STATE OF WISCONSIN IN SUPREME COURT

In the Matter of Disciplinary Proceedings
Against John Kenyatta Riley, Attorney at Law:

OFFICE OF LAWYER REGULATION, Case No. 2010AP2942-D

Complainant-Respondent,

v.

Case Code: 30912

JOHN KENYATTA RILEY,

Respondent-Petitioner.

---

**BRIEF OF RESPONDENT-PETITIONER, ATTORNEY JOHN KENYATTA RILEY**

---

Appeal from the Report and Recommendation of Referee Hannah Dugan, dated April 16, 2012

---

GUTGLASS, ERICKSON, BONVILLE
& LARSON, S.C.
Paul R. Erickson (#1003920)
Stacie H. Rosenzweig (#1062123)
Attorneys for Attorney John Kenyatta Riley

P.O. ADDRESS:
735 North Water Street, Suite 1400
Milwaukee, Wisconsin 53202-4267
(414) 273-1144

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**



**Rules**

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Former SCR 20:3.3(a)(3) allow litigators to rely on issues noticed for hearing in determining what is material evidence subject to the Rule?

Answered by the Referee: No.

2. Does Former SCR 20:3:3(a)(3) require litigators to speculate as to what matters other than those noticed for a hearing a future referee might think is material for purposes of the Rule?

Answered by the Referee: Yes.

3. Has a lawyer committed misconduct if, years after a case has been decided adversely to his client, he learns from the Office of Lawyer Regulation that testimony his client gave before a referee was incomplete and does not immediately notify the same agency about what it just told him?

Answered by the Referee: Yes.

4. Does a litigator "assist a witness to testify falsely" when his client omits non-material information regarding a past employer that the litigator is unaware of during narrative testimony in an OLR proceeding related to the client's unpaid judgments, traffic record, and drug-related loitering conviction?

Answered by the Referee: Yes.

## STATEMENT ON ORAL ARGUMENT

Respondent-Petitioner believes that oral argument would assist the Court in its deliberations.

## STATEMENT ON PUBLICATION

Publication is governed by SCR 22.23(1).

## STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal by the Respondent-Petitioner, Attorney John Kenyatta Riley ("Attorney Riley"), from a Report and Recommendation issued by Referee Hannah Dugan, the Referee appointed by the Court in this attorney disciplinary matter.

B. Procedural Posture and Disposition at the Hearing Below

This Complaint was filed December 10, 2010 (R.1), alleging, in one count, that Attorney Riley violated three Supreme Court Rules and requesting a public reprimand. Attorney Riley filed a Motion for Summary Judgment on September 21, 2011 (R.29), to which the Office of Lawyer Regulation's (OLR) retained counsel filed a response on October 14, 2011 (R.32). Attorney Riley submitted a reply on October 31, 2011 (R.34), and, despite no order providing for a sur-reply,OLR filed a sur-reply on November 2, 2012 (R.38). A telephone hearing was held November 9, 2011, and

Referee Dugan denied summary judgment.(R.39)(R-Ap. 001-003).

A two-day hearing was held February 6 and 7, 2012, in Milwaukee, Wisconsin. (R.54; R.55). Referee Dugan, after a reminder from this Court that her report was still pending, (R:51),issued a report on April 16, 2012, finding Attorney Riley in violation of the three above-referenced Supreme Court Rules. (R:52)(P-Ap. 004-020.) Attorney Riley timely filed the instant appeal on April 30, 2012. (R:58.)

## STATEMENT OF FACTS

The absence of merit in the underlying case resulted in a rare motion for summary judgment by a respondent in this administrative proceeding. In a decision that can only be described as pure fantasy, the Referee, in denying the motion due to claimed issues of material fact, conjured "facts" in an attempt to create materiality out of purely background testimony. Even after a hearing that revealed that the evidence against the Respondent was completely missing substance, the Referee created a work of pure fiction in her zeal to rubber stamp the OLR complaint. The Referee ignored the standard of proof (clear, satisfactory and

convincing) and, in an exercise lacking any logic or reason, assumed facts and circumstances to reach a decision that is unsupported by any credible evidence. As will be set forth below, rather than subjecting the highly suspicious claims of the Complaint to a microscope, the Referee, using bizarre reasoning and manufactured facts, created her own "factual" record upon which to base her recommendation.

The underlying matter giving rise to the Complaint involved Brian Polk, an attorney formerly licensed in the State of Wisconsin. He had worked with Attorneys Riley and Eisenberg at the Eisenberg, Weigel, Blau & Clemens firm in the late 1990s as a "glorified paralegal" (R:53)(P-Ap. 061) but left in June of 2000, because he believed he did not have the opportunity to grow professionally. (R:53)(P-Ap. 062) He later decided on a career change and allowed his Wisconsin law license to be administratively suspended in June of 2001 for failure to comply with CLE requirements. (R:53)(P-Ap. 072-073) Mr. Polk has had a troubled past, which includes a felony conviction for fleeing and eluding an officer in 1997. (R:53)(P-Ap. 058) On March 5, 1999, he received a citation for "loitering—illegal drug activity,"

stemming from an incident in which police officers found two packets of cocaine in his vehicle. (R:53) (P-Ap. 059.) Mr. Polk pled no contest and was found guilty of the civil ordinance violation. In addition, his traffic record includes more than 20 violations (R:53) (P-Ap. 056-57), and he had incurred nine civil judgments, most of which remained unsatisfied (R:53) (P-Ap. 060-061).

Mr. Polk applied, *pro se*, for reinstatement in early 2006. (R:1)(Compl. ¶ 15.). Because he had been suspended for more than three years, reinstatement was not a simple matter of paying a fee, completing his CLEs, and petitioning the Board of Bar Examiners (BBE). To be reinstated after a three-year CLE suspension, a reinstatement petition must be filed with the Court, and, in addition to the BBE's certifying that the petitioner has met CLE requirements, the OLR investigates the eligibility of the petitioner for reinstatement. SCR 31.11(1m). In this case, following investigation, the OLR recommended against Mr. Polk's reinstatement due to "multiple instances of driving after suspension/revocation of his driving privileges, a 1999 citation for loitering-illegal drug activity and discrepancies between Attorney Polk's version of

that incident and the police report, and a substantial number of unpaid civil judgments against Attorney Polk." Polk v. Office of Lawyer Regulation, 2007 WI 51 ¶ 4, 300 Wis. 2d 280, 732 N.W.2d 419. The Court appointed Referee Dennis Flynn to address these issues. This Court appointed Judge Dennis Flynn to report on three specified matters—Mr. Polk's traffic record; the illegal drug activity citation and whether Mr. Polk misrepresented the facts to the OLR; and the outstanding civil judgments. (R:53)(P-Ap. 045). The Referee was also asked to consider "any other matter that the referee deems helpful to this court's decision of the reinstatement petition." (*Id.*) A hearing was scheduled for September 6, 2006. (R:53) (P-Ap. 046).

Attorney Riley had left the Eisenberg, Weigel firm in approximately 2000 or 2001 (R:54:266)(P-Ap. 033), was a solo practitioner for a period before he started working with Mr. Eisenberg in 2005. He became a shareholder in 2007. (R:54:267)(P-Ap. 038). Unlike the other attorneys in the Eisenberg firm who practice personal injury law, Attorney Riley performed bankruptcy, criminal, real estate, and general practice (*Id.*) During the timeframe relevant to this

proceeding, Attorney Riley did not have administrative responsibility for the Firm, nor did he make decisions regarding hiring and firing. (R:55:325)(P-Ap. 042.) He did not supervise anyone other than his assistant (R:29) (P-Ap. 091) and did not review payroll records or time sheets (*id.*). Even after he became a shareholder, he only became involved with firm administration in March of 2008, well after the events of the underlying matter. (R:55:326)(P-Ap. 042.)

