

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JAMES NEWELL CHARLES,

Respondent.

Supreme Court Case

No. SC13-1382

The Florida Bar File

No. 2010-31,481(09A)

ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, James Newell Charles, is seeking review of a Report of Referee recommending a rehabilitative suspension from the practice of law for 91 days and payment of The Florida Bar's costs in these proceedings totaling \$3,790.85.

Complainant will be referred to as The Florida Bar, or as the bar. James Newell Charles, Respondent, will be referred to as Respondent, or as Mr. Charles throughout this brief.

References to the Report of Referee shall be by the symbol ROR followed by the appropriate page number (e.g., ROR-12).

References to specific pleadings will be made by title. Reference to the transcript of the hearing held on January 13, 2014, are by the symbol T1, followed by the appropriate page number (e.g., T1-289).

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References to Bar exhibits shall be by the symbol TFB Ex. followed by the appropriate exhibit number (e.g., TFB Ex. 10).

References to Respondent's exhibits shall be by the symbol R Ex. followed by the appropriate exhibit number (e.g., R Ex. 10).

STATEMENT OF THE CASE

On August 2, 2013, The Florida Bar filed a complaint against respondent, which was subsequently assigned Supreme Court Case No. SC13-1382. On August 23, 2013, The Honorable William Bruce Smith was appointed as referee.

Judge Smith held the final hearing on January 13, 2014 and January 14, 2014. The referee entered his report of referee on February 20, 2014, finding respondent guilty of violating the following Rules Regulating The Florida Bar: 4-3.1 A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established; 4-8.4(c) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; and 4-8.4(d) A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice. [ROR–16.] The referee recommended that respondent be suspended from the practice of law for 91 days requiring proof of rehabilitation prior to reinstatement and that he pay the bar’s disciplinary costs. [ROR–20.]

Respondent filed Respondent's Notice of Intent to Seek Review on or about April 18, 2014. On or about May 12, 2014, respondent filed Respondent's Unopposed Motion for Extension of Time in Which to File Initial Brief. On or about June 2, 2014, respondent filed Amended Supplemental Unopposed Motion for Extension of Time in Which to File Initial Brief, which the Court granted on June 3, 2014. Respondent filed his Initial Brief on June 18, 2014.

STATEMENT OF THE FACTS

The Bar adopts the referee's findings of fact as set forth in his report. The following facts are taken from the report of referee and as otherwise noted.

This matter was referred to The Florida Bar by The Honorable Richard B. Orfinger, of the Fifth District Court of Appeal subsequent to the Appellate Court's review of the Final Judgment entered by Judge Parsons in the Circuit Court proceedings. Judge Parsons entered the Final Judgment on November 26, 2008 and entered the Order on Attorneys Fees and Costs on July 29, 2011. [TFB Ex. 1, 2, 7.]

The disciplinary proceedings in the present case are not a trial de novo regarding the merits of the underlying federal and civil cases. The disciplinary proceedings solely concern respondent's conduct in both these matters. Both orders entered by Judge Parsons were the subject of appellate review. The Final Judgment was affirmed without opinion on May 18, 2010. The Order on Attorneys Fees and Costs awarding fees and costs to the State of Florida was affirmed on March 19, 2013. [TFB Ex. 5.]

Respondent, in his Answer, admitted paragraphs 1 through 8 and 11 through 17 of the formal complaint. In the paragraphs which were denied, respondent stated that a review of the applicable orders, as set forth in the complaint, was necessary and that the orders were the best evidence of what was stated in each order. The

orders as referenced in the formal complaint and respondent's Answer are the afore-referenced orders entered by Judge Parsons.

In both orders the court identified actions by respondent which had a negative impact his client, the judicial system, and the State of Florida. This included causing the client to lose his right to recovery for a clearly meritorious claim as well as the imposition of fees and costs jointly against respondent and his client for more than \$400,000.00.

In the Final Judgment, the court found that the federal court was directly misled by respondent in his representations that the amounts in the settlement agreement had been reviewed and determined to be reasonable by attorney Michael Roper, acting as an independent expert. The court further found that respondent conceded that such a review never took place. The court specifically found respondent did not act in good faith and perpetuated "an overt fraud on the Federal Court." [TFB Ex. 1.]

The court found that respondent did not make the client's claims in good faith and with full disclosure. Instead, respondent tried to magnify the claim, in an attempt to exaggerate the basis for recovery. Ultimately, the court concluded that respondent's efforts to assert a claim for recovery and fees involved gross

overreaching, which caused the client to lose his right to recovery when he would be entitled to receive some compensation for his damages. [TFB Ex. 1.]

