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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1391
The Florida Bar File No. 2016-70,106 (11J)

THE FLORIDA BAR,
Complainant,

-vs-

JONATHAN STEPHEN SCHWARTZ,
Respondent.

SUPPLEMENTAL APPENDIX TO ANSWER BRIEF OF RESPONDENT

ON APPEAL FROM REPORT OF REFEREE
HON. LIZZET MARTINEZ, REFEREE/COUNTY JUDGE

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Index of Appendix

Final Hearing Transcript Volume 1 (8/1/18).....3

Final Hearing Transcript Volume 2 (8/1/18).....128

Final Hearing Transcript Volume 3 (8/1/18).....308

Corrected Respondent's Documentation Exhibits for Sanctions Hearing (8/21/20).....538

Documentation of Support- Mitigation Documents (8/21/20).....585

Notice of Filing Transcripts from Original Bar Grievance Trial (8/31/20) 626

Notice of Filing Transcripts from Sanctions Hearing on August 21, 2020 (9/1/20).....629

Respondent's Notice of Filing Case Law (9/30/20).....632

Respondent's Notice of Filing Proposed Report of Referee (9/30/20).....807

Respondents Proposed Report of Referee (9/30/20).....809

The Florida Bar's Proposed Report of Referee (9/30/20).....842

Amended Index of Record (10/22/20).....866

Certificate of Service.....871

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(Before a Referee)

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THE FLORIDA BAR FILE NO.: 2016-70,106(11J)

THE FLORIDA BAR,

Complainant,

vs.

JONATHAN STEPHEN SCHWARTZ,

Respondent.
_____/

Lawson E. Thomas Courthouse
175 Northwest 1st Avenue
Miami, Florida 33128
Wednesday, April 4, 2018
9:04 a.m. - 4:37 p.m.

VOLUME I

Hearing in above-styled cause taken before the Honorable Celeste H. Muir, Judge of the above-styled court, reported by Rinele Abramson, Shorthand Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice filed in the above cause.

CERTIFIED COPY

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- - - - - - -

(Thereupon, the following proceedings were had):

THE COURT: Welcome, everyone. The first thing I have to say is that, the first thing that happened is, my recollection is, your motion in limine was given to my JA to put with the rest of the file so I could read it close to the time of the hearing. It's now lost.

So we will start with that, but if someone has an extra copy...

MR. KUEHNE: This is the Bar's motion in limine, and my motion in limine.

THE COURT: Okay. So the Bar's counsel, I've had mostly a telephone relationship with you.

MR. KROEGER: Correct.

THE COURT: Mr. Jonathan Schwartz, the respondent, has been before me in regard to some of the people with mental illnesses that are in the criminal justice system. So I've known him through that. Most notably -- who was it?

MR. SCHWARTZ: Michael Kirchoff.

THE COURT: Very difficult person.

MR. SCHWARTZ: Daily business.
THE COURT: He's still your --
MR. SCHWARTZ: Daily, for 15 years.
THE COURT: Oh, my goodness.
Anyway, we will proceed.
Are you ready?
MR. KROEGER: Yes, Your Honor.
THE COURT: It's Mr. Kuenhe's motion in limine.
MR. KUEHNE: We have two.
MR. KROEGER: We both do.
THE COURT: Okay, both of yours.
Well, I asked my office to check this file carefully, and my JA said she went through it twice. Apparently both of them are missing.
MR. KUEHNE: Can I just look at mine for a moment? I just need to refresh myself on the first one.
THE COURT: So whose was filed first?
MR. KROEGER: Technically, the Bar's was filed first.
THE COURT: Are you ready?
MR. KROEGER: Yes.
THE COURT: You may proceed.

MR. KROEGER: There are several requests that the Bar is making in its motion in limine. These are premised on what, in the Bar's view, are the facts that this is a pretty simple case factually.

In the motion, I briefly describe what the Bar contends are the operative facts, which, in a nutshell, are Mr. Schwartz's use of altered photographic lineups in a deposition of a victim in a criminal defense case. The lineups are altered based upon a lineup previously provided by the state in discovery.

What part of my motion is requesting is that Mr. Schwartz's counsel not be permitted to inquire or present evidence regarding the State Attorney's Office, quote, unquote, knowing history, end quote, of prosecuting defendants who have been misidentified via photographic lineups, and also the fact that the Bar's witness, a former state attorney, was involved in an unrelated criminal case where the defendant had been

misidentified.

The central reason why I don't believe this material should be inquired into is because it simply is not relevant to this case.

(Whereupon, there was an interruption and a discussion was held off the record.)

THE COURT: Susan Mahmoud is present.

MR. KUEHNE: She is a potential witness. She was the court reporter.

MR. KROEGER: Whether Mr. Schwartz did or did not use these lineups and whether that does or does not constitute a violation of the rules regulating the Bar is not proven or disproven by what the State Attorney's Office does in other cases.

I don't know, as a threshold matter, how exactly Mr. Schwartz intends to establish the State Attorney's Office has a knowing history of prosecuting misidentified defendants. I haven't seen any indication there are going to be statistics introduced or audits or investigative reports by any sort of

Inspector General's Office, which would corroborate these sorts of statements.

Even if it were true, it does not change the probability of whether Mr. Schwartz, in this particular case, violated the rules regulating the Bar by virtue of using altered photographic lineups in the deposition.

With respect to the Bar's witness, it's essentially the same analysis, whether in a completely unrelated criminal case she handled a case, a prosecution of a defendant who had been misidentified, does not prove or disprove what Mr. Schwartz did in this particular case.

The basic test of relevancy is whether it tends to prove or disprove a material fact, and none of this evidence would prove or disprove the salient issues in this case.

And even, for some reason, if Your Honor were to determine that they were relevant, they are, in essence, more prejudicial than probative, and tend to confuse the issue.

Now, what the State Attorney's Office has done in other cases isn't the issue in this case. The issue in this case is what, essentially, in the course of eight pages of a deposition transcript, which Your Honor will have the chance to review, what did Mr. Schwartz do.

I mean, really, this is a case that perhaps could have been --

THE COURT: Well, even if it isn't relevant, wouldn't it be some form of mitigation for his --

MR. KROEGER: Well, I'm talking about the guilt phase. If you look at the motion, I'm requesting this relief for the guilt phase of these proceedings.

THE COURT: I'm sorry, I didn't notice that --

MR. KROEGER: I'm not suggesting that Mr. Schwartz --

THE COURT: -- since I haven't read the motions, unfortunately.

MR. KROEGER: Sure.

THE COURT: So probably, I should reserve ruling on the motion until I

actually read it through.

Okay, there is one, and here is yours.

Do you want to respond to his -- do you want to continue your argument?

MR. KROEGER: Most of it is contained in the motion. It included some general case law on the points.

The other part of the motion is that during the statements, should Your Honor allow them, I would like to be able to provide you with copies of the lineups in question, which would be introduced into evidence, essentially, just as a demonstrative aid.

THE COURT: Okay.

MR. KROEGER: The one other thing I would like to add ore tenus today, based on Mr. Kuehne's exhibit list, it appears he intends to introduce the entire employment file of former assistant state attorney, Cristina Cabrera, who is the Bar's witness.

I would question, again, what the relevance of her employment file is to the

underlying issues of this case. I anticipate there is going to be some argument that she was terminated as a result of, perhaps, this case involving Mr. Schwartz, or this other case where there was a defendant who had been misidentified through a lineup, but nothing in the employment file corroborates or supports that assertion.

So given all the extraneous information that's included in this file, all of her addresses for probably five to ten years before she started with the State Attorney's Office, her transcripts from college and law school, her resume, her credit report, her -- there is a lot of information in there that just simply is not at all relevant to the issues in this case.

So if Your Honor is inclined to admit it, I would ask that we go through that document and perhaps streamline, you know, some of the information.

THE COURT: Response?

