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-Appellant.

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**REPLY BRIEF OF RESPONDENT-APPELLANT, ATTORNEY JOHN KENYATTA RILEY**

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

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## ARGUMENT

The Office of Lawyer Regulation is unable to reconcile Polk's incredible testimony. He has admitted he did not discuss his employment, in any capacity, at Eisenberg & Riley ("E&R") with Attorney Riley before March 3, 2006. (R.54:187-188; S-App. 22.) He further admitted he had no preparation meetings with Attorney Riley before the September 6, 2006 reinstatement hearing. (Id.) There is no foundation for his contention that the two nonetheless had "discussions" about either Polk's employment or Polk presenting himself as an attorney.

OLR originally charged Attorney Riley with violations stemming from allegedly knowing of and failing to disclose "Polk's employment at Riley's law firm" (R.1:6 ¶ 24). However, this case has morphed into Attorney Riley knowing about Polk's "concerns about presenting [himself] as an attorney to third parties" (R:29)(P-Ap. 077). Apparently OLR and the Referee assumed this was in the context of Polk's employment at E&R, but the record does not connect any alleged discussions he had with Attorney Riley about representing himself as a lawyer (which could have happened

in any context), with his employment at E&R[1], the subject of the Complaint.

OLR claims that two Supreme Court Rules, Chapter 22 and Chapter 31, are substantively identical (OLR Br. p. 16, n.7), when, in fact, there is a crucial difference. The Rule applicable to Polk's petition, SCR 31.10, does not preclude him from working at a law firm, but solely from "engag[ing] in the practice of law." On the other hand, SCR 22:26(2) specifically precludes "law work activity," but does not apply to Polk's reinstatement from a CLE suspension. The Complaint only alleges that Attorney Riley knew Polk had performed "law work activity, contracting work and/or other work" for E&R. (R.1:2 ¶¶ 13-14). The Complaint uses the language of Chapter 22, not Chapter 31, which does not apply here. Polk, under a CLE suspension, was permitted to perform "law work activity."

Attorney Riley has been accused of attacking the Referee (OLR Br. p. 47), when pointing out the defects in her "analysis" of the inconsistent and false evidence OLR

[1] The Complaint briefly mentions letters in which Polk represented himself as an "attorney at law" (R.1:2 ¶ 12), but nothing in the Complaint or in the record since then has ever tied these letters to Attorney Riley.

introduced. But OLR's goalposts-shifting attitude toward these serious charges needs to be strictly, if not microscopically, reviewed. The clear, convincing, and satisfactory evidence standard required by SCR 22:16(5) exists for a reason, and OLR has not met that standard.

## I. POLK'S EMPLOYMENT WAS NEVER MATERIAL TO REFEREE FLYNN'S PROCEEDING

In a desperate attempt to make employment a "material" issue to Polk's reinstatement hearing, OLR makes the absurd claim that Attorney Riley's conduct at the September 6, 2006 hearing impeded Ms. Peterson's investigation (OLR Br. p. 17)—but her investigation concluded four months earlier with an April 27, 2006 memorandum opposing Polk's reinstatement. (R.53:Ex.1:1.) It is undisputed that Attorney Riley was not involved prior to July 2006 and Polk testified Riley never really got involved at all. (R:29)(P-Ap. 095) (*See,* R:53)(P-Ap. 077; 081). By that time, this Court had framed the issues for hearing, none of which implicated employment. (R.53:Ex. 1)(P-Ap. 045).

The question Attorney Riley asked Polk, which is the subject of this proceeding, asked him to describe "what kind

of jobs you've had since the loss of your license" (R.53:Ex.2:56; P.-App. 47). It does not ask him to identify his employers, or for an exhaustive list. Any untruthful testimony, then, only came out on cross examination, not on direct, and Attorney Riley could not have "offered" it or "assisted" Polk in his testimony as charged.

OLR argues that by asking this question, Attorney Riley made Polk's employment "material" (*see* OLR Br. p. 21-22). By this logic, every litigator would be subject to OLR charges for background questions, since asking a question makes the answer "material" regardless of what the matter is about. OLR is attempting to create an entirely new, extreme standard for litigators.

The "ginned up" hybrid is clearly an attempt to make an issue that was not material to Flynn's hearing material years later to support an overly aggressive charge. "Any other matter that the referee deems helpful" (R:53)(P-Ap. 045) was to be determined by Referee Flynn, not OLR or Referee Dugan.

## II. POLK'S TESTIMONY HAS BEEN INCREDIBLE THROUGHOUT THIS PROCEEDING

As with any factual finding, this Court reviews credibility determinations for whether "the trier of facts could, acting reasonably, be convinced to the required degree of certitude by the evidence which it had a right to believe and accept as true." In re Disciplinary Proceedings Against Lister, 2010 WI 108 ¶ 32, 329 Wis. 2d 289, 787 N.W.2d 820 (citation omitted).