The Order of Attorneys Fees and Costs found that the claim brought by respondent was without any legal basis in fact or law, which satisfied the elements required for recovery by the State of Florida pursuant to Florida Statutes, Section 57.105. The court held that fees and costs should be imposed against respondent and his client as a result of respondent's overt actions to perpetrate a fraud upon the court and the State of Florida. [TFB Ex. 2.]

The findings by Judge Parsons in both orders regarding respondent's conduct are supported by competent substantial evidence by the standard of clear and convincing evidence as further set forth below.

The referee heard testimony from the following witnesses in this matter: James Peters, Assistant Attorney General, Florida Attorney General's Office, retired; Michael Roper, private attorney; E. Clay Parker, private attorney; James R. Tanner, private attorney; and James Charles, respondent.

In addition to the testimony, The Florida Bar submitted Exhibits 1-22 into evidence and respondent submitted Exhibits 1-25 into evidence without objection. Further, based on the ore tenus request of the parties, the referee took judicial notice of the following court files: *Michael C. DuPont v. Sebastian Tanguoso, Luis*

Bustamante, Jane Rowe, and John Doe, Case No. 98-41-CIV-ORL-19A, in the United States District Court for the Middle District of Florida, Orlando Division and *Michael C. DuPont v. Jeffrey Atwater*, Case Number 2002-3288 CICI, in the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida.

James Peters testified regarding his extensive involvement with the underlying state court proceedings. Mr. Peters, recently retired from his position as an Assistant Attorney General and Special Counsel with the Florida Attorney's General's Office, having started with the office in 1977. Mr. Peters was the Special Counsel from the Florida Attorney General's Office assigned to the state court matter filed by respondent.

In his testimony, Mr. Peters provided the procedural background for both the federal and state court cases. Respondent represented Michael C. DuPont in a federal case claiming civil rights violations arising from a government sting operation which was resolved with a signed settlement agreement. The agreement reached by the parties was referred to as a "Coblentz Agreement," pursuant to *Coblentz v. American Surety Co. of New York*, 416 F.2d 1059 (5th Cir. 1969). The settlement agreement, which specified the amount of damages, attorney's fees and costs, was accepted by the federal court without an evidentiary hearing as to the reasonableness of the agreement. [TFB Ex. 9; R Ex. 21-24.]

Mr. Peters' involvement began when respondent filed the state action to enforce the judgment and seek recovery against the State of Florida, in accordance with the provisions of the settlement agreement. Mr. Peters, on behalf of the State of Florida challenged the enforcement of the judgment. The trial court granted summary judgment in favor of the State of Florida and denied the State's motion for attorney's fees under Section 57.105, Florida Statutes (2003). Both parties appealed the trial court's order. *Gallager v. DuPont*, 918 So. 2d 342 (Fla. 5th DCA 2005). According to Mr. Peters, in its opinion the appellate court remanded the case back to the trial court for the purpose of determining the issues specifically related to the agreement, which included the reasonableness of the recovery and fees and whether the agreement was made in good faith. *Gallagher*, at 348-350. The appellate opinion was received into evidence. [TFB Ex. 20, 22; R Ex. 12.]

Mr. Peters provided testimony regarding the tremendous length of time it took to reach final determination with the case. The proceedings began in December 2002 and the appellate court affirmed the Order on Attorneys Fees and Costs in March 2013. Mr. Peters testified that the pace of the case was unlike any other he had experienced in his years with the Florida Attorney General's Office. He testified that, based on his direct involvement with the case, there were delays during the proceedings which were attributable to respondent's actions. Further,

respondent's actions subsequent to the final appellate determination also caused delays with the State of Florida's efforts to enforcement the judgment entered on its behalf against respondent. He agreed with the reference by Judge Parsons in the Order on Attorneys Fees and Costs that the case was an "ancient" case. [TFB Ex. 2, page 2.]

According to Mr. Peters, respondent's deposition in the underlying case was set and rescheduled on more than one occasion. Mr. Peters described the events involving each time respondent's deposition was scheduled. In the first instance, the date and location were coordinated with respondent. However, respondent failed to appear for his deposition. Respondent's deposition was subsequently rescheduled for the Orlando Office of The Florida Attorney General. According to Mr. Peters, respondent appeared late for the deposition and without the requested documents, including those documents specifically pertaining to respondent's attorney's fees. The deposition was again rescheduled for a third time. In this instance, the deposition was also a video deposition. Respondent appeared late for the deposition and refused to sit in the witness chair. While he ultimately was seated for the deposition, it once again had to be rescheduled. Mr. Peters testified that respondent's deposition was finally taken and completed in the presence of the judge, in his chambers. Mr. Peters also testified regarding the difficulty he

encountered in obtaining documents from respondent regarding the amount of his claim for attorney's fees.

