

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ROGER S. RATHBUN,

Respondent.

Supreme Court Case
No. SC19-370

The Florida Bar File
No. 2018-50,949(17I)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Rule 3-7.6 Rules of Discipline, the following proceedings occurred:

On March 8, 2019, The Florida Bar (“the Bar”) filed its Complaint against Respondent in these proceedings. On March 28, 2019, the Bar filed its Motion for Partial Summary Judgment. A case management conference was held on April 2, 2019, and a written scheduling Order was issued that same day. Because Respondent’s answer was due on March 28, 2019 and had not been filed, the Referee ordered that Respondent must file an answer no later than April 15, 2019. Respondent assured the Referee that he could comply with that deadline.

Additionally, the Referee set the Motion for Partial Summary Judgment to be heard on May 6, 2019.

On April 17, 2019, Respondent filed his Motion for Extension of Time to Comply with Court Order and the Bar filed its Motion for Default. The Referee granted the Bar's Motion for Default with an order dated April 17, 2019, and did not rule on Respondent's Motion for Extension of Time. On April 22, 2019, the Notice of Final Hearing as to Sanctions Only was served thereby converting the reserved hearing date of May 6, 2019 to a Sanctions hearing only since a Default had been entered.

On May 6, 2019, a final hearing as to sanctions only was held in this matter.

On May 6, 2019, the Bar filed a Motion to Assess Costs. On May 21, 2019, Respondent finally filed an Answer and also filed a Verified Motion for Relief and to Vacate Default or in the Alternative Motion for Reconsideration for a Change of Plea and on May 24, 2019, the Bar filed its Response In Opposition to that motion. On June 3, 2019, the Referee denied the Respondent's motion. All items properly filed including pleadings, recorded testimony (if transcribed), exhibits in evidence, and the Report of Referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

Narrative Summary Of Case.

1. At all times material hereto, Respondent represented Danny Daniels in the case styled Danny Daniels and Linda Daniels v. Raymundo Gonzalez, et al., Case No. 2009-4414-CA-01, in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

2. At all times material hereto, Jay Farrow, Esq., represented one of the defendants in the matter. Jonathan Kline, Esq., represented a second defendant in the matter.

3. Respondent believed that Farrow was improperly pursuing an appeal on behalf of his own client.

4. On or about June 15, 2018, Respondent and Farrow engaged in e-mail communications. Such communications are set forth below:

- ***Respondent:*** I have received a Pro Se Motion to Dismiss from your client. (Attached)
It appears you did not have her consent to file the Appeal.
I believe this may have ethical implications.
But I will let the Appellate or State Court to decide on that.
My client would like to be able to resolve this without having to bring this to the court's attention or the Florida Bar. (Emphasis added.)

My client has spent a few hours on this appeal and would be agreeable not to seek sanctions against you. But most likely you will think you can get away with this.

- **Farrow:** I don't understand your email and I am not concerned with your accusation.
- **Respondent:** Figured you wouldn't be smart enough to figure it out. This is going to be fun.
- **Farrow:** How would your client like to handle
- **Respondent:** Ask my buddy Mark P. Stopa. How after dealing with me worked out for him.
- **Farrow:** How would you like to settle this?
- **Farrow:** What happened to mark stoppa [sic]?
- **Farrow:** Fun? How is this fun?
- **Farrow:** Roger, what is it going to take?
- **Respondent:** **What is your Bar liscence [sic] worth to you? Mr. Klien [sic]. You next.** (Emphasis added.)

5. Such e-mails threatened Farrow and Kline in order to gain an advantage in the civil case in violation of the Rules Regulating The Florida Bar. (A copy of this e-mail chain was attached to the Bar's Complaint as **The Florida Bar's Composite Exhibit A.**)

6. As a result of the above e-mails, Farrow filed a Bar grievance against Respondent.

7. On or about June 25, 2018, The Florida Bar sent Respondent a letter requesting a response to Farrow's grievance by July 9, 2018.

8. After being made aware of the grievance filed against him, Respondent sent a series of harassing, threatening e-mails to Farrow and to Kline, in a continued attempt to intimidate them.

9. On or about June 27, 2018, Respondent sent multiple e-mails to Farrow which contained the following statements:

- 4:34 PM – Subject: RE: **Not your best Photo**

Respondent's e-mail attached Farrow's arrest photo and other related information. (Emphasis added.)

- 4:36 PM – Subject: RE: **Disorderly Intoxication:**

I get to include all this in my response to the Bar you know I can as its public records. (Emphasis added.)

- 4:48 PM – No subject.

This one is better will make sure when I respond to the bar I use the color version

Respondent's e-mail contained Farrow's Arrest Information and photo. (Emphasis added.)

- 6:41 PM – Subject: RE: **Public Records are awesome**

Respondent's e-mail attached litigation by Wells Fargo bank concerning Farrow's home mortgage. (Emphasis added.)

