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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

KAREN SCHMID COX,

Respondent.
_____/

CASE NO. 96,217

TFB No. 98-11,584(13A)

ANSWER BRIEF OF RESPONDENT

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REFERENCES

In this brief the Report of the Referee is cited as "RR." The transcripts of the hearings are cited by volume number and page (for example I-20 refers to page 20 of the first volume).

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ARGUMENT:

JUDGE COBB'S RECOMMENDATION SHOULD BE FOLLOWED BECAUSE THE BAR HAS FILED TO OVERCOME ITS PRESUMPTION OF CORRECTNESS AND HAS FAILED TO DEMONSTRATE THAT THE RECOMMENDATION IS NOT REASONABLY SUPPORTED BY EXISTING CASE LAW .. . 23

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STATEMENT OF THE ISSUE

WHETHER THE REFEREE'S RECOMMENDATION OF DISCIPLINE SHOULD BE FOLLOWED WHERE THE BAR HAS FAILED TO DEMONSTRATE THAT THE RECOMMENDATION IS NOT REASONABLY SUPPORTED BY EXISTING CASE LAW.

STATEMENT OF THE CASE AND FACTS

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The Florida Bar (The Bar) filed a one-count complaint in this matter charging Karen Schmid Cox (Ms. Cox) with violating Rule 4-3.3(a)(1) and (4), and Rule 4-3.4(a) and (b) of the Rules Regulating the Florida Bar. The Honorable Wayne L. Cobb, Circuit Court Judge for the Sixth Judicial Circuit, served as the referee. By stipulation of the parties Judge Cobb bifurcated the hearings as to guilt and discipline.

On December 16, 1999, after two days of hearings, Judge Cobb issued a preliminary report of guilt recommending that Ms. Cox be found guilty of violating the two rules alleged in the complaint. RR-4. Judge Cobb concluded that although Ms. Cox's conduct technically violated two rules, the rules were redundant and there had been, in fact, only one violation. RR-4.

On December 30, 1999, Judge Cobb conducted a hearing on discipline, where he considered evidence from nineteen witnesses called by Ms. Cox who established mitigating factors. RIV; RV.[1] Nine of the witnesses were state or federal court judges. Id. On January 13, 2000, Judge Cobb, haying considered the testimony

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[1] 'One of the witnesses, the Honorable Donald C. Evans, Circuit Court Judge for the Thirteenth Judicial Circuit, could not personally appear and his testimony was presented by way of affidavit.

presented during the three days of hearings, the Florida Standards for Imposing Lawyer Sanctions, and this Court's prior decisions, concluded that Ms. Cox should receive a public reprimand, be placed on probation for one year, complete fifteen hours of approved continuing legal ethics education, and pay the costs of the proceedings. In his report Judge Cobb stated:

> . . . Mrs. Cox is one of those lawyers whose sense ofjustice is sufficient that she will truly suffer as a result of a public reprimand, She will be "punished" not simply "hurt." A public reprimand of Mrs. Cox will protect society from unethical conduct by her in the future and will not deny to the public the services of a fine lawyer and excellent prosecutor. It will encourage her reformation and rehabilitation.

RR-7.

The Bar has petitioned for review of Judge Cobb's recommended sanction. Although the Bar contended before Judge Cobb that an appropriate sanction was a period of suspension of ninety-one days to two years, the Bar now asserts that this Court should impose a three-year suspension. RV-590-91,600. To explain its change of position, the Bar states that the Board of Governors of the Florida Bar (the Board) considered Judge Cobb's report in its meeting ending February 4, 2000, voted to petition for review, and to change the Bar's earlier position by increasing the sanction. See The Bar's brief at 2, 20.

No member of the Board attended any portion of hearings and the transcripts of the proceedings could not have been reviewed since they were not prepared until after the Board had voted to challenge Judge Cobb's recommendation.[2] Nevertheless, despite its previously-taken position that the record, the relevant case law, the aggravating and mitigating factors, and the Florida Standards for Imposing Lawyer Sanctions require a suspension ranging from ninety-one days to two years, see RV-590-91,600, and despite the findings and well-considered recommendation of Judge Cobb, the Bar now advocates a three-year suspension.

B. STATEMENT OF THE FACTS

James Sterba was indicted for using the Internet to attempt to entice a juvenile to engage in sexual activity. Bar Exh. 9. The evidence against Sterba consisted of the following: electronic and instant messages that had been transmitted via the Internet between Sterba and an informant of the United States Customs Service (Customs) who was posing as a thirteen-year-old girl named Katie; copies of some of the Internet correspondence with "Katie" recovered from Sterba's computer; child pornography recovered from Sterba's computer; Sterba's statements to employees of the Tampa

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[2]The court reporter certified the transcripts on February 8 and 9, 2000, see R I-V, the meeting of the Board in which this matter was considered had adjourned on February 4, 2000, Bar's brief at 2, 20. Thus, it is apparent that the Board relied only upon the representations of Bar counsel in reaching its decision.

hotel where Sterba had planned to meet Katie; and Sterba's taped admissions to law enforcement after his arrest. RI-138; RIII-274-75, 285-87, 315. The only role that the witness took in the investigation was to engage in electronic correspondence with Sterba via the Internet. RI-1 38-39. The witness had communicated with Sterba only via the Intemet, had saved all of the correspondence between herself and Sterba, and, while the investigation was on-going had immediately provided all such correspondence to a Customs agent. Id.; RI-138-39; 145; see Respondent's Exh.s 7 & 8 (electronic messages and instant messages between witness and Sterba).

An attorney was appointed by the District Court to represent Sterba. RII-208. Ms. Cox provided discovery to Sterba's counsel, provided additional discovery as she received it, and assisted the defense in obtaining copies of the evidence. RIII-283-87, During the course of the discovery process, some of the material was provided informally through discussions and phone conversations. Prior to the trial, the court-appointed attorney filed several motions, including a motion to interview and disclose the identity of the informant. RII-209. The motion was denied without prejudice. The order required the United States to give the name of the informant to defense counsel prior to the start of the trial. The order also provided that defense counsel could request an interview the informant prior to the start of the trial. RI-49.

Some time before the trial started, Sterba's court-appointed counsel was permitted to withdraw and an assistant federal public defender was appointed to represent him. RII-208. The public defender was satisfied with the discovery that was provided to him by Sterba's former counsel and, after Ms. Cox confirmed that the public defender was not requesting additional discovery, Ms. Cox provided him with nothing further. RII-209-10; RIII-340. With the change of counsel came a change of trial strategy and the filing of new defense motions. RIII-289, 342. The public defender never asked to interview the informant. RIII-290. Ms. Cox and the public defender had no conversations about the confidential informant. RII-339; 343.

Customs had come into contact with the witness, Adria Jackson, in connection with Customs's investigation of child pornography on the Internet. RI-l 00. During that investigation, Customs never developed any evidence to suggest that the witness had been engaging in criminal activity on the Intemet. RI-102.[3] After the witness had been interviewed in connection with the investigation, Customs offered her a position as an informant assisting Customs in the investigation of child pornography. RI-l 0 1.