Mr. Peters further described the case progression which included numerous motions and appellate proceedings. At one point the trial date was continued at the last minute based on respondent's filing of a writ with the Fifth District Court of Appeal. In preparation for the final hearing Mr. Peters testified that he took depositions of witnesses and reviewed numerous documents regarding the reasonableness of the recovery and fees and whether the agreement was made in good faith. This evidence included, but was not limited to the affidavit and deposition of attorney Michael Roper, the deposition of attorney Leonard Alterman, and correspondence from both attorneys to respondent.

Mr. Peters testified that the evidence he obtained established that the settlement agreement respondent filed with federal court, which was ultimately approved by the court contained a misrepresentation. Paragraph number one on page five of the agreement specifically stated "An independent expert, Michael Roper, Esquire, has reviewed the amounts and determined the amounts are reasonable." Mr. Peters testified that this paragraph was contrary to the affidavit and deposition testimony of Mr. Roper. [TFB Ex. 9, page 5; TFB Ex. 11-14.]

In addition, Mr. Peters testified that during the proceedings an offer of settlement was made by the State of Florida to respondent. The offer was rejected and the case proceeded to trial. Further, based on the orders entered by Judge Parsons and affirmed by the appellate court, respondent's client was determined to have a valid claim but recovered nothing. The court entered a judgment in favor of the State of Florida jointly against respondent and respondent's client for more than \$400,000.00. [TFB Ex. 1, 2.]

Michael Roper, a member of The Florida Bar admitted to practice in 1985, testified regarding his brief communication with respondent regarding the settlement agreement at issue. Mr. Roper's testimony was also presented via his video deposition taken in 2006 and his affidavit in the underlying state court proceedings. Mr. Roper is a private attorney from Orlando whose primary area of practice is representing governmental agencies in civil rights litigation.

Mr. Roper and respondent represented opposing parties in an unrelated matter in or around 2001 during which time, on a break in the proceedings, respondent asked Mr. Roper if he would consider providing expert testimony regarding the amount of attorney's fees in another case. According to Mr. Roper's testimony and affidavit, respondent never provided him with any documentation to render an opinion. Further, it was Mr. Roper's testimony that the brief conversation

with respondent was the one and only time in which Mr. Roper had any contact with respondent regarding the issue of attorney's fees in the case at bar. [TFB Ex. 11-14.]

In his testimony Mr. Roper testified regarding his background and experience regarding the review and calculation of attorney's fees in civil rights cases. Mr. Roper also testified that Mr. Peters was the one who provided him with respondent's documentation regarding the claim for attorney's fees. Mr. Peters also provided Mr. Roper with a copy of the settlement agreement filed with the federal court.

Upon review of the agreement Mr. Roper testified that he did not render the opinion contained in the settlement agreement. Further, Mr. Roper testified that he did not authorize respondent to make any statements or opinions on his behalf. Mr. Roper was unaware that respondent filed an agreement with the federal court which contained an expert opinion by Mr. Roper that he never rendered. It was Mr. Roper's testimony that respondent's claim for attorney's fees, based on the records respondent produced to the State of Florida were not reasonable and he never would have rendered such an opinion. [TFB Ex. 11-14.]

Respondent testified in the bar's case via the transcript of the hearing held before Judge Parsons on November 21, 2008. In his response to the inquiry by

Judge Parsons regarding respondent's representations to the federal court pertaining to the settlement agreement, respondent stated that Mr. Roper reviewed the amounts in the agreement. Respondent further stated that he provided Mr. Roper the specific amounts at issue. He stated he did not have the paperwork to support the amounts. Mr. Roper's testimony was wholly contrary to respondent's regarding the review of amounts and the rendering of an expert opinion. In his response to the court's inquiry, respondent stated that Mr. Roper did not remember the conversation or in the alternative, Mr. Roper had a misunderstanding with respondent as to the issue of the attorney's fees. [TFB Ex. 21, pages 404-412.]

The affidavit of James R. Tanner, a member of The Florida Bar, dated January 16, 2008, was received into evidence on behalf of respondent in lieu of live testimony. Mr. Tanner's affidavit was submitted in the state court proceedings before Judge Parsons in support of respondent's position regarding the reasonableness the settlement agreement and respondent's attorney's fees. [R Ex. 16.]

E. Clay Parker, a member of The Florida admitted to practice in 1963, testified on behalf of respondent. Mr. Parker was received as an expert in the area of settlement agreements in federal civil rights cases as well as the duties and responsibilities pertaining to the insurance carriers directly related to the

enforcement of such agreements. Mr. Parker testified that respondent provided him with documents in support of his claim for attorney's fees.