MR. KUEHNE: As to the personnel

file, Your Honor, the entire document is identified as a potential exhibit. I intend to show it to the witness, as I did during her deposition, so that she can establish that it is, in fact, her personnel file. And then for purposes of this proceeding, I intend to utilize a number of discrete documents in the personnel file basically for the timing aspect of the Woodson case, which is the underlying case, and the other case, both significant arguable misidentification cases, and then the witness/prosecutor very soon thereafter leaving the office.

She denies there is any connection between her tactics of prosecuting potentially innocent individuals, but the timing speaks for itself. And that's the purpose for doing that.

There is also another part of the file that has a supervisor reflecting that her understanding of Brady, or obligation to disclose favorable material, seems to need work. And we believe that's also at issue here, particularly when the conduct

is one of intention on Mr. Schwartz's part, and the knowledge of how she handled cases aggressively, when there were real identification questions, was relevant to Mr. Schwartz's handling what he thought was an actual misidentification in the underlying criminal case.

So that's the reason part of the personnel file will -- I will seek to introduce.

THE COURT: I'll reserve on whether the excerpts are admissible or not relevant to the predicate laid.

So as to the personnel file, I'll deny the motion in limine, but he doesn't plan to introduce all the irrelevant information, and I don't expect we will have too much controversy over this.

But just object piece of paper by piece of paper as it's offered into evidence.

On the other issue, go ahead.

MR. KUEHNE: The other issue, which is the overarching issue, is what Mr. Schwartz contends is the operative

facts for this case. He is, as the Bar reflected, charged with violating Rule 4-8.4(c), engaging in misconduct involving dishonesty, fraud, deceit or misrepresentation solely in connection with acting as a criminal defense lawyer during a deposition of a state -- a prosecution witness.

And in that deposition, he took, and identified it as his own exhibit, a defense-function lineup that he made by taking an actual lineup and putting a photograph of the person who had been identified as committing the crime by three other individuals and telling the witness simply to look at the pictures -- not in any way making any misrepresentations or leading the witness in any way or pointing out the details of the lineup -- asks the witness to look at the pictures and see if she sees the person who committed the robbery, with the backdrop that the prosecutor in this case had taken the depositions of witnesses, defense witnesses, who said, no,

Mr. Woodson didn't commit this robbery, a person named Fritz committed the robbery. And the picture of Fritz was put on the defense-created lineup.

Mr. Schwartz shows the lineup to the witness, asked the witness to look at the pictures, and the witness can't identify Fritz.

THE COURT: So there was a prosecutor there and there was no objection to this? Because the prosecutor -- have you deposed the prosecutor who was at the deposition?

MR. KUEHNE: Yes, and we have the deposition. There is significant discussion about that. The prosecutor's objection comes after the fact, but she claims that in her -- in her own testimony, and to the Bar, she claims that Mr. Schwartz acted in a way to prevent her from knowing what's going on at the deposition, not in any way consistent with the actual deposition transcript, which is why the court reporter is here.

The court reporter has done an affidavit in connection with this case

saying that the deposition was a very normal deposition.

But the prosecutor basically says Mr. Schwartz was acting improperly in the deposition. The transcript does not reflect that, but that's her position.

So in this deposition -- by the way, the witness, who was the victim of a robbery, she really had her car taken away from her and her car keys and cell phone, and identified Mr. Woodson, Mr. Schwartz's client, from what Mr. Schwartz believed was an illegal suggestive police lineup. A motion to suppress the photo lineup had been filed in the criminal case before the deposition of the victim.

So that's the backdrop for a real misidentification case; suggestive lineup, identified by the victim, and witnesses, defense-supplied witnesses deposed by the prosecutor who said Woodson didn't do it, and the rather uninterested attitude of this prosecutor that was, to the effect, it doesn't matter, I'm prosecuting Mr. Woodson.

Mr. Schwartz goes into the deposition using a legitimate technique of seeing if he can test the witness's identification. She does not pick out Mr. Fritz, the picture that other witnesses had said was the perpetrator. She picks out some completely different person on the lineup.

THE COURT: She didn't have a choice of Mr. Woodson?

MR. KUEHNE: Mr. Woodson was not on that lineup. Mr. Fritz was there, and all of the other people that she had seen in one of the police lineups. There were multiple police photo lineups. Mr. Woodson was not in the defense-created lineup.

She doesn't pick out Fritz. She picks out somebody else. And her identification is not so clear under any circumstances.

The matter moves on, and the prosecutor originally files a complaint, a motion for sanctions with the judge, Judge Block. She voluntarily withdraws the sanctions motion from Judge Block in favor

of, on the eve of her leaving the State Attorney's Office, filing a Bar complaint.

MR. KROEGER: Your Honor, if we are going into this much detail, which is almost an opening statement, I guess I would ask for an opportunity to join --

THE COURT: He is answering --

MR. KROEGER: I understand.

MR. KUEHNE: So with regard to the state attorney practice, it's in that context that Mr. Schwartz, having been a defense lawyer for a significant amount of time, is aware of, one, situations where the state attorney gets it wrong, has absolutely gotten it wrong, and the necessity for defense lawyers in real identification cases, to fulfill their obligation to constitutionally challenge the legitimacy of identification.

And then, more specifically, the manner of this particular prosecutor dismissing away any concerns about a real misidentification and her, I'll call it reputation, for being very uninterested in whether she was prosecuting the right

person or not, that led to, we believe, her ending her tenure, because there was a very celebrated case where it made -- celebrated because it made the newspapers, where she was prosecuting, based on virtually no evidence at all, a truly innocent person who spent 48 days in jail before a supervisor said "we are dismissing the case."

So that's the context of all of this, why Mr. Schwartz had to be diligent in trying to test the victim's identification.

THE COURT: Any rebuttal?

MR. KROEGER: Yes, Your Honor.

Again, we could posit for argument's sake, a number of things. Let us say that, A, the State Attorney's Office has this known history of prosecuting innocent individuals. We could posit that, B, this very prosecutor had previously prosecuted innocent individuals. We could even say that Mr. Woodson was misidentified as a result of an overly suggestive out-of-court identification. But none of

that changes, proves or disproves what Mr. Schwartz did in this case.

The facts are very simple. It's eight pages of --

THE COURT: All right. Let me just interrupt to get this going. Because it's a non-jury proceeding, and because if there is a finding of violation of the Bar rules, I will then need to have a guilt phase. And both of those are scheduled for today, if he is found guilty; correct?

MR. KROEGER: Correct, but --

THE COURT: Or do we recess?

MR. KROEGER: -- Mr. Kuehne has listed, I think, 16 witnesses. I don't know how many of those are being called, and certainly that's --

THE COURT: Oh, wow.

MR. KUEHNE: I was not quite certain if the Court, if we had to get to a mitigation phase or punishment phase, was going to hear matters today or not. I'll do my best to comply with the Court's schedule. I have some witnesses who are available. Some witnesses, basically, I

have on standby, if needed, on mitigation.

THE COURT: All right. So because it's non-jury and you -- I presume I'll be handling, if there is a guilt phase, the whole procedure. And I was hoping we could finish it today. But, you know, 16 witnesses sounds like maybe not.

But it is non-jury. I think rather than call people in the -- because some of these people involved would have to be called twice, especially Ms. Cabrera.

You are calling her; right?

MR. KROEGER: Correct.

THE COURT: So I think I'll just not limit it. And even though I agree with you, I could say, we are going to concentrate on this particular alleged violation of the rules, rather than to call witnesses twice, if there is a guilt phase, I think I ought to hear it all without, you know, allowing the mitigation issue to affect my issue of whether he violated the Bar rules.

So with that, does everybody get that? Any questions?

MR. KROEGER: So just for the record, you are denying the motion in limine?

THE COURT: Right.

MR. KROEGER: How about the portion of the motion asking to show Your Honor the lineups during opening statement?

THE COURT: You mean the -- he called it a defense-function lineup?

MR. KROEGER: That's what Mr. Kuehne refers to it as.

THE COURT: I think anything they want to do on opening statements --

MR. KUEHNE: I'm not objecting to the court seeing those during opening statement.

THE COURT: Okay.

MR. KROEGER: Okay.

THE COURT: So you have a motion in limine, too?