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[3]The Bar inappropriately implies that Customs developed evidence against the witness, but chose not to file charges. See Bar's brief at 4 ("After electing not to prosecute Ms. Jackson, Customs took steps to use her as a confidential informant in other criminal investigations."). There is no merit to this position. The record is clear that Customs concluded that the witness was not involved in criminal activity, RI-102.

Incident to the employment of the witness, a Customs agent checked her "record" on several occasions by running a variety of criminal database searches. RI-128-34; Respondent's Exh.s 1-5. Every check revealed that the witness had no criminal history. Id. When asked by a Customs agent, the witness denied having a criminal record. RI-127. Customs thus had no reason to believe that the witness had a criminal record. RI-136.[4]

Pursuant to Customs' procedures, Customs gave the witness the option of using an assumed name to protect the her identity. RI-82,125. The witness chose to use the name "Gracie Greggs." RI-125-26. Thereafter, and pursuant to Customs' procedures, all documents signed by the witness regarding her employment with Customs, including the agreements that governed the conditions of her assistance to Customs (the Personal Assistance Agreement and Instructions to Confidential Source), RI- 123, and her receipts for payments, were signed "Gracie Greggs." RI-82-83. Additionally, the witness was instructed to identify herself as Gracie Greggs when she called Customs, and she was addressed by that name by all Customs agents when at the office. RIII-319.

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[4]For the purposes of this brief it is unnecessary to debate whether or not an arrest that does not result in a conviction constitutes a criminal record. It has been established that both Cox and Customs reasonably believed that the witness had never even been arrested. RR-3.

Before the Sterba trial the witness moved to Oklahoma. RI-53-55, 116. Ms. Cox first spoke with the witness about testifying at the trial after she had moved. RI-56. The only reason that the witness was needed at trial was to authenticate the electronic correspondence between her and Sterba. RI-58; RIII-276. When the witness learned she might have to testify, she became upset, The witness believed she had been promised by Customs agents that she would remain completely anonymous with respect to her involvement in the investigation of child pornography. R1-56-57, 60; RIII-3 19; see R1-109. The witness did not want her name exposed in the court proceeding and repeatedly expressed to Ms. Cox her desire that she remain anonymous. RI-60. The witness's concern arose from her fear that her former husband would use her involvement in child pornography investigations as a means to gain custody of their young daughter in ongoing and protracted child custody litigation. RI-6 1; RIII-3 18, 336.

On the Friday before the Sterba trial Ms. Cox met with a Customs agent and reviewed the agency's tile on the witness. RI-77-78, 114-15. It was then that Ms. Cox first learned that Customs had documented the witness under the name Gracie Greggs and had authorized the witness to sign agreements and acknowledgments using that name. Id.

Immediately before the trial, without giving the matter much thought, Ms. Cox decided to identify the witness at trial as Gracie Greggs. Ms. Cox reasoned that because the witness was merely a records custodian her credibility was not material; accordingly her identity would not be important to the case. RIII-350-53. When Ms. Cox made this decision she was relying upon Customs' background check and conclusion that the witness had no criminal record. RI-70-71. Indeed, as recently as the Friday before trial Ms. Cox had met with a Customs agent who had provided Ms. Cox with the several criminal history checks that had been run on the witness, **including** one that had been run that very day), **RI-71, 135; RIII-295,** and all of the criminal history checks reflected the witness had no criminal history. Id.; RI-104,112; RII-257. Moreover, the Customs agent told Ms. Cox that the witness had no criminal history. RI-134. Ms. Cox did not conduct any additional background research because federal prosecutors, of necessity, rely on law enforcement agencies to provide criminal histories of witnesses, R1-70-71: RII-257.

Ms. Cox identified the witness as Gracie Greggs because she sympathized with the witness, wanted to accommodate her desire for anonymity and wanted to avoid aggravating an already difficult domestic situation. RIII-31, 36, 350-53. When Ms. Cox made the decision to allow the witness to testify as Gracie Greggs Ms. Cox believed that the witness' credibility would not be in question since, in Ms. Cox's

mind, the witness was a mere records custodian. RI-95; see RII-213; RIII-276. Based upon her perception of the witness's role in the case, it did not occur to Ms. Cox that the credibility of the witness would be at issue. RIII-276-77, Likewise, she did not believe the real name of the witness was needed by the defense because it did not occur to Ms. Cox that the defense would run a background check on the witness. RI-93-94. Ms. Cox had never known a defense counsel to run background checks on a records custodian and, in her experience, the credibility of records custodians has never been an issue; such witnesses in state court usually were not deposed or cross-examined. RI-94. Furthermore, Sterba's public defender had never expressed any interest in the witness, and, in fact, had no discussions with Ms. Cox about the witness RII-222.

Ms. Cox first met the witness on the morning of the trial when Ms. Cox picked her up at a hotel and transported her to court. RI-67, 69, 290. That morning, Ms. Cox told the witness that she had to truthfully answer all the questions asked of her, including those about her identity, but Ms. Cox advised the witness that Ms. Cox would ask the witness about Gracie Greggs. RI-81-82; RI11320.

Pursuant to her decision, Ms. Cox prepared a witness list that listed the witness as Gracie Greggs. RI-77. Ms. Cox read the name Gracie Greggs from the witness list during jury selection and identified the witness only as Gracie Greggs or "Katie"

throughout the trial, At trial, regarding the witness's identity, Ms. Cox asked the witness if she was Gracie Greggs and if she was also Katie1 6 140, her America OnLine screen name:

Ms. Cox: Are you Gracie Greggs?

Witness: Yes.

Ms. Cox: Are you also Katie16140?

Witness: Yes.

Bar Exh. 15, RI-81-82.

After the United States and the defense had rested their cases, defense counsel informed Ms. Cox that his investigator had been unable to find information regarding Gracie Greggs. RR-3, RII-218,223, RIII-328-29, RV-554, 572.[5] "Cox responded

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[5]Although the Bar accurately portrays this exchange in the Statement of the Facts portion of its brief, Bar's brief at 6, it inexplicably states in the Conclusion portion of the brief that "Respondent only revealed the true identity to the defense when the defendant's attorney questioned her after the trial and advised that Investigator Palmer was willing to testify as to the nonexistence of 'Gracie Greggs,"' Bar's brief at 29. This is a misstatement of the evidence and the only support that can be found for the statement is that bar counsel similarly misstated the evidence in its argument to Judge Cobb. See RI113 88. The testimony is consistent throughout that defense counsel and Cox had a calm, matter-of-fact, non-confrontational discussion regarding the name of the witness and that defense counsel never mentioned that his investigator was willing to testify as to the nonexistence of Gracie Greggs. RII-217-18; RV-554,572; see RII-169,216 (Ms. Cox was not present when the public defender asked the investigator if he would be willing to testify).

candidly that her true name was Adria Jackson and gave him other identifiers for her also." **RR-3; see RII-171, 218, 223, 230**; RIII-328-29. Ms. Cox was surprised that the defense was interested, RIII-343,352, and immediately provided the information, **RII-230**. Ms. Cox was not obligated to provide any identifying information other than the name, but once she learned that the defense wanted to run a background check she provided it to facilitate the defense's efforts in this regard. RIII-329-30. Ms. Cox assured defense counsel that a background check had been conducted and the witness had no criminal history. RII-234; RI11330.

