No. 2010AP2942-D

IN THE

Supreme Court of Wisconsin

IN THE MATTER OF DISCIPLINARY PROCEEDINGS
AGAINST JOHN KENYATTA RILEY, ATTORNEY AT LAW:

OFFICE OF LAWYER REGULATION,

Complainant-Respondent,

v.

JOHN KENYATTA RILEY,

Respondent-Appellant.

On Appeal from the *Referee's Report and Recommendation*
Dated April 16, 2012
Referee Hannah C. Dugan, Presiding

BRIEF AND SUPPLEMENTAL APPENDIX OF COMPLAINANT-RESPONDENT OFFICE OF LAWYER REGULATION

Matthew J. Price
OLR Retained Counsel
State Bar No. 1021922

FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202
414.271.2400

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Treatises

I. STATEMENT OF ISSUES PRESENTED

Did Attorney John Kenyatta Riley (Riley) conclusively show that he was entitled to summary judgment?

Referee concluded: No.

Did the Office of Lawyer Regulation of the Supreme Court of Wisconsin (OLR) prove at trial by clear, satisfactory and convincing evidence that Riley engaged in the misconduct alleged in the single count of the complaint?

Referee concluded: Yes.

II. STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

OLR does not believe that oral argument would materially assist the Court in the disposition of this matter. The parties have had ample opportunity to develop the legal issues in their briefs, and resolution of these issues can be achieved by a straightforward and routine application of well-settled law. The record is complete and the referee's report is thorough and supported by the record.

As to publication, all disciplinary matters with sanctions exceeding a private reprimand require publication. SCR 22.23(1).

III. STATEMENT OF CASE

On December 6, 2010, OLR filed a single-count complaint charging Riley with violating three Supreme Court Rules arising from his representation of Attorney Brian K. Polk (Polk) in Polk's law license reinstatement proceedings. (R.1.) Riley filed an answer denying the alleged Supreme Court Rules violations. (R.7.) The Court initially appointed Attorney Jonathan V. Goodman as the referee. (R.9.) OLR moved for substitution of Attorney Goodman (R.11.) The Court granted the motion and appointed Attorney Hannah C. Dugan as the substitute referee. (R.12.)

At the close of discovery, Riley filed a motion for summary judgment, (R.29, 34, 36), which OLR opposed, (R.32, 38). On December 6, 2011, Referee Dugan entered an order denying summary judgment. (R.39; Appellant's App. (A-App.) 1-3.) The trial occurred on February 7 and 8, 2012. (R.54, 55.)

On April 16, 2012, Referee Dugan issued her *Referee's Report and Recommendation* (Referee Report), which concluded that Riley violated the Supreme Court Rules as charged, and recommended a public reprimand and assessment of full costs against Riley. (R.52; A-App. 4-20.) Riley timely appealed. (R.58.)

IV. STATEMENT OF RELEVANT FACTS

In 2001, Polk's license to practice law was administratively suspended for non-compliance with continuing legal education requirements, and has not been reinstated since. (R.52:4;[1] A-App. 7; R.54:109-110; Supp. App. (S-App.) 2.) Prior to his suspension, Polk and Riley were employed, simultaneously for three years, as associates at Eisenberg, Weigel, Carlson, Blau, Reitz & Clemens, S.C. (R.52:5; A-App. 8; R.54:108-109; S-App. 2.) Polk and Riley maintained a professional and friendly relationship while employed together at the Eisenberg, Weigel firm. (R.52:5; A-App. 8; R.54:108; S-App. 2.)

In 2005, Attorney Alvin Eisenberg and Riley formed Eisenberg & Riley, S.C. (E&R).[2] (R.52:3-4; A-App. 6-7; R.54:266-67.) From at least October 10, 2005 through March 3, 2006, Polk was employed at E&R. (R.52:4; A-App. 7; R.53:Ex.7:18-19; R.54:110-11; S-App. 2-3.) Initially,

[1] The record citation convention used in this brief is R.X:Y, where X is the record number and Y is the page number(s), paragraph number(s) (if preceded by "¶") or exhibit number(s) (if preceded by "Ex." and followed by ":" and the page or paragraph number(s)).

[2] The firm was also known as Eisenberg, Riley & Muwonge, S.C., and is now known as Eisenberg, Riley & Zimmerman, S.C. (R.52:3; R.54:266.) The firm's name variations are inconsequential to this appeal.

Polk was hired to perform routine client intake functions for personal injury matters. (R.52:4; A-App. 7; R.54:111; S-App. 3.) However, notwithstanding his continued license suspension, Polk's work expanded to performing legal services, including: client consultations, providing legal advice to firm clients, presenting himself to clients and other third parties as a practicing attorney and identifying himself as "Attorney at Law" under his signature on correspondence written on law firm letterhead to third parties. (R.52:4; A-App. 7; R.54:116, 118, 121; S-App. 4-5.) Polk had his own office and telephone extension. (R.52:4; A-App. 7; R.53:Ex.8; R.54:179, 213; S-App. 20.) Polk spent 50 hours per week in the office while employed at E&R. (R.52:4; A-App. 7; R.54:114; S-App. 3.)

Polk testified at trial that, although Polk and Riley did not work on cases together, they saw each other in the office, including when Polk was with firm clients:

> Q: In what ways, if at all, did you -- did you ever see Mr. Riley at the firm?
>
> A: Yes.
>
> Q: Okay. And in what context did you see him? What were you doing?
>
> A: I was usually hustling and bustling throughout the firm, whether it was making phone calls, going to the copy machine, coming from the lobby to my office with clients

that I was dealing with in a personal injury case. So he would walk by my office where I was located. I know that, oftentimes, he met in the conference room sometimes; so he would see me, and I would see him.

Q: Would you talk with each other?

A: Stop and talk. John was usually pretty busy, and I was pretty busy. We spoke. "Hey, how you doing? What's going on?" But yeah.

* * *

Q: Did you ever see Mr. Riley when you were with clients?

A: Yes, I would see him.

Q: Okay. Go ahead.

A: I might be sitting in my office and with someone -- and if I understand what you're asking me correctly, someone might be sitting in my office, and he might walk by my door; so I would be with someone and see him, if that's what you're referring to.

(R.54:113-14, 116; S-App. 3-4.) Also, Brian Ingram, a legal assistant at E&R while Polk was employed there, testified that there were occasions where the personal injury team (consisting of Ingram and Polk, among others) would hold case meetings in the 12' x 14' conference room and Riley would come in the room and exchange pleasantries. (R.54:195-97, 202.) Riley acknowledges seeing Polk at E&R on many occasions from 2005 through summer 2006, but denies knowing at that time that Polk was then an E&R employee. (R52:5; A-App. 8; R.54:268-70, 277-78). Instead,

Riley claims he thought at the time that Polk was at E&R primarily working on his license reinstatement petition. (R52:5; A-App. 8; R.54:268-70, 277; R.55:332-33.) Polk testified, however, that he believed that the entire E&R staff, including Riley, knew at the time that Polk was employed by E&R and performing legal work for firm clients. (R.54:117-18; S-App. 4.)