MR. KUEHNE: Yes, Your Honor.

THE COURT: I need to read that real quick.

Any argument?

MR. KUEHNE: Yes, Judge.

I want to say briefly, on the first

two points, Mr. Schwartz is not a public defender, has not been a public defender for 20-something years, when he was an assistant public defender. This is not a public defender case.

So what the public defender does or doesn't do in their training, since none of it affected Mr. Schwartz, is not an appropriate consideration in this case.

As to the other arguments, the other aspects, my sense is that they will either come or not come in the context of evidentiary points, which may require the court to more specifically rule on evidentiary points.

I don't yet have an appreciation for whether there will be any effort on the part of the Bar to challenge Mr. Schwartz's ability to confront a witness about identification during a deposition, as opposed to the discrete aspect of using the defense function, the defense-created lineup.

If it's the former, we have significant legal dispute, because

Mr. Schwartz was absolutely entitled to use a procedure to challenge a victim's eyewitness identification during a deposition.

If it's simply limited to whether he could use this form of the defense-created lineup, then it really doesn't relate to the admissibility issue.

THE COURT: Response?

MR. KROEGER: Sure, Your Honor.

As to points number 1 and 2 in Mr. Kuehne's motion, the Bar will not be calling anyone from the Public Defender's Office or submitting any affidavit into evidence. That was premised upon Mr. Schwartz's answer to interrogatories, which had disclosed a potential intent to call Carlos Martinez and Steven Kramer, a former assistant public defender, to specifically have them talk about the Public Defender's Office's training and practices. So this was wheels set in motion based on Mr. Schwartz's response to the interrogatories.

At this point, unless necessary for rebuttal, I'm not calling Mr. Hellman or introducing any other evidence regarding the Public Defender's Office's practices.

THE COURT: All right.

MR. KROEGER: As for number 3, I would contend that Ms. Cabrera should be entitled to testify as to her perceptions and her mental state during the deposition. So I think any attempt to preclude her from expressing her perception that she was confused by Mr. Schwartz's use of these altered lineups would be an improper exclusion of her testimony.

As to number 4, there is potentially one affidavit that the Bar would intend to introduce in this case; that is an affidavit prepared by an intern from the State Attorney's Office, who was present at the deposition. Mr. Schwartz has also secured affidavits from all the other individuals who were present at the underlying deposition.

As a threshold matter, the rules of

evidence are relaxed during disciplinary proceedings; hearsay is admissible and affidavits are admissible as evidence if they are relevant. The crucial test in these proceedings is always relevancy.

I have that case law if Your Honor would like to review some of it. But just as a general matter, there is no legal precedent for precluding the introduction of affidavits in disciplinary matters.

As to issues regarding sort of the constitutional dimensions of this case, I agree with Mr. Kuehne that we ought to see how those play out in the course of the testimony.

The one thing I would address is number 10. Mr. Kuehne seeks to limit any effort by the Bar or witnesses to assert that respondent utilized a forged, fabricated or altered photographic lineup. I think the facts speak for themselves, this was a lineup that had been altered.

So I believe the Bar should be able to use adjectives within reason to describe what these documents were.

THE COURT: All right. So I will preserve the right to object item by item as the Florida Bar introduces it. But agree with Bar counsel, that -- it's Mr. Kroeger; right?

MR. KROEGER: Yes.

THE COURT: -- that the only ruling really maybe is 10. And this seems to be a matter of argument. And I won't limit that effort.

So anything else I need to specifically rule on in the Schwartz motion in limine?

The affidavit issue, did you have any contrary case law?

MR. KUEHNE: No. I agree with the Bar, that the technical rules of evidence are relaxed, and the general approach used in these matters is one of reliability.

I don't have a familiarity with the intern's affidavit.

Do you have a copy that I could take a look at?

MR. KROEGER: I do. It's been previously provided, and I will give you a

copy.

MR. KUEHNE: And that way, I could remind myself what it says. But generally speaking, I may have specific objections, but I do recognize that some limited forms of hearsay are allowed.

THE COURT: All right. Is there case law on this? Is this a case of first impression?

MR. KROEGER: With respect to the specific facts of a lineup, yes; however, in the context of deception or misrepresentation and the discovery process of litigation, no.

THE COURT: Okay, thank you.

So let's proceed with openings.

Are the attorneys happy with the witness's location, which --

MR. KROEGER: I might ask: Where is the witness going to be?

THE COURT: Normally I put the witness at the end of the table, but this office is set up a little differently.

MR. KROEGER: I can slide over.

THE COURT: I need to return these,

and I'm hoping my paper copies will show up.

So I think my office printed out the motion in limine, and I can get it that way, too.

MR. KUEHNE: Yes.

THE COURT: I've only been dealing with paper.

MR. KUEHNE: The submissions, I know, were also sent by e-mail to -- is it Crawford?

THE COURT: Adrian Crawford.

MR. KUEHNE: A. Crawford.

THE COURT: Okay.

Are you ready?

MR. KROEGER: Yes.

THE COURT: Go ahead.

MR. KROEGER: It is the Bar's position that the facts of this case present an excellent reminder of an aphorism that the ends justify the means don't apply to the actual practice of law.

While attorneys, such as Mr. Schwartz, who engage in the, admittedly, noble practice of defending

the criminally accused, are expected to zealously advocate for their clients, they must still do so within the strictures and the bounds of the rules regulating the Florida Bar.

The practice of law is not a pursuit of consequentialism. Attorneys cannot engage in discrete, ethical violations to try and achieve at a macro level what they think is a just result, especially when those means to get to that end, in this case defending a criminally accused individual, involves engaging in inherently dishonest and deceptive misconduct.

(Whereupon, there was an interruption and a discussion was held off the record.)

THE COURT: All right. Sorry about the interruption.

MR. KROEGER: Not a problem.

As the Bar has indicated, in its view, the facts in this case are quite simple. Mr. Schwartz represented a criminally accused individual named Virgil Woodson, who had been charged by the

Miami-Dade State Attorney's Office with armed robbery and carrying a concealed firearm.

The victim in this case, Gerdie Talisma, had made an out-of-court identification of Mr. Woodson as the perpetrator of the crime.

You will hear evidence that there were, perhaps, several lineups presented to Ms. Talisma, but on one of those lineups, she identified Mr. Woodson as the perpetrator. She circled his photograph, she printed her name, she signed her name. The detective who administered the photographic lineup printed his name, signed his name. There was a box that is checked yes, a positive identification was made, and then the date of that identification is listed.

For demonstrative purposes, this is that lineup.

That lineup was provided by the State Attorney's Office in discovery. As you will hear, Mr. Schwartz's theory of defense was that an individual named Fritz

was the one who actually committed the crime, and that Ms. Talisma had misidentified Mr. Woodson on that lineup.

He presented several witnesses to the state, to say that someone else had committed the crime, and the State Attorney's Office took depositions of those individuals.

During the course of Mr. Schwartz's deposition of Ms. Talisma, he introduced two exhibits into evidence and attempted to ask her questions about them. Those two exhibits, which were introduced as Exhibits 2 and 3, which I will show you a copy of now, were also photographic lineups, identical in almost every single way to the lineup provided by the State Attorney's Office, except for one crucial difference.

(Whereupon, there was an interruption and a discussion was held off the record.)

THE COURT: So we have to move back to my office at noon. My bailiff will have half a day working at my computer.

MR. KROEGER: These lineups were

created by Mr. Schwartz. They still have a circle around a photograph. They still have Ms. Talisma's signature. They still have the detective's signature. They still indicate a positive identification was made.

The difference is that Mr. Schwartz shrunk a photograph of Fritz, the individual he believes committed the crime, and pasted it on top of Mr. Woodson's photo.

In Exhibit 2, it's apparently just a plain pasting of Fritz's face. On Exhibit 3, Mr. Schwartz kept Mr. Woodson's hairline, but then used the face of Mr. Fritz. All the indicia of the positive identification Ms. Talisma had made back in 2013 remain. And keep in mind, this deposition was taking place in February of 2015.

