bar v. Kandekore and Fla. Bar v. Dougherty, supra.* Respondent pled *nolo contendere* to felony charges of Obtaining Property in Return for Worthless Check. Respondent's pleas were accepted by the criminal court and the court issued Orders Withholding Adjudication of Guilt on December 15, 2003 and on May 5, 2009. Respondent admitted writing the worthless checks and testified extensively concerning the circumstances surrounding the check charges.

This Court has imposed discipline on attorneys who write worthless checks. In *Fla. Bar v. Williams*, 753 So.2d 1258 (Fla. 2000), the responding attorney wrote a paycheck to an employee that was returned for insufficient funds. Williams subsequently paid the employee for the returned check and her bank fees.

Williams was not criminally charged. The referee found Williams guilty of violating Rule 3-4.3 (engaging in conduct that is unlawful or contrary to honesty and justice). *Id.* at 1260. Williams argued on review that he did not commit a deliberate act in writing the check when there were insufficient funds in the account to cover it. This Court held that:

The issuance of a worthless check by an attorney constitutes unethical conduct and subjects the attorney to professional discipline by the Florida Bar. Writing worthless checks, even where restitution is made, “burdens the recipient and is fundamentally dishonest. It brings disrepute on the writer and the profession. It is inconsistent with fitness to practice law.

Id. at 1261-62 (citations omitted). This Court found that the referee’s findings of fact and conclusions of guilt were supported by Williams’ admission that he gave a worthless check to his employee. *Id.* In this case, Respondent not only admitted writing worthless checks, he was convicted of three felonies. The Referee’s findings of fact and conclusion as to guilt are supported by the competent and substantial evidence in the records and should be upheld.

Supreme Court Case No. SC09-1218:

Respondent argues that the evidence does not support the Referee’s findings of guilt in this case. The Referee found Respondent guilty of violating Rules 3-4.3 (committing an act that is unlawful or contrary to honesty and justice); 4-5.5

(unlicensed practice of law); 4-8.4(a) (violate or attempt to violate Rules of Professional Conduct); Rule 4-8.4(c) conduct involving dishonesty, fraud, deceit or misrepresentation); and 4-8.4(d) (conduct in connection with the practice of law that is prejudicial to the administration of justice). Respondent claims that the evidence is insufficient to find that he intentionally sought to practice law while ineligible or that he intentionally misrepresented his status to opposing counsel or the court.

Respondent acknowledged that on March 10 and 11, 2008, he was ineligible to practice law because of his delinquent status for failing to pay costs to The Florida Bar. Initial Brief, at 11-12. He testified that he knew of his ineligibility when he appeared in court on March 10, 2008. TR2 84. The Referee found that, at the time Respondent appeared at the hearing on March 10, 2008, he failed to advise the court or opposing counsel that he was not authorized to practice law. The Referee further found that Respondent continued to practice law after the hearing on March 10, 2008 by representing his client in settlement negotiations and by disseminating pleadings and papers relative to the case. When the trial reconvened on the morning of March 11, 2008, Respondent informed the court and opposing counsel of his ineligibility. RR 3 (January 7, 2010).

The Referee also found that “the un rebutted evidence proves beyond a

reasonable doubt that the Respondent has engaged in deliberate conduct resulting in damages to the parties in the underlying litigation.” RR 11 (January 7, 2010).

The Referee found that Respondent engaged in intentional conduct in the underlying litigation involving dishonest, fraud, deceit or misrepresentation to both opposing counsel and the presiding Judge.” RR 12 (January 7, 2010).

The Referee’s findings are supported by the record. Steven Wenzel was counsel for the plaintiff in the civil case in which Respondent represented defendant Daniel LaSalla. Mr. Wenzel testified that at the “cattle call” on March 10, 2008, Respondent asked the court for a continuance of the trial but did not give any indication that he was ineligible to practice law. TR2 16. Mr. Wenzel testified that he continued to engage in settlement negotiations with Respondent on and off during the day on March 10th, received a witness list from Respondent by email on March 10th, and received emails pertaining to settlement from Respondent into the evening of March 10th. TR2 18-22; TFB Exhs. 15, 16. Respondent did not inform Mr. Wenzel of his ineligibility at any time on March 10th. Mr. Wenzel’s client continued to incur costs as Mr. Wenzel prepared for trial the following day. TR2 29-30; TFB Exh. 6, pgs 6-7. Charles Barrett, co-counsel to Mr. Wenzel, testified that Respondent indicated to the court on the morning of March 10, 2008 that he had something urgent to attend to and was unable to go to trial that day. TR2 49,

53. Mr. Barrett did not know that Respondent was ineligible to practice law. TR2 53, 57. Mr. Barrett continued to work on the case on March 10th and billed his client for the time spent preparing for trial. TR2 55. Mr. Barrett testified that the plaintiff's main witness traveled several hours to be in court the morning of March 10th. TR2 55.