During the charging conference the Judge asked Ms. Cox the **name** of the witness. She initially responded "Katie," and then responded "Gracie Greggs." Shortly thereafter, the public defender advised the court that the previous day Ms. Cox had told him that Gracie Greggs was the witness's Customs name, and had provided the name Adria Jackson to him. RII-223. The court then asked Ms. Cox if she had allowed the witness to testify under a false name without court approval. RII-224. Ms. Cox told the court that she had allowed the witness to testify as Gracie Greggs. **RII-224**. Ms. Cox explained that she was still operating under her original decision that it would be appropriate to use the Custom's name because she believed the witness's real identity was unimportant. RI-89; **RIII-353**. Because Ms. Cox still believed she could identify the witness by this name, she answered the judge's questions although defense

counsel, to whom she had previously disclosed the witness's true identity, was present at the time of the court's questioning. RI-89.

Ms. Cox had not then realized the implication of her use of the Customs name because when she had explained to the public defender that she had used the Customs name for the witness, the public defender did not appear troubled. Ms. Cox remained under the mistaken belief that the witness's true identity was unimportant to the public defender . Id. Furthermore, after having provided the name to public defender, she returned to her office to learn that two Tampa Police Department detectives, men who were her good friends, had been murdered. Ms. Cox had worked with the detectives on a daily basis for almost six years. RV-573. The murders and the apprehension of the murderer became Ms. Cox's overriding concern and she spent the rest of the evening at the police department or at home watching the televised coverage of the events unfolding after the murders. RV-574. Ms. Cox was so troubled she could not sleep that night and gave no thought to the Sterba trial. RV-556,574. In fact, Ms. Cox did not even recall the court having asked her the next morning about the name of the witness. RV-574. Judge Cobb found that Ms. Cox's emotional state due to these circumstances contributed to her professional lapse. RR-8.

The public defender moved for a mistrial, and the Court granted the motion, RII-225. After the court had granted a mistrial an investigator for the public defender

called the witness' former husband and was told that the witness had been arrested. The investigator then traveled to the Dekalb County Courthouse, manually searched its indexes, and learned of a 1982 incident that resulted in the arrest of the witness. RII-186-193; RIII-301, That arrest, as well as the disposition of the case, had been removed from the computer databases because the witness had been sentenced pursuant to the Georgia First Offender's Act, an Act which "completely exonerated [the witness] of any criminal purpose" upon the successful completion of probation. the witness had met the conditions of her sentence, the records relating to it were expunged, and Customs had not discovered it. RII-198, 201, 205; RIII-301-302.

At the time of the Sterba trial, Ms. Cox was one of the busiest prosecutors in the United States Attorney's Office, handling about one hundred cases. RII-252; RIII-292; RIII-292. During her first year as a federal prosecutor, Ms. Cox had the highest number of indictments in the Tampa Division of the United States Attorney's Office, had conducted a significant number of jury trials, and had been in a jury trial of another case the week before the Sterba trial. RII-252-53,292; RV-553.

Ms. Cox immediately reported the mistrial and the reasons for it to her supervisor, who reported up the chain of command ultimately to the Office of Professional Responsibility, RII-254.

The public defender later tiled a motion to dismiss the indictment with prejudice. RII-226, Ms. Cox's immediate supervisor, the chief of the Appellate Division, the First Assistant United States Attorney and the United States Attorney all assisted in drafting the government's response to the motion to dismiss. The United States Attorney himselfreviewed and approved the response before it was filed. RII-258-59, 261-263. The court dismissed the case. RII-226.

After Judge Cobb had entered his preliminary findings of guilt, he conducted a hearing on December 30, 1999 as to the appropriate discipline. Ms. Cox presented substantial evidence in mitigation, including the testimony of many judges, law enforcement officers, and associates who attested to Ms, Cox's character.

The Honorable Susan C. Bucklew, a federal district court judge, has known Ms. Cox since she started practicing law. RV-443. When Judge Bucklew was a state court judge, she presided over approximately fifty cases prosecuted by Ms. Cox. RIV-443. Judge Bucklew testified she continues to have the utmost respect for Ms. Cox, describing her as professional, ethical, and as having always been candid and honest. Id. Judge Bucklew stated that Ms. Cox was not a win-at-all-costs prosecutors and was a person who treated witnesses, defendants, opposing counsel, and the presiding judge with respect and fairness. RIV-444. Judge Bucklew stated that she had "complete

respect for [Ms. Cox] as an attorney, and would trust her implicitly," and was willing to have her appear before her in the future. Id.

The Honorable Manuel Menendez, Jr., a state circuit court judge, first became acquainted with Ms. Cox shortly after she became an assistant state attorney. For approximately three years Ms. Cox was assigned as the division chief for the State Attorney's Office of the division that he presided over. RIV-450. In his experience with Ms. Cox, Judge Menendez never had any reason to doubt Ms. Cox's integrity or honesty, and had never heard any complaints about her conduct from opposing counsel. RIV-45 1-52. Judge Menendez described Ms. Cox as straightforward, professional, well-prepared, very intelligent, courteous to all, and not as a win-at-all costs prosecutor. RIV-451-53. Judge Menendez stated he would have absolutely no problem with having Ms. Cox appear before him in the future and, based on his experience with her for numerous years, he could not conceive that she would make the same mistake again. RIV-452-53.

The Honorable Gregory Holder, a state circuit court judge, knew Ms. Cox because she had appeared before him on several occasions and he had, on his own time, watched her prosecute various cases. RV-462-63,468. Judge Holder stated that based upon his knowledge of Ms. Cox, she had exhibited the highest standards of ethics and professionalism. Judge Holder viewed the instant situation as an isolated

aberration. RV-465. He knew that Ms. Cox had provided extensive service to the State of Florida and the federal government and had spent countless hours serving our system of justice. RV-468. Judge Holder called Ms. Cox at her home to ask if he could testify on her behalf because he felt so strongly about the matter. RV-466. Judge Holder believed, as an ethics and professionalism instructor, that the imposition of too harsh a punishment in this case would be detrimental to the justice system RV-463, 465-66. Judge Holder, having considered that person he knew Ms. Cox to be and the service that she had provided to the system of justice, believed that her misconduct warranted no more than a reprimand. RV-468.