When questioning Ms. Talisma, using these lineups, Mr. Schwartz did not disclose that these were created. He did not disclose that he pasted someone else's photograph on Mr. Woodson. He did not

disclose that these lineups were altered versions of the original lineup produced by the state in discovery in which Ms. Talisma had viewed when she had made her identification.

What he said -- and I'm reading front of the transcript -- is this. When first asking her about Exhibit Number 2, Mr. Schwartz asks the question:

"QUESTION: Now, later, the police officer showed you what they call a photographic lineup. Do you remember that?

"ANSWER: I remember they gave me the lineup.

"QUESTION: And do you remember?

"ANSWER: Huh?

"QUESTION: Do you remember they showed you a lineup?

"ANSWER: Yes, I remember.

"QUESTION: Was it like a piece of paper, like my Exhibit Number 2 over here? Was it a piece of paper like that or was it on like a cardboard, inside like a box set?

"ANSWER: It was on a piece of paper like that.

"QUESTION: A piece of paper like this?"

Presumably Mr. Schwartz is holding Exhibit Number 2.

"ANSWER: Uh-huh.

"QUESTION: Let me show you what's been marked as Exhibit 2.

"Now, forget about what you did before. Now, I just want you to look at Exhibit 2."

He then goes on to ask later:

"QUESTION: Let me show you Exhibit 2, and just ask you to look at it and just ask you to pick out the person, if you know, who is the one who robbed you, if you can tell me."

Where in those series of questions -- and Your Honor will have a chance to review the relevant excerpts -- actually, you will have the entire deposition. And you can review the eight pages, which are essentially -- constitute the facts in this case. Nowhere in those questions

does Mr. Schwartz say "I created this" or "I've altered this" or "I materially changed this."

There is no indication to the witness from these questions that when she is looking at a document that has her own signature and the detective's signature and a circle around the individual, that they had been materially altered.

What Mr. Schwartz did was set the stage for Ms. Talisma to potentially render a misidentification.

Now, ultimately, she did not. But, again, the very fact of presenting her with these documents without adequately disclosing what he had done to the lineup originally provided by the state, is, itself, inherently misleading and deceptive.

When asking Ms. Talisma about Exhibit Number 3, Mr. Schwartz says:

"QUESTION: All right. Let me show you now Exhibit Number 3, and just ask you to look at them as if you've never seen them before, because I don't know whether

you have or not. And the same question I asked you as Exhibit Number 2; in other words, see if you can identify the person who robbed you."

When Ms. Talisma -- when it's a document that's presented that has all the indicia of an identification, that is not sufficient to put anyone on notice -- that these photos have been altered.

THE COURT: These are the defense-function lineup?

MR. KROEGER: Nowhere in the deposition transcript will you see the phrase or term or the words "defense-function lineup."

THE COURT: Was this lineup the official lineup from the criminal case at the deposition? Was it used by -- I presume when a defense attorney takes a deposition, does the prosecution have cross and all of that?

MR. KUEHNE: Yes.

MR. KROEGER: Yes.

THE COURT: Okay. The prosecutor didn't have the original lineup with her

or didn't --

MR. KROEGER: She did. You will hear from Ms. Cabrera today, and she will testify that --

THE COURT: Okay. I shouldn't ask these questions because it will come from the witness.

Go ahead.

MR. KROEGER: When she first was able to see these Exhibits 2 and 3, that Mr. Schwartz was introducing, she thought initially they were just, in fact, a copy of the lineup that had been provided by the state.

It wasn't until she was able to see a bit closer, she realized that there was something off or something strange about what purportedly was Mr. Woodson's photo.

She took the exhibit and looked at it and then realized that this had been -- the exhibits that were being introduced had been materially altered.

Mr. Schwartz did not provide the victim with a copy of the original identification. He provided these two

exhibits, and a third lineup, which didn't have any markings of a positive identification. Apparently, it had been another lineup that the state had provided to Ms. Talisma, where she didn't make an identification.

Mr. Schwartz did not introduce the original lineup provided by the state. His actions were inherently misleading and deceptive, and they are contrary both to substantive law and, more importantly, the rules regulating the Florida Bar.

Your Honor will know that, here today, about a criminal law case styled State v. Kuntsman. In that case, the court notes that defense counsel does not have a right under the rules of discovery in criminal procedure to manufacture a misidentification.

And at the end of the day, the only reasonable interpretation of what Mr. Schwartz did in this case was an attempt to secure a misidentification.

Now, it didn't work. Ultimately, the proceedings themselves were not

prejudiced, but the risk was there. It's not permissible under the rules of criminal procedure and it is certainly not permissible under the rules regulating the Florida Bar.

This was a deceptive act and it violates both Rule 3-4.3 and Rule 4-8.4(c).

This is not a case of constitutional dimensions. You are going to hear evidence about how this was in keeping with Mr. Schwartz's ability to vigorously test the lineup that Mr. Woodson had due process rights that had to be vindicated.

That's not what this case is about. The Bar is not saying that a defense attorney cannot show a lineup to a witness. What the Bar is saying is that in doing so, a defense attorney can't be deceptive, can't sort of hide of ball.

That's what this case is about. It's about eight pages of this deposition transcript and the two exhibits that Mr. Schwartz attempted to question the witness about.

That is clear and convincing evidence in this case. It will establish that Mr. Schwartz violated Rules 3-4.3 and 4-8.4(c).

THE COURT: Opening for Mr. Kuehne -- for Mr. Schwartz.

MR. SCHWARTZ: I'm a good client.

MR. KUEHNE: In a gross departure from Bar rules and Bar precedent, the Bar is challenging the bona fides of a good criminal defense lawyer in fulfilling his function, not just under the constitution, but under the case law that the Bar continues to refuse to recognize in legitimately challenging the reliability of an eyewitness identification in a case where there was not only legitimate reason to question whether the witness, in fact, identified the correct person, but a real reason to believe that the wrong person, Mr. Woodson, may have been the subject of a prosecution.

Mr. Schwartz began his representation of Mr. Woodson. Mr. Woodson was charged with a crime. In his effort to be

effective, brought to the state attorney witnesses and documentation that appeared to reflect the involvement of a different person as the perpetrator, so much so that one of the items was a letter written by the mother of the believed perpetrator, who the victim happened to know, returning the victim's car keys to her.

So the mother of Fritz writes a letter to Ms. Talisma, the victim, saying: Here are your car keys. And basically asking her to forgive her son.

Mr. Schwartz brought this information to the attention of the state attorney and arranged the appearance of these witnesses for state attorney depositions. And this prosecutor was not only dismissive, she flat-out accused these witnesses of lying, so much for Mr. Schwartz's efforts to at least have the prosecutor consider that this may be a wrong identification case.

Mr. Schwartz filed a motion to suppress the actual photographic lineup, a photographic lineup procedure that itself was unconstitutional, in that the victim

was, on separate occasions, shown different photographic arrays by the police. The first time, the photographic arrays without Mr. Woodson in the picture; and then some significant time later, she's asked the -- the victim is asked to come to the police department after being told by the police, "we found the guy," identifying Woodson, and then showing a new lineup, which is the subject lineup, to Ms. Talisma. She identifies Mr. Woodson.

And you'll note in the demonstrative that among other aspects of the unconstitutional suggestiveness, is that Mr. Woodson, number 5, circled, is the only one appearing with a white background as opposed to the black background, a technique that individuals who have been through the many years of researching false witness identification, and that underplays much of what's going on.

The Supreme Court commission on false eyewitness identification, that was chaired by Hank Cox, a former Florida Bar

president, and others, evaluating the fact of wrongful convictions based on misidentification, demonstrated a number of very subjective techniques; and that is, using a different background for the one person you want the victim to pick out, a light background versus a dark background. So we see that in this suggestive lineup.

And a motion to suppress the photo identification has been made by Mr. Schwartz in the Woodson case.

Ms. Talisma appears for a deposition. It's called "deposition one." It's really not at issue in this case. Ms. Talisma, after going through a portion of the deposition, is ill and asks to have the deposition re-set.