On February 22, 2006, Polk filed a *pro se* petition for reinstatement of his license to practice law, *Polk v. OLR*, Case No. 2006AP3096–D (Wis.) (Reinstatement Matter) (R52:4; A-App. 7; R.53:Ex.4:¶3.) Polk did not disclose his employment at E&R in his reinstatement petition. (R.52:124; S-App. 6.) Nor did he subsequently do so in a questionnaire from OLR which sought, among other things, his employment history while suspended. (R.54:124-125; S-App. 6.) Further, Attorney Polk did not disclose to the Court, the referee in the Reinstatement Matter or OLR at any time during the course of the Reinstatement Matter, that during his suspension he was employed at E&R and performing legal work there, and he has made no attempt to remedy that omission since. (R.54:151-153; S-App. 13.)

On April 27, 2006, OLR filed a memorandum opposing Polk's reinstatement because of concerns as to Polk's driving history, a loitering incident and multiple civil judgments against him. (R.53:Ex.1:1.)

On June 23, 2006, this Court issued an order appointing Reserve Judge Dennis J. Flynn as referee to conduct reinstatement proceedings. (R.53:Ex.1:2; A-App. 44-45.) The appointment order directed Referee Flynn to develop facts during the course of reinstatement proceedings regarding Polk's driving history, loitering and civil judgment issues raised by OLR. (R52:5; A-App. 8; R.53:Ex.1:2; A-App. 45.) In addition to those specific areas of inquiry, the Court included broad catch-all language in its order authorizing Referee Flynn to "consider any other matter that the referee deems helpful to this court's decision of the reinstatement petition." (R52:5; A-App. 8; R.53:Ex.1:2; A-App. 45.)

In approximately July 2006, at the direction of Alvin Eisenberg, Riley commenced representation of Polk in the Reinstatement Matter. (R.52:5; A-App. 8; R.53:Ex.13:1; A-App. 82; R.54:129; S-App. 7.) Riley provided very limited legal services to Polk in advance of the September 6, 2006, reinstatement hearing. (R54:130-131; S-App. 7-8.) But, *before* the reinstatement hearing, Polk and Riley discussed Polk's concerns about how

Polk having provided legal services and presented himself as an attorney to third parties while employed at E&R during his suspension would impact the Reinstatement Matter:

> Prior to my reinstatement [hearing], there was a concern that I spoke with [Riley] about, about me presenting myself as an attorney. So I don't know if that clears the record for you, but I'm telling you, while I was in that office, no, sir; never did I ever discuss with [Riley] about me representing people. Before my hearing, yes, ma'am.

(R.52:6; A-App. 9; R.54:187; S-App. 22.) Riley conducted all aspects of the reinstatement hearing as Polk's counsel. (R.52:5-6; A-App. 8-9; R.53:Ex.2; R.55:337.)

During the September 6, 2006 reinstatement hearing, Riley elicited the following testimony from Polk on direct examination:

> Q: And I know you touched on it earlier, but can you tell the Court what kind of jobs you've had since the loss of your license? What have you done?
>
> A: 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.

(R.53:Ex.2:56; A.-App. 47.) Polk's answer omitted his E&R employment. Later at the reinstatement hearing, counsel for OLR elicited the following testimony from Polk on cross-examination:

> Q: Have you attempted to practice law at all during your period of suspension?
>
> A: No.
>
> Q: Have you held yourself out to anyone as an attorney during your suspension?
>
> A: No.
>
> Q: Have you used any checks, legal stationary, any sort of documentation, that would indicated to someone that you were an attorney?
>
> A: No.
>
> Q: Have you provided any legal advice to anyone during your period of suspension?
>
> A: No.
>
> * * *
>
> Q: Have you engaged in any law work activity during the period of your suspension?
>
> A: No.
>
> Q: Have you worked for any - - done any contracting work or done any work for any law firms during the period of your suspension?
>
> A: No.

(R.53:Ex.2:81-83; A.-App. 50-51.) Polk's responses to OLR counsel were not truthful. (R.54:145-46; S-App. 11.)

Riley did not elicit any direct or redirect examination testimony from Polk at the reinstatement hearing seeking to correct either: a) Polk's omission about his E&R employment, in response to the question posed to him by Riley on direct examination or b) Polk's misstatements that he had not worked for a law firm nor performed legal work during his suspension, in response to the questions posed to him on cross examination by OLR counsel. (R53:Ex.2.) Moreover, Riley never advised this Court, Referee Flynn or OLR at any time after the reinstatement hearing of Polk's omission and misstatements at the reinstatement hearing, nor has he sought to otherwise remedy them. (R.52:6; A-App. 9; R.55:340-42.)

On October 4, 2006, Referee Flynn issued a report recommending denial of Polk's license reinstatement based upon Polk's driving history, the loitering incident and his civil judgments, and more specifically, what Referee Flynn believed to be Polk's lack of truthfulness in his reinstatement hearing testimony about those issues and his failure to take adequate responsibility for them. (R.53:Ex.3; A-App. 52-69.) Referee Flynn acknowledged in his report that he was to consider any other matters

deemed by him to be helpful to the Court's disposition of the Reinstatement Matter. (R.53:Ex.3:2; A-App. 53.) He then proceeded to consider other matters from information made available to him at the reinstatement hearing, including Polk's employment history while suspended. (R.53:Ex.3:9-11, 16, A-App. 61-63, 68.) However, Referee Flynn's consideration of that employment history was necessarily cabined by Polk's incomplete and untruthful testimony at the reinstatement hearing that he had not worked for a law firm nor performed legal work during his suspension. (R.53:Ex.3:10; A-App. 62.) Polk did not appeal from Referee Flynn's report. (R.53:Ex.4:¶7.)

On May 11, 2007, this Court issued an opinion denying Polk's license reinstatement based exclusively upon the findings in Referee Flynn's report. *Polk v. OLR*, 2007 WI 51, ¶7, 300 Wis. 2d 280, 732 N.W.2d 419. (R.53:Ex.4.)

It was only after the conclusion of the Reinstatement Matter, during the course of an investigation unrelated to Polk's reinstatement, that OLR

first became aware that Polk was employed by E&R during his suspension. (R.52:6; A-App. 9; R.54:29.)[3]

V. STANDARDS OF REVIEW

A. SUMMARY JUDGMENT

Though rarely employed, this Court has approved the use of the summary judgment process in disciplinary proceedings. *See, e.g.*, *In re Disciplinary Proceedings Against Crandall*, 2011 WI 21, 332 Wis. 2d 698, 798 N.W.2d 183; *In re Disciplinary Proceedings Against Peiss*, 2010 WI 115, 329 Wis. 2d 325, 788 N.W.2d 636.