Respondent argues that he lacked the intent to deceive counsel or the court. The Referee found that Respondent intentionally misled counsel and the court. This Court has held that in order to satisfy the element of intent under Rule 4-8.4(c) it must only be shown that the conduct was deliberate or knowing. *Fla. Bar v. Fredericks*, 731 So.2d 1249 (Fla. 1999). This Court has further held that the motive behind the attorney's action is not the determinative factor. Rather, the issue is whether the attorney deliberately or knowingly engaged in the activity in question. *Fla. Bar v. Riggs*, 944 So.2d 167, 171 (Fla. 2006) (citations omitted) (emphasis added). *See also Fla. Bar v. Forrester*, 818 So.2d 477 (Fla. 2002) (attorney violated Rule 4-8.4(c) by failing to making an evasive remark to opposing counsel concerning the whereabouts of a deposition exhibit). Because Respondent's actions were deliberate and knowing, the element of intent is satisfied. His conduct was intentional within the meaning of Rule 4-8.4(c).

Respondent appeared in court on March 10, 2008 knowing he was ineligible

to practice law. He intentionally misrepresented his status to the court and opposing counsel. He intentionally continued to engage in the practice law after the hearing without informing the court or opposing counsel of his ineligibility. The record supports the Referee's finding that Respondent violated Rule 4-5.5 by engaging in the unlicensed practice of law, and Rule 4-8.4(a) by violating or attempting to violate the Rules of Professional Conduct. The record also supports the Referee's findings and conclusions that Respondent violated Rule 3-4.3 by committing an act contrary to honesty and justice, and Rule 4-8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Referee's findings and conclusions of guilt are supported by the competent substantial evidence in the record and should be upheld.

III. PERMANENT DISBARMENT IS THE APPROPRIATE SANCTION FOR RESPONDENT'S CUMULATIVE MISCONDUCT.

The Referee recommended the sanction of permanent disbarment. Respondent argues that the recommended sanction is excessive and contrary to the Standards for Imposing Lawyer Discipline and the aggravating and mitigating factors. The Florida Bar submits that permanent disbarment is the appropriate sanction for Respondent's extensive and cumulative pattern of misconduct. This sanction is supported by the Rules Regulating The Florida Bar, the Standards for

Imposing Lawyer Sanctions, and the case law.

The Rules Provide for Permanent Disbarment

Rule 3-5.1 addresses the types of disciplinary measures available once guilt has been established. The Rules Regulating The Florida Bar were amended in 1998 to allow permanent disbarment as a disciplinary sanction. Rule 3-5.1(f), pertaining to disbarment, provides that a disbarred attorney may not apply for readmission for 5 years, or such longer period as the Court may determine in the disbarment order. The Rule also provides that a permanently disbarred attorney may not apply for readmission. The Rule states, in pertinent part:

(f) Disbarment. A judgment of disbarment terminates the respondent's status as a member of the bar. **Permanent disbarment shall preclude readmission.** A former member who has not been permanently disbarred may only be admitted again upon full compliance with the rules and regulations governing admission to the bar.

R. Reg. Fla. Bar 3.51(f) (emphasis added).

The Florida Standards for Imposing Lawyer Sanctions Support Disbarment

The Florida Standards for Imposing Lawyer Sanctions provide a format for Bar counsel, Referees, and the Supreme Court to determine the appropriate sanction in attorney disciplinary matters. This Court has held that "[t]he Florida Standards for Imposing Lawyer Sanctions provide a starting point for determining, in the absence of mitigating or aggravating circumstances, an appropriate

discipline based on the duty violated and the potential or actual injury caused by the violation." *Fla. Bar v. Cox*, 794 So.2d 1278, 1283 (Fla. 2001). In this case, the applicable Standards indicate that disbarment is the appropriate sanction for Respondent's misconduct. The following Standards apply to Respondent's conduct:

5.1 Failure to Maintain Personal Integrity

Standard 5.1 applies to cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation.