Mr. Schwartz, of course, courteously, and not wanting to in any way cause a witness problems, arranges the re-setting. And sometime later, on February 13th of 2015, Ms. Talisma appears for her continuation of the deposition. That's the subject deposition.

Mr. Schwartz handles the deposition, as the transcripts reflects, in due course, a regular deposition of a victim in a robbery case where the defense is misidentification.

And Mr. Schwartz makes it very clear in the deposition that he -- and tells this witness this on the deposition transcript -- he's concerned about misidentification because there had been other witnesses, including this woman that Ms. Talisma agrees she knows from church, who have identified Fritz as the perpetrator.

So Mr. Schwartz is transparent with the victim, that this really is a case about her identification. And that was not a surprise to the prosecutor at all.

In the course of the deposition, Mr. Schwartz does something very simple. He had prepared before the deposition, using the police lineup, a photocopy of the police lineup, the only thing that he had from discovery, taken a picture of Fritz and put it in the place of

Mr. Woodson.

Now, what's critical here is that the Florida Bar, not in an effort to mislead the Court, I don't think so, the Florida Bar misstates the facts in a critical way. The actual lineup presented to Ms. Talisma is a colored-picture lineup.

So Ms. Talisma reviews a lineup with colored pictures. That's what the police do.

THE COURT: So this is not a true copy of --

MR. KUEHNE: That's just the discovery photocopy disclosed in discovery. The photocopy of discovery.

So Mr. Schwartz gets what is normal discovery, black-and-white repros of things. Mr. Schwartz takes his discovery, and in preparing for the deposition, puts a picture of Fritz where Mr. Woodson appears. And uses -- actually takes two pictures, because there was an issue about whether the perpetrator was wearing a hat or a covering, a hoodie or not.

So Mr. Schwartz prepares two of

Fritz, the person who had been previously identified by defense witnesses deposed by the prosecutor as the perpetrator, and puts Fritz into the lineup, two different pictures of Fritz. Those are Exhibits 2 and 3.

On the black-and-white photocopy, Mr. Schwartz then in presenting these to the witness -- and there will be a little side note that's less important, but it's a credibility issue on the prosecutor's part, or lack of credibility -- Mr. Schwartz has Exhibit 2. There is an Exhibit 1 first.

Exhibit 2, marked by the court reporter, shown to the witness, and he says with as much directness as he can, he refers to Exhibit 2 as "my exhibit." Not a police exhibit. My exhibit. And asks her to look just at the pictures to see if she can identify the person who robbed her.

And it's important to note that Mr. Schwartz does not identify the defense-function lineup as a police

lineup, does not in any way refer to the witness having seen this lineup before. In fact, it's just the opposite. Never refers to, points to, mentions or gives the witness an opportunity to look at a signature on the lineup. Never points to a police officer's name on the lineup.

And, by the way, the lineup writing is in English, and the witness is using a Creole translator during the deposition. So her first language is Creole, not English.

And Mr. Schwartz only directs the witness to the pictures. She is unable to identify anybody on Exhibit 2, including the Fritz picture. And she thinks that picture number 1 is closest to the perpetrator.

Mr. Schwartz then -- by the way, this is done without objection by the prosecutor. And that's because the Kuntsman case, which is a 1994 case -- 1994 -- known by all good criminal defense lawyers, and, frankly, all good state attorneys. By the way, the prosecutor

knew nothing about Kuntsman case, which suggests a lack of preparation on actual misidentification cases.

But Kuntsman is known, has been known to Mr. Schwartz, and is known for years as being the case that allows the defense lawyers to challenge a witness's identification during deposition, but can't make the witness subject themselves to an eyewitness identification. Meaning, the defense is allowed to request, and if the state puts a stop to it, says "I'm directing the witness not to make an identification," then Kuntsman says the matter has to be determined by the judge, basically so a judge can determine: Is this a real identification case or is it just an effort to do normal cross-examination of a witness?

The McWilliams case, a later decision, also well known, says it's appropriate and permissible for defense lawyers to question witnesses about their identification. But, again, a prosecutor can stop it if the prosecutor believes

that it's an effort to go further than allowed. And then there is clarification from the judge.

Here, the prosecutor never stopped the deposition or said to the witness "you don't have to make any identification," as she could have.

And then when the prosecutor objects after Exhibits 2 and 3 are shown, and Exhibit 4 is presented, the prosecutor first objects to Exhibit 4 by saying -- misstating -- the Bar is not concerned with a misstatement of the prosecutor on the record, but misstates that this is yet another exhibit that is not her or the police exhibit, when, in fact, Exhibit 4 was an exact photocopy of one of the police lineups not altered at all, that the prosecutor claims she never saw before, even though she is the one who produced it to Mr. Schwartz, and misleads the witness into believing that the defense lawyer is trying to show her something that the prosecutor never saw. But, in fact, that was one of the first

lineups that the witness was shown by the police, a black-and-white copy of it, where she did not identify anybody.

After this series of photographic --

THE COURT: Could you tell me again her objection to Exhibit 4? Misstates --

MR. KUEHNE: Yes. When Exhibit 4 was presented --

THE COURT: Assumes facts not in evidence? What was it?

MR. KUEHNE: On page 33, the question is:

"QUESTION: Let me show you what's been marked as Exhibit 4."

So this is one that the witness had seen before not in black-and-white version, but seen before, but she was unable to identify anybody on it. But that's the backdrop.

So here is the question by Mr. Schwartz:

"QUESTION: Let me show you what's been marked as Exhibit 4. Do you recall ever seeing this document before?"

The witness answers:

"ANSWER: No, I've never seen that.

"QUESTION: You've never seen that document?

"ANSWER: No.

"QUESTION: Was there a time when the officer came by and showed you six pictures and asked you to identify one of the six pictures, and you said you couldn't identify anybody?"

Cabrera is the prosecutor:

"MS. CABRERA: I object to the form of the question.

"THE WITNESS: When the officer showed me this, Woodson wasn't there in the picture.

"MR. SCHWARTZ: Right. And so do you remember, then, him coming by and showing you six other pictures?

"ANSWER: I don't know how many pictures that the officer showed me, but he shows me some pictures.

"QUESTION: Well, there are two different times where he asked you to make an identification, two different occasions.

"ANSWER: So the first time when he showed up with the picture, Mr. Woodson wasn't on the picture. So the second time when he show up (sic), I say 'yes, there he is.'

"QUESTION: You said Woodson wasn't in the pictures?"

There's an interpreter issue. And Mr. Schwartz says:

"MR. SCHWARTZ: The first time he said Woodson was not in the pictures?

"ANSWER: He could not tell me anything because he was looking for Mr. Woodson. He didn't find him yet.

"QUESTION: Well, when you made the identification of Mr. Woodson, did you know that he was the one who had been found already with your phone and money?

"ANSWER: Yes.

"QUESTION: So one last time. Exhibit 4, can you look at it closely, and I'll just ask you: Do you remember ever seeing this form before?

"ANSWER: No, I don't remember seeing something like that.

"QUESTION: Let me show you what's going to be marked as Exhibit 5."

And Exhibit 5 is something else.

And in the course of Exhibit 4, which we talked about, no objection from the prosecutor at all at this point, and it's clearly something that had been shown to this witness before, and Mr. Schwartz makes clear to the witness, unlike using 2 and 3, that this is something, by questioning, that she had been shown by the police before. That context is very important.

Then what I refer to is the --

MR. SCHWARTZ: It was before when you started reading. It was provided by the state.

Right there.

MR. KUEHNE: On page 32, before Mr. Schwartz, before that context of the actual -- Number 4, that was shown to this witness by the police.

Here is the introduction. On page 32, Mr. Schwartz says:

"MR. SCHWARTZ: Let me show you

what's been marked as Exhibit 4.

"Thereupon, Exhibit 4 was marked and introduced into evidence."

The state attorney says:

"MS. CABRERA: And I will be objecting to any line of questioning regarding Exhibit 4. Again, this -- I want to object to Exhibit 4. That was not provided by the state."

And Mr. Schwartz:

"MR. SCHWARTZ: Let me show you what's marked Exhibit 4."