The denial of summary judgment is reviewed independently, but applying the same methodology employed by the trial court. *Novell v. Migliaccio*, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544. This Court recently codified the summary judgment standard, as follows:

> The principles of summary judgment are well-defined. Summary judgment shall be granted '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.' Stated conversely, summary judgment should not be granted

[3] Additional facts pertinent to specific arguments will be introduced where appropriate.

> 'unless the facts presented conclusively show that the plaintiff's action has no merit and cannot be maintained.'
>
> In determining whether to grant summary judgment, 'the court decides whether there is a genuine issue of material fact; the court does not decide the fact.' The moving party bears the burden of establishing the absence of a genuine, that is, disputed, issue of material fact. Moreover, we view summary judgment materials in the light most favorable to the non-moving party. As we have often stated, 'summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy.'

Affeldt v. Green Lake Co., 2011 WI 56, ¶¶58-59, 335 Wis. 2d 104, 803 N.W.2d 56 (internal citations omitted). Further, where there exists a dispute among witnesses about a material fact, summary judgment is inappropriate because credibility of witnesses is not a determination to be made at the summary judgment stage. *Yahnke v. Carson*, 2000 WI 74, ¶11, 236 Wis. 2d 257, 613 N.W.2d 102.

B. DISCIPLINARY PROCEEDINGS

In an attorney disciplinary proceeding, a referee's findings of fact must be affirmed on appeal unless found to be clearly erroneous. *In re Disciplinary Proceedings Against Nunnery*, 2011 WI 39, ¶5, 334 Wis. 2d 1, 798 N.W.2d 239. Appellate courts review the record for evidence supporting factual findings, not contradicting them. *Hofflander v. St.*

Catherine's Hosp., 2003 WI 77, ¶70, 262 Wis. 2d 539, 664 N.W.2d 545; *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶50, 319 Wis. 2d 1, 768 N.W.2d 615. As part of its review under the clearly erroneous standard, this Court will not supplant the reasonable inferences drawn by the referee in reaching his or her factual findings. *In re Disciplinary Proceedings Against Lister*, 2010 WI 108, ¶32, 329 Wis. 2d 289, 787 N.W.2d 820. Further, should testimony conflict, "the referee is the ultimate arbiter of credibility." *Id.* Even in the absence of specific credibility findings, the Court assumes the referee made implicit credibility findings when it weighed the testimony and evidence in formulating his or her findings of fact. *In re Disciplinary Proceedings Against Charlton*, 174 Wis. 2d 844, 872, 498 N.W.2d 380 (1993).

A referee's conclusions of law are reviewed *de novo*. *Nunnery*, 334 Wis. 2d 1, ¶5. And while this Court independently determines the appropriate level of discipline to impose, it can benefit from the referee's sanction recommendations. *Id.*

VI. ARGUMENT

A. REFEREE DUGAN PROPERLY DENIED RILEY'S MOTION FOR SUMMARY JUDGMENT.

The sole count of the complaint charged Riley, as follows:

> By eliciting and allowing Polk's testimony at Polk's reinstatement hearing regarding Polk's work history during the suspension of Polk's license that omitted Polk's employment at Riley's law firm, Eisenberg & Riley, S.C., when Riley knew of that employment at the time he elicited and allowed that testimony, and his failure to remedy that omission at any time thereafter, Riley violated former SCR 20:3.3(a)(4),[4] SCR 20:3.4(b),[5] and SCR 20:8.4(c).[6]

(R.1:6.)

In her order denying summary judgment, Referee Dugan concluded that the genuine issue of material fact precluding granting summary judgment was "whether Riley knew about [Polk's] employment [at E&R while under license suspension] and failed to remedy the record of the false testimony, as required by the SCR's." (R.39:3; A-App. 3.)

---

[4] Former SCR 20:3.3(a)(4), in effect prior to July 1, 2007, provided, "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 remedial measures."

[5] SCR 20:3.4(b) provides, "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."

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

1. Riley's Knowledge At Polk's Reinstatement Hearing Of Polk's Employment At E&R While Suspended Is A Material Fact.

Polk's E&R employment while suspended was material to the Polk Reinstatement Matter. The standard for reinstatement for an attorney, such as Polk, with a license administratively suspended more than three years at the time reinstatement proceedings commenced, supports that conclusion. Analogizing such a reinstatement to an initial application for a license to practice law, the Court set forth the standard, as follows: "[A]n attorney who has been administratively suspended and out of the practice of law in this state for three or more consecutive years must…demonstrate the attorney's "eligibility"-namely, that the attorney has good moral character and the fitness to practice law in this state." *Polk*, 300 Wis. 2d 280, ¶10.[7]

[7] Riley argues that Referee Flynn mistakenly applied the SCR Ch. 22 reinstatement standard to Polk's circumstances and that Referee Dugan manufactured a hybrid standard to supplement and support Referee Flynn's. Br. of Appellant 30-33. As an initial matter, the SCR Ch. 22 disciplinary reinstatement standard is substantively identical to the standard articulated above for an administrative CLE non-compliance suspension exceeding three years: moral character and fitness. The petitioner must demonstrate "the moral character to practice law in Wisconsin" and "[t]hat his or her resumption of the practice of law will not be detrimental to the administration of justice or subversive of the public interest." SCR 22.31(1)(a) and (b). Irrespective of the rules cited in his report, Referee Flynn applied the correct standard when he concluded that Polk lacked the proper moral character and fitness to resume the practice of law: "The credible evidence indicates that Mr. Polk does not now have a proper

Additionally, SCR 31.10(1) expressly prohibits practicing law while administratively suspended for non-compliance with continuing legal education requirements. Doing so reflects negatively on a petitioner's moral character and fitness to resume the practice of law. (R.54:19.)

Whether Polk was practicing law while suspended is precisely one of the key issues that OLR was seeking to investigate in the Polk Reinstatement Matter. (R32:Aff. of Sarah E. Peterson, OLR investigator, Oct. 10, 2011 (Peterson Aff.):¶¶3-4, 17; R.54:17-19.) However, Riley's eliciting and failing to remedy Polk's omission and misstatements at the reinstatement hearing as to his law firm employment and practicing law while suspended improperly interfered with that investigation. (R.32:Peterson Aff.:¶19-20.)

Riley advances two arguments why Polk's employment at E&R while suspended was immaterial to the Reinstatement Matter: a) because OLR purportedly read the catch-all provision of Referee Flynn's

---

understanding of and attitude toward the standards that are imposed on members of the bar in Wisconsin." (R.53:Ex.3:16; A-App. 68.) This Court agreed. *Polk.*

As to Riley's charge that Referee Dugan ginned up a new hybrid standard as cover for Referee Flynn, she merely recited the standard applied by Referee Flynn and confirmed by this Court in *Polk*, and noted some procedural history of Polk's case. (R.39:2; A-App. 2.) She neither criticized Referee Flynn's reinstatement standard nor invented a new one.

appointment order to deem everything material and that cannot be so and b) the omission and misstatements as to Polk's employment at E&R did not affect the outcome of the Reinstatement Matter. Neither are availing.