The Honorable Barbara Fleischer, a state circuit court judge, first met Ms. Cox in 1985, when Ms. Cox began her employment as an assistant state attorney. RV-469-70. Ms. Cox had appeared before her on a daily basis for one and one half years, and continued to appear before her periodically for the next eleven and one half years. RV-470-71. During the fifteen years she had known Ms. Cox, Judge Fleischer had never had any reason to doubt anything that Ms. Cox had said. RV-47 1. During that time, Ms. Cox had never been accused by opposing counsel of being untruthful. RV-472. Judge Fleischer had no concern about Ms. Cox appearing in her courtroom again. RV-473.

The Honorable J. Rogers Padgett, a state circuit court judge, testified that he had presided over approximately ten jury trials that Ms. Cox had prosecuted. RV-477-78. Judge Padgett described Ms. Cox as being neither casual about her job as an assistant state attorney, nor arrogant. He described her as being humble and quiet and possessing excellent trial skills. RV-479. He stated that it was a joy to preside over cases that she was prosecuting, and that it was a joy for everyone involved including the defense attorneys. RV-479. Judge Padgett knew Ms. Cox's reputation from his own experience and from his friendship and association with other judges, prosecutors, and defense attorneys. He believed Ms. Cox was the most admired, highly respected lawyer in the State Attorney's Office when she was a state prosecutor. RV-479-80. Judge Padgett never had any reason to doubt anything that Ms. Cox had said and believed that she has an excellent character. RV-480. Judge Padgett stated that he had never encountered anyone who had ever had reason to doubt anything Ms. Cox said or did. RV-480. Judge Padgett had no concern about Ms. Cox appearing before him again even taking into consideration what had occurred in this instance. RV-480-81.

The Honorable Katherine Essrig, a state circuit court judge, first met Ms. Cox when they both were interviewing for positions as assistant state attorneys. RV-485-86. Both were hired, consequently Judge Essrig worked with Ms. Cox for four years. RV-484-86. Judge Essrig described Ms. Cox as a steadfastly hard worker who has

always taken her job and position seriously. She described Ms. Cox an exemplary assistant state attorney. RV-487. Judge Essrig testified that Ms. Cox has an impeccable reputation for honesty, integrity, intelligence, and diligence, and at times went beyond what was required of her in terms of fairness and honesty. RV-487-88. Judge Essrig would have no reservations about Ms. Cox appearing before her in the future or any representations that she might make, and does not believe that the incident was reflective of her character. RV-488-89.

The Honorable Robert Simms, a state circuit court judge, became acquainted with Ms. Cox when he was a criminal defense attorney. RV-490. Judge Simms described Ms. Cox as the type of prosecutor that you could lay your cards on the table and reach a reasonable resolution of a case. RV-490. Judge Simms stated that Ms. Cox did her job the right way and was not just trying to win but was trying to achieve justice. Id. He described Ms. Cox as fair, reasonable, honest and candid with everybody. She was someone you could rely upon to make the right decision. Id. Judge Simms stated Ms. Cox's reputation among other defense attorneys for honesty and integrity was excellent and he had never heard anyone complain about her making misrepresentations. RV-492. Judge Sirnms said that, if anything, his opinion about Ms. Cox's integrity and honesty had increased when he became a member of the judiciary. RV-493. He said it was always a pleasure to have Ms. Cox appear before

hirn and that she would be welcome in his courtroom at any time because he felt like he could continue to rely upon her one hundred percent. RV-494-95.

The Honorable William Fuente, a state circuit court judge, became acquainted with Ms. Cox when he was a criminal defense attorney. RV-496-97. He never had any reason to question anything that Ms. Cox had told him. RV-498. Judge Fuente stated that Ms. Cox enjoyed one of the finest reputations of any of the members of the State Attorney's Office. RV-499. Judge Fuente had no reservations about the truthfulness of Ms. Cox's representations to him in the future. RV-501.

The Honorable Donald C. Evans, a state circuit court judge, had known Ms. Cox since approximately 1985, and Ms. Cox had appeared before him daily for four or five years. See RV588-89 (aflidavit published in part). Judge Evans knew Ms. Cox to be totally ethical and professional. Judge Evans volunteered to testify as to Ms. Cox's character. Id. Judge Evans believed Ms. Cox had suffered enormously as a result of the disciplinary proceedings and did not believe any further sanctions would have more impact upon her. Id. He believed that Ms. Cox's behavior, although it represented a mistake in judgment, was an extremely isolated event, and he was confident that in the future she would conduct herself professionally, Id.

In addition to the judges, Ms. Cox's current and former supervisor testified as to her character. Christian Hoyer, the Chief Assistant State Attorney for much of the

time that Ms. Cox was a state court prosecutor described Ms. Cox as a very honest person of the highest integrity and stated that she was one of those wonderful people who cares about what she does at all times. RV-507. He had never received complaints about Ms. Cox. RV-506.

Tamra Phipps had been Ms. Cox's supervisor since 1998 when Ms. Cox was assigned to the Appellate Division of the United States Attorney's Office. RV-509. She testified Ms. Cox had been remarkably professional under adversity and that she had impressed all in the Appellate Division by her determination to contribute to the division despite the strain of the pending Bar proceeding. RV-5 11-12. She had seen Ms. Cox work evenings and weekends to make up for time that she had been absent due to this proceeding. RV-512. Phipps described Ms. Cox as one of the most genuine and sincere attorneys that she had ever encountered in litigation. RV-5 13.

Numerous law enforcement officers also testified about their experiences with Ms. Cox. Rv-515-546. They described her as professional, RV-515, 526, respectful, RV-5 16, forthright, RV-526, and honest and hard-working, RV-532, 538. They described how Ms. Cox worked countless hours on nights, weekends and early mornings, going to crime scenes, reviewing search warrants, and giving them advice and whatever assistance they needed. RV-525, 532, 538.

C. STATEMENT OF THE STANDARD OF REVIEW

This Court should presume that the Referee's findings of fact are correct and should not reweigh the evidence unless the findings are clearly erroneous or lacking in evidentiary support. Florida Bar v. Beach, 675 So. 2d 106, 108 (Fla. 1996). The Bar, as a party contesting a referee's findings of fact, "carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996).

This Court should presume that the Referee's recommendation regarding discipline is correct and should follow the recommendation if it is reasonably supported by the existing case law and is not clearly off the mark. Florida Bar v. Williams, 2000 WL 21806 *4 (Fla., 2000); see Florida Bar v. Laing, 695 So. 2d 299,304 (Fla. 1997) (the Court will not second-guess a referee's recommended discipline as long as it has a reasonable basis in existing case law.); Florida Bar v. Niles, 644 So. 2d 504, 506-507 (Fla. 1994) (the Court affords referee's recommendations with "a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence.").

SUMMARY OF THE ARGUMENT

This Court should follow Judge Cob's recommendation that the discipline Ms. Cox should receive is a public reprimand. Judge Cobb's recommendation was reached after he had carefully considered the gravity of the ethical violation, the purposes of discipline, the presumptively appropriate sanctions, and the aggravating and mitigating circumstances. The Bar has failed to meet its burden on this appeal that the discipline recommended has no reasonable basis in existing case law.