In his testimony Mr. Parker detailed his experience regarding civil rights and the duties of plaintiff's counsel pertaining to the filing of the law suit and determination of coverage. Mr. Parker also testified regarding the procedure he follows in his legal practice regarding the determination of reasonable fees. Mr. Parker reviewed respondent's records in anticipation of testifying at the November 2008 hearing before Judge Parsons. While he did not testify at the hearing, Mr. Parker opined that it was the responsibility of plaintiff's counsel to optimize the recovery for the client and highlight the exposure for the defendant. It was Mr. Parker's opinion that Judge Parsons did not understand this aspect of such cases nor was he provided the necessary expert testimony at the hearing. Mr. Parker further testified that based on the foregoing he could reasonably disagree with the conclusions reached by Judge Parsons.

Respondent testified on his own behalf. In his testimony respondent explained that Mr. DuPont's federal case was the first civil rights claim that he handled. Respondent provided testimony regarding his own difficult experience involving criminal charges for which he was acquitted. Respondent's charges were handled by the same agency and prosecutor who handled Mr. DuPont's case. In his

testimony, respondent described himself as a zealous advocate for his clients. It was respondent's position that the Office of the Attorney General succeeded in placing the focus of the case on respondent's conduct rather than the merits of Mr. DuPont's claim. Respondent described in his testimony particular incidents in which he felt that the Office of the Attorney General was engaging in bullying tactics with him. Respondent also testified regarding the circumstances with his deposition from his perspective. It was respondent's position that the State of Florida improperly placed him in a position of being a witness while at the same time representing Mr. DuPont. These circumstances as well as other actions by the State of Florida were the basis for the appellate review sought by respondent.

Respondent further testified that it was his reasonable belief that based on his conversation with Mr. Roper respondent had an expert to support his claim for recovery and attorney's fees. Respondent also testified that he expected to have a hearing in the federal case regarding the amounts in the agreement. However, the court approved the agreement without requiring a hearing.

According to respondent testimony, Mr. Roper had no recollection of serving or agreeing to serve as an expert witness. Thus, respondent's statement contained in the settlement regarding Mr. Roper's expert opinion was not a misrepresentation or misleading. It was respondent's position that the settlement agreement was a

private agreement between the parties. He anticipated that there would be a hearing before the federal judge.

Respondent's exhibits do not support his position that there would be a hearing before the federal judge. Respondent's exhibits 20 through 24 clearly establish that the federal court directed respondent to submit a memorandum of law regarding his claim for fees. Moreover, the federal court's order directed respondent to respond and provide justification for the legality of the arrangement reached by the parties in the settlement agreement. In response, respondent filed a Motion for Entry of Final Order and Memorandum of Law. [R Ex. 20-23.]

SUMMARY OF ARGUMENT

The referee, who was in the best position to weigh the evidence, considered witness testimony, numerous exhibits submitted by both parties, and the underlying federal and civil cases in this matter. Thereupon, he referenced the record evidence in his extensive report to support his finding of guilt as to respondent's violations of R. Regulating Fla. Bar 4-3.1, 4-8.4(c) and 4-8.4(d). Respondent has failed to meet his burden to demonstrate that the record lacked supporting evidence of the referee's findings. Thus, the referee's recommendations as to guilt should be approved.

Veracity is the foundation upon which our judicial system rests. Dishonesty cannot, therefore, be tolerated by those in the legal profession. A rehabilitative suspension is the appropriate discipline for respondent's egregious misconduct pursuant to the Florida Standards for Imposing Lawyer Sanctions and relevant case law, particularly in light of the aggravation and limited mitigation applicable herein.

ARGUMENT

POINT I

THE REFEREE’S RECOMMENDATIONS AS TO FACTS AND FINDINGS OF GUILT AS TO THE VIOLATION OF RULE REGULATING THE FLORIDA BAR 4-8.4(C) ARE SUPPORTED BY THE COMPETENT RECORD EVIDENCE.

Respondent’s burden on review is to demonstrate that there is no evidence in the record to support the referee’s findings or that the record evidence clearly contradicts the conclusions. *The Florida Bar v. Vining*, 721 So. 2d 1164 (Fla. 1998).