First, Riley asserts that by OLR referencing on page 13 of its summary judgment response brief the catch-all language at the end of the appointment order, OLR somehow argued that "everything Mr. Polk uttered was…material" and that OLR advanced the "incredible argument that everything was material at the Polk hearing, …creat[ing] an impossible standard for any litigator." Br. of Appellant 26-27 (emphasis in original). With that premise cast, Riley hyberbolically bolsters his position with a speculative parade of horribles certain to cripple litigators given such an infinitely expansive reading of the catch-all provision of the appointment order in this instance. Br. of Appellant 27-28.

But, Riley misstates OLR's brief. OLR's reference in its brief to the catch-all provision came in response to Riley's argument in his summary judgment brief that Polk's employment history was not material because it "was not even on the agenda for the reinstatement hearing." (R.29:14.) OLR responded, in its entirety:

> First, he speciously argues that Polk's employment history was not even on the agenda for the reinstatement hearing. Riley Br. at 12. As discussed earlier, *see supra* note 3, that issue could not possibly have been included on the reinstatement hearing agenda because Polk failed to disclose it. Further, Referee Flynn was empowered to include in his report any other matters deemed by him to be helpful to the Court's decision on reinstatement, which would have included Attorney Polk's E&R employment had Referee Flynn been made aware of it. Peterson Aff., ¶13.

(R.32:13.) The footnote 3 referenced in the above-quoted paragraph provided:

> Riley curiously suggests that Polk's E&R employment was immaterial to the Reinstatement Matter because it was "not one of the three issues Attorney [sic] Flynn was appointed to decide" and not on Referee Flynn's "agenda for the hearing." Riley Br. at 7, 12. How could it have been? The only participants in the Reinstatement Matter that were privy to Polk's E&R employment were Polk and Riley, and neither disclosed it, at any time, to Supreme Court of Wisconsin, Referee Flynn or OLR.

(R.32:6.) At no time has OLR argued that the catch-all provision relegated even the most trivial of facts to material status. Instead, it was Riley's stunning argument that, because Referee Flynn did not put on his reinstatement hearing agenda an item that he was kept in the dark about it was rendered immaterial, which drew OLR's reference to the catch-all provision.

To the contrary, it is obvious that Referee Flynn, as trier of fact, believed that Polk's employment history while suspended was material to the Reinstatement Matter. He delineated in his report Polk's representations

about his employment history and abstinence from practicing law while suspended. (R.53:Ex.3:10; A-App. 62.) The full extent of that discussion, of course, was necessarily curtailed given Polk's omission and misstatements, and Riley's failure to remedy them.

Second, Riley asserts that Polk's employment history is immaterial because his reinstatement petition was ultimately denied on other grounds. Br. of Appellant 28-29. But how is he able to state with such certainty that evidence of Polk's E&R employment would not have altered the outcome? Had OLR been advised during the course of the Reinstatement Matter that Polk was employed at E&R during his suspension, OLR would then have conducted necessary additional investigation to determine whether during his suspension Polk was simply performing permissible administrative tasks or instead, as was later discovered, engaging in the practice of law, which is prohibited and a violation of the Supreme Court Rules. (R.32:Peterson Aff.:¶17.) This discovery, if made during the course of the Reinstatement Matter, likely would have resulted in not only another ground for denial of reinstatement, but also could have resulted in added conditions to reinstatement (none of which were or could have been included in the Court's opinion given the lack of disclosure) and additional

disciplinary charges against Polk. (R.32:Peterson Aff.:¶¶17.) Also, had Referee Flynn been otherwise inclined to recommend granting Polk's reinstatement petition after considering the issues relating to Polk's driving history, the loitering incident and civil judgments, there cannot be serious doubt that if also armed with evidence of Polk's practicing law while suspended, that evidence alone would have compelled Referee Flynn to recommend denial of reinstatement.

Far more importantly, even assuming that the outcome would have been unchanged, Riley's "no harm-no foul" argument demonstrates a profoundly-troubling attitude toward the ethical precepts that lawyers are sworn and expected to uphold. Under this theory, for example, an attorney facing revocation for violating one rule should not be discouraged from violating other rules because the "bottom line" would remain the same, rendering all of the other violations "immaterial." This attitude is incompatible with the profession's ethical standards.

Lastly, as noted in the Referee Report, Riley's argument against materiality is undercut by his having elicited in the first place testimony about Polk's employment history while suspended: "[I]n the underlying matter [Riley] asked the reinstatement petitioner the very questions about

employment that [Riley] in this matter now claims were not material to the underlying case." (R.52:10; A-App. 13.)

Polk's employment at E&R was material to the Reinstatement Matter and Riley's knowledge of it at the time of the reinstatement hearing is a material fact in these proceedings.

2. There Was A Genuine Issue As To The Material Fact.

OLR acknowledges that Riley's actual knowledge that Polk testified inaccurately at the reinstatement hearing is the lynchpin for proving each of the three Supreme Court Rule violations charged in the complaint. While "actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry," Restatement (Third) of the Law Governing Lawyers (Restatement) §120 cmt. c (2000), (S-App. 24), that "knowledge may be inferred from circumstances," SCR 20:1.0(g). To that end, "a lawyer may not ignore what is plainly apparent…." Reinstatement §120 cmt. c. (S-App. 24.) Riley's actual knowledge (be it inferentially or directly) was required to be viewed most favorably to OLR. *Affeldt*, 335 Wis. 2d 104, ¶59.

At the summary judgment stage, Referee Dugan not only had the benefit of evidence proving Riley's actual knowledge before the reinstatement hearing of Polk's E&R employment by inference and observation, but also directly through his conversations with Polk. (R.32:3-4.) Polk testified at his deposition in this matter as to three distinct sets of circumstances evidencing Riley's knowledge, each fatal to Riley's summary judgment motion: Riley's workplace observations of Polk, common office knowledge of Polk's employment and, most damning, Polk's discussions about his employment with Riley before the reinstatement hearing:

Riley's Observations of Polk

Q: Okay. And what would lead you to that conclusion?

A: I was there working every day --

Q: Okay. And --

A: -- which is I'm there 50, 60 hours a week.

Q: Okay. And other than your appearance in the office -- because you testified that you weren't working for Mr. Riley in any matters. So other than what you just testified about, which was your significant number of hours --

A: Um-hum.

Q: -- at the office, is there any other reason that you would conclude that Mr. Riley knew that you were employed at

Eisenberg Riley at the time you were employed at Eisenberg Riley?

A: I would venture to say that the flow of -- I mean, I had intake packets in my hand, I'm running out, coming in, I'm sitting in the office, I'm on the phone, I'm back and forth to the copy machine.

Q: And you believe Mr. Riley saw that?