OLR's response brief accuses Attorney Riley of parsing words to find inconsistencies in Polk's testimony. But, no parsing is required. Polk fluctuated wildly, both within his deposition and between his deposition and the hearing. In his deposition, he testified:

> Q. You testified that two facts that lead you to believe that Mr. Riley knew that you were employed at the firm at the time you were employed at the firm were, one, the large number of hours that you were in the office and, two, that you were [carrying intake packets, talking on the telephone, and walking back and forth to the copy machine] and Mr. Riley saw you perform those duties.
> Are there any other facts that would lead you -- 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.29)(P-Ap. 074-75). OLR then goes beyond the issue in the Complaint and asks about whether Attorney Riley knew of Polk's representing himself as an attorney:

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 --
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.

***

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)(P-Ap. 077)(emphasis added). Then, Polk immediately contradicts himself:

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.

(Id.)(emphasis added). So, in sum: Polk had "no specific facts" about how Attorney Riley may have known he had been working at E&R. But he somehow, maybe, managed to discuss with Attorney Riley his concerns about representing himself as an attorney (which was not the subject of the Complaint) without having a direct conversation about it with Attorney Riley. If he did so at all, it happened around February 22, 2006, when he filed his petition. (R.52:4; P-App. 7; R.53:Ex.4:¶3.) This inconsistent and speculative testimony should have been sufficient for the Referee to decide there was no material issue of fact and grant summary judgment to Attorney Riley.[2]

At hearing, Polk was impeached with the above-cited deposition testimony:

> 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 [*sic*] 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

2 OLR improperly brings trial testimony to defend Polk's alleged "consistency" at the summary judgment phase. (OLR Br. pp. 27-28) Polk's coached and ultimately self-defeating clarification during trial has absolutely no bearing on summary judgment; that testimony did not exist yet.

> 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.
>
> ***
>
> Q: Why don't you tell the referee then how you could have had that conversation when you never had a prep meeting and you never prepared with Mr. Riley for the hearing. He just showed up and didn't do anything.
> A: Well, and that is true, and I'll stand on that. He didn't show up and didn't do anything. But we had discussions before the hearing.

(R.54:187-188; S-App. 22.) Polk worked at E&R until March 3, 2006. (R.52:4; P-Ap. 7; R.53:Ex.7:18-19; R.54:110-11; S-App. 2-3.) At his deposition, he testified that he didn't have "discussions" with Riley, but if he had these discussions, they happened around late February, 2006—when he would have been working at E&R. At trial, he contradicts himself and said discussions did not occur while he worked at E&R.

If, as OLR concedes, Polk's credibility is the lynchpin of the Referee's decision, then the record is clear: Polk could not keep his story straight. Without his testimony, OLR's case disintegrates.

The remainder of OLR's responsive argument

concerning what Attorney Riley knew and when he knew it trots out the now-debunked number of hours Polk spent in the office (Appellant Br. p. 39 n.6), the papers in his hand, and that "everybody knew" (OLR Br. p. 23)[3], and adds that Attorney Riley saw him at the office with a "client" and in a "meeting" with other members of E&R. (Id. p. 4-5) There is no foundation in the record for the idea that Attorney Riley would know that a person near Polk was a "client" of the firm or that Polk was "working" with him. It is undisputed that Attorney Riley had no involvement with personal injury clients, and did not participate in the member "meetings" beyond walking by and saying hello (R.54:195-97, 202). Even on this superficial evidence, the best OLR can do is to point to Polk's testimony that he "believed" that Attorney Riley knew but could point to nothing concrete to base this opinion on. (OLR Br. p. 39.) More importantly, implicit in the use of the term "believe" is the fact that the speaker does not "know" the answer. As a matter of law, this cannot be

[3] "Everybody knew" is a conclusion, and the cited testimony offers no supporting explanation for why Polk would believe this, other than "people were talking." Without more, Polk's opinion as to what Attorney Riley may have known was not "rationally based on the perception of the witness" and was therefore inadmissible. Wis. Stat. § 907.01(1).

"clear and convincing."

Even accepting *arguendo* OLR's guess (OLR Br. p. 44 n. 8) that the Referee only held that other E&R employees' testimony was insufficient to prove Attorney Riley's knowledge, these illusory "discussions with Polk," the only other possible means by which OLR suggests Attorney Riley learned of Polk's employment (id.) cannot form the basis of this discipline. The only credible testimony—Attorney Riley's—shows these discussions never happened.

## III. OLR HAS NOT SHOWN HOW ATTORNEY RILEY'S CONDUCT VIOLATES THE RULES

Even if Attorney Riley knew of Polk's work history at the hearing, OLR has failed to show how his handling of Polk's testimony violated any of the Supreme Court Rules.