Respondent argues that he should not be found guilty of violating R. Regulating Fla. Bar 4-8.4(c) because his conduct did not rise to the level of a misrepresentation and he seeks to have the court address whether “when a trial court has issued an order finding attorney misconduct, does that order constitute competent substantial evidence *per se* of a violation of The Rules Regulating The Florida Bar?” [IB–11.] The referee herein did not solely rely on the orders entered by Judge Parsons to determine respondent was guilty of violating rule 4-8.4(c), as well as rules 4-3.1 and 4-8.4(d). The referee held a two-day hearing at which he considered the testimony of five witnesses and a total of 47 exhibits. The referee also took judicial notice of the court files in the underlying matters. As detailed in

his 22 page report, the referee found the testimony and evidence supported the findings in Judge Parsons orders by clear and convincing evidence. [ROR–4.] As the referee correctly noted in his report, “[t]he disciplinary proceedings in the present case are not a trial de novo regarding the merits of the underlying federal and civil cases. The disciplinary proceedings solely concern respondent’s conduct in both these matters.” [ROR–2.]

In order to sustain a violation of rule 4-8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation, the bar must prove intent as a necessary element of the violation; it must only be shown that the conduct was deliberate or knowing in order to establish intent. *The Florida Bar v. Russell-Love*, 135 So. 3d 1034 (Fla. 2014). Intent may be established by circumstantial evidence. *The Florida Bar v. Forrester*, 916 So. 2d 647 (Fla. 2005). In this case, respondent’s actions clearly establish respondent’s intent.

In a settlement agreement which was filed with the federal court, respondent made the definitive statement of fact that “An independent expert, Michael Roper, Esquire, has reviewed the amounts and determined the amounts are reasonable.” [TFB Ex. 9; R Ex. 21-24.] While respondent inquired whether Mr. Roper would be willing to act as an expert regarding the amount of attorney’s fees, respondent never

provided Mr. Roper with any information regarding the case nor any documentation with which to render an opinion. [ROR-9; T1-16-17, 19.]

Respondent argues that “[t]aken in a light least favorable to Respondent, he did not follow through and formally engage Mr. Roper or allow him to review file materials. This does not render inclusion of his name in the Coblenz agreement a fraudulent act.” [IB-9.] However, respondent’s misrepresentation did not end with his statement in the settlement agreement. In a hearing before Judge Parsons on November 21, 2008, respondent again stated that Mr. Roper had reviewed the amounts in the agreement. [ROR-11; TFB Ex. 21, page 404-412.] This was false.

Respondent states, in a footnote in his brief, that his and Mr. Roper’s “respective recollections part ways on the extent to which information was provided to Roper and whether the Respondent had the authority to use Roper’s name.” [IB-5.] Mr. Roper testified that: he had a one-time brief communication with respondent regarding his willingness to tender an expert opinion as to the reasonableness of attorney’s fees; respondent never provided him with documentation to render an opinion; he did not render the opinion contained in the settlement agreement; he did not authorize respondent to make any statements or opinions on his behalf; and he would never have rendered the opinion that the

attorney's fees were reasonable based on the documents respondent produced to the State of Florida. [ROR-9-10]

Respondent testified that: it was his reasonable belief, based upon his conversation with Mr. Roper, that he had an expert to support his claim for recovery and attorney's fees; Mr. Roper had no recollection of serving or agreeing to serve as an expert witness; and thus, respondent's statement in the settlement agreement was not a misrepresentation or misleading. [ROR-13-14]

The referee found that "Respondent made no mention to the federal judge that a hearing was indeed needed on these issues" [ROR-13] and that "Respondent was complicit in placing fraudulent material facts before the federal court, to enhance the value of the case" [ROR-14].

Respondent's testimony contradicted Mr. Roper's testimony. However, a party cannot meet its burden by simply pointing to contradictory evidence when there is also competent, substantial evidence in the record to support the referee's findings. See *The Florida Bar v. MacNamara*, 132 So. 3d 165 (Fla. 2013); *The Florida Bar v. Committee*, 916 So. 2d 741, 746 (Fla. 2005). The referee was in the best position to determine the credibility of the witnesses and weigh the evidence before him. The referee found that Mr. Roper was a very credible witness. [ROR-10.]

Furthermore, the standard of proof in a Bar disciplinary proceeding is clear and convincing evidence. *The Florida Bar v. Niles*, 644 So. 2d 504, 506 (Fla. 1994), citing *The Florida Bar v. Rayman*, 238 So. 2d 594 (Fla. 1970). The Bar has met its burden of proof by clear and convincing evidence, while respondent has failed to meet his burden of establishing that the record is wholly lacking in evidentiary support for the referee's findings. The Court has consistently held that where a referee's findings are supported by competent substantial evidence, it is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Vining* 721 So. 2d at 1167, quoting *The Florida Bar v. MacMillan*, 600 So. 2d 457, 459 (Fla. 1992).

The referee properly found respondent guilty of violating rule 4-8.4(c). As set forth above and in the report of referee, the record contains substantial, competent evidence that clearly and convincingly supports the referee's findings of facts and recommendations of guilt. The referee was in the best position to review the evidence and assess the credibility of the witnesses who testified. Therefore, consistent with its prior holdings, this Court should not reweigh the evidence or substitute its judgment for that of the referee, but should approve the referee's findings of fact and recommendations of guilt.