A: Oh, absolutely.

(R.53:Ex.7:39.)

Common Office Knowledge

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: You believe it was just common office discussion or knowledge?

A: No. I know it was [knowledge]. I don't believe it was. I know it was.

(R.53:Ex.7:48-49.).

Polk's Discussions with Riley

Q: Did you ever discuss with Mr. Riley your concerns about presenting yourself as an attorney during the course of your employment at Eisenberg Riley?

A: I'm going to say yes to that.

* * *

Q: -- your best recollection is that sometime in February of 2006, you expressed concerns to Mr. Riley about the fact that during the course of your employment at Eisenberg Riley, you were hanging yourself out, presenting yourself as a third -- as an attorney to third parties; is that correct?

* * *

A: -- times. Yeah, I'm going to say yes on that.

* * *

Q: Did you ever discuss with Mr. Riley, though, the -- how that issue of your employment [at E&R] may impact the reinstatement proceedings?

A: I think I did. I believe I did.

Q: Okay. And that was before the hearing or after the hearing, the reinstatement hearing?

A: I want to say before the hearing.

(R.53:Ex.7:50, 55, 83.)

Despite the deposition testimony quoted above, Riley persists in arguing that OLR offered no direct testimony at the summary judgment stage that Riley had actual knowledge at the reinstatement hearing of Polk's employment at E&R while suspended. Br. of Appellant 20-23.

He first argues that Polk's testimony is insufficient to provide a genuine issue of material fact as to Riley's knowledge because, "[t]he undisputed evidence only showed that Mr. Polk was in the office, and

Attorney Riley saw him there on occasion" and that based upon that "there is no evidence that Riley actually did discover Mr. Polk's employment." Br. of Appellant 20-21 (emphasis omitted). Aside from the factual inaccuracy of that assertion given Polk's testimony set forth above as to observations, common office knowledge and direct conversations with Riley, even if factually true, it ignores that "knowledge may be inferred from circumstances," SCR 20:1.0(g), and that "a lawyer may not ignore what is plainly apparent…." Reinstatement §120 cmt. c., (S-App. 24).

And despite Riley's protestations to the contrary, Br. of Appellant 23-24, Polk was well-suited to provide lay opinion and inference testimony because it was rationally based on Polk's perceptions and was helpful to the determination of a material fact in issue. WIS. STAT. § 907.01(1). "Lay opinion evidence is generally permitted when such opinion is based on matters about which the witness is actually competent to testify, such as: personal observations by the lay witness…." *Poston v. Burns*, 2010 WI App 73, ¶22, 325 Wis. 2d 404, 784 N.W.2d 717. Polk testified at his deposition that he was working fifty to sixty hours per week and during that time Riley observed him traversing in and out of the office, making copies and having firm intake packets in his hand. (R.53:Ex.7:39.) Polk would have no reason

to have firm intake packets unless he was employed by and performing work for the firm. Polk's perceptions arising from his observations of Riley observing Polk are admissible. Likewise, Polk's extensive presence in the office positioned him to formulate admissible perceptions that the entire firm knew that Polk was employed by E&R and practicing law there while suspended.

Then, contrary to Polk's deposition testimony confirming that he had conversations with Riley before the reinstatement hearing about Polk's employment at E&R while suspended, (R.53:Ex.7:50, 55, 83), Riley argues that Polk had no direct conversations with Riley that could prove Riley knew anything about Polk's work. Br. of Appellant 22-23. Riley cites to an earlier portion of Polk's deposition transcript, which on its face appears to conflict with Polk's testimony later in the deposition that he had spoken with Riley before the reinstatement hearing about his E&R employment. (*Compare* R.53:Ex.7:49, *with* R.53:Ex.7:50, 55, 83.) But, when confronted with that apparent inconsistency on cross examination at trial, Polk explained that during the deposition he believed the question to which he answered in the negative to be limited to in-office conversations with Riley:

> Q: Don't you agree, Mr. Polk, 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 third-parties?
>
> A: I disagree with you. And my understanding of this question that is being asked of me, was that anytime while I was in that office did I discuss whether I was representing people. And no, in that office, while I was working out of that firm, we didn't have those discussions. Prior to my reinstatement [hearing], there was a concern that I spoke with him about, about me presenting myself as an attorney. So I don't know if that clears the record for you, but I'm telling you, while I was in that office, no, sir; never did I ever discuss with him about me representing people. Before my hearing, yes, ma'am.

(R.54:187; S-App. 22.) Thus, Riley did not give inconsistent testimony about his direct conversations with Riley before the reinstatement hearing concerning his E&R employment.

Based upon the foregoing, when viewed most favorably to OLR, *Affeldt*, 335 Wis. 2d 104, ¶59, Riley's knowledge, before the reinstatement hearing, of Polk's E&R employment while suspended constituted a genuine issue of material fact for trial.

With the presumption that the genuine issue of material fact is true, OLR now turns to the rule violations to evaluate whether, notwithstanding that truth, Riley was entitled to judgment on them.

3. Former SCR 20:3.3(a)(4)

Former SCR 20:3.3(a)(4), in effect prior to July 1, 2007, provided, "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 remedial measures." As applied here, OLR alleged that Riley knowingly offered evidence he knew to be false, had a duty to remedy it and to date has failed to do so. Riley argues that he did not knowingly offer false evidence. Br. of Appellant 24-25. He suggests that he did not offer the knowingly false evidence because he merely asked an open-ended question to Polk about his employment to which Polk provided a narrative answer, and he not ask Polk directly leading questions that would prompt Polk to lie. Br. of Appellant 24-25.

However, Riley fails to cite any authority constraining former SCR 20:3.3(a)(4) to those circumstances where the attorney prompts a client to lie through use of leading questions. Riley opened the door to eliciting Polk's false testimony by directly inquiring of Polk about his employment history while suspended. (R.53:Ex.2:56; A.-App. 47.) The former SCR 20:3.3(a)(4) violation triggered once Riley failed to remedy that testimony and Polk's later false testimony on cross examination to OLR's counsel

about his employment history while suspended. (R.53:Ex.2:81-83; A.-App. 50-51.)

The interpretive comments to former SCR 20:3.3(a)(4) plainly demonstrate that former SCR 20:3.3(a)(4) imposes a continuing duty for a lawyer to take remedial measures when a client offers false testimony:

> False Evidence
>
> * * *
>
> *When false evidence is offered by the client*, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed,. If the persuasion is ineffective, *the lawyer must take reasonable remedial measures*.
>
> Except in the defense of a criminal accused, the rule generally recognized is that, *if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party*….
>
> * * *
>
> Remedial Measures
>
> If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. *If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court.*
>
> * * *

> Committee Comment
>
> * * *
>
> Under paragraph (b) ["The duties stated in paragraph (a) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."], *the duties under this rule do not terminate at the conclusion of the proceeding.*

(S-App. 26-27.) That duty applies irrespective of who elicited the false testimony. Restatement §120 cmt. d (Lawyer's responsibility for false evidence "extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client….") (S-App. 24.) Accordingly, Riley had a duty to elicit direct or redirect examination corrective testimony from Polk at the reinstatement hearing regarding both: a) Polk's omission about his E&R employment in response to the question posed to him by Riley on direct examination and b) Polk's misstatements that he did not practice law or perform any work for a law firm during his suspension in response to the questions posed to him on cross examination by OLR counsel, or to disclose the omission and misstatement to the Court. He failed to do so at the reinstatement hearing, at any time during the Reinstatement Matter or since. (R53:Ex.2; R.52:6; A-App. 9; R.55:340-42.)