ARGUMENT

JUDGE COBB'S RECOMMENDATION SHOULD BE FOLLOWED BECAUSE THE BAR HAS FAILED TO OVERCOME ITS PRESUMPTION OF CORRECTNESS AND HAS FAILED TO DEMONSTRATE THAT THE RECOMMENDATION IS NOT REASONABLY SUPPORTED BY EXISTING CASE LAW.

Judge Cobb's recommendation was made after a thorough consideration of the existing case law and the circumstances of this particular case. The Bar has failed to demonstrate that Judge Cobb's recommendation is clearly erroneous or that it is not reasonably supported by the existing case law. Accordingly, this Court should follow Judge Cobb's recommendation.

When determining the appropriate sanction to impose the Court considers, among other things the existence of aggravating or mitigating circumstances. Judge Cobb carefully considered and addressed the aggravating and mitigating factors he found to exist in this case. See RR.

1. **Aggravating Factor**

Judge Cobb found only one aggravating factor to exist, that Ms. Cox had substantial experience in the practice of law (Standard 9.22(i)). RR-6. Judge Cobb did not indicate the weight he attributed to that factor. Id. Ms. Cox had been a lawyer for more than thirteen years at the time of the Sterba trial, however, as the Bar established during the hearing on discipline, there is a great difference between the practice of criminal law in federal court and the practice of criminal law in state court, IV-432 ("there is a huge difference in prosecuting and defending criminal cases in state and federal court"). See IV-420. Despite her substantial experience in the practice of law, Ms. Cox had been practicing in federal court for less than a year. See Florida Bar v. Burkich-Burrell, 695 So. 2d 1082, 1084 (Fla. 1995) (lack of experience in personal injury litigation considered as mitigation). Furthermore, Ms. Cox had had very little experience at all in handling cases involving informant witnesses. RIII-293-94. Judge Cobb was aware of Ms. Cox's inexperience in these areas of the law in making his recommendation to this Court.

The Bar contended before Judge Cobb that he should find Ms. Cox's special duties as a prosecutor to be an aggravating circumstance. RV-593. Judge Cobb rejected the contention and did not make the finding. See RR. Despite Judge Cobb's rejection of this argument, the Bar now urges this Court to consider this to be an aggravating factor. Bar's brief at 19. Ms. Cox's actions in this case were neither motivated by a desire to violate the defendant's rights nor to strengthen the case of the United States; as Judge Cobb found, Ms. Cox ". . . believed that the use of an assumed name for the witness would not be any impediment to justice in her cause." RR-6. Judge Cobb found that Ms. Cox acted in what she thought was the best interest of her witness. Id. The Bar has not alleged or demonstrated, as it must, that Judge Cobb erred in refusing to find this alleged aggravating circumstance existed, but merely suggests that this Court "might also consider in aggravation, Respondent's special duties as a criminal prosecutor." Bar's brief at 19. The Bar has thus failed to establish a sufficient basis for this Court to substitute its judgment for that of the referee. See Florida Bar v. Spann, 682 So. 2d 1070, 1073 (F.a. 1996).

2. **The Mitigating factors**

Judge Cobb found that six factors mitigated Ms. Cox's discipline: (1) absence of prior disciplinary record (Standard 9.32(a)); (2) absence of a dishonest or selfish motive (9.32(b)); (3) full and free disclosure to the disciplinary board or cooperative

attitude toward proceedings (9.32(e)); (4) character or reputation (9.32(g)); (5) imposition of other penalties or sanctions (9.32(k)); and, (6) remorse (9.32(l)).

The record support for each of the mitigating factors is extensive, and the Bar does not now suggest that Judge Cobb's findings as to the existence of these factors was in error.

A. Absence of Prior Disciplinary Record (Standard 9.32(a))

To the extent that Ms. Cox's more than thirteen years as a lawyer should be considered to be an aggravating factor, that she has maintained an unblemished disciplinary record throughout certainly should also be considered to substantially mitigate this isolated incident of misconduct. See Florida Bar v. Adler, 589 So. 2d 899, 900 (Fla. 199 1) (the Court "deals more severely with cumulative misconduct than with isolated misconduct.").

B. Absence of a Dishonest or Selfish Motive (Standard 9.32(b))

Judge Cobb's finding of the absence of a dishonest or selfish motive, a finding that the Bar has not challenged, should be given great weight, since the misconduct involved a violation of the duty of candor. Judge Cobb found in this regard that "[a]lthough Ms. Cox's actions violated her duty of candor her motivation was not to lie or to conceal evidence from the court or the defense, and her motivation was not to personally benefit in any manner," and Ms. Cox "acted (albeit without reflection) in

what she thought was the best interest of her witness," and that Ms. Cox did not believe "that the use of an assumed name for the witness would be any impediment to justice in her cause," RR-6.

There is no support for any suggestion that Ms. Cox was acting for her own benefit, and she was certainly not attempting to gain an advantage or to strengthen her case. &Bar's brief at 18 (" . . . it appears that the Respondent may have acted for her own benefit"). Her misconduct was not motivated by a desire for a conviction; rather it was motivated by "concern for the informant," RR-3, and she "did not intend to deceive the United States District Court before which she was practicing on any matter of substantial justice," RR-6; see also, RV-553 (Ms. Cox did not do this to gain advantage; she was trying to help a woman she didn't even know), RV-556 (Ms. Cox did not do this because of desire to win; she did this because witness was very fearful of her ex-husband).

C. Full and Free Disclosure to the Disciplinary Board or Cooperative Attitude Toward Proceedings (Standard 9.32(e))

The Bar expressly asserted to Judge Cobb that this factor was present. Ms. Cox demonstrated a cooperative attitude toward the proceedings by appearing voluntarily for deposition, assisting the Bar in obtaining access to the United States Attorneys Office's file regarding this case, and voluntarily disclosing to Bar counsel that she had

personal and professional relationships with two of the members of the grievance committee who had been assigned to review the matter. RV-566-67. Furthermore, although Ms. Cox was deposed, testified three times during the course of the hearings, and discussed the case with her supervisors and associates, the Bar has never suggested that her testimony has ever changed, or that it conflicted with the accounts of any of the other witnesses. RV-567, see RV-546 (Ms. Cox's version of events has never varied)

D. Character or Reputation (Standard 9.32(g))

As to Ms. Cox's character and reputation Judge Cobb found:

> From the testimony presented by the respondent at the hearing on December 30, 1999 it is apodictic that her character is excellent and her reputation is unsullied except for this instance. . , . She had a very impressive list of state and federal judges, law enforcement officers, and associates who willingly testified that she is intelligent, candid, hardworking, always well-prepared, courteous, professional, admired, respected and dedicated to our system of justice. Several testified that they are convinced that this conduct was a mistake and an aberration.

RR-7.