During the summer of 2006, after the reinstatement petition was filed, Mr. Polk asked Attorney Riley to assist him with the hearing, for moral support or as a "second chair." (R:29)(P-Ap. 094) Attorney Riley had observed Polk in the Eisenberg & Riley offices from time to time prior to that and he had assumed that he had been allowed by Mr. Eisenberg to use the offices to work on his reinstatement. (R:29)(P-Ap. 095.) It was not an uncommon circumstance for former employees and other guests to visit the Firm. (*Id.*)

Attorney Riley entered his appearance on July 28, 2006, but performed no substantive work on the file prior to the hearing on September 6, 2006. (R:29)(P-Ap. 095) He was not compensated in any way for his work on Mr. Polk's case.

(*Id.*) He did not help prepare the petition, nor did he prepare Mr. Polk in any way to testify. (*Id.*) Despite his request for limited assistance, Mr. Polk complained about Attorney Riley's lack of involvement. (*See, e.g.,* R:53)(P-Ap. 077; 081).

At the reinstatement hearing, Mr. Polk testified on his own behalf. As can be seen from the transcript (R:53)(Ex. D to Rosenzweig Aff.), Attorney Riley asked him a series of boilerplate background questions. Attorney Riley asked Mr. Polk to "tell the Court what kind of jobs you've had since the loss of your license." (R:53)(P-Ap. 047). Mr. Polk responded in narrative form:

> Worked as—worked for 7-Up Bottling loading trucks, riding a forklift. Worked at a video distribution center, doing everything from sweeping the floors to loading trucks. At one point in time, for a period of time, I worked for Progressive Training Consultants. During that period I did some consulting work on the Marquette Interchange. But for the most part, I've had labor related, you know, jobs, warehouse type of work.

(*Id.*)

During cross-examination, OLR's attorney, asked him to confirm the employment he had held, and asked if he

had any other jobs other than those listed. Mr. Polk replied that he had sold Tahitian Noni health products. (R:53)(P-Ap. 048.) The OLR attorney asked a series of very direct questions:

> OLR: Have you held yourself out to anyone as an attorney during your suspension?
> Petitioner: No.
> …
> OLR: Have you engaged in any law work activity during the period of your suspension?
> Petitioner: No.
>
> OLR: Have you worked for any – done any contracting work or done any work for any law firms during the period of your suspension?
> Petitioner: No.

(R:53)(P-Ap. 050-051.)

Referee Flynn recommended against Mr. Polk's reinstatement based on the three specified character and fitness issues, as well as Mr. Polk's lack of truthfulness during the hearing (R:29) (P-Ap. 068) Attorney Riley had no involvement with Polk's case following the hearing. Mr. Polk has confirmed in a letter to the clerk of the Supreme Court that Mr. Riley had no involvement with his case after the hearing. (R:29, Ex. E) Mr. Polk did not appeal Referee Flynn's recommendation, so this Court reviewed the record and affirmed the referee's decision. Polk, 2007 WI 51 ¶¶ 6-7 .

Mr. Polk's lack of candor and truthfulness regarding the loitering/drug matter and intentional failure to at least attempt to pay his debts were cited as reasons by both Referee Flynn and the Supreme Court.

In or around 2008, OLR Investigator Sarah Peterson was told by another OLR investigator, who was handling a grievance against another attorney, that Mr. Polk might have been employed by Mr. Eisenberg's firm prior to the reinstatement hearing. (R:54:81)(P-Ap. 022). An investigation into what Attorney Riley knew and when he knew it was initiated. Attorney Riley was asked in writing by Ms. Peterson "when and how [he] became aware that Mr. Polk, during the time his license to practice law was suspended, worked at the same law firm you worked at[.]"(R:53)(Ex. 15 p.2 ) Attorney Riley responded that he was unaware but, as a result of the grievance investigation against the other attorney, he investigated within the firm and learned that, in fact, Polk had worked for the firm. (R:53)(P-Ap. 083-084.) When asked why he had not brought this up when Mr. Polk omitted this information, Attorney Riley explained that he did nothing because there was no purpose;

the Office of Lawyer Regulation already knew. (R.55:341)(P-Ap. 043).

Ms. Peterson, based on the hearsay statement of the unidentified grievant conveyed to her by the other OLR investigator (R:54:79-81)(P-Ap.022), issued a report recommending Attorney Riley be charged with misconduct. (*Id.*) In preparing her report, she did not research the Supreme Court Rules to determine whether Attorney Riley's conduct violated any of them (R:54:90-91) (P-Ap. 024). Further, even though Attorney Riley reported that he did not know Mr. Polk had been employed by Mr. Eisenberg at the time of the hearing (R.53)(P-Ap. 082-084), and Ms. Peterson did not find any inconsistencies with Attorney Riley's assertions, Ms. Peterson recommended charging Attorney Riley because she "did not believe" him. Attorney Riley (R:54:101-102)(P-Ap. 025-026).

Ms. Peterson's belief formed the basis of the charges against Attorney Riley. He was charged with one count, alleging three violations of the Supreme Court rules focusing solely on questioning relating to Polk's employment history during the Polk reinstatement matter:

1. "A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable and remedial measures." (Former SCR 20:3.3(a)(3))

2. "A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely or offer an inducement to a witness that is prohibited by law." (SCR 20:3.4(b))

3. "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud or misrepresentation." (SCR 20:8.4(c))

(R:1). Referee Hannah Dugan was appointed to oversee the proceeding. (R.12)

After OLR took depositions of Attorney Riley and Mr. Polk, Attorney Riley moved the Referee for summary judgment. (R:29). In his summary judgment brief, Attorney Riley argued that he had no knowledge of Mr. Polk's employment until notified by OLR, and no duty to remediate the testimony because Mr. Polk's employment was not material to the proceedings before Referee Flynn. (*Id.*) In response OLR speculated that Mr. Polk's employment may have been material to Referee Flynn's determination and was therefore in need of remediation, because, in OLR's words, "who can say for certain?" (R:32:13) (P-Ap. 098.)

In what can only be described as a conclusion in search of reasoning, Referee Dugan denied summary judgment (R:39)(P-Ap. 001-003), asserting, without evidentiary support, that Mr. Polk's reinstatement was subject to a "hybrid" standard between Supreme Court Rules Chapters 22 and 31; and that the instant case turned on an unresolved issue of material fact—"whether Riley knew about the employment and failed to remedy the record of the false testimony" (R:39:3)(P-Ap. 003). The Referee sidestepped this critical issue and, although the SCR rules in question specifically refer to materiality, determined that whether Mr. Polk's employment was "material" to the underlying proceedings was irrelevant to the instant proceeding. (Id.)