5.11 Disbarment is appropriate when:

(a) lawyer is convicted of a felony under applicable law; or

....

(f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Standard 5.11(a) makes disbarment the appropriate sanction when a lawyer is convicted of a felony. Under the Rules, Respondent's plea of *nolo contendere*, which was accepted by the criminal court with an order withholding adjudication, is deemed a felony conviction. Respondent issued four worthless checks, three of which resulted in felony charges. The Referee considered this Standard in recommending discipline in Case No. SC09-1040. *See* RR 5 (December 11, 2009).

The Referee applied Standard 5.11(f) in recommending permanent disbarment in his Report of Referee in Case No. SC09-1218. The Referee found that Respondent engaged in intentional conduct in the underlying litigation involving dishonesty, fraud, deceit or misrepresentation to both opposing counsel and the presiding Judge. The Referee further found that “this pattern of intentional misconduct seriously adversely reflects on his fitness to ever practice law.” RR 12 (January 7, 2010).

6.1 False Statements, Fraud, and Misrepresentation

Standard 6.1 applies to cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court.

6.11 Disbarment is appropriate when a lawyer:

(a) with the intent to deceive the court, knowingly makes a false statement or submits a false document;

(b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

While the Referee did not specifically refer to this Standard in his Report, the Referee found that Respondent engaged in intentional conduct in the underlying litigation involving dishonesty, fraud, deceit or misrepresentation to both opposing counsel and the presiding Judge. RR 12 (January 7, 2010). The Referee also

found that Respondent's misconduct caused actual damage to his clients, adversaries and other lawyers. *Id.* at 13. Respondent deceived the court by failing to advise the court of his ineligibility. *Fla. Bar v. Forrester, supra.* His withholding of this material information caused serious or potentially serious injury to his client, the opposing party, and the system of justice.

6.2 Abuse of the Legal Process.

6.21 Disbarment is appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

In applying this Standard, the Referee found beyond a reasonable doubt that Respondent engaged in deliberate conduct resulting in damages to the parties in the underlying litigation. RR 11 (January 7, 2010).

7.0 Violations of Other Duties Owed as a Professional

7.2 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes injury or potential injury to a client, the public, or the legal system.

8.0 Prior Discipline Orders

8.1 Disbarment is appropriate when a lawyer:

- (a) intentionally violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system, or the profession; or
- (b) has been suspended for the same or similar misconduct, and

intentionally engages in further similar acts of misconduct.

Here, Respondent violated a prior disciplinary order by failing to pay assessed costs as ordered by this Court on January 17, 2008, and by representing a client while ineligible to practice law. Although Respondent has not been previously suspended, his prior public reprimand was imposed for extensive misconduct in four separate cases spanning a period of several years that included practicing law while ineligible in TFB No. 2004-10,651(6A).

In this case, disbarment is appropriate under Standards 5.11, 6.11, 6.21, 7.1, and 8.1. While it is clear that the Standards support disbarment in this case, the Standards do not provide specific guidance as to when permanent disbarment should be imposed. As discussed above, permanent disbarment is authorized by the Rules Regulating The Florida Bar and the case law. In addition, Standard 3.0 directs a court to consider the following factors in imposing a sanction:

- (1) the duty violated;
- (2) the lawyer's mental state;
- (3) the potential or actual injury caused by the lawyer's misconduct;
- (4) the existence of aggravating or mitigating circumstances.

Consideration of these factors, in conjunction with the relevant case law, supports permanent disbarment for Respondent's misconduct. Respondent violated important duties, and in so doing, caused both potential and actual harm. The Referee found "beyond any reasonable doubt" that Respondent engaged in

deliberate conduct resulting in damages to the parties in the underlying litigation. The Referee found that Respondent engaged in a willful and contumacious pattern of misconduct designed to benefit both himself and his clients and frustrate the system of law. The Referee further found that the misconduct caused financial damage to other members of the Bar and the Respondent's clients and adversaries. RR 11-13 (January 7, 2010).