And that was the context.

So she had started this process by objecting to a document that she contended had not been provided by the state, in front of the witness. So in our view, misleading the witness by telegraphing: Hey, he is showing you something that is not a state attorney document.

Contrasting that in context with what Mr. Schwartz had done in using Exhibits 2 and 3, making it clear to this witness by his use of "my exhibit" and by his phrasing of just look at the pictures that

he is asking the witness to look at something anew.

The prosecutor then comes and essentially says in front of the witness "I'm objecting," falsely, and telling the witness by the objection: He is showing you something that I've never seen and I never provided to him.

And that's the context that this deposition is ongoing. Of course, the prosecutor was wrong. That was a document that was part of the discovery, the black-and-white copy. And there was no effort on this later one, or the earlier ones, to mislead Ms. Talisma.

And the deposition ends.

The prosecutor files a motion for sanctions with Judge Block in the criminal case and gets it set for a hearing. It has now become obvious that the prosecutor not only wants to prosecute Mr. Woodson, an individual who may, in fact, be innocent, but she wants to prosecute Mr. Schwartz.

Mr. Schwartz and his associate, Jody

Baker McGuire, agree that he may be doing more harm than good if the prosecutor is going to look at him as the enemy, as she is prosecuting Mr. Woodson.

So Ms. Baker takes over the primary responsibility of the case and actually works out the case to boot camp, a case where the previous offer had been by Ms. Cabrera, the prosecutor, 30 years in state prison. Works it out to boot camp in connection with two other cases. There were three cases pending. Two other cases, plus this one, get rolled into boot camp.

Ms. Baker McGuire is able to do that, and she will explain that one of the reasons was, there was significant doubt that Woodson really committed the crime in this case. So they resolved it.

The case goes to Judge Block for a disposition hearing. The judge specifically asks about setting the motion for sanctions, because he was aware of it, and the prosecutor says: Judge, we are withdrawing that motion. And then

resolves the Woodson case.

The prosecutor withdraws the motion, the Woodson case gets resolved with boot camp. And then roughly a couple of weeks before the prosecutor is leaving the office, she pens -- not to Judge Block where the motion for sanctions for this alleged misconduct with the eyewitness identification was done in the deposition, and you will see the motion for sanctions, it identifies the exact same conduct -- she instead brings it to the Florida Bar.

The Florida Bar then makes its determination, and we are here, even though, plainly, Judge Block had the original jurisdiction over the sanctions matter. Judge Block, as a circuit judge, has jurisdiction to make any determination of whether Bar rules had been violated.

But the prosecutor, we believe -- and Mr. Schwartz will testify, based on the conversation -- that Judge Block was totally unimpressed with the state attorney's motion for sanctions.

So we suspect that the state attorney

knew that this was not going to get the kind of treatment that she wanted, meaning, to hurt Mr. Schwartz, and sent it to the Bar. And that brings us here today.

THE COURT: How do you prove this, that a judge is not impressed with a motion before it's heard?

MR. KUEHNE: Mr. Schwartz will testify, having been at the hearing, that when the judge said "in this matter, do we have it for hearing," appeared to be, in Mr. Schwartz's view, and Ms. Baker's view --

THE COURT: Okay. That answers the question.

MR. KUEHNE: -- wanting to get this resolved.

THE COURT: Okay.

MR. KUEHNE: So we are here on the Bar contending violations the rule based on dishonesty. Here is what Rule 4-8.4(c) says: Engaging in misconduct involving dishonesty, fraud, deceit or misrepresentation. And the definition in

the rule for "fraud" or "fraudulent" denotes: Having a purpose to deceive, and not merely negligent misrepresentation or failure to apprise another of relevant information.

And the Bar's definition continues to say: Fraud, when used, refers to conduct that has a purpose to deceive.

The Bar rule requires proof that Mr. Schwartz acted purposefully, intentionally to deceive, and it cannot be proven by a negligent misrepresentation or a failure to apprise another of relevant information.

So the Bar writes from whole cloth, when the Bar says which is not established by any case law whatsoever, and there is no case law that says a lawyer, a criminal defense lawyer, cannot construct a lineup from a police lineup and show it to the witness. No law whatsoever says that.

And the Bar says, but Mr. Schwartz, when you read the transcript, didn't introduce Exhibits 2 and 3 by saying "now, I created this lineup myself. This is not

the police lineup you looked at," or the other operative, introductory language the Bar claims a good defense lawyer should do.

That's, even if required, and it's not, would be a failure to apprise another of relevant information, if that is even relevant information.

But we note, and this is where the constitutional issue comes into this case, and what's going to be a critical part of this case, the defense is going to present evidence that Mr. Schwartz and Ms. Baker were fulfilling what they believed was their reasonable efforts to promote effective assistance of counsel and cross-examination.

And if a defense lawyer had attempted to examine a witness by saying -- what the Bar would have the lawyer say -- I've created this lineup myself. This is not the police lineup.

That would be, we think, ineffective assistance of counsel. It would not be cross-examination. It would be telling

the witness: Hey, I'm trying to trick you. Something the witness was not being tricked, and something Mr. Schwartz was not trying to do at all.

So in the context of this specific case, in the context of what is going on in cases like this at the State Attorney's Office, and in the context of the actual innocence focus of the criminal justice system, Mr. Schwartz acted properly, did not violate Rule 4-8.4(c) or the other charged violation, and acted in no way to intend or act with a purpose to deceive, falsify, act dishonestly, or deceitfully.

Thank you.

THE COURT: Thank you.

Okay. Do you want to take a short break before we start with the witnesses?

MR. KROEGER: Sure.

THE COURT: We will be in recess for five minutes.

(Thereupon, a brief recess was taken.)

MR. KROEGER: These are all the exhibits that the Bar intends to

introduce, if Your Honor wants to go along, for ease of reference.

THE COURT: Thank you.

Please raise your right hand.

Thereupon,

CRISTINA CABRERA,

having been first duly sworn or affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KROEGER:

Q. Good morning. Could you please state your name for the record?

A. Christina Cabrera.

Q. How are you presently employed?

A. I work for Progressive Insurance Company.

Q. When did you start working with Progressive Insurance Company?

A. July 2015.

Q. What is your role there?

A. I'm house counsel attorney.

Q. Prior to working at Progressive, where were you employed?

A. I worked at the Miami-Dade State Attorney's Office.

Q. What years did you work there?
A. From August 2011 through July 2015.
Q. I'll ask at the outset, why did you leave the State Attorney's Office?
A. For financial reasons.
Q. Is the salary at Progressive better than at the State Attorney's Office?
A. Much better.
Q. Have you had any other jobs as an attorney since you graduated from law school?
A. No.
Q. Where did you attend law school?
A. Emory University, School of Law.
Q. What year did you graduate?
A. 2011.
Q. Where did you attend undergrad?
A. University of Pennsylvania.
Q. What year did you graduate from there?
A. In 2007.
Q. You are, I assume, a member of the Florida Bar?
A. Yes.
Q. Are you a member of any other state bars?

A. No.

Q. Are you a member of any federal jurisdictions?

A. No.

Q. During your time at the State Attorney's Office, did you have an occasion to be the prosecutor assigned to a case styled State of Florida versus Virgil Woodson?

A. Yes.

Q. Can you tell us when that case was assigned to you and what the circumstances were?

A. Well, the case was assigned to me around December of 2014. That's when I was promoted as an A prosecutor in Judge Block's division.

Q. What does it mean to be an A prosecutor?

A. It's just that we handle certain cases --

THE COURT: First-degree felonies. I did a little criminal.

THE WITNESS: Yes.

THE COURT: Two years, almost.

BY MR. KROEGER:

Q. When you were assigned to the Woodson case, what was the status of it? Where was it at in the processing?

A. Well, an information had already been filed. It was filed by the former prosecutor, Jessica Dobbins. She also left the State Attorney's Office, and that's when I took her role.

I believe -- so basically, the original information that was filed charged one count of armed robbery and one count of carrying a concealed firearm. And then, I believe November of 2014, an amended information was filed to include a charge of tampering with an electronic monitoring device. I believe the defendant had pulled his GPS off his ankle.