Therefore, if OLR proved at trial the material fact – Riley's actual knowledge at the time of the reinstatement hearing of Polk's E&R employment while suspended – Riley violated former SCR 20:3.3(a)(4). Accordingly, at the summary judgment stage the alleged violation had merit and could be maintained. *Affeldt*, 335 Wis. 2d 104, ¶58. Referee Dugan properly denied Riley summary judgment on that violation.

4. SCR 20:3.4(b)

SCR 20:3.4(b) provides, "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." Riley's defense to the SCR 20:3.4(b) violation is that he did not actively counsel or assist Polk to testify falsely at the reinstatement hearing. Br. of Appellant 33-34. But as OLR noted in its summary judgment brief, "OLR agrees with Riley that there is no evidence at this time that he actively coached or advised Polk to conceal Polk's E&R employment at the reinstatement hearing. Instead, it is what Riley was obligated to do [elicit direct or redirect examination corrective testimony, or take subsequent remedial actions], *but did not do*, that constitutes his assisting Polk to testify falsely." (R.32:15; bracketed material added.) Riley

criticizes this assisting-by-omission approach, pointing to SCR 20:3.4(b) cases where the attorney took an affirmative action to falsify evidence, or counsel or assist false testimony. Br. of Appellant 33-34.

That no prior Wisconsin disciplinary case may involve a passive SCR 20:3.4(b) violation is inapposite. None of the cases cited by Riley reject such an approach. Moreover, this Court has concluded that another rule which suggests by its plain language prerequisite active conduct to violate likewise applies to passive conduct. *See In re Disciplinary Proceedings Against Knickmeier*, 2004 WI 115, ¶93, 275 Wis. 2d 69, 683 N.W.2d 445 (holding that SCR 20:8.4(c) ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.") applies to intentional acts and omissions.) Lastly, as a matter of policy, it would be incongruous to hold that under SCR 20:3.4(b) the only conduct that matters is conduct through the offering of false evidence or testimony, while the obligation under former SCR 20:3.3(a)(4) to correct a witness's knowingly false testimony continues thereafter. By not later correcting that testimony, as here, Riley assisted Polk conceal truthful testimony and testify falsely -- no differently than Gino Alia whiting-out his witness's testimony before he gave it. *See In re*

Disciplinary Proceedings Against Alia, 2006 WI 12, 288 Wis. 2d 299, 709 N.W.2d 399.

Therefore, if OLR proved at trial the material fact – Riley's actual knowledge at the time of the reinstatement hearing of Polk's E&R employment while suspended – Riley violated SCR 20:3.4(b). Accordingly, at the summary judgment stage the alleged violation had merit and could be maintained. *Affeldt*, 335 Wis. 2d 104, ¶58. Referee Dugan properly denied Riley summary judgment on that violation.

5. SCR 20:8.4(c)

SCR 20:8.4(c) provides, "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." And, as noted above, the rule applies to both intentional acts and omissions. *Knickmeier*. Riley argues that proof of SCR 20:8.4(c), which is based upon the same evidence of the other violations, is lacking. Br. of Appellant 35. As detailed repeatedly, applying Riley's now presumed knowledge of Polk's E&R employment while suspended, Riley had a duty to elicit direct or redirect examination corrective testimony from Polk at the reinstatement hearing regarding both: a) Polk's omission about his E&R employment in response to the question posed to him by Riley on

direct examination and b) Polk's misstatements that he did not practice law or perform any work for a law firm during his suspension in response to the questions posed to him on cross examination by OLR counsel, or to disclose the omission and misstatement to the Court. He failed to do so at the reinstatement hearing, at any time during the Reinstatement Matter or since. (R53:Ex.2; R.52:6; A-App. 9; R.55:340-42.) It would be inconceivable to conclude that Riley's offering false testimony and/or his assisting Polk in testifying falsely did not constitute any one or more of dishonesty, deceit and/or misrepresentation.

Therefore, if OLR proved at trial the material fact – Riley's actual knowledge at the time of the reinstatement hearing of Polk's E&R employment while suspended – by virtue of either of the other violations, *see supra* Section VI.A.3. and A.4., Riley violated SCR 20:8.4(c). Accordingly, at the summary judgment stage the alleged violation had merit and could be maintained. *Affeldt*, 335 Wis. 2d 104, ¶58. Referee Dugan properly denied Riley summary judgment on that violation.

* * *

In conclusion, because there was a genuine issue of material of fact and Riley could not otherwise demonstrate a right to a judgment on any of the violations with such clarity as to leave no room for controversy, *Affeldt*, 335 Wis. 2d 104, ¶59, Referee Dugan properly denied Riley's motion for summary judgment.

B. OLR PROVED BY CLEAR, SATISFACTORY AND CONVINCING EVIDENCE THAT RILEY COMMITTED THE VIOLATIONS CHARGED.

Riley cites, with apparent agreement, OLR's framing of the case, as articulated in OLR's summary judgment response brief. Br. of Appellant 35-36. It stated:

> As disciplinary cases go, this one is quite elementary. Its 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 license reinstatement hearing that Polk was employed at Riley's law firm, Eisenberg & Riley, S.C., during Polk's suspension? The answer is "yes," but Riley disagrees. If proven in the 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.)

Throughout ten single-spaced pages of her Referee Report, Referee Dugan meticulously evaluated the evidence and witness credibility, concluding ultimately that Riley knew before the reinstatement hearing of

Polk's E&R employment while suspended and violated the rules charged. (R.52:3-13; A-App. 6-16.)

1. Referee Dugan's Finding That Riley Knew At The Reinstatement Hearing Of Polk's E&R Employment While Suspended Was Not Clearly Erroneous.

Whether Riley knew at the reinstatement hearing of Polk's E&R employment while suspended is a question of fact, which must be upheld unless clearly erroneous. *Nunnery*, 334 Wis. 2d 1, ¶5. When reviewing factual findings, the Court designates the referee is the "ultimate arbiter of credibility" and refrains from supplanting the reasonable inferences drawn by the referee in reaching his or her factual findings. *Lister*, 329 Wis. 2d 289, ¶32.