POINT II

THE REFEREE’S RECOMMENDED DISCIPLINE OF A 91-DAY SUSPENSION IS APPROPRIATE GIVEN THE REFEREE’S FINDINGS OF FACT, CASE LAW, AND STANDARDS FOR IMPOSING LAWYER SANCTIONS.

The Bar submits that based on the available case law and the Florida Standards for Imposing Lawyer Sanctions, the referee’s recommended discipline of a 91-day suspension is appropriate. The referee made his disciplinary recommendations after considering the evidence, relevant case law, and aggravating and mitigating factors. As a general rule, the Court will not second-guess a referee’s recommendation of discipline as long as the discipline is authorized under the Florida Standards for Imposing Lawyer Sanctions and has a reasonable basis in existing case law. *The Florida Bar v. Spear*, 887 So. 2d 1242, 1246 (Fla. 2004).

The practice of law is a privilege, not a right. *Petition of Wolf*, 257 So. 2d 547 (Fla. 1972). R. Regulating Fla. Bar 3-1.1 states “A license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause.” The conditional privilege to practice law is encumbered by an attorney’s obligation to uphold the high ethical standards of the legal profession. “Lawyers are officers of the Court and members of the third branch of government. That unique and enviable position carries with it commensurate responsibilities” (see *The Florida Bar v. Levine*, 498 So. 2d 941, 942 (Fla. 1986)); conditions (see

The Florida Bar v. Massfeller, 170 So. 2d 834, 839 (Fla. 1964)); and special burdens (see *State v. Fishkind*, 107 So. 2d 131, 132 (Fla. 1958)).

The Supreme Court of Florida has long held that “[i]t is essential to the well-being of the profession that every lawyer square his personal and professional conduct by the precepts of the Code of Ethics.” *Dodd v. The Florida Bar*, 118 So. 2d 17, 21 (Fla. 1960). Respondent failed to uphold such standards during his representation of Mr. Dupont in the underlying federal and civil cases.

A judgment must be fair to society, fair to the respondent, and severe enough to deter others who may be tempted to become involved in like violations. *Spear* 887 So. 2d at 1246, citing *The Florida Bar v. Lord*, 433 So. 2d 983 (Fla. 1983). Respondent’s serious misconduct in this matter should not be taken lightly. A 91-day suspension requiring proof of rehabilitation prior to reinstatement would adequately protect the public and suitably address respondent’s misconduct and act as an effective deterrent.

The referee’s disciplinary recommendation is supported by the Florida Standards for Imposing Lawyer Sanctions, as outlined in the referee’s report. Suspension is appropriate pursuant to Standard 6.12 when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action.

Suspension is also appropriate under Standard 7.2 when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Indeed, respondent concedes that case law supports a suspension for a violation of rule 4-8.4(c). [IB–9.] Respondent, however, argues that a non-rehabilitative, rather than a rehabilitative, suspension is appropriate in the instant matter.

The referee found limited mitigation herein, i.e., an absence of a prior disciplinary record, inexperience in the practice of law, and good character or reputation. See Fla. Stds. Imposing Law. Sanctions. 9.32(a), 9.32(f), and 9.32(g), respectively. [ROR–17.] The referee also considered respondent’s testimony that he could have been clearer in his documents and communication and that he had been professionally impacted by the orders entered by Judge Parsons. [ROR–13-14.] However, the referee determined that respondent’s “limited mitigation does not overcome the Court’s presumption of suspension for his misrepresentations made to the federal court and state court during his representation of Mr. DuPont.” [ROR–20.]

In aggravation, the referee considered respondent’s dishonest or selfish motive, the pattern of misconduct, the multiple offenses, respondent’s refusal to acknowledge the wrongful nature of his conduct, and the vulnerability of the victim.

See Fla. Stds. Imposing Law. Sanctions. 9.22(b), 9.22(c), 9.22(d), 9.22(g), and 9.22(h), respectively. [ROR–17.] The referee further found that respondent’s conduct negatively impacted his client as his client lost the right to pursue his meritorious claim. [ROR–15.] He specifically noted that “Respondent had many occasions to salvage his client’s case by correcting the misrepresentation made to the federal judge, but did not choose to do so, to his client’s detriment.” [ROR–15.]