The Referee also found significant aggravating factors. In both cases, the Referee found in aggravation Respondent's prior disciplinary record, specifically noting the extensive violations found in Case No. SC07-835. RR 8 (December 11, 2009); RR 11 (January 7, 2010). The Referee listed the 27 Rule violations found in the prior disciplinary proceeding. The Referee also found as an aggravating factor a pattern of misconduct over an extended period of time from 2004 to the present. The Referee noted that Respondent's lengthy pattern of misconduct "has continued for the past five years and throughout these many disciplinary proceedings." RR 11-12 (January 7, 2010).

As to mitigating factors, the Referee noted that Respondent presented "absolutely no corroboration or credible evidence" to support his claimed personal problems. RR 13 (January 7, 2010). The Referee did not make any other findings as to mitigating factors.

Respondent's cumulative misconduct warrants permanent disbarment

It is well established that in rendering discipline, this Court considers the respondent's previous disciplinary history and increases the discipline where appropriate. *Fla. Bar v. Bern*, 425 So.2d 526, 528 (Fla. 1982). The Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct. *Id.* In *Fla. Bar v. Williams*, 753 So.2d 1258, 1263 (Fla. 2000), the Court recognized that "enhanced discipline is permissible when multiple violations occur or the attorney has a prior history of misconduct."

The Referee recommended permanent disbarment based on Respondent's egregious cumulative conduct over a lengthy period of time. The Referee cited *Fla. Bar v. Springer*, 873 So.2d 317 (Fla. 2004), in which this Court approved the referee's recommendation of disbarment based on Springer's multiple instances of misconduct occurring over a span of ten years. RR 12 (January 7, 2010). Like Springer, the Respondent's course of conduct demonstrates that he does not understand the most fundamental legal doctrines or procedures. Like Springer, Respondent engaged in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on his fitness to practice law.

873 So.2d at 321.

In recommending permanent disbarment, the Referee considered Respondent's "lengthy pattern of misconduct" including his prior discipline (Case No. SC07-835), and the recommended findings of misconduct in the felony suspension case (Case No. SC09-1040). The Referee could not consider the recommended three-year suspension in Case No. SC09-1040 as prior discipline because this Court has not yet approved that recommendation. *See Fla. Bar v. Inglis*, 660 So.2d 697, 700-701 (Fla. 1995). However, the Referee could consider Respondent's conduct in that case in aggravation as part of a continuing pattern of misconduct. This Court has held that "it is not necessary for misconduct to have been a basis for discipline in order for it to be considered in aggravation." *Fla. Bar v. Ratiner*, 2010 WL 2517995 (Fla. 2010). This Court has also held that even uncharged conduct can be considered in imposing discipline due to its relevancy to the question of the respondent's fitness to practice law and the discipline to be imposed. *Fla. Bar v. Vaughn*, 608 So. 2d 18, 21 (Fla. 1992). Thus, the Referee correctly considered Respondent's conduct in both of the current proceedings in arriving at an appropriate discipline. This Court should approve both Reports of Referee and permanently disbar Respondent. *Inglis, supra*.

In the prior disciplinary proceeding, Respondent received the benefit of

significant mitigation and received a public reprimand for numerous acts of misconduct, including engaging in conflicts of interest and trust accounting violations. Respondent has apparently failed to respond to a lesser form of discipline. In 2008, within months of his public reprimand in Case No. SC07-835, Respondent was facing criminal charges for issuing worthless checks and engaging in the practice of law while ineligible for failing to pay costs to the Bar.

Respondent also committed violations similar to those that resulted in his previous disciplinary sanction. Such conduct warrants the harshest of sanctions.

Respondent has demonstrated a pattern of irresponsibility regarding the obligations of Bar membership

In this case, Respondent was found guilty of engaging in the practice of law while ineligible for failure to pay the costs of the prior disciplinary proceeding. In TFB No. 2004-10,651(6A), one of the cases that resulted in the public reprimand, Respondent provided legal services to clients while he was ineligible to practice law due to a CLER delinquency (failure to comply with continuing legal education requirements). Respondent appears not to take seriously the requirements of maintaining his status as a member in good standing of The Florida Bar. He acknowledged in his testimony at the final hearing that he had been delinquent on his annual Bar dues in the past. TR2 76. He was questioned by Bar counsel about

a recent CLER delinquency during the 30-day period prior to the effective date of his felony suspension, July 23, 2009. Respondent admitted that he was CLER delinquent at that time. TR1 55-56.