Referee Dugan specifically found that "Attorney Riley and Brian Polk spoke about this law firm employment during 2006 when [Riley] was serving as counsel for Polk." (R.52:6; A-App. 9.) That finding is clearly evidenced by Polk's trial testimony that *before* the reinstatement hearing, Polk and Riley discussed Polk's concerns about how Polk having provided legal services and presented himself as an attorney to third parties while

employed at E&R during his suspension would impact the Reinstatement Matter:

> Prior to my reinstatement [hearing], there was a concern that I spoke with [Riley] about, about me presenting myself as an attorney. So I don't know if that clears the record for you, but I'm telling you, while I was in that office, no, sir; never did I ever discuss with [Riley] about me representing people. Before my hearing, yes, ma'am.

(R.52:6; A-App. 9; R.54:187; S-App. 22.)

Riley argues that that Polk's trial testimony was not credible because of apparent inconsistencies in his deposition and trial testimony, as well as purported equivocalness when questioned about his discussions with Riley about his E&R employment. Br. of Appellant 37-40.

By way of example, Riley cites to page 134 of the trial transcript, (R.54:134; S-App. 8), where Polk initially testifies that he did not recall such a discussion occurring before June 23, 2006. Br. of Appellant 38. However, it soon becomes clear Polk's curious initial answer was prompted by his confusion about the date posed to him in the question: "I'm confused about what time you're referring to and what-not. So right now, I'm confused; so unless you can bring some clarity to my confusion right now, I don't know how to answer your question." (R.54:139; S-App. 10.)

Riley then parses Polk's later use of the phrase "I believe" (instead of "I did") on pages 144-45 of the trial transcript, (R.54:144-45; S-App. 11), when asked whether he had a pre-reinstatement hearing conversation with Riley about his E&R employment while suspended. Br. of Appellant 38-39. However, any lingering doubt that Polk was emphatic about such a conversation occurring is extinguished when one looks to Polk's cross examination testimony:

> Prior to my reinstatement [hearing], there was a concern that I spoke with [Riley] about, about me presenting myself as an attorney. So I don't know if that clears the record for you, but I'm telling you, while I was in that office, no, sir; never did I ever discuss with [Riley] about me representing people. Before my hearing, yes, ma'am.

(R.52:6; A-App. 9; R.54:187; S-App. 22.)

Riley next argues that Polk's belief of the conversation's occurrence conflicts with his deposition testimony that purportedly suggested that Riley would only be in a position to know about Polk's employment based upon the number of hours Polk worked and seeing Polk around the office with papers in hand, on the phone and making copies. Br. of Appellant 39. But, Riley forgets that in Polk's deposition, Polk also testified as to his pre-hearing conversations with Riley about his E&R employment. (R.53:Ex.7:50, 55, 83.)

Riley then concludes by oddly asserting that Polk's deposition testimony, also supposedly affirmed at trial, admitted that he did not have those conversations with Riley. Br. of Appellant 39-40. It is difficult to reconcile that allegation with the oft-cited, consistent deposition and trial testimony of Polk confirming such conversations occurred. (R.53:Ex.7:50, 55, 83; R.54:187; S-App. 22.) It will not be repeated here yet again.[8]

Additionally, Referee Dugan found Polk highly credible, and made extensive supporting findings (as pasted from the Referee Report):

[8] Referee Dugan found the trial testimony by E&R employees as to their observations of Riley to be of limited usefulness as additional evidence of Riley's actual knowledge. (R.52:11; A-App. 14.) In a footnote to that finding, Referee Dugan states: "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; A-App. 14.) Riley, taking the last sentence out of context of the entire Referee Report, suggests that sentence is fatal to the case – if it is plausible Riley did not have knowledge, OLR could not meet its burden of proving it, the argument goes. Br. of Appellant 36. Referee Dugan is unmistakably concluding there that those employees' observations cannot prove Riley's knowledge. It does not speak to Riley's acquiring that knowledge by other means (e.g., discussions with Polk). To read it otherwise would render the balance of the Referee Report inconsistent and superfluous.

The testimony of Brian Polk was credible and consistent, and clear and convincing. Brian Polk appeared at the trial with counsel. Brian Polk's counsel was actively engaged in protecting his client's interests. Subsequent to his own reinstatement hearing decision, he has been forthright and cooperative with OLR about his law firm employment at Eisenberg law offices, all contrary to his interests and self-interest. He was overall consistent in his testimony about the reason he asked Attorney Riley as counsel, Attorney Riley's level of representation and the parties' "terms of engagement" (e.g. Brian Polk would not pay; Brian Polk should be expected to receive only "support" and Attorney Riley would assume "second chair" status).

Contrary to his counsel's advice at the trial in the instant case and despite being afforded attorney-client privilege and a claim of confidentiality with respect to conversations he had with Attorney Riley as counsel, Brian Polk essentially waived his privileges and testified about Attorney Riley knowing that Brian Polk's law license was suspended and yet that Brian Polk was employed at the law firm.

Respondent's counsel asserts that Brian Polk admitted to not telling the truth in the underlying case and therefore, rightly, his credibility needs to be called into question. However, this referee in this proceeding gives the credibility of his testimony great weight. He waived attorney-client privilege, makes statements against interest and makes admissions against interest, presented with forthright demeanor during the testimony and a determination to tell the truth, and his statements were consistent between his deposition testimony and trial testimony, and overall consistent with other testimony and exhibits. (Tr. 125-129; Exhibit 7).

Given the totality of the record, his testimony that Alvin Eisenberg "assigned" Attorney Riley to represent Brian Polk at the reinstatement hearing is the more credible testimony. (Tr. 130-31, Exhibit 8, with attachments). Brian Polk's statements that prior to the hearing that he raised with Attorney Riley concerns about not disclosing that he was working at the firm are forthright, clear and convincing. (Tr. 138-139,144-145; Exhibit 7). His statements that Attorney Riley never attempted to elicit corrections to the record for the false evidence or that, within his knowledge, that Attorney Riley later attempted to correct the false evidence in the record are clear and convincing and supported by the record. (Tr. 148-153).

(R.52:11-12; A-App. 14-15.)

Referee Dugan then evaluated Riley's credibility and concluded that his testimony was neither as credible nor consistent as Polk's (R.52:12; A-App. 14-15.) Riley argues that the referee's credibility determination of Riley is "bizarre and unsupported" because it purports to cite inconsistencies that did not exist between trial exhibit 13 (Riley's December 5, 2008, letter to OLR explaining his role in defending Polk in

the Reinstatement Matter), (R.53:Ex.13), and Riley's own trial testimony. Br. of Appellant 40-41. Instead, it appears that Referee Dugan first relayed Riley's assertions in trial exhibit 13 and then concluded that those assertions were inconsistent with what she believed to be the highly credible and consistent testimony at deposition and trial by Polk.

Based upon the record and Referee Dugan's credibility assessments of Polk and Riley, her finding that Riley knew before the reinstatement hearing that Polk was employed at E&R while suspended was not clearly erroneous.