- 9:07 PM – Subject: RE: **did you let the Bar know you were on probation. I love the police report. Going to Dade to get the other one** (Emphasis added).

- 9:36 PM – Subject: RE: **I am going to find a case you appeared out of county before you got your probation modified to travel. Love public records. Yes fun.** (Emphasis added.)

(Copies of the June 27, 2018 e-mails were attached to the Bar's Complaint as **The Florida Bar's Composite Exhibit B.**)

10. On or about June 28, 2018, Respondent sent an e-mail to Farrow which contained the following:

- 12:09 PM – Subject: RE: Flacka, Vodka, Crack, Librium medication,

Going to do a public records request for your toxicology results of the DUI.

And for any time you were tested during your probation.
(Emphasis added.)

(A copy of the June 28, 2018 e-mail was attached to the Bar's Complaint as **The Florida Bar's Exhibit C.**)

11. On or about July 16, 2018, Respondent sent an e-mail to Farrow and Kline which stated:

- 8:30 PM – Subject: RE: Did not know you were a Florida Gator:
Did you let the Bar know of Alachua case. # 011998CF001491A
When you submitted your bar application? or law school application.
I read the police report disturbing.
I found 15 Arrests. at least 2 felony
and now you filing Appeals without your client consent.
Yes this will be fun.
You started this with the police report and subsequent Bar complaint.

I was just trying to resolve the appeal without further litigation and without further fees.

Now you get what you get. (Emphasis added.)

(A copy of the July 16, 2018 e-mail was attached to the Bar's

Complaint as **The Florida Bar's Exhibit D.**)

12. Respondent's response to the grievance filed against him by Farrow was due on July 9, 2018.

13. Respondent failed to respond and on July 12, 2018, Respondent requested additional time. Respondent was given until July 27, 2018 to respond.

14. On or about July 18, 2018, Respondent sent three e-mails to Jonathan Kline, with an attached police report, which stated:

- 5:16 PM – Subject: RE: I have 2 girls and I support them by practicing law. let me know if you going to take a shot at my Bar license.

So this is a Guy you are co counsel with.

So Rape is ok with you and your clients.

you got kids. any girls.

maybe let them hang out with your co counsel (Emphasis added.)

- 6:59 PM No subject.

Sure you want to continue. Or resolve

- 7:11 PM – Subject: Re: **going to send letter to every one of your clients. With your co counsel notice and Farrow Rape report.** (Emphasis added.)

If you don't have the testicular ability to call I understand. It's the bow tie.

(Copies of the July 18, 2018 emails were attached to the Bar's

Complaint as **The Florida Bar's Composite Exhibit E.**)

15. The foregoing e-mails served to harass and to intimidate opposing counsel(s) who was also a complainant in the Bar grievance filed against the Respondent.

16. Respondent finally responded to The Florida Bar on August 13, 2018, five weeks after the response was due. Said delay was either Respondent's attempt to dissuade Farrow from pursuing his Bar grievance or otherwise retaliate for filing the grievance, or both, neither of which is permissible.

III. RECOMMENDATIONS AS TO GUILT

Irrespective of the default entered, the Referee has independently reviewed the Complaint filed by The Florida Bar, which includes the e-mails that are the subject of the Complaint.

During the final hearing, Respondent, while under oath, admitted sending the emails and provided various explanations for sending them. Respondent claimed he was merely sending the emails to alert opposing counsel of what he intended to include in his response to the Bar grievance. Respondent also stated he thought there was nothing wrong with sending the emails because the subject matters contained in the emails were all "public record." The Referee does not

find Respondent's explanations to be credible nor do the explanations in any way justify sending e-mails of such horrific proportions to opposing counsel.

Furthermore, most of the emails at issue were sent by Respondent while a Bar grievance regarding similar emails was pending and before the Respondent had provided his response to The Florida Bar, therefore Respondent was on notice that threatening emails of this nature were not tolerated and were already being investigated by the Bar. The fact that the Respondent continued sending even more egregious and threatening emails to opposing counsel (who was also the Bar grievance complainant) during this time period indicates that the Respondent was either attempting to intimidate opposing counsel into abandoning the Bar grievance or that he had total disregard for the Bar Rules governing this sort of behavior, or both, neither of which is acceptable or tolerable behavior on the part of a nineteen-year member of The Florida Bar.

The Respondent stated that he is currently going through a separation after eighteen years of marriage, that his house is in foreclosure, and that he has financial problems. When asked by the Referee whether he had substance abuse or alcohol abuse issues, the Respondent denied both but stated that he does drink too much on occasion.