Respondent cites to *The Florida Bar v. Varner*, 780 So. 2d 1 (Fla. 2001), *The Florida Bar v. Morse*, 587 So. 2d 1120 (Fla. 1991) and *The Florida Bar v. Myers*, 581 So. 2d 128 (Fla. 1991) to support a 90-day, non-rehabilitative, suspension for misrepresentation by an attorney. However, this Court has moved towards stronger sanctions for attorney misconduct in recent years. See, *The Florida Bar v. Herman*, 8 So. 3d 1100, 1108 (Fla. 2009); *The Florida Bar v. Rotstein*, 835 So. 2d 241, 246 (Fla. 2002); see also *The Florida Bar v. Erlenbach*, 138 So. 3d 369 (Fla. 2014).

In *The Florida Bar v. Rotstein*, 835 So. 2d 241 (Fla. 2002), an attorney was suspended for one year for various acts of misconduct, including creating a fraudulent letter for the purpose of submitting it to the bar and the grievance

committee in order to conceal his neglect in allowing the statute of limitations to run on a client's claim.

In *The Florida Bar v. Miller*, 863 So. 2d 231 (Fla. 2003), the attorney was suspended for one year for deliberately concealing a material fact from the court in an employment discrimination case. After the truth came to light, the court held a hearing during which the attorney falsely testified under oath that he did not recall having received the first notice from the client. As a result, the trial court imposed sanctions against the attorney for concealing critical evidence, advancing spurious arguments, and submitting misleading affidavits and testimony. The trial court found the attorney engaged in a bad faith course of deceit. In mitigation, the attorney had no prior disciplinary history and suffered the imposition of sanctions by the federal trial court for his misconduct.

In *The Florida Bar v. Head*, 27 So. 3d 1 (Fla. 2010), the Supreme Court imposed a one-year suspension and disapproved the referee's recommended 60-day suspension for the attorney's failure to be forthcoming with the bankruptcy court regarding case information and pleadings. The bankruptcy court found the attorney's statements to be disingenuous regarding the receipt of funds on behalf of his clients which interfered with the resolution of the pending case. The attorney also filed a Suggestion of Bankruptcy even though no petition for bankruptcy had

been filed with the court. The bankruptcy court found that the attorney violated the fundamentals of the Bankruptcy Code and that his conduct was contrary to his ethical duties to his clients. In aggravation, the Court found that the attorney was previously disciplined for similar misconduct.

In *The Florida Bar v. Adler*, 126 So. 3d 244 (Fla. 2013), the Supreme Court of Florida imposed a 91-day suspension for an attorney's misconduct involving misrepresentation of his personal finances pertaining to the purchase of an apartment. The Court considered the attorney's false statements and actions, including assertions he knew to be untrue, in order to complete the real estate purchase. In mitigation, the attorney had no prior discipline history, made full disclosure to the disciplinary board and had a cooperative attitude during the proceedings. The court found that the attorney had extensive experience in the practice of law and a selfish or dishonest motive as the two aggravating factors.

Recently, in *The Florida Bar v. Russell-Love*, 135 So. 3d 1034 (Fla. 2014), this Court found that an attorney's misrepresentations in the course of representing her client, by knowingly filling out immigration forms in a manner that led immigration officials to believe that a professional tennis organization was petitioning for a visa on behalf of her client and that the attorney represented such organization, violated the bar rule prohibiting conduct involving dishonesty, fraud,

deceit, or misrepresentation, i.e., R. Regulating Fla. Bar 4-8.4(c). The referee found that Russell-Love “acted knowingly and deliberately in order to expedite the immigration filing for her client.” *Id.* at 1039. Similarly, the referee in the instant case found that “[i]t is clear to the Referee that the Respondent was complicit in placing fraudulent material facts before the federal court, to enhance the value of the case” [ROR–14] and that respondent “had many occasions to salvage his client’s case by correcting the misrepresentation made to the federal judge, but did not choose to do so” [ROR–15].

Russell-Love’s actions caused harm to her client, as her client was charged with violations of the Immigration and Nationality Act based upon Russell-Love’s misrepresentations and was subject to permanent inadmissibility. Likewise, respondent’s conduct harmed his client as his client lost the right to pursue his meritorious claim and was subject to the imposition of attorney’s fees and costs due to respondent’s misconduct. [ROR–15].

The referee in *Russell-Love* found four mitigating factors: the absence of a prior disciplinary record; inexperience in the practice of law; good character or reputation; and remorse. Nevertheless, the Court concluded that the mitigating factors did not outweigh the seriousness of the misconduct and suspended Russell-Love for 91 days. The referee in the instant matter found three of these same

mitigating factors and determined that they did not overcome respondent's misconduct herein.