Attorney Riley in no way "knowingly offer[ed] evidence" that he "[knew] to be false," as suggested by former SCR 20:3:3(a)(4). OLR has not offered any authority expanding this Rule to circumstances where the attorney asks a boilerplate background question and the witness omits something. Published cases involve active, deliberate behavior on the part of the lawyer:

- Filing a receipt with the court falsely indicating that an heir had been paid from an estate (In re Disciplinary Proceedings Against Krezminski, 2007 WI 21 ¶ 9, 299 Wis. 2d 152, 727 N.W.2d 492);

- Making changes to an appraisal report without the appraiser's knowledge and allowing the appraiser to testify about it (In re Disciplinary Proceedings Against Alia, 2006 WI 12, 288 Wis. 2d 299, 317, 709 N.W.2d 399);

- Filing a client affidavit that falsely claimed the client had money in a trust account, where the attorney had already withdrawn thousands of dollars for his fees. (In re Disciplinary Proceedings Against Raneda, 2012 WI 42, 340 Wis. 2d 273, 811 N.W.2d 412.)

None of these cases involved background information or open-ended questions. OLR's interpretation of this former Rule is inconsistent with the case law.

Similarly, OLR offers nothing to support its contention that SCR 20:3.4(b), prohibiting assisting a witness to testify falsely, was intended to apply to what Attorney Riley "did not do." (OLR Br. p. 32) OLR's argument that different Rules, prohibiting different things, have been interpreted to include passive conduct is irrelevant, and its argument that Attorney Riley's "not later correcting [Polk's] testimony" is "no differen[t] than [*sic*] Gino Alia whiting-out is witness's

testimony before he gave it" (OLR Br. p. 33)(citation omitted) is extreme and offensive.

If Attorney Riley did not knowingly offer testimony he knew to be false, and did not assist Polk in testifying falsely, the only remotely possible violation is failing to remediate Polk's testimony after the fact under former SCR 20:3.3(a)(3). However, as previously briefed, that duty is only triggered for material evidence, which this was not.

But even if employment was material to Referee Flynn's determination, OLR and the Referee suggest Attorney Riley has a duty, *continuing to this day*, to remediate the evidence. (OLR Br. p. 33; R.52:13)(P-Ap. 016.) Such a duty would be onerous, and current law rejects it. Current SCR 20:3.3 imposes a similar remedial duty, and its comment sets the endpoint as affirmation of a final judgment on a appeal or expiration of time for review. Id. cmt. 13.

The Polk decision was issued May 11, 2007. Polk v. Office of Lawyer Regulation, 2007 WI 51, 300 Wis. 2d 280, 732 N.W.2d 419. Attorney Riley's obligation, if existent, expired at that time. Attorney Riley wrote he learned of Polk's employment only "some months" before December 8,

2008, when any remedial duty was over. (R:53)(P-Ap. 083-084.)

Finally, if Attorney Riley did not knowingly offer evidence he knew to be false, did not assist Polk to testify falsely, and had no duty to remediate the evidence, there is nothing left. Attorney Riley did nothing wrong. The catch-all SCR 20:8.4(c), prohibiting "conduct involving dishonesty, fraud or misrepresentation," cannot apply either. Therefore, this case should be dismissed.

## CONCLUSION

OLR spent its response brief attacking Attorney Riley for letting Brian Polk's testimony stand, though OLR has done the same thing. Not only does its case hinge on the testimony of that same admitted perjurer (*see* R.54:145-147), but OLR offered false testimony from Kerry Ingram and Patrick McClellan, former E&R employees. OLR called Ingram to testify that she created a telephone list purporting to list Polk as an attorney (R.54:212; R.53:Ex.8), but according to her payroll records, she did not work at E&R when Polk did (R.55:302, 328). OLR exacerbated the situation by calling McClellan, Ingram's father, to lay the

foundation for the list. He claimed he kept the list in his briefcase, years after his daughter left E&R, so he had the extensions available when he was out of the office. (R.54:248.) He later had to admit that E&R uses a receptionist, not an automatic switchboard, and an answering service after hours, making the extension list useless outside the office. (R.54:260.)

The Referee properly discarded the perjurious testimony of Ingram and McClellan (R.52:10-11), but OLR never remediated it. Perhaps OLR's counsel did not know in advance that his witnesses would lie. He could have presented their testimony "even if a reasonable lawyer would have discovered [the falsehood] through inquiry[.]" Restatement (Third) of the Law Governing Lawyers 120 cmt. c (2000) (S-App. 24). Still, once OLR's counsel learned his witnesses had lied, shouldn't he have recalled them, withdrawn the exhibit, or otherwise notified the Referee or this Court?

The Referee has since written that she did not rely on Ingram's or McClellan's testimony in making her decision. (R.52:3-4). The telephone list was immaterial to the hearing and its outcome. Presumably, OLR decided that since it was

not outcome-determinative, there was no reason to pursue a corrective course.

This is what happened to Attorney Riley with regard to Polk's testimony, and an example of how the Rules Attorney Riley is charged with violating cannot be interpreted as OLR is attempting to do. Attorney Riley therefore respectfully requests the Court dismiss the complaint against him.

Dated at Milwaukee, Wisconsin this 30th day of July, 2012,

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

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## 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 2,971 words using the word count feature of Microsoft Word.

Dated this 30th day of July, 2012.

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## 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 30th day of July, 2012.

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