The case was heard on February 6 and 7, 2012. (R: 54; R:55.) Referee Dugan issued her Report and Recommendation April 16, 2012 (R:52)(P-Ap. 004-020), rubber-stamped the OLR's Complaint, and found Attorney Riley in violation of the three Supreme Court Rules as alleged in the complaint. The Referee specifically found that "it is plausible that [Attorney Riley] didn't assume or know that

Brian Polk was employed in the law firm" (R:52:11 n. 4)(P-Ap. 014). In its response to Respondent's motion for summary judgment, OLR argued that the present matter was an "elementary" disciplinary case, whose "success or failure rests on a solitary genuine issue of material fact: Did Attorney John Kenyatta Riley know prior to representing Attorney Brian K. Polk at Polk's reinstatement hearing that Polk was employed at Riley's law firm . . . during Polk's suspension?" (R:32.1)(P-Ap. 097)

The Referee's ultimate finding, that Attorney Riley was aware of that employment, relied entirely on two brief portions of Mr. Polk's testimony in the hearing transcript. (R:52:6, *citing* R:54:138-139, 144-145)(P-Ap. 009, 028, 029). The initial response of Mr. Polk to the question and answer forming the entire basis of the Referee's decision was:

> Q. [D]id you ever discuss with Mr. Riley, at any point before [he became your lawyer], your concerns about presenting yourself as an attorney during the course of your employment at Eisenberg & Riley?"
> A. I don't recall.

(R: 54:27)(P-Ap. 027) After several minutes of an attempt by OLR's counsel to use Mr. Polk's deposition testimony to refresh his recall, Mr. Polk testified that it did not help to

refresh his recall. (R: 54:138)(P-Ap. 029). Of significant interest is the fact that the pages of the deposition that the witness looked over included his testimony that he had no direct conversations with Mr. Riley about his employment by Eisenberg:

> Q Did you ever hear Mr. Riley discuss with anybody --
> A Did I ever hear? No.
> Q -- your --
> A I did not ever hear him directly discuss it with anybody.
> Q Okay. Did you ever discuss it with him?
> MR. ERICKSON: It being?
> BY MR. PRICE:
> Q Your presenting yourself as an attorney to third parties.
> A I can't say that I had that direct conversation with him, no.

(R:53) (P-Ap. 077). See also R:54 (P-Ap. 027) (requesting that Mr. Polk begin reading his deposition on page 49). After this painful exercise, the best that OLR's counsel was able to obtain from the witness was:

> Q. At some point before the hearing, the reinstatement hearing, do you recall discussing with Attorney Riley concerns about presenting yourself as an attorney during the course of your employment at Eisenberg & Riley?
> A. I <u>believe</u> that I did.

(R:54:141)(P-Ap. 028) (Emphasis added.)

The cross-examination of the witness revealed that that this witness's testimony was anything but consistent. Mr.

Polk admitted that his conversations with Mr. Riley before the hearing focused upon women, and they did not discuss work. (R:54:161)(P-Ap. 031.) He also admitted that his deposition testimony, that he had no direct conversations with Attorney Riley about his job duties or representing himself as an attorney to third parties, was a "true statement." (R:54:180)(P-Ap. 035). He also testified that Attorney Riley did not prepare him for the reinstatement hearing (R:54:187) (P-Ap. 037)—he just showed up for the hearing. Yet, they had "discussions" (R:54:188) (P-Ap. 037), but no "direct conversations," about Mr. Polk's non-disclosure of his work. When pressed as to whether he agreed that if "you didn't talk to Mr. Riley about presenting yourself as an attorney to third-parties, you couldn't talk to him about concerns you had about presenting yourself as [*sic*] third-parties" (R:54:188)(P-Ap. 037), Mr. Polk disagreed! (*Id*.) Nonetheless, the Referee described this witness's testimony as "consistent." (R:52:11)(P-Ap. 014.)

## ARGUMENT

### I. STANDARD OF REVIEW

Attorney Riley appeals from both the Referee's denial of his motion for summary judgment and from the Referee's report itself.

Review of a denial of summary judgment in an attorney discipline case appears to be a matter of first impression for this Court. The briefing and opinions concerning discipline cases where parties have utilized dispositive motions do not address said motions, only the referee's reports. See, e.g., In re Disciplinary Proceedings Against Inglimo, 2007 WI 126, 305 Wis. 2d 71, 740 N.W.2d 125; In re Disciplinary Proceedings Against Crandall, 2011 WI 21, 332 Wis. 2d 698, 798 N.W.2d 183; In re Disciplinary Proceedings Against Elverman, 2008 WI 28, 308 Wis. 2d 524, 746 N.W.2d 793. As Attorney Riley is appealing the Referee's denial of his dispositive motion in addition to the Referee's recommendation, he respectfully asks the Court to apply the same methodology used at the trial level, as with summary judgment appeals. See Wisconsin Patients Comp. Fund v. Wisconsin Health Care Liab. Ins. Plan, 200 Wis.2d 599, 606, 547 N.W.2d 578 (1996). Wis. Stats. § 802.08(2) allows a court to grant a motion for summary judgment if the

"pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The purpose of summary judgment is to avoid trials where there is nothing to try. Transportation Ins. Co. v. Hunzinger Constr. Co., 179 Wis.2d 281, 289, 507 N.W.2d 136, 139 (Ct. App. 1993).

When reviewing a Referee's report, the Court may overturn clearly erroneous findings of fact. Disciplinary Proceedings Against Charlton, 174 Wis.2d 844, 498 N.W.2d 380 (1993). No deference is granted to the Referee's conclusions of law, which are reviewed *de novo*. Disciplinary Proceedings Against Norlin, 104 Wis.2d 117, 310 N.W.2d 789 (1981).

In disciplinary cases, the Office of Lawyer Regulation "has the burden of demonstrating by clear, satisfactory, and convincing evidence that the respondent has engaged in misconduct." SCR 22:16(5).

## II. THE REFEREE ERRED IN FAILING TO GRANT SUMMARY JUDGMENT

Attorney Riley was charged with violating three Supreme Court Rules:

1. "A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable and remedial measures." (Former SCR 20:3.3(a)(3))

2. "A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely or offer an inducement to a witness that is prohibited by law." (SCR 20:3.4(b))

3. "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud or misrepresentation." (SCR 20:8.4(c))

The entire case against Attorney Riley boils down to two questions:

1. Did Attorney Riley knowingly offer evidence he knew to be false in the underlying Polk matter?

2. Was the allegedly false evidence material to the underlying Polk matter?

It is undisputed that Mr. Polk omitted his employment with the Law Firm during his reinstatement matter. However, contrary to the Referee's Order on Summary Judgment, the undisputed facts available to the Referee from the motion papers show that Attorney Riley did not have knowledge of Mr. Polk's omitted employment when he asked the boilerplate background questions on direct examination. It is also undisputed that Mr. Polk's employment was not one of

the matters Referee Flynn was asked to address during the reinstatement hearing, rendering the testimony regarding same immaterial and remediation unnecessary. These undisputed facts show summary judgment was appropriate here.

### A. THE UNDISPUTED EVIDENCE SHOWS THERE WAS NO GENUINE ISSUE OF MATERIAL FACT REGARDING ATTORNEY RILEY'S KNOWLEDGE OF POLK'S EMPLOYMENT AT THE TIME OF HIS REINSTATEMENT HEARING

OLR, in its summary judgment briefing, conceded that this case turned on the question of whether "Attorney John Kenyatta Riley [knew] prior to representing Attorney Brian K. Polk at Polk's license reinstatement hearing that Polk was employed at Riley's law firm . . . during Polk's suspension[.]" (R:32:1)(P-Ap. 097). In order to show that Attorney Riley "knew" that Mr. Polk had been working for the law firm (and thus knew that Mr. Polk's testimony was incomplete), OLR must prove by clear, convincing, and satisfactory evidence that Attorney Riley had actual knowledge of that fact. *See* SCR 20:1.0(g). Although "a person's knowledge may be

inferred from circumstances," (*id*.), the standard for proving actual knowledge is high:

> The prohibition against offering false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact.