So when I reviewed the file, I saw that the victim of the robbery, Gerdie Talisma, she had -- I guess the deposition -- her deposition had already began about a year prior, but it wasn't completed. Apparently the deposition ended because she didn't feel well.

So in order to finish preparing the case for trial, that was the next step I needed to do, was complete her deposition.

Q. When you were assigned the case, I assume you reviewed all the materials that were in the file?

A. Yes.

Q. What is your impression, in terms of what the evidence was against Mr. Woodson? If you could, sort of summarize what that was.

A. Well, we had the victim, her testimony. From what I understood, she was the -- there was no other witnesses to the armed robbery, it was just her.

However, after the fact, she received a mysterious letter with an envelope containing her car keys. I also saw that she basically was approached by the Woodson family at the parking lot, I believe, in her apartment complex.

And basically they were there on the phone with Mr. Woodson's mother, who was pretty much apologizing for what her son did, because she had found car keys and money that was basically taken from Mr. Talisma.

So she was just apologizing and wanting to give her the keys back and basically not, you know, proceed with any formal charges against her son.

Q. Was there any documentation in the file as to what the defense theory or strategy was?

A. Well, I know that a couple of defense witnesses were listed, and Mr. Schwartz did file a motion to suppress the photo ID lineup.

Q. When you first had the case in late December of 2014, was there any information available to you about what those defense witnesses were likely to testify to?

A. My understanding was that they were going to say it wasn't him, that it was someone else.

Q. Did you conduct any depositions of those defense witnesses?

A. From what I recall, I believe I deposed one witness, I think there were three, but I remember deposing one.

Q. Do you know if the other two were deposed by a predecessor?

A. Yes. I think it was Jessica Dobbins.

She deposed them.

Q. And were there transcripts from those depositions?

A. Yes, I remember that there were transcripts.

Q. Did you review those?

A. Yes.

Q. And then you conducted the deposition of the third witness?

A. Yes.

Q. What was your impression of those witnesses, the deposition that you took and then the transcripts that you reviewed with respect to the other two?

MR. KUEHNE: Objection; speculation.

THE COURT: Could you repeat the question?

MR. KROEGER: My question was what Ms. Cabrera's impression was of -- I can rephrase, if necessary, but the testimony in the other two transcripts and the testimony from the deposition she conducted.

THE COURT: And the objection was --

MR. KUEHNE: Objection is

speculation, foundation. She is being asked to weigh in on her believability of these witnesses, is the way I understand the question.

THE COURT: Overruled.

Your impression is what you are giving.

THE WITNESS: Right. Just based on the information I had, I didn't find them to be credible. Their story didn't match up with the time line of what had occurred.

BY MR. KROEGER:

Q. Can you describe a little bit what the time line is of the actual underlying incident?

A. Well, I know that the -- from what I recall, this happened a while back. I know that the robbery happened in 2013. And so when I took over the case, it was almost a year and a half, two years after the incident.

And I don't remember exactly what they said, but they were basically trying to say that it was someone else who did it. That's what I remember. The defense witnesses

were saying that it wasn't Mr. Woodson, it was someone else.

Q. And what is your understanding, your recollection of what the purported facts were of the underlying crime?

A. So Ms. Talisma, I believe she worked at the airport, and she was driving home from work, I believe it was at night. And she lives in an apartment complex. She parked her car, and then as she was walking to her apartment, I believe there was a stairwell and there was some bushes on the side. The defendant jumped out of the bushes and had a firearm, pointed the firearm in her face and asked for her money and her car keys. So she gave that to him, and then he fled.

Q. Obviously you are aware that this case has a lot to do with the identification of Mr. Woodson. Can you describe your understanding of how that identification was made?

A. Through a photo lineup.

Q. Did you ever speak with the detective who had administered that lineup?

A. Before the deposition?

Q. At any point in time.
A. I don't remember. I don't remember if I spoke with him.
Q. And do you recall how many photographic arrays were utilized by that detective?
A. I'm not 100 percent sure. I know definitely there is one, but there may have been a second one, but I don't recall and I haven't -- I don't recall exactly how many lineups were presented to the victim.
Q. Do you recall approximately when it was that you took the deposition of, I guess, the remaining third defense witness?
A. I honestly don't remember exactly when. Obviously it was after I started in that division, so December 2014.
Q. Would it have been before or after Ms. Talisma's deposition?
A. I don't remember.
Q. What did you do once Mr. Schwartz had filed the defense motion to suppress the identification?
A. What did I do?
Q. If anything.

A. I think -- I don't remember when it was actually filed, but I hadn't done anything at the moment. I think my focus was just finishing the deposition of the victim and then addressing that. Obviously, that motion would have been set, you know, for hearing on a future date, and then, you know, we would have handled it.

Q. Prior to this particular case, the Woodson case, had you ever had any previous professional dealings with Mr. Schwartz?

A. I believe I may have had some cases with him, but I think I always saw his associate, Jodi Baker. She is now married, her last name is now McGuire.

So I used to see her in court, but I never dealt with Mr. Schwartz, you know, via deposition or plea negotiations. I don't recall ever really dealing with him.

Q. Was there anything noteworthy about those previous cases you had handled?

A. No.

Q. I would like to move and talk about the deposition of Ms. Talisma that was taken.

Do you remember approximately when

that occurred?

A. February 13th of 2015.

Q. Who all was present at the deposition?

A. The victim, Gerdie Talisma; there was a court reporter, the interpreter, Mr. Schwartz, his associate, Ms. McGuire, and a State Attorney's Office intern, Cindy Ferrera.

Q. Can you sort of describe the arrangement of the room, where this took place and where everyone was seated?

A. The deposition took place in my office, that was very common. And so basically I was sitting at my desk. And then across from me was, starting from my left, it was the court reporter, then the interpreter, then Ms. Talisma, Mr. Schwartz, and then off to my right was Ms. McGuire, and then the intern was sitting next to me.

Q. At this point in time when you took this deposition in February of 2015, how long had you been a member of the Bar?

A. Well, since -- I was sworn in in September of 2015, so -- I'm sorry, 2011. So

it was three and a half years, approximately.

Q. And the deposition itself, did it result in a transcript?

A. Yes.

Q. Did you have a chance to review that transcript?

A. Yes.

MR. KROEGER: Your Honor, if I could show the witness what has been marked for identification purposes as Florida Bar Exhibit A. Copies have been provided.

I'll be introducing this as the actual exhibit. This is a courtesy copy for the judge.

THE COURT: Okay. You may proceed.

BY MR. KROEGER:

Q. Ms. Cabrera, if you could, take a look at that document for me.

A. Sure. Yes.

Q. Does that appear to be an accurate copy of the transcription of Ms. Talisma's deposition?

A. Yes.

MR. KROEGER: At this time, Your Honor, the Florida Bar would seek to move

what has previously been marked as Florida Bar Exhibit A into evidence.

THE COURT: Any objection?

MR. KUEHNE: No objection, Judge.

THE COURT: It's admitted.

MR. KUEHNE: I presume that includes the exhibits that were attached to the deposition.

MR. KROEGER: It does, yes.

THE CLERK: Florida Bar Exhibit Number 1.

THE COURT: Any objection to the clerk following her standard numbering system for the exhibit list?

MR. KROEGER: No, Judge.

MR. KUEHNE: No, Judge.

BY MR. KROEGER:

Q. Now the title page reflects that this is a continuation of the deposition. Can you explain why this was a continuation?

A. I believe the deposition started about a year before. And from what I understood, the deposition was stopped because the victim did not feel well.

Q. Were you present at that initial

deposition?

A. No.

Q. Do you know if anyone from the State Attorney's Office was present?

A. I believe the prosecutor, Jessica Dobbins, she had handled the case previously.

Q. Can you tell us your recollection of how this deposition began?

A. Well, I remember basically we had an interpreter, a Creole interpreter. The victim, she spoke a little bit of English, but she felt more comfortable speaking in her native language. So that's why we were -- we made sure that there was an interpreter that was present.