The referee's finding that Ms. Cox's character or reputation was a factor mitigating the sanction was based, in part, upon the testimony of eight judges, and the affidavit of another. RR-7. Some of the judges volunteered to testify on Ms. Cox's

behalf before having been asked. RV-466, 586-88 (affidavit of Judge Evans published in part). All of the judges testified that despite the misconduct in this case they would welcome her to appear before them in the future and that she had never given them reason to question her honesty. RIV-444, 452-53; RV-473, 480-81, 488-89, 494-95, 501.

The mere fact that eight judges were willing to travel from Hillsborough County to Dade City and invested their personal time to attend a lengthy hearing during the holidays (December 30th) is a testament to their opinion of Ms. Cox's character. Most of the judges who testified had known Ms. Cox for her entire legal career, More importantly, none of the judges knew Ms. Cox or her family prior to Ms. Cox having begun the practice of law in Hillsborough County. RV-549-50. Two of the judges who testified had, as defense attorneys, tried cases against Ms. Cox and stated that not only had she always treated them fairly, but that she had an excellent reputation among criminal defense attorneys. RV-492,499. Likewise, Ms. Cox's previous and current supervisors, as well as the law enforcement officers who had worked with her, attested to her character.

E. Imposition of Other Penalties or Sanctions (Standard 9.32(k))

In this regard, this case is unusual. As a federal prosecutor, Ms. Cox is subject to the scrutiny and discipline of the Office of Professional Responsibility (OPR), a division of the Department of Justice which, among other things, investigates and sanctions instances of attorney misconduct RII-243; RV-568-69. Ordinarily when a complaint has been made as the result of conduct occurring in a federal proceeding in federal court and the conduct is being investigated by OPR, the state bar will not pursue the matter in state grievance proceedings. RV-570-7 1; see RII-248-49. In fact, the former head of OPR was unaware of any instance where the state bar had refused to defer to OPR. RV-569-70. This case is the exception. The federal government, after conducting its own investigation, determined the appropriate sanction was two weeks of unpaid leave. RV-569.

F. Remorse (Standard 9.32(l))

Ms. Cox has accepted responsibility for her actions, has recognized the seriousness of her misconduct, and will always be scrupulously honest in her representations to the court. Judge Cobb, after having heard from Ms. Cox, found that Ms. Cox is sincerely remorseful, fully grasps the serious import of her conduct and truly regrets her actions. RR-7. Judge Cobb stated that "I believe her when she says that her remorse stems not only from the embarrassment it has caused her personally

but also from the embarrassment it has caused to her profession as a lawyer and prosecutor." Id. This remorse is entitled to great weight as a mitigating factor because it establishes that punishment is unnecessary to assure that Ms. Cox will never again engage in similar conduct. See RV-588 (affidavit of Judge Evans) (Ms. Cox has already suffered enormously and it is doubtful that further sanctions will have any more impact upon her than has already occurred).

Although in cases involving misrepresentation to the court the discipline imposed has ranged from public reprimands to disbarment, many of this Court's decisions establish not only that Judge Cobb's recommendation is not clearly off the mark, but that a public reprimand and a term of probation are indeed the appropriate sanctions in this case. Judge Cobb stated:

> Considering the misconduct and the aggravations and mitigations, a public reprimand and probation seem to be proportional with other similar disciplinary cases. Ms. Broida was found to have engaged in a long and continuing list of violations including "continuously misrepresenting facts to the court" and "Personally attacking the integrity of multiple lawyers and judges with whom Respondent has come in contact." The Florida Bar v. Broida, 574 So. 2d 83, 86 (Fla. 1991). She was suspended from the practice of law for one year. Mr. Cibula lied to the court about his annual income fully intending to thwart the administration of justice and personally benefit therefrom. There were no mitigations found by the referee yet Mr. Cibula received only 91 days suspension [from] the practice of law. The Florida Bar v. Cibula, 725 So. 2d 360 (Fla. 1999). Intending to mislead

> the court and thwart justice, Mr. Kravitz lied to the court and tried to extort money from his client and received a suspension of 30 days. The Florida Bar v. Kravitz, 694 So. 2d 725 (Fla. 1997). It does not appear that Mr. Kravitz benefitted from any mitigation except a clean prior disciplinary record. Mrs. Cox benefits from a clean prior disciplinary record and five other significant mitigations.

RR-8.

The facts of this case are unique; therefore, no case specifically addresses this particular conduct with the same aggravating and mitigating circumstances. A review of the cases is instructive, however, because it demonstrates that in cases involving a violation of the duty of candor, the Court's sanctions have ranged from reprimands to disbarment. Accordingly, since Judge Cobb's recommendation falls within the range, it is not clearly erroneous

Indeed, there is ample basis in existing case law to support the imposition of a reprimand in this case. This Court on many occasions has disciplined attorneys who made false statements to courts or demonstrated a deliberate lack of candor with reprimands. See, e.g., Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989) (imposing public reprimand on Anderson for patent misrepresentations to the appellate court in a brief, making extended argument based on the inaccurate facts, and for failing to correct misrepresentations even when brought to her attention in motion for sanctions but instead responding by accusing opposing counsel with attempting to obfuscate and

deceive the court);[6] Florida Bar v. Fatolitis, 546 So. 2d 1054 (Fla. 1989) (imposing public reprimand for forging wife's name as a witness); Florida Bar v. Wright, 520 So. 2d 269 (Fla. 1988) (imposing public reprimand for lying during discovery); Florida Bar v. McLawhorn, 535 So. 2d 602 (Fla. 1988) (imposing public reprimand for false statements in traverse despite the fact that attorney had been publicly reprimanded the year before for conduct involving misrepresentations); Florida Bar v. Sax, 530 So. 2d 284 (Fla. 1988) (imposing public reprimand for submission of false pleading that was improperly notarized); Florida Bar v. Batman, 511 So. 2d 558 (Fla. 1987) (imposing public reprimand for testifying falsely); Florida Bar v. Hagglund, 372 So. 2d 76 (Fla. 1979) (imposing public reprimand for filing false affidavit in lawsuit against former client); Florida Rar v. Pearce, 356 So. 2d 317 (Fla. 1978) (imposing public reprimand for knowing of and participating in plans for witnesses to perjure themselves); Florida Bar v. Brooks, 336 So. 2d 359 (Fla. 1976) (imposing public reprimand for falsely testifying before coroner's inquest to avoid potential discipline for trespassing or attempting to steal a hog); Florida Bar v. King, 174 So. 2d 398 (Fla. 1965) (imposing public reprimand for knowingly and willfully testifying falsely under oath before a grand jury regarding incident of bribery during attorney's campaign for state senate and for not attempting to dissuade two witnesses from perjuring themselves for his benefit).

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[6]Anderson's co-counsel received a thirty-day suspension, Id. at 854.

See also In re Frank, 2000 WL 183512 (Fla. 2000) (in judicial disciplinary hearing, public reprimand appropriate for judicial officer who initiated a proceeding and then provided false or misleading testimony compromising the integrity of the system). Thus, Judge Cobb's recommendation is more than reasonably supported by existing case law, and the Bar can not demonstrate otherwise.