SCR 20:3.3, ABA Comment ¶8 (2007) (citation omitted).[1] The Restatement (Third) of Law Governing Lawyers, Sec. 120, Comment b (2000), provides that "actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it.[.]"

Here, OLR did not meet its burden, and summary judgment should have been granted. OLR offered no direct testimony, including that of Mr. Polk, to show that Attorney Riley had actual knowledge of Mr. Polk's employment at the Eisenberg firm, as a glorified paralegal, lawyer, or otherwise. The undisputed evidence only showed that Mr. Polk was in the office, and Attorney Riley saw him there on occasion. (R:32) (Ex. 1 to Price Aff. p. 39) [2] (P-Ap. 074). When asked if he had any other facts

[1] This comment was adopted with the 2007 revision of SCR 20:3.3; however, both the former and current versions prohibit a lawyer from offering testimony he or she "knows to be false."

[2] Mr. Polk's deposition testimony has been excerpted throughout the

> -- in addition to those that would lead you to conclude that Mr. Riley knew that you were employed at Eisenberg Riley at the time you were employed at Eisenberg Riley?
> A No.

(R:32)(Ex. 1 to Price Aff. p. 41)(P-Ap. 075.) This testimony is simply not enough. Furthermore, even if a reasonable attorney in Attorney Riley's position would have followed up on seeing Mr. Polk in the office and discovered Mr. Polk's employment there, there is no evidence that Attorney Riley actually did discover Mr. Polk's employment. Mr. Polk's testimony speculates solely on what Attorney Riley might have known. And, Mr. Polk actually had no specific facts showing whether Attorney Riley knew anything or not:

> A. I believe that -- and again, what facts? You know, the only thing that I can tell you with respect to facts is that everybody knew. I mean, when I say everybody, I mean from the secretaries to the accounting department, the office manager, receptionist who answered the phone.
> Q. But your prior testimony was you weren't working on any cases with Mr. Riley.
> A No.
> Q He was working in a different area of the law than what you were working on.
> A Um-hum.
> Q But you have still testified, nonetheless, that you believe that Mr. Riley knew --
> A You asked me what I believe --

---

record in this matter. Excerpts were attached to counsel affidavits in support of Attorney Riley's motion for summary judgment (R:29) and to OLR's response (R:32). The entire deposition was offered as a hearing exhibit (R:53 Ex. 7). To avoid unnecessary duplication, only one copy of the relevant excerpts has been included in the Petitioner's Appendix.

Q Right.
A -- and yeah, that's what I believe.
Q But if -- do you have any specific facts that would demonstrate Mr. Riley's knowledge of that?
A I don't have any specific facts, no.

(R:29) (Ex. 1 to Price Aff. p. 48)(P-Ap. 076) (emphasis added). MR. Polk's deposition testimony unequivocally stated:

Q Did you ever hear Mr. Riley discuss with anybody --
A Did I ever hear? No.
Q -- your --
A I did not ever hear him directly discuss it with anybody.
Q Okay. Did you ever discuss it with him?
MR. ERICKSON: It being?
BY MR. PRICE:
Q Your presenting yourself as an attorney to third parties.
A I can't say that I had that direct conversation with him, no.

(R:29) (Ex. 1 to Price Aff. p. 49)(P-Ap. 077). Mr. Polk had no specific facts and no direct conversations with Attorney Riley that could prove Attorney Riley knew anything about Mr. Polk's work. Just a few lines later in the deposition, Mr. Polk testified:

Q Okay. Can you tell me approximately what month or maybe season that discussion or discussions where you expressed concerns about your presenting yourself as an attorney to third parties occurred with Mr. Riley?
A I'm going to say that -- that my concerns or that, if a discussion of that nature came up, to my recollection, I would -- that would have been somewhere around when I filed my petition for reinstatement.

(R:32) (Ex. 1 to Price Aff. p. 50-51)(P-Ap. 077.) (emphasis added). So, Mr. Polk's testimony was, he never had a direct conversation, but if he did, it would have been when he filed a petition?

As the party with the ultimate burden to prove that Attorney Riley had this "actual knowledge", to survive summary judgment, OLR had to have set forth "specific facts showing that there is a genuine issue for trial," Transp. Ins. Co., Inc. v. Hunzinger Const. Co., 179 Wis. 2d 281, 290-91, 507 N.W.2d 136, 139 (Ct. App. 1993). OLR may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits, set forth specific evidentiary facts that would be admissible in evidence, showing that there exists a genuine issue requiring a trial. Bd. of Regents of Univ. of Wisconsin Sys. v. Mussallem, 94 Wis. 2d 657, 673, 289 N.W.2d 801, 809 (1980), citing Wis. Stat.§ 802.08(3).

Even if we view this testimony in the light most favorable to OLR, all we have is speculation as to Mr. Polk's belief of what Attorney Riley might have known, which would not be admissible at trial. Lay opinion or inference testimony is only admissible if it is "rationally based on the

perception of the witness." Wis. Stat. § 907.01(1). A lay witness cannot competently testify as to a car's speed when he is no position to judge or when his exposure to the vehicle is too brief to reasonably observe it. City of Milwaukee v. Berry, 44 Wis. 2d 321, 324, 171 N.W.2d 305, 307 (1969), citing Culver v. Webb, 244 Wis. 478, 485, 12 N.W.2d 731 (1944). Courts exclude such testimony because the witness simply has no rational basis on which to form his or her opinion. Berry, 44 Wis. 2d at 324-25. Here, Mr. Polk's conclusions are not rationally based on his conversations with Mr. Riley nor his perception—he offers no specific facts as to how he believed "everybody knew" (and any conversations or statements he overheard from support staff would be inadmissible hearsay) or as to how Attorney Riley would have surmised, by occasionally running into Mr. Polk at the office, that Mr. Polk was employed in some capacity by at the Law Firm.

Even assuming, *arguendo*, that Attorney Riley did know of Mr. Polk's employment at the Firm, it is undisputed that Attorney Riley did not "knowingly offer" evidence to the contrary. Attorney Riley simply asked Mr. Polk an open-

ended question about his employment, and Mr. Polk gave a narrative outline of his work during his suspension. Attorney Riley neither elicited false testimony nor offered false evidence—he did not ask leading questions that would prompt Mr. Polk to lie, e.g.: "So, you never worked for me, did you?" As the noticed subject matter of the hearing was clearly not Mr. Polk's employment but his citations, drug/loitering conviction, and unpaid judgments, Attorney Riley had no reason to focus on Mr. Polk's employment.

### B. POLK'S EMPLOYMENT WAS IMMATERIAL TO HIS REINSTATEMENT PROCEEDING

If OLR cannot demonstrate that Attorney Riley "knowingly" offered testimony he "knew to be false," this case rests solely on the idea that Attorney Riley later came to learn that material testimony was false and he failed to remediate it. The Referee held that the materiality of Mr. Polk's employment testimony did not actually matter to her summary judgment determination: "Whether the content of the testimony was a genuine issue of material fact in the underlying proceedings is irrelevant as to whether there is a genuine issue of material fact in dispute in these

proceedings." (R:39:2)(P-Ap. 002). The Referee missed the mark completely. If Mr. Polk's employment testimony was not "material" to the underlying matter, as Attorney Riley contends, then he would have had no duty to remediate Mr. Polk's omissions. SCR 20:3.3(a)(3) only requires remediation of material testimony.