Respondent also cites to *The Florida Bar v. MacNamara*, 132 So. 3d 165 (Fla. 2013), to support his position that a non-rehabilitative suspension is appropriate in the instant case. In *MacNamara*, the Court held that a 90-day suspension was warranted for an attorney who provided false and misleading statements to The Florida Bar and to the Internal Revenue Service (IRS). He falsely stated to the bar that he had filed his client's estate tax return with the IRS in a timely manner. In a cover letter to the IRS, he referred to the return as a duplicate estate tax return which was dishonest, misleading, and designed to convey to the IRS that the estate tax return had been previously sent to the IRS. However, unlike *MacNamara*, respondent did not admit his misrepresentation before the referee. In fact, the referee herein found that “[i]n his testimony [before the referee], respondent did not accept full responsibility for the consequences of his actions and the impact on his client as well as the judicial system” [ROR–15] and that Fla. Stds. Imposing Law. Sanctions 9.22(g) (refusal to acknowledge wrongful nature of conduct) was an applicable aggravating factor [ROR–17].

Respondent continues to not take full responsibility for his conduct. In his brief, he states “Judge Parsons’ order is, for lack of a better phrase, over the top.

Respondent testified that he simply did not see it coming, as if Judge Parsons was awaiting his opportunity to wreak havoc on Respondent. (TII, 104). Effectively, this is what took place.” [IB–13]

To further support the recommendation of a 91-day suspension, the bar has considered the serious nature of respondent’s misconduct in this matter in conjunction with the following cases: *The Florida Bar v. Brown*, 905 So. 2d 76, 82 (Fla. 2005); and *The Florida Bar v. Valentine-Miller*, 974 So. 2d 333, 338 (Fla. 2008), which uphold the proposition that attorneys are held to the highest ethical standards because the Rules of Professional Conduct mandate such a level of conduct and, more importantly so as to not damage the public’s trust in the legal profession. Indeed, the referee herein specifically found that:

It is abundantly clear that the Respondent’s actions were not forthright as an officer of the court and one who would choose to disrupt timely legal processes and would utilize a material misrepresentation to a judge that would ultimately undermine the sustainable cause of action of his unknowing client. [ROR–15.]

Veracity should be the hallmark of an attorney and officer of the Court. It is the foundation of the trust and confidence which must vest in a lawyer. *Petition of Steele*, 283 So. 2d 350, 351 (Fla. 1973). This Court has stated that it “find[s] it troubling when a member of the Bar is guilty of misrepresentation or dishonesty,

both of which are synonymous for lying. Honesty and candor in dealing with others is part of the foundation upon which respect for the profession is based.”

The Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992).

“[D]ishonest conduct by a lawyer results in ‘an erosion of confidence on the part of the judiciary and the public in lawyers' honesty. There is no more serious impact upon the integrity of our judicial system.’” *The Florida Bar v. Russell-Love*, 135 So. 3d 1034, 1039 (Fla. 2014), quoting *The Florida Bar v. Corbin*, 701 So. 2d 334, 336 (Fla. 1997).

Dishonesty and a lack of candor cannot be tolerated in a profession that relies on the truthfulness of its members. See, *The Florida Bar v. Rotstein*, 835 So. 2d 241, 246 (Fla. 2002); *The Florida Bar v. Korones*, 752 So. 2d 586, 591 (Fla. 2000).

In *The Florida Bar v. Wilson*, 425 So. 2d 2, 4 (Fla. 1983), this Court stated “if the discipline does not measure up to the gravity of the offense, the whole disciplinary process becomes a sham to the attorneys who are regulated by it.”

CONCLUSION

This Court should approve the referee's findings of fact and recommendations of guilt as well as the sanction of a 91-day suspension requiring proof of rehabilitation prior to reinstatement. Respondent failed to meet his burden of establishing that the record is wholly lacking in evidentiary support for the referee's findings. Indeed, the referee's report and the record support, by clear and convincing evidence, the referee's finding that respondent was guilty of misrepresentations to a federal court and state court. As demonstrated herein, the referee's recommended sanction is appropriate and supported by the Florida Standards for Imposing Lawyer Sanctions and recent case law.



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CERTIFICATE OF SERVICE

I certify that this document has been e-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the e-filing portal and that a copy has been furnished to Barry William Rigby, Respondent's Counsel, Law Offices of Barry Rigby, P.A., 924 North Magnolia Avenue, Suite 350, Orlando, Florida 32803-3852, via e-mail to barryrigbylaw@gmail.com; and to Staff Counsel, The Florida Bar, Lakeshore Plaza II, Suite 130, 1300 Concord Terrace, Sunrise, Florida 33323, via e-mail to aquintel@flabar.org on this 2nd day of July, 2014.



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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

A handwritten signature in black ink, appearing to read 'Patricia Ann Toro Savitz', with a stylized flourish at the end.

Patricia Ann Toro Savitz
Bar Counsel