2. Referee Dugan Properly Concluded That Riley Committed The Violations Charged.

Once Riley's pre-hearing knowledge of Polk's E&R employment while suspended was proven (as it was), for the reasons set forth in Sections VI.A.3-A.5, *supra*, his failure to elicit direct or redirect examination corrective testimony from Polk at the reinstatement hearing regarding both: a) Polk's omission about his E&R employment in response to the question posed to him by Riley on direct examination and b) Polk's misstatements that he did not practice law or perform any work for a law firm during his suspension in response to the questions posed to him on cross examination

by OLR counsel, or to disclose the omission and misstatement to the Court, constituted violations of former SCR 20:3.3(a)(4), SCR 20:3.4(b), and SCR 20:8.4(c). That aforementioned analysis will not be duplicated here.

Riley seeks to evade that inexorable conclusion by devoting nearly eight pages of his brief to excoriating Referee Dugan's discussion in the Referee Report as: rambling, defying logic, bizarre, and attacking her integrity by accusing her of making misrepresentations, inventing wrongs and engaging in baseless speculation. Br. of Appellant 41-48. But, OLR need not engage Riley by offering a point-by-point retort to those disrespectful distractions. For even if all of those allegations are assumed true, they do not appear to have played a consequential role in Referee Dugan's findings of fact or conclusions of law. Referee Dugan stated:

> The analysis then turns to whether OLR met its burden of establishing by clear, satisfactory and convincing evidence that the respondent has engaged in the misconduct that Attorney Riley knowingly presented the false information to the tribunal and that Attorney failed to remedy the false evidence. <u>The answer is based on weighing the credibility of the witnesses and the consistency of their statements.</u>

(R.52:10; A-App. 13 (internal citation and footnote omitted) (emphasis added).) In short, it came down to witness credibility, which lies exclusively within the province of the referee. *Lister*, 329 Wis. 2d 289, ¶32. As noted in Section VI.B.1, *supra*, Referee Dugan evaluated witness

testimony and gave the credibility of Polk's testimony great weight, resulting in her finding that Polk discussed his employment at E&R with Riley before the reinstatement hearing. (R.52:6, 12; A-App. 9, 15.) Riley's extraneous claims about: inaccurate recitations of case history, the impact of alleged inconsistent assertion of privileges, whether Riley's failure to remediate triggered a dissent before this Court in *Polk* and whether Riley withdrew from representation, as well as the litany of others, Br. of Appellant 41-48, bore no weight on Referee Dugan's conclusions of law based upon the critical finding of fact – Riley's knowledge.[9]

Finally, Riley elects to crown his brief by resorting to a misguided attack on the OLR investigator for the decision to charge this case. Br. of Appellant 48-50. Riley claims there was no cause to proceed because OLR investigator Sarah Peterson: received the initial information second hand via an unidentified complainant, did not perform independent research of the applicable rules, and solely based her charging recommendation on her belief that Riley's statements that he did not know Polk was employed were

[9] Notwithstanding, conclusions of law are reviewed *de novo*. *Nunnery*, 334 Wis. 2d 1, ¶5. Even had Referee Dugan offered no rationale at all in her Referee Report, for the reasons stated throughout this brief, the Court can easily independently conclude based upon the record that OLR proved by clear, satisfactory and convincing evidence that Riley's offering false testimony and not remedying it constituted violations of the three rules charged.

incredible. Br. of Appellant 49-50. Riley apparently misunderstands the pre-charging process in disciplinary matters.

The Preliminary Review Committee (PRC), not the investigator, determines whether there is cause to proceed. SCR 22.07(1). The PRC is provided with the "investigative reports, including all relevant exculpatory and inculpatory information obtained and appendices and exhibits, if any...," SCR 22.06(1), as well as any response of the respondent to the investigatory report, SCR 22.06(2). Additionally, OLR staff appear at the PRC meetings to summarize the investigative reports and address any inquiries of the PRC. SCR 22.06(3). Unlike the trial burden, the PRC is not held to a clear, satisfactory and convincing standard in order to issue cause to proceed. SCR 22.07(3). It must merely hold a reasonable belief that such a burden could be met at trial. SCR 22.001(2). Much like a grand jury, the PRC's deliberations are private and confidential, SCR 22.07(2), so any attempt to gauge the basis upon which it issues cause to proceed is an endeavor of pure speculation. Riley's attack on the pre-charging process lacks any traction.

* * *

OLR proved by clear, satisfactory and convincing evidence that Riley violated former SCR 20:3.3(a)(4), SCR 20:3.4(b), and SCR 20:8.4(c).

VII. CONCLUSION

For the foregoing reasons, the Court should affirm the denial of summary judgment, uphold the findings of fact contained in the Referee Report, conclude that Riley committed the misconduct alleged in the single count of the complaint, impose a public reprimand, and order Riley to pay the full costs of these disciplinary proceedings.[10]

Respectfully submitted this 13th day of July, 2012.

OFFICE OF LAWYER REGULATION

By _____
Matthew J. Price
Retained Counsel
State Bar No. 1021922

[10] Riley does not contest the Referee Report's recommendations to impose a public reprimand and assess payment of full costs if the count is proven, and has waived the right to do so. *State v. Nawrocki*, 2008 WI App 23, ¶2 n.3, 308 Wis. 2d 227, 746 N.W.2d 509 (arguments reasonably believed to be relevant to the outcome of the case not made in the principal brief are waived). OLR does not contest those sanction recommendations, either.

Mailing Address:
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
414.271.2400
414.297.4900 Facsimile

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in WIS. STAT. § RULE 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,522 words.

Dated this 13th day of July, 2012.

OFFICE OF LAWYER REGULATION

By _____
Matthew J. Price
Retained Counsel
State Bar No. 1021922

Mailing Address:
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
414.271.2400
414.297.4900 Facsimile

CERTIFICATION AS TO ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of WIS. STAT. § RULE 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the printed form transmitted for filing on this date.

Dated this 13th day of July, 2012.

OFFICE OF LAWYER REGULATION

By _____
Matthew J. Price
Retained Counsel
State Bar No. 1021922

Mailing Address:
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
414.271.2400
414.297.4900 Facsimile

CERTIFICATION OF MAILING

I hereby certify that on July 13, 2012, I mailed, properly enclosed in a first-class postage pre-paid envelope, a copy of this brief and its annexed supplemental appendix to the following:

Ms. Diane M. Fremgen
Clerk of Supreme Court
110 E. Main St., Suite 215
Madison, WI 53703

Mr. Paul R. Erickson
Gutglass, Erickson, Bonville & Larson, S.C.
735 N. Water St., Suite 1400
Milwaukee, WI 53202

Dated this 13th day of July, 2012.

OFFICE OF LAWYER REGULATION

By _____
Matthew J. Price
Retained Counsel
State Bar No. 1021922

Mailing Address:
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
414.271.2400
414.297.4900 Facsimile