Indeed, Polk's omissions were not material to his reinstatement proceeding. The Order appointing Referee Flynn specified:

> IT IS ORDERED that the Hon. Dennis J. Flynn is appointed referee in this matter for the purpose of determining (1) the number and type of citations/convictions that Attorney Polk has received that involved his operation of a motor vehicle, (2) the facts surrounding the incident for which Attorney Polk received a citation for loitering—illegal drug activity and whether Attorney Polk misrepresented those facts to the OLR, and (3) the facts concerning the nature and status of any outstanding civil judgments against Attorney Polk. The referee may also consider any other matter that the referee deems helpful to this court's decision of the reinstatement petition.

(R:53)(Ex. 1 to hearing)(P-Ap. 045). OLR has argued that due to the catch-all language at the end of this Court's order appointing Referee Flynn allowing him to consider matters he deemed helpful (not matters someone else deemed "material" years later), and, therefore, everything Mr. Polk uttered was thus material. (*See* R:32:13) By accepting OLR's incredible

argument that everything was material at the Polk hearing, the Referee created an impossible standard for any litigator. Every question to be asked of a witness must be analyzed in light of every possible issue, no matter how small or how seemingly unrelated to the agenda at hand, because maybe, the tribunal possibly might find it "helpful."A litigator would need to analyze everything in light of a continuing duty to notify the tribunal of every potential discrepancy in testimony following the conclusion of a proceeding, whether or not his client lost, and even after he had already withdrawn representation. A litigator would unnecessarily prepare and explore facts and issues not before the tribunal on the off chance that someday OLR will suggest that a benign boilerplate question was an attempt to "knowingly offer false testimony" that the litigator "knew to be false." Even after losing and withdrawing, a litigator would have this burdensome duty to "remedy" something that was not initially material because an OLR investigator may later claim that there is some new issue that "might" have been something worth following up on.

If this is the legal standard to which attorneys are held, nearly every attorney in practice has violated Former SCR 20:3.3(a)(4) and/or its successor. The Referee's standard would mean that lawyers would need to routinely interrupt proceedings to correct every omission or misstatement of their clients, no matter how slight, because, according to the Referee, everything is material or may become material years later. Further, if this were the standard, there would endless conflict of interest problems. For instance, in this case, assuming Attorney Riley knew about Mr. Polk's employment he would have had to stop the proceeding, meet privately with Mr. Polk (assuming the referee would allow the interruption) to discuss the omissions and, apparently, the need to bring up the employment. What would happen if, after discussing it, Mr. Polk told Attorney Riley to skip it? What is Riley to do now? Call the Lawyer Hotline? Hire another lawyer to now advise him? What if his lawyer or the Hotline asks: "What is the hearing about?" Is he supposed to say, "It doesn't matter because 'everything' might be material?"

Importantly, Mr. Polk's employment was not material because it did not make a difference in the outcome. Referee

Flynn recommended against reinstatement because of Mr. Polk's civil and criminal problems, and the Supreme Court agreed with that assessment. If Mr. Polk had testified that he had acted as a "glorified paralegal," or even as a lawyer, Referee Flynn still would have recommended against reinstatement. Likewise, had Attorney Riley pointed out, at some later date, to the OLR or Referee Flynn or the Supreme Court that his client had performed some work for the Law Firm, Mr. Polk's law license still would be just as suspended as it is today. The only reason Mr. Polk's employment is "material" to his reinstatement matter is because Referee Dugan, not Referee Flynn, retroactively decided it should be.

### C. THE REFEREE INAPPROPRIATELY CREATED A "HYBRID" REINSTATEMENT STANDARD

It is important to note that Mr. Polk let his CLE lapse due to a disinterest in practicing law; he was not suspended due to misconduct. "Had he complied with the mandatory reporting requirement for continuing legal education, he would still be practicing law." Polk v. Office of Lawyer Regulation, 2007 WI 51 ¶¶16, 25-26, 300 Wis. 2d 280, 288-89, 732 N.W.2d 419, 423 (Bradley, J., dissenting). Referee

Dugan, in denying summary judgment, confused the requirements for reinstatement after a long-term administrative suspension for CLE deficiencies (which is governed by Chapter 31 of the Supreme Court Rules), versus the requirements for reinstatement after a disciplinary suspension (which is governed by Chapter 22).

The decision denying summary judgment references a "hybrid standard." (R:39:2) (P-Ap. 002.) Without any basis in the Polk hearing transcript or Referee Flynn's report, the Referee, unable to otherwise reconcile the rule Referee Flynn applied, manufactured a "hybrid" standard that nonetheless had to meet Chapter 22 requirements, and retroactively applied to the Polk hearing, at which she was not present. However, the difference between the two chapters is vital, and underscores just how wrong the Referee got it.

- There is nothing in Chapter 31 prohibiting someone suspended for CLE from performing paralegal, research, or law clerk work. SCR 31.10(1) simply states, "A lawyer shall not engage in the practice of law in Wisconsin while his or her state bar membership is suspended under this rule." If the drafters of the

Supreme Court Rules had wanted to prohibit lawyers on CLE suspensions from performing any law-related work, they very easily could have done so, as they did with SCR Ch. 22. OLR insists that CLE-suspended lawyers cannot perform law-related work at all, but a plain reading of the Rule shows otherwise.[3]

- Chapter 22, which pertains to disciplinary suspension, does prohibit lawyers suspended for misconduct from engaging in most paralegal or other law-related work. *See* SCR 22.26(3).
- To reinstate a license after a three-year CLE suspension, lawyers show that they are "eligible" for reinstatement—which, at least in the Polk matter, this Court has interpreted to include proving character and fitness similar to that of a new applicant to the bar. Polk v. Office of Lawyer Regulation, 2007 WI 51, 300 Wis. 2d 280, 285, 732 N.W.2d 419, 421).

[3] OLR has even conceded that "administrative" work for the Law Firm would have been permitted (R:32)(Peterson Aff. ¶ 17). Thus, the mere fact that Mr. Polk may have done some work at the Law Firm could not form the foundation for the material issue, as OLR claimed it did.

While Referee Flynn's decision issued after the hearing referred to the SCR Ch. 22 standard (R:29) (Ex. C to Aff. of Rosenzweig)[4](P-Ap. 053), Attorney Riley had no reason, a month earlier, to anticipate that Referee Flynn would subsequently refer to the wrong rule or that a Referee would create a new "hybrid" rule and apply it retroactively. Regardless, the hearing was not about Mr. Polk's employment; it was about his character.

While the ultimate outcome would have been the same under either rule because Polk's character, the noticed subject of the hearing, was a material issue under either rule, it is very important when accusing Riley of misconduct to look at the correct rule because "glorified paralegal" employment is only arguably material to SCR Ch.22, and only if that was an issue framed for hearing. Employment as a lawyer might be material to a Chapter 31 proceeding, but there is no credible evidence, just the unfounded deposition testimony of Mr. Polk's belief, to suggest Attorney Riley found out about the

[4] Referee Flynn's report was included both as an exhibit to counsel's affidavit in support of Attorney Riley's Motion for Summary Judgment (R:29) and as an exhibit to the hearing in this matter (R:53 Ex. C). To avoid unnecessary duplication, it is included only once in the Appendix.

alleged legal work prior to it coming up as part of an OLR investigation.