The cases cited by the Bar in support of a term of suspension are distinguishable from the present case. The Bar relies upon Florida Bar v. Burkich-Burrell, 659 So. 2d 1082 (Fla. 1995), in which this Court imposed a thirty-day suspension for Burkich-Burrell's actions in a law suit that she brought to recover for injuries her husband had sustained in an automobile accident. Id. Burkich-Burrell assisted her husband in withholding information relevant to the issue of damages, soughtto minimize her conduct and refused to acknowledge the wrongful nature of her conduct or to accept responsibility for her conduct, and, during the disciplinary hearing, gave evasive answers, displayed selective recall and lacked credibility. Id. at 1083. In mitigation, Burrell presented evidence her husband abused alcohol and physically and mentally abused her, that she had no prior disciplinary record, and that she lacked experience in personal injury litigation. Id.

Unlike Burkich-Burell, Ms. Cox did not possess a dishonest or selfish motive, made full and free disclosure to the disciplinary board, is of excellent character (as was

attested to by a "very impressive list of state and federal judges, law enforcement officers, and associates,") will suffer other sanctions as a result of her conduct and is sincerely remorseful. RR-7. Accordingly, Judge Cobb's recommendation that Ms. Cox be publicly reprimanded is proportional because Judge Cobb found many mitigating factors not present in Burkich-Burrell.

The Bar relies on Florida Bar v. Kravitz, 695 So. 2d 725 (Fla. 1997), a case also relied upon by Judge Cobb, RR-8. Kravitz, a fifty percent owner of a particular company, had intentionally misrepresented to the court the name of the individual responsible for the company's failure to obey an injunction, and misrepresented the identity of the company's manager. Kravitz at 727. Further, Kravitz made misrepresentations to the court in an attempt to have the court vacate a contempt order entered against him for the above misrepresentations. Id. Kravitz also had falsely represented to opposing counsel he had sufficient settlement funds in his trust account, and to one of the parties, that the judge had required the party to pay his client $4,000. Id. In deciding to impose a thirty-day suspension upon Kravitz, this Court was influenced by the fact there had been no showing of any prior disciplinary infractions and by the fact the referee recommended probation. Id. at 728. As Judge Cobb observed, unlike Kravitz, whose only mitigation was a clean prior disciplinary record,

Ms. Cox has a clean prior disciplinary record and five other significant mitigating factors. RR-8.

The Bar also relies upon Florida Bar v. Colclough, 561 So. 2d 1147 (Fla. 1990), in which Colclough made fraudulent representations to the court and opposing counsel. Colclough's falsely represented that he had already been awarded approximately $5,000, resulting in the court ordering an award in that amount. The only mitigation presented was that Colclough had no prior disciplinary record and letters written by other lawyers that stated he had never given them cause to question his credibility, Id. at 1150. This Court imposed a six month suspension rather than the year suspension recommended by the referee. Id. Unlike Colclough, who made misrepresentations with the intent of obtaining personal benefit, and thus possessed a dishonest and selfish motive, Ms. Cox's was not to personally benefit in any manner, and she did not believe her actions would in any way impede justice. Furthermore, Ms. Cox established substantial additional mitigation not present in Colclough.

Although the Bar argues Ms. Cox's actions robbed Sterba of his right to confront and cross-examine the witness, the Bar fails to note Judge Cobb found that Ms. Cox had not intended to deprive the defense of its right to confrontation and that, had the name of the witness been disclosed to the defense prior to the commencement of the trial, the defense still would not have discovered her criminal history. RR-4. That Ms.

Cox acted without intention to prejudice the defense in this case is conclusively established by the fact that immediately upon being notified by defense counsel that he was attempting to do a criminal history check on the witness, Ms. Cox provided the name of the informant, and further provided identifiers that were not required to be disclosed by any discovery obligation or ruling of the court, to assist the defense in running a criminal history. RIII-329-30; RV-554.

The Bar relies upon Florida Bar v. Rood, 569 So. 2d 750 (Fla. 1990), where Rood was found to have violated five disciplinary rules for conduct involving dishonesty, fraud, deceit or misrepresentation as the result of Rood's preparing false interrogatories in two cases and destroying an expert's memorandum in which the expert concluded there had been no negligence. Id. at 75 1. Despite the existence of five aggravating factors; a dishonest or selfish motive, a pattern of misconduct, refusal to acknowledge that his conduct was wrong, substantial experience in the practice of law, and causing his clients to commit perjury through false interrogatory answers, this Court imposed only a one-year suspension. Id. at 75 1-53.

The Bar relies upon The Florida Bar v. Broida, 574 So. 2d 83 (Fla. 1991), where this Court imposed a one-year suspension for Broida's long and continuous list of violations, including continuous misrepresentations of facts to the court and personally attacking the integrity of multiple lawyers and judges. Id. at 86. Judge Cobb

specifically addressed Broida in his report as a basis for concluding that the sanction of a public reprimand and probation was a proportional discipline. RR-8. Unlike Broida, who engaged in a continuing pattern of misconduct, Broida at 86-87, Judge Cobb found that Ms. Cox had committed only one violation, RR-4. Further, it appears that Broida's only mitigation was her reputation in the community. See id. at 87.

The Bar also relies on The Florida Bar v. Hrnielewski, 702 So. 2d 2 18,221 (Fla. 1997), in which this Court imposed a three-year suspension for Hmielewski's misrepresentations during a wrongful death and medical malpractice action he had filed against the Mayo Clinic. Hmielewski knew his client had stolen records from the Mayo Clinic yet, in responses to discovery, lied about having provided these "critically important documents." Id. at 2 19. Hmielwski made numerous false representations to the Mayo Clinic regarding the medical records and likewise misrepresented to the trial court that the Mayo Clinic had failed to provide the records. Id. at 2 19-20. Hmielwski continued to make deliberate misrepresentations in a settlement letter demanding $400,000. Id. at 220.

This Court relied on the referee's finding that Hmielewski's actions were not motivated by personal gain (notwithstanding that it appears that Hmielewski had a financial interest in the outcome of the case), and that he had presented extremely strong character evidence in imposing its sanction. Id. at 22. Unlike Hmielewsi, Ms.

Cox "did not intend to deceive the United States District Court before which she was practicing on any matter of substantial justice," "did not believe that the use of an assumed name for the witness would be any impediment to justice in her cause," and Ms. Cox established four additional mitigating factors. RR 6-7.

Finally, the Bar cites Florida Bar v. Kickliter, 559 So. 2d 1123 (Fla. 1990), in which this Court disbarred Kickliter because after the death of his client Kickliter forged his client's signature on a will, had two of his employees witness the forged signature, notarized the self-authenticating clause himself, and submitted it for probate. Kickliter at 1223. As a result of his actions, Kickliter was convicted of three felonies, and was found to have violated nine subsections of five of the Rules Regulating The Florida Bar.