So basically I just wanted to remind -- before we went on the record, I just wanted to remind the victim, like, just the process of letting everyone speak first, you know, when Mr. Schwartz would ask a question, to let the interpreter translate everything in Creole, then she could respond back in Creole, and then the interpreter would translate everything into English for the court reporter.

So I remember just going over some ground rules, and then we began the deposition.

Q. We talked a little bit about the fact that there was an out-of-court identification that resulted in Mr. Woodson being identified as the perpetrator.

Did you have an occasion when you took over this case to look at that identification?

A. Yes.

MR. KROEGER: Your Honor, I'm showing the witness what has been marked as Florida Bar Exhibit B for identification purposes.

Do you want to compare it with B?

MR. SCHWARTZ: Sure.

BY MR. KROEGER:

Q. Please take a moment to review that.

A. Okay.

Q. Do you recognize this document?

A. Yes.

Q. And does it appear to be a true and accurate copy of the photographic lineup that was produced by the state in discovery?

A. Yes.

Q. Do you know, from handling this case, how the original lineup was presented to the witness; for instance, in color or in black and white?

A. I wasn't sure.

Q. Had you ever seen a color version of the lineup in your handling of the case?

A. No.

Q. Had your predecessor, Ms. Dobbins, told you that there was a photographic lineup?

A. Well, I never --

Q. Excuse me, a color photographic lineup.

A. I believe when I took over her position, I don't think we went over this case together. I think I just reviewed it on my own.

Q. Did the file that you inherited, essentially the work product from the State Attorney's Office, do you recall if there were any notes in the file indicating that there had been a color lineup?

A. I don't recall. I don't remember.

Q. Did you have any involvement in the

initial disclosure of this lineup to Mr. Schwartz or to Mr. Woodson?

A. No.

MR. KROEGER: At this time, Your Honor, I seek to introduce what has been marked as Florida Bar Exhibit B into evidence as Exhibit 2.

THE COURT: Any objection?

MR. KUEHNE: No objection.

THE COURT: It's admitted.

THE CLERK: Florida Bar Exhibit 2 has been placed into evidence.

BY MR. KROEGER:

Q. Was there a time in the deposition that you recall seeing a photographic lineup?

A. During the -- yes.

Q. During the deposition.

Can you describe when that was and sort of the circumstances surrounding it?

A. Well, Mr. Schwartz basically, you know, he started off the deposition asking, you know, what had occurred, you know, I guess the interaction between the victim and the defendant's family members. And after that line of questioning, he asked the victim if

she recalled being presented with a photo lineup. And that's when he -- you know, he had a lineup in his hand.

I originally thought that was the state's lineup --

MR. KUEHNE: Objection; non-responsive.

THE COURT: Sustained.

BY MR. KROEGER:

Q. When you first saw the lineup in Mr. Schwartz's hands, what was happening in the deposition at that point?

THE COURT: Okay, can you give an exhibit number for that, rather than say "B"?

MR. KROEGER: Well --

THE COURT: Is it the one she's got?

MR. KROEGER: No.

Let me withdraw that question.

BY MR. KROEGER:

Q. What has been introduced as Florida Bar's Exhibit 2, was that particular photographic lineup ever utilized by Mr. Schwartz in the deposition?

A. No.

Q. You mentioned that you saw that he had -- I would like to show you what I've marked as Florida Bar Exhibit C.

A. Thank you.

Q. Do you recognize what I marked as the Florida Bar Exhibit C?

A. Yes.

Q. How do you recognize it?

A. This is one of the lineups that Mr. Schwartz presented to the victim on the day of the deposition.

Q. And this document that I presented to you, is that a true and accurate representation of the lineup utilized in the deposition?

A. Yes.

MR. KROEGER: Your Honor, I seek to introduce this as Florida Bar's Exhibit 3.

THE COURT: Any objection?

MR. KUEHNE: Judge, no objection, but I do want to note that the exhibit tab that shows Exhibit C blocks off the exhibit tab from the actual deposition of exhibit, so it's a little bit unclear.

So using the demonstratives, just to

show Your Honor, the exhibit tab by the Bar covers over the actual exhibit tab on the exhibit. So I want the court to be aware of that, if we can replace the exhibit tab, that would be a little bit better.

MR. KROEGER: I have no objection to trying to move the tab.

MR. KUEHNE: Thank you.

THE COURT: So the clerk -- did the clerk put those tabs on or did the Florida Bar?

MR. KROEGER: The Florida Bar pre-marked these exhibits for identification purposes.

THE CLERK: Exhibit Florida Bar Number 3 has been placed into evidence.

BY MR. KROEGER:

Q. Can you describe for us --

MR. SCHWARTZ: One second.

BY MR. KROEGER:

Q. Can you describe for us how that document came to be used in Mr. Schwartz's deposition?

A. Well, Mr. Schwartz asked Ms. Talisma

if -- if a photo lineup was ever presented to her by the detective, and she said yes. And then -- or he said "like this one." And she said yes. And then he proceeded to ask her, you know, please look at this lineup and let me know if you are able to identify the defendant in this lineup.

Q. Now, I would like to direct you to page 25 of the deposition.

A. Okay.

Q. If we could look at lines 8 through 11, which states:

"QUESTION: Was it like a piece of paper like my Exhibit Number 2 over here? Was it a piece of paper like that or was it on like a cardboard inside, like a boxed set?"

Q. Is that the question you are referring to in your previous answer?

A. Yes. Yes.

Q. And does the Exhibit Number 2 that is referenced in those lines of the deposition, correspond to the exhibit which is in front of you and has been introduced as the Florida Bar Exhibit Number 3?

A. Yes.
Q. Going on in the deposition, you appear to interrupt the deposition at line 25 on page 25.
A. Yes.
Q. And that continues on to lines 1 through 3 on page 26.
Why did you interrupt the deposition at that point?
A. Because the victim appeared -- she appeared confused.
MR. KUEHNE: Objection; foundation, move to strike.
THE COURT: Could you lay the predicate as to who was the one who stopped the deposition?
BY MR. KROEGER:
Q. Was there a time when the deposition was interrupted?
A. Yes.
Q. And can you point out and tell us when that occurred in this transcript in front of you?
A. On page 25, line 22.
Q. Is there other instances on page 25

where that interruption continues?

A. Yes. Basically I was the one that interrupted the deposition at that point.

Q. Why did you interrupt the deposition at that point?

A. Because the victim appeared confused.

MR. KUEHNE: Objection, move to strike.

THE COURT: Denied.

BY MR. KROEGER:

Q. Why do you believe that the victim appeared confused?

MR. KUEHNE: Objection; relative, speculative opinion.

THE COURT: Overruled.

THE WITNESS: I don't recall exactly why I thought, but I remember her just looking confused.

MR. KUEHNE: Objection, move to strike; foundation.

THE COURT: Denied.

BY MR. KROEGER:

Q. On page 26, beginning at line 1, you ask Ms. Talisma:

"QUESTION: When the detective showed

you the photo lineup, was it in color or was it in black and white?"

Q. Is that correct?

A. Yes.

Q. Why did you ask that question?

MR. KUEHNE: Objection, transcript speaks for itself.

THE COURT: Sustained. Well, he's not asking what the transcript shows, but --

MR. KROEGER: I'm asking the witness why she asked a particular question in the deposition.

MR. KUEHNE: And I would say, this is now relevance. It's getting into her speculation. I didn't realize that her intention was at issue in this case. But if the Bar is making her intention at issue in this case, I will appropriately cross-examine it.

MR. KROEGER: I don't know that I'm asking what her intention is. I'm asking why she asked a particular question.

Mr. Kuehne had previously commented on in his opening statement regarding the

supposed original identification being in color.

THE COURT: I'll overrule the objection. Go ahead, if you can remember the question.

Why did you ask about black and white versus color?

THE WITNESS: I don't remember why I asked that question, but I don't remember if there was ever -- if the photo lineup was ever in color or just black and white, but I know what was in the file was only a black and white lineup, in the state's file.