As a result, the Referee recommends that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: 3-4.3 [The commission

by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline whether the act is committed in the course of the lawyer's relations as a lawyer or otherwise, whether committed within Florida or outside the state of Florida, and whether the act is a felony or a misdemeanor.]; 4-3.4(g) [A lawyer must not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.]; 4-3.4(h) [A lawyer must not present, participate in presenting, or threaten to present disciplinary charges under these rules solely to obtain an advantage in a civil matter.]; 4-4.4(a) [In representing a client, a lawyer may not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person.]; 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, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.].

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

The Referee considered the following Standards as applicable prior to recommending discipline:

6.3 IMPROPER COMMUNICATIONS WITH INDIVIDUALS IN THE LEGAL SYSTEM

6.32 Suspension is appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

7.0 VIOLATIONS OF OTHER DUTIES OWED AS A PROFESSIONAL

7.2 Suspension is appropriate 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.

9.2 AGGRAVATION

9.22 d) multiple offenses;

9.22 e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

9.22 i) substantial experience in the practice of law

9.3 MITIGATION

9.32 a) absence of prior disciplinary record;

c) personal or emotional problems

V. CASE LAW

The Referee considered the following case law prior to recommending discipline:

The Florida Bar v. Norkin, 132 So.3d 77 (Fla. 2013)

The Florida Bar v. Parrish, 241 So. 3d 66 (Fla. 2018)

Bar's Petition for Emergency Suspension in The Florida Bar v. Krapacs, SC19-277 and the Court's order dated February 27, 2019.

The Florida Bar v. Sayler, 721 So. 2nd 1152 (Fla. 1998).

The Florida Bar v. Martocci, 791 So. 2nd (Fla. 2001).

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

Respondent's misconduct began with e-mails threatening opposing counsel asking him what his Bar license was worth to him in exchange for settling pending litigation. This improper conduct understandably led to the filing of a Bar grievance. For five weeks, Respondent failed to respond to the Bar grievance but instead continued to send highly humiliating, unprofessional, and intimidating e-mails to opposing counsels containing threats of disciplinary proceedings and threats to send damaging letters to the counsels' clients if they did not resolve the

“appeal without further litigation.” (See July 16, 2018 email contained in The Florida Bar’s Exhibit D). On July 18, 2018, after sending numerous threatening emails to opposing counsels since June 15, 2018, the Respondent sent three emails to opposing counsel containing threats and stating “Sure you want to continue. Or resolve.” (See July 18, 2018 emails at The Florida Bar’s Exhibit E). This email leaves no doubt that Respondent’s motivation for sending the inappropriate emails was to attempt to resolve the litigation by threat. These e-mails are more offensive than the ones sent by respondent Jeffrey Norkin. See The Florida Bar v. Norkin, 132 So.3d 77 (Fla. 2013). Further, most of the emails were sent by the Respondent while a Bar grievance was pending for the sole purpose of intimidation and retaliation against opposing counsels. In fact, Respondent did state in one e-mail, “you get what you get.”

Given the necessary push toward civility and case after case in which the Florida Supreme Court has warned attorneys that incivility will not be tolerated, the Respondent nevertheless shamelessly engaged in this type of misconduct. Additionally, the Referee notes that at the final hearing the Respondent continued to maintain his belief that such communications were permissible as the information was obtained from “the public record.” Respondent completely misses the point with regard to these tactics, which is surprising from a seasoned member of The Florida Bar who advised that he is a busy litigator.

The Referee recommends that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. 1-year suspension;

B. Respondent shall attend a Florida Bar Professionalism Workshop within six (6) months of the Court's approval and acceptance of this Report and shall pay any fees associated with the workshop;

Respondent shall pay The Florida Bar's costs in these proceedings within sixty (60) days of the Court's approval and acceptance of this Report.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), the Referee considered the following:

Personal History of Respondent:

Age: 51

Date admitted to the Bar: November 20, 2000

Aggravating Factors:

9.22(d) multiple offenses – The Florida Bar v. Massari, 832 So.2d, 701(Fla. 2002) permits this aggravator when the Bar has charged one matter;

9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency – The Respondent was ordered by the Referee to file an Answer by April 15,

2019 and he filed the Answer on May 21, 2019 after Default Judgment had been entered. He also repeatedly failed to comply with the Bar's deadlines in responding to the underlying Bar grievance.

9.22(i) substantial experience in the practice of law – Respondent was admitted to The Florida Bar in November of 2000.

Mitigating Factors:

9.32(a) Absence of a prior disciplinary record;

(c) Personal or emotional problems.

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

The Referee finds the following costs were reasonably incurred by The Florida Bar:

Administrative Fee	\$1,250.00
Bar Counsel Costs	98.90
Court Reporter's Fee	205.00
TOTAL	\$1,553.90

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be deemed delinquent 60 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 5th day of June, 2019.

 
ADMINISTRATIVE OFFICE OF THE COURT

Dina Keever-Agrama, Referee

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