Kickliter is distinguishable because Ms. Cox has no disciplinary history, a mitigating factor not present in Kickliter. Id. at 1124. Further, unlike Ms. Cox, Kickliter clearly acted with the intention to defraud the court in a matter of substantial importance, and knew that his actions would be an impediment to justice because the will he presented for probate was void. Id. at 1123. In Kickliter, although this Court noted the referee had found substantial mitigation, the nature of the mitigation is not set forth in the opinion. Id. at 1124. In any event, the Bar does not rely upon Kickliter to support the sanction of disbarment.

In discussing Kickliter the Bar appears to have equated Kickliter's felony convictions with Ms. Cox's two-week suspension without pay resulting from Department of Justice's investigation of her actions in the Sterba trial. See Bar's brief at 21.[7] This comparison is unwarranted. Kickliter's felony convictions, in and of themselves violated Rule 3-4.3 of the Rules Regulating The Florida Bar (commission of a felony). Ms. Cox was not charged with having violated Rule 3-4.3. In fact, the Department of Justice's conclusion, after having conducted a lengthy investigation was that Ms. Cox should continue to serve as an Assistant United States Attorney. RV-569-7 1. As previously discussed, Ms. Cox's two-week suspension is mitigating because it demonstrates the imposition of other sanctions for the identical misconduct which was the subject of this proceeding. Kickliter's probation was imposed as the result of a criminal prosecution involving a greater burden of proof, resulting in convictions which themselves formed the basis of a charge of violation of the Rules Regulating the Florida Bar.

In a similar vein, the Bar suggests by implication that Ms. Cox could have been criminally charged and insinuates that consideration had been given to doing so. See

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[7] "Unlike Kickliter, Respondent in the instant case was not criminally prosecuted for her misconduct. However, Respondent testified that she would receive a two-week suspension without pay from her employment with the United States Government in response to a Department of Justice investigation." Bar's brief at 21.

Bar's brief at 11 ("[a]lthough the State Attorney's office elected not to bring charges of perjury or solicitation to commit perjury against Respondent. . .). There is absolutely no record support for this statement!

A review of other cases in which this Court has imposed a three-year suspension demonstrate that the imposition of a three-year suspension in this case is not appropriate. See, Florida Bar v. Beach, 699 So. 2d 657 (Fla. 1997) (three-year suspension for committing acts contrary to honesty and justice and attorney's reckless disregard for the truth where attorney had a history of serious ethical misconduct that resulted in two prior suspensions, the victim was particularly vulnerable to harm, and the attorney possessed a selfish motive); Florida Bar v. King, 664 So. 2d 925 (Fla. 1995) (three-year suspension for multiple ethical violations involving attorney's representation of clients where attorney had disciplinary history and was on probation at the time for among other things, misrepresentations).

None of the cases relied upon by the Bar in support of the imposition of a suspension involve a situation where the respondent believed that his actions would not be any impediment to justice in the cause, was not motivated by dishonesty or selfishness, did not intend to deceive the court in a matter of substantial justice, had demonstrated great remorse, had cooperated with the Bar, had no prior disciplinary history, and where the respondent had a well-established reputation with the judiciary,

the legal community and law enforcement for integrity and fairness. The Bar fails to take into consideration that, unlike all of the cases that it relies upon, this was not a deliberate attempt to abuse the system or to thwart justice, but was a serious mistake, an uncharacteristic lapse in judgment. Thus, Ms. Cox's misconduct is not as egregious as the misconduct and aggravating circumstances described in the cases cited by the Bar.

Any period of suspension would be disproportionate given the circumstances of the case. Moreover, the goals of Bar disciplinary proceedings will be achieved through a public reprimand. Because this misconduct resulted from an uncharacteristic lapse in judgment, there is no need to protect the public and any period of suspension could result in the end of a career of public service by a person described by Judge Cobb as "a fine attorney and an excellent prosecutor." RR-7. [8] The reprimand will sufficiently serve to punish Ms. Cox because "Ms. Cox is one of those lawyers whose sense of justice is sufficient that she will truly suffer as the result of a public reprimand." RR-7. A public reprimand is severe enough to deter others because prosecutors "are very sensitive to any charges that they themselves have violated the rules" and "[w]hen a prosecutor is publicly criticized, it reverberates throughout the criminal justice system."

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*Any period of suspension could result in Cox no longer being qualified to serve as an Assistant United States Attorney.

Id.; see RV-550-5 1 (suggestion that another federal prosecutor would take the same action is ridiculous in light of what has already occurred to Ms. Cox in this case).

If this Court were to suspend Ms. Cox for more than ninety days, she would be required to establish rehabilitation before reinstatement. This Court has previously imposed lesser suspensions in cases involving misrepresentations where the mitigation was not as significant. See Florida Bar v. Corbin, 701 So. 2d 334 (Fla. 1997) (imposing ninety-day suspension for deliberately misrepresenting material facts to court in summary judgment motion and in knowingly submitting false affidavit, and deliberately attempting to mislead Bar by misstatement where attorney had three prior disciplinary offenses, possessed a dishonest motive, and substantial experience in the practice of law and the only mitigation was remoteness of prior offenses); Florida Bar v. Story, 529 So. 2d 1114 (Fla. 1988) (imposing thirty-day suspension for submitting false affidavits regarding execution of will); Florida Bar v. Morrison, 496 So. 2d 820 (Fla. 1986) (imposing ten-day suspension for discrepancy in testimony before grievance committee); Florida Bar v. Shapiro, 456 So. 2d 452 (Fla. 1984) (imposing ninety-day suspension for filing false motion to dismiss with forged signature). Because this is an isolated instance of misconduct, and because the record establishes that in the nearly two years that have passed since this incident Ms. Cox has been a hard-working, conscientious, professional and capable assistant United States attorney, there is no

need to establish rehabilitation. Notwithstanding Ms. Cox's actions in this case, she maintains the respect and trust of the judiciary, her peers, and law enforcement. All of the judges unhesitatingly stated they would have no reservations about Ms. Cox appearing before them. Any need for rehabilitation is adequately addressed by Judge Cobb's recommendation that Ms. Cox attend fifteen hours of legal ethics education.

Accordingly, Judge Cobb's recommendation, reached after his careful consideration of the gravity of the ethical violation, the purposes of discipline, the presumptively appropriate sanctions, and the aggravations and mitigations, should be accepted by this Court.

CONCLUSION

This Court should adopt the Report and accept the recommendations of Judge Cobb.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies hereof, together with a diskette, have been furnished by Federal Express overnight , this 24th day of April, 2000 Debbie Casseaux, Acting Clerk, Supreme Court of Florida 500 South Duval Street, Tallahassee, Florida, 32399-1925, and by U. S. Mail to Debra J. Davis, Esquire, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida, 33607; Billy Jack Hendrix, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, and the Honorable Wayne L. Cobb, Referee, Pasco County Courthouse, 38053 Live Oak Avenue, Dade City, Florida, 33523.

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