Respondent's disciplinary record also reveals that he failed to maintain his trust account in compliance with Bar Rules. In Case No. 2005-11,186(6A), the Bar subpoenaed Respondent's trust accounting records. Respondent failed to produce all the records required to be maintained by the Rules. An audit of the records produced revealed that Respondent failed to follow the minimum trust accounting procedures and/or did not maintain his trust account in substantial compliance with Bar Rules. This behavior is consistent with Respondent's general disregard of the requirements of maintaining his status with the Bar. Respondent has failed to pay Bar dues, failed to complete CLER requirements, failed to pay disciplinary costs, and failed to maintain trust accounting records. Respondent's behavior is consistent with a pattern of financial irresponsibility in both his professional and personal life.

Respondent has demonstrated a pattern of financial irresponsibility causing harm to his clients and others.

Respondent's current and past disciplinary proceedings show a pattern of financial irresponsibility in his professional and personal life. In this proceeding, in Case No. SC09-1040, Respondent was found guilty of committing felony

misconduct by writing worthless checks. The misconduct in Case No. SC09-1218, resulted from Respondent's failure to pay costs due to the Bar from his prior disciplinary proceeding. In the prior public reprimand proceeding, Case No. SC07-835, several cases involved Respondent's failure to pay monies owed. In one case, Respondent purchased a car from a client on a promissory note and failed to make the payments. TFB Exh. 14 (Consent Judgment in Case No. SC07-835). In another case, Respondent closed a business deal for the sale of a Subway store and failed to promptly deliver loan payoff funds in the amount of \$36,685.21. Respondent wrote a check that was returned for insufficient funds and promised to make good on it with a new check. Respondent issued a replacement check which was returned for insufficient funds. It was several days before Respondent made good on the check. TR1 28-29.

Respondent has also demonstrated a pattern of financial irresponsibility in his personal life. At the final hearing, Respondent testified that he was sued by his homeowner's association in 2002 for failure to pay association fees. TR1 20-21. Respondent's home was subject of a foreclosure action and was sold prior to foreclosure. Respondent subsequently made a deposit on the purchase of another home and agreed to pay rent. In November 2007, Respondent was sued for non-payment of rent. TR1 22-23. In 2007, Respondent invested in a business venture

involving the purchase of an ice skating rink and invested all of his available funds into the venture. Respondent was sued for failure to pay rent on the underlying property and was evicted. TR1 24-26. Respondent was also subject of a lawsuit for failure to make payments owed to the law firm Englander and Fisher. In connection with that matter, Respondent wrote a check that was returned for insufficient funds. TR1 26-27.

Respondent has consistently failed to meet his financial obligations, both personally and professionally. Respondent acknowledged he “is horrible with money” and does not balance his checkbook. TR2 150; TR1 37, 47. Respondent stated that he doesn’t “keep up with things” and that’s why he does not maintain a trust account. TR2 150. Respondent’s complete lack of financial responsibility shows his lack of fitness for the legal profession.

Respondent has demonstrated a pattern of dishonest conduct.

In this case, the Referee found that Respondent engaged in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation to both opposing counsel and the Judge. Respondent was found guilty of violating Rule 4-8.4(c) and 3-4.3 (committing an act that is unlawful or contrary to honesty and justice). Respondent deliberately misrepresented his status to the court and opposing counsel. Respondent also engaged in dishonest conduct by issuing worthless

checks. *Fla. Bar v. Williams, supra*. In his previous disciplinary proceeding, Respondent engaged in other dishonest acts. In three cases, Respondent was found guilty of using misleading letterhead that represented he employed associates in his law firm when he did not. Respondent also failed to make payments on a vehicle he purchased from a client, and failed to disclose to a business client that he had a conflict of interest due to his representation of another client. On multiple occasions, Respondent has allowed himself to become a delinquent member of the Bar and then continued to act as if he were a member in good standing.

In *Fla. Bar v. Head*, 27 So.3d 1, (2010), this Court emphasized the importance of honesty and truthfulness in members of the profession:

The Court has clearly stated that “basic, fundamental dishonesty . . . is a serious flaw, which cannot be tolerated” because dishonesty and a lack of candor “cannot be tolerated by a profession that relies on the truthfulness of its members.” *Fla. Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2002). Dishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole.