### D. THERE IS NO BASIS FOR FINDING THAT ATTORNEY RILEY ASSISTED MR. POLK IN FALSIFYING EVIENCE

The second Supreme Court Rule Attorney Riley is charged with violating reads, "A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." SCR 20:3.4(b). It was undisputed that Attorney Riley did not coach Mr. Polk to do or say anything at all, did not advise Mr. Polk top conceal his employment, and did not counsel him to lie. (R:32)(OLR Brief p. 15). It was also undisputed that Attorney Riley entered an appearance and appeared at the hearing but performed no other substantive work. (R:29) (Ex. B to Rosenzweig Aff., p. 85) (P-Ap. 081) Mr. Polk drafted and submitted his petition without Attorney Riley's assistance (R:29) (*see id.* p. 73;) (P-Ap. 079) Attorney Riley did not prepare Mr. Polk for the hearing or counsel him in any way. (R:29) (*Id*. p. 85)(P-Ap. 081).

The disciplinary cases citing violations of SCR 20:3.4(b) clearly show that this Rule was intended to prevent

active coaching or falsification by a lawyer, not merely sitting by while someone else testifies. A review of cases in which attorneys were disciplined under 20:3.4(b) does not reveal a single example of where this rule was applied to conduct that was, as alleged in this case, passive. See, e.g., In re Disciplinary Proceedings Against Arthur, 2005 WI 40, 279 Wis. 2d 583, 609, 694 N.W.2d 910, 923 (attorney instructed a client to lie about an illness to avoid appearing at a properly noticed deposition); In re Disciplinary Proceedings Against Alia, 2006 WI 12, 288 Wis. 2d 299, 320, 709 N.W.2d 399, 409 (attorney altered an expert witness report without the expert's knowledge or permission); Matter of Disciplinary Proceedings Against Salmen, 187 Wis. 2d 318, 319-20, 522 N.W.2d 779, 779-80 (1994) (attorney testified that a letter he had back-dated was genuine). These cases involve either an attorney coaching a client to lie, or an attorney actually falsifying evidence.

OLR, in its response to Attorney Riley's Motion for Summary Judgment, seems to invent, from whole cloth, a sort of bizarre "assisting by omission" doctrine. (*See* R:32:5.) OLR offers no citation to authority for this doctrine because it

has never been used in a reported disciplinary decision in Wisconsin. Such a rule does not exist. This claim should have been dismissed on summary judgment. The Referee, nonetheless, allowed this novel charge to proceed to hearing.

### E. THERE IS NO EVIDENCE OF DISHONEST, FRAUDULENT, OR DECEITFUL CONDUCT

The third charge against Attorney Riley is for an alleged violation of SCR 20:8.4(c): "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." This section is non-specific; its proof seemingly depends on proof of the other allegations. This charge therefore fails for the same reasons the other counts fail. There is simply no evidence of dishonesty, fraud, deceit, or misrepresentation by Attorney Riley at any stage of the Polk reinstatement matter.

## III. THE REFEREE'S REPORT AND RECOMMENDATIONS ARE UNSUPPORTED BY EVIDENCE

OLR admitted in its response to Attorney Riley's motion for summary judgment:

> [S]uccess or failure rests on a solitary genuine issue of material fact: Did Attorney John Kenyatta Riley know prior to representing Attorney Brian K. Polk at Polk's reinstatement hearing that Polk was employed at Riley's law firm . . . during Polk's suspension? . . . If proven

> affirmative at trial, Riley will have violated the three Supreme Court Rules as charged in the Complaint. Otherwise, the case should be dismissed at the trial's conclusion.

(R:32:1)(P-Ap. 097.) Referee Dugan, after the hearing, found that OLR did not prove Attorney Riley knew of Polk's employment:

> It seems incredible that Attorney Riley did not see or know that Brian Polk was not performing legal work (for pay or not) in the law office. "Seeming" incredible does not rise to the clear and convincing burden of proof. Given the testimony about Attorney Riley's caseload and the isolated nature of his work within the office it is plausible that he didn't assume or know that Brian Polk was employed in the law firm.

(R:52.11 n.4)(P-Ap. 014). Therefore, according to OLR's concession, this is where this case should have begun and ended.

However, this is not what happened. The Referee conjured a story on imagined facts. It is clear the Referee did not apply, or refused to apply OLR's "clear, convincing, and satisfactory" burden of proof. The Referee's "Discussion" inaccurately describes the underlying reinstatement matter, misrepresenting what this Court ordered Referee Flynn to do, and why this Court handled the Polk matter in the first place. Even assuming, *arguendo*, that summary judgment was not appropriate; there is no factual or legal basis for finding

Attorney Riley in violation of the three Supreme Court rules cited in the Complaint.

### A. THE REFEREE'S FACTUAL FINDINGS WERE CLEARLY ERRONEOUS

This Court will overturn a Referee's factual findings when they are clearly erroneous and should do so here. Incredibly, the Referee found the testimony of Brian Polk—a convicted felon with a history of lying before an OLR referee—"forthright, clear, and convincing" (R:52:12)(P-Ap. 015) . Based on a plain reading of the hearing and deposition transcripts, this credibility determination is clearly erroneous and cannot rationally form the basis of a public reprimand.

In order to find against Attorney Riley, the Referee had to find Mr. Polk's testimony credible. Specifically, the Referee found "Attorney Riley and Brian Polk spoke about his law firm employment during 2006 when he was serving as counsel for Brian Polk." (R:52:6)(P-Ap. 009.) Theevidence says otherwise. Attorney Riley unambiguously denied discussing anything of the sort with Mr. Polk:

> Q Did Mr. Polk, during the time frame—and let's talk about October of '05 up until the hearing in September of '06. Did he ever talk to you about anything that led you to believe that he had been working for Mr. Eisenberg?

A Never. Never.[5]

(R:54:278)(P-Ap. 040). On the other hand, Brian Polk's testimony regarding this issue is literally all over the place. Had the Referee objectively reviewed the testimony, these incredible inconsistencies would be readily apparent. First, in the testimony referenced by the Referee, Mr. Polk does not recall discussing with Attorney Riley "concerns about presenting yourself as an attorney during the course of your employment at Eisenberg & Riley." (R:54:134)(P-Ap. 027.) Faced with this lack of recall, OLR counsel invites Mr. Polk to re-read his deposition testimony to refresh his recall, but he testified that the deposition testimony did not refresh his recall. (R:54:138)(P-Ap. 028) After several minutes of leading questions by OLR counsel, to Attorney Riley's counsel objected, Mr. Polk testified that "I believe there were some discussions with Mr. Riley before my hearing about my concerns about disclosing—my not disclosing that I was

[5] As an example of the lack of objectivity, the Referee indicated that "Attorney Riley never directly refutes Brian Polk's statements at the hearing that they discussed the law firm employment concerns of Brian Polk prior to the hearing." (R:52:12)(P-Ap. 015) Apparently in the rush to get her report our after being notified it was overdue, the Referee failed to review the transcript in which Attorney Riley testified that he never had any conversations with Mr. Polk that would lead him to believe he had been working for Mr. Eisenberg. (R.54:278)(P-Ap. 040.)

working for Eisenberg." (R:54:144-145)(P-Ap. 029)(emphasis added). Not "I did discuss," but "I believe," and that belief only came out after OLR counsel fed him testimony.