27 So.3d at 8-9.

Respondent has exhibited a pattern of dishonesty and lack of candor that has harmed clients, other members of the Bar, and the legal system as a whole.

The case law supports permanent disbarment.

This Court has recognized that permanent disbarment is appropriate in certain circumstances. In *Fla. Bar v. Gross*, 896 So.2d 742 (Fla. 2005), for

example, this Court stated that if it was not for the substantial mitigation present, permanent disbarment could have been imposed. Gross's misconduct included misappropriation of trust funds, failure to comply with a Florida Bar subpoena, neglecting a client's case, forgery of a judge's signature on certain orders, forgery of a client's signature on a written plea, and forgery of a client's signature on a check. The referee found several mitigating factors: a physical or mental disability in that Gross suffered from a severe addiction, remorse, and rehabilitation. No aggravating factors were found. *Id.* at 745. This Court approved the referee's recommendation of disbarment, stating: "if it had not been for this significant mitigation, Gross could have faced an even lengthier disbarment, up to and including permanent disbarment" *Id.* at 747. This Court noted that the Rules Regulating The Florida Bar were amended in 1998 to allow permanent disbarment as a disciplinary sanction. See Rule 3-5.1(f).

Respondent has demonstrated a complete unfitness for the practice of law. In *Fla. Bar v. Zyne*, 266 So.2d 668 (Fla. 1972), the respondent commingled client funds, deposited a client's check into his own account, and let the statute of limitations run in a case in which there had been a previous offer to settle. Zyne had a prior six-month suspension. The referee recommended permanent disbarment, finding that Zyne was "quite incapable of ever developing the moral

character necessary to one whose business is handling the money, secrets and affairs of others." *Id.* at 669. Without specifically commenting on the referee's recommendation of permanent disbarment, this Court held: "In light of the repeated and completely unprofessional actions of respondent and his serious defalcations and damage to clients and to the profession, we find that this is a case for disbarment." *Id.* At the time *Zyne* was decided, permanent disbarment was not authorized by the Supreme Court. The Florida Bar submits that the language of the referee in *Zyne* is an appropriate standard to support permanent disbarment and is applicable to Respondent. Like *Zyne*, Respondent has demonstrated that he is incapable of developing the moral character necessary to be entrusted with clients' money or legal matters.

In a recent case, this Court permanently disbarred an attorney, stating: "The only appropriate sanction under these circumstances—cumulative misconduct and a persistent course of unrepentant misconduct—is permanent disbarment from the practice of law." *Fla. Bar v. Behm*, 41 So.3d 136 (Fla. 2010).

Respondent has demonstrated a persistent course of unrepentant conduct wholly inconsistent with approved professional standards. The Referee found that Respondent "has continued to exhibit an attitude of arrogance and has shown absolutely no remorse nor . . . any indication that he will ever meet the standards

imposed by the Oath of every Florida Attorney.” RR 4 (January 7, 2010). He has engaged in a long-term course of egregious misconduct that has caused harm to others. Respondent’s unethical and irresponsible conduct poses a danger to client and to the legal system as a whole. Respondent failed to present any credible evidence in mitigation of his misconduct and has failed to respond to lesser forms of discipline. Given Respondent’s cumulative misconduct and the aggravating factors, the Bar submits that permanent disbarment is the appropriate sanction.

CONCLUSION

Respondent was not denied due process of law by the application of the felony suspension rule, Rule 3-7.2. The Referee's findings and conclusions of guilt are supported by the competent and substantial evidence in the record and should be approved by this Court. As to discipline, this Court should approve the Referee's recommendation and permanently disbar Respondent from the practice of law. Respondent should be assessed the costs of this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by UPS Delivery, Tracking Number 1ZE3277W1891200105, to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1900; a true and correct copy by regular U.S. Mail to **Kevin J. Hubbart**, Respondent, 2471 McMullen Booth Rd., Suite 316, Clearwater, FL 33759; by regular U.S. mail to **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of November, 2010.

Karen Boroughs Lopez
Bar Counsel

CERTIFICATION OF FONT SIZE AND STYLE **CERTIFICATION OF VIRUS SCAN**

Undersigned counsel does hereby certify that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

Karen Boroughs Lopez
Bar Counsel