This "belief" also contradicts his deposition, in which he testified that there were only two reasons he would conclude that Attorney Riley knew of his employment at the Law Firm: the large number of hours he worked,[6] and that Attorney Riley would have seen him with papers in his hand, on the phone, and back-and-forth to the copy machine. (R:53)(P-Ap. 074)(R:54:172-173)(P-Ap. 033) When asked if there were "any other facts that would lead you . . . to conclude that Attorney Riley knew that you were employed at Eisenberg Riley at the time you were employed at Eisenberg Riley," Mr. Polk's answer was an unqualified "no." (R:53)(P-Ap. 76)(R:54:173-174)(P-Ap. 033)(emphasis added.) Mr. Polk's deposition testimony, which he affirmed at the trial, admitted that he did not have direct conversations with

[6] Even Mr. Polk's testimony as to the number of hours he was in the office was inconsistent. At his deposition, he testified he was in the office 50 to 60 hours a week. (R:53)(P-Ap. 074). At trial, he testified he was not actually in the office even 50 hours a week; he was out signing clients up and investigating personal injury cases. (R:54:160)(P-Ap. 030).

Attorney Riley regarding his employment with the Law Firm. (R:53:49)(P-Ap. 077)(R:54:177-178, 186)(P-Ap. 034-035, 37).

Attorney Riley's testimony was firm and forthright. Mr. Polk's testimony was coached and wavering.7 This entire case is built upon beliefs and speculation. Take out the "beliefs"[8] and the entire house of cards upon which this case rests falls.

### B. THE REFEREE'S FINDINGS REGARDING ATTORNEY RILEY HAVE NO BASIS IN THE RECORD

The Referee's credibility determination of Attorney Riley is similarly bizarre and unsupported. She indicated that Attorney Riley's "comments about Attorney Riley's observation of Brian Polk in the law offices are significantly different in exhibit 13 from testimony at the deposition and from testimony in trial." (R:52:12)(P-Ap. 015) "Exhibit 13" was Attorney Riley's written responses to Attorney Peterson's initial inquiry on December 5, 2008 (R:53)(P-Ap.

[7] The Referee found the testimony of the other witnesses not useful to her determination of Attorney Riley's "actual knowledge" of Mr. Polk's law firm employment. (*See* R:52:11)(P-Ap. 014.) Therefore, we are not addressing them here.

[8] It appears consistently that when pressed for factual testimony, Mr. Polk admits there is no foundation for his "belief."

081-084). In that exhibit, he indicated he was usually out of the office, and that he would have seen Mr. Polk in the lobby or back office areas of the Law Firm. Further, he "assumed that he was utilizing office space and/or office resources to prepare his petition for reinstatement." (P-Ap. 083-084). In both his deposition and trial testimony, Attorney Riley testified that he ran into Mr. Polk occasionally, made small talk, and assumed Mr. Polk was using firm resources to prepare his petition. (R:29) (Ex. A to Rosenzweig Aff. p. 39-41)(P-Ap. 093) (R:54:277-279)(P-Ap. 071) The Referee fails to enumerate the alleged inconsistencies between Exhibit 13 and Attorney Riley's testimony, because there are none.

C. THE REFEREE'S DISCUSSION DEFIES LOGIC

The Referee's enumerated conclusions of law (R:52:6-7)(P-Ap. 009-010) are merely cursory recitations of parts of the procedural history and the Supreme Court Rules Attorney Riley has been accused of violating. The "discussion" section offers rambling prose purporting to be an explanation for those conclusions. This Court is to review the conclusions (by whatever label) *de novo*, and should find that they are not supported by the record.

The Referee offers a bizarre summary of "complicating factors," purportedly to explain her decision. For instance:

> Attorney Riley's failure to follow the court order in the underlying case with respect to the reinstatement directive the court delineated to be used and then Attorney Riley's turn-about reliance on a narrow reading of the court order reinstatement directive for his defense. Through admittedly unprepared and inattentive representation of Brian Polk during the underlying hearing, Attorney Riley incorrectly used Chapter 22 disciplinary reinstatement standards to elicit, on direct examination, the false testimony about Brian Polk's employment (omissions of law firm employment). Attorney Riley did not object to OLR counsel's subsequent use of Chapter 22 standards resulting in Brian Polk's flagrantly false, even perjurious, testimony.

(R:52:8)(P-Ap. 011) This summary blatantly misrepresents this Court's directive in the Polk matter, and baldly speculates as to Attorney Riley's interpretation of it. This Court, in its Order appointing Referee Flynn, enumerated three factors for him to consider—Mr. Polk's traffic record; civil judgments; and his drug/loitering conviction. There is nothing in the Order to suggest that, by asking a few boilerplate background questions about Mr. Polk's work history during his CLE suspension, Attorney Riley actually violates this Court's Order as the Referee suggested. Likewise, there is no basis in reality for the Referee's conclusion that Attorney Riley

"incorrectly used Chapter 22 standards," or somehow changed the nature of the proceeding from a CLE reinstatement to a disciplinary reinstatement, by asking these questions or failing to object to Attorney Falk's questions. Attorney Riley simply asked background questions, as litigators do.

The Referee invents more wrongs throughout her "discussion." Some of the more egregious examples:

- "Attorney Riley originally asserts attorney-client privilege when OLR inquires about his knowledge of Brian Polk's law firm employment. He never actually answers the question about his attorney client discussions with Brian Polk. (Exhibit 13). It should be noted that Attorney Riley does not assert attorney-client privilege at any other juncture, and makes statements to OLR and at the trial that included privileged and confidential information which Brian Polk, as client holding the privilege, had not waived." (R:52:12)(P-Ap. 015)

Somehow, the Referee seeks to cast Mr. Riley's behavior as inconsistent. However, when answering the

original inquiry, Attorney Riley was unrepresented, and he asked OLR for guidance on what to disclose given the attorney-client privilege. (See R:53)(P-Ap. 084). He did not specifically answer the question because he had yet to receive the requested guidance. He later made statements that (arguably) implicated privilege, *after* he retained counsel. In any case, SCR 20:1.6(c) permits disclosure of confidential information, to the extent the lawyer reasonably believes necessary to respond to allegations in a proceeding concerning the lawyer's representation of the client (including a disciplinary proceeding), so these later disclosures are in no way inappropriate.

- "Attorney Riley's conduct misused the justice system, i.e., an optional reinstatement petition containing false evidence (by omission) and assistance of a client to provide false evidence needlessly resulted in a Wisconsin Supreme Court review, conference, and issuance of a split decision."

(R:52:14)(P-Ap. 017). This statement is simply absurd. The Referee in the Polk matter was appointed in the first place because there were disputed issues of fact precluding an

immediate determination (Polk v. Office of Lawyer Regulation, 2007 WI 51 ¶ 4, 300 Wis. 2d 280, 282, 732 N.W.2d 419, 420) and well before Attorney Riley became involved. There was a Wisconsin Supreme Court review of Referee Flynn's recommendation because the Wisconsin Supreme Court reviews all such recommendations. (*See* SCR 22.23.) More importantly, Mr. Polk did not appeal the denial of his reinstatement (Polk, 2007 WI 51 at ¶ 7), so the Court made its determination on the record—the Court's review had nothing whatsoever to do with anything Attorney Riley did or did not do! Further, this Court's "split decision" has nothing to do with Attorney Riley's conduct. The dissent criticized the idea that Mr. Polk's CLE suspension could turn into a *de facto* disciplinary suspension of indefinite duration. (*Id.* at ¶ 17). The Referee implied that this dissent may not have occurred had Mr. Polk's alleged employment been revealed at the hearing (*See* R:52.9-10 n.2)(P-Ap. 013). Such rank speculation plays no part in this proceeding.

- The Referee also, inexplicably, chides Attorney Riley for not remediating Mr. Polk's

testimony "with Referee Flynn, OLR or the Supreme Court at any time, up to and including the date of trial in the instant case" (R:52.13)(P-Ap. 016). This is ludicrous. Even if, somehow, the alleged employment would have been material to Referee Flynn's decision or that of the Court, Attorney Riley has testified that he found out about Polk's employment when OLR notified him. (R:55:341)(P-Ap. 043.) This meant that any duty to remediate the testimony arose after the OLR already knew about Mr. Polk's employment. Why would it occur to Attorney Riley, or anyone else, to notify the OLR of something he just learned from the OLR?

- The Referee suggested that Attorney Riley "inexplicably withdrew from the case after the trial." (R:52:12)(P-Ap. 015.) Mr. Polk did not appeal the recommendation (Polk, 2007 WI 51 at ¶ 7). There was nothing to withdraw from!

Discipline should not be founded on baseless speculation by the Referee.

### B. THE REFEREE OFFERS NO SUPPORT FOR ANY VIOLATIONS OF SCR 20:3.4(b) OR 20:8.4(c)

The Referee's report provides only passing references to the second and third Supreme Court Rules Attorney Riley is alleged to have violated, SCR 20:3.4(b) and 20:8.4(c). In fact, the primary discussion regarding both of these Rules (other than a rote recitation of same, an indication that 8.4(c) can apply to omissions, and a conclusory statement that Attorney Riley violated them) is contained in a single paragraph:

> Attorney Riley's violation of 8.4(c) is underscored by his conscious choice in a defense strategy—asserting that representation was unprepared, "second chair" status, "support" and "by the seat of one's pants" and yet this position is countered by his notice of appearance filing with the court (thereby precluding other counsel from appearing), appearance as counsel, performance of all examination of witnesses and presentation of exhibits, and his assistance of his client to provide false evidence to a tribunal.

(R:52:15)(P-Ap. 018). This recitation, as best as can be determined, suggests that Attorney Riley, by appropriately defending the present matter, engaged in dishonest conduct.

However, there is nothing in the record or in case law (as explained in Sec. II.D, *supra*) to support the idea that Attorney Riley "assisted" his client to do anything. Further,

the Referee does not explain how Attorney Riley's "second chair" status is undermined by his filing of an appearance (which is what an attorney typically does before appearing in a case) or his questioning of witnesses (which is what an attorney, even a second chair attorney, does). The Referee also states that that other counsel were precluded from appearing because Attorney Riley filed an appearance, a statement which is inexplicable.

Likewise, the Referee's suggestion that Attorney Riley's defense strategy is itself indicative of dishonesty is troubling. She points to nothing that was actually dishonest and just condemns the strategy itself. She also cites "Attorney Riley's refusal to acknowledge the wrongful nature of his conduct" (R:52:13)(P-Ap. 016) as an aggravating factor. This is a textbook example of a Catch 22—Attorney Riley's very defense of his alleged conduct is proof of his alleged conduct.

## V. THIS CASE NEVER SHOULD HAVE BEEN CHARGED IN THE FIRST PLACE

Under the Supreme Court Rules, the Office of Lawyer Regulation makes an investigation of a disciplinary complaint, and a committee decides if there is cause to

proceed. "Cause to proceed" means a reasonable belief of an investigative report that an attorney has engaged in misconduct or has a medical incapacity that may be proved by clear, satisfactory, and convincing evidence." (SCR 22.0001(2)).

There was no actual cause to proceed here. Attorney Sarah Peterson, the investigator assigned to Attorney Riley's matter, testified that:

- She heard from an investigator who was researching a matter involving another Law Firm principal that Mr. Polk may have been working for the Law Firm (R:54:79)(P-Ap. 022). That investigator heard the information from an "unidentified complainant." (R:54:81)(P-Ap. 022).
- Mr. Polk's fitness issue framed for his hearing before Referee Flynn had nothing to do with his employment. (R:54:82)(P-Ap. 022).
- She did not research the Supreme Court Rules to determine whether Attorney Riley's conduct actually violated any Supreme Court rules (R:54:90-92)(P-Ap. 024.)

- Attorney Riley did not make inconsistent statements during her investigation of this matter (R:54:101-102)(P-Ap. 025-026), only that she found it "incredible" that Mr. Polk could have been working at the Law Firm without Attorney Riley's knowledge. (*Id*.)

That last assertion seems to form the entire basis for the charging recommendation: Attorney Peterson found Attorney Riley's statements "incredible," even though she had nothing to refute them. Attorney Peterson did not indicate how her belief was "reasonable," or how OLR might meet its burden of proof.[9] She did not talk to Mr. Polk. She did not go to the law firm and see why, in the "rat's maze" (R:54:159)(P-Ap. 030) of a building, and given the isolated nature of Attorney Riley's practice in a personal injury firm, he may not have known of Polk's employment. This disciplinary proceeding has been based on nothing more than the gut feelings of Attorney Peterson.

[9] In direct response to Ms. Peterson's disbelief, the Referee did find it is plausible that [Attorney Riley] didn't assume or know that Brian Polk was employed in the law firm." (R:52:11 n.4)(P-Ap. 014).

## CONCLUSION

The "clear, convincing, and satisfactory evidence" standard for misconduct was ignored in this case. Where an attorney's license, reputation and career is at stake, evidence needs to be scrutinized and the burden needs to be shouldered by OLR.

Respondent-Petitioner Attorney John Kenyatta Riley therefore respectfully requests this Court reverse the decision on summary judgment or, alternatively, apply the burden of proof appropriately, determine that the Referee's findings are clearly erroneous, and dismiss the complaint against him.

Dated at Milwaukee, Wisconsin this 18th day of June, 2012,

GUTGLASS, ERICKSON, BONVILLE & LARSON, S.C.

___/s/ Stacie H. Rosenzweig_____
Paul R. Erickson (#1003920)
Stacie H. Rosenzweig (#1062123)
Attorneys for Attorney John Kenyatta Riley

P.O. ADDRESS:
735 North Water Street, Suite 1400
Milwaukee, Wisconsin 53202-4267
(414) 273-1144
paul.erickson@gebsc.com
stacie.rosenzweig@gebsc.com

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced using the following font:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 9,674 words using the word count feature of Microsoft Word.

Dated this 18th day of June, 2012.

GUTGLASS, ERICKSON, BONVILLE & LARSON, S.C.

___/s/ Stacie H. Rosenzweig_____
Paul R. Erickson (#1003920)
Stacie H. Rosenzweig (#1062123)
Attorneys for Attorney John Kenyatta Riley

P.O. ADDRESS:
735 North Water Street, Suite 1400
Milwaukee, Wisconsin 53202-4267
(414) 273-1144
paul.erickson@gebsc.com
stacie.rosenzweig@gebsc.com

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of June, 2012.

GUTGLASS, ERICKSON, BONVILLE & LARSON, S.C.

___/s/ Stacie H. Rosenzweig_____
Paul R. Erickson (#1003920)
Stacie H. Rosenzweig (#1062123)
Attorneys for Attorney John Kenyatta Riley

P.O. ADDRESS:
735 North Water Street, Suite 1400
Milwaukee, Wisconsin 53202-4267
(414) 273-1144
paul.erickson@gebsc.com
stacie.rosenzweig@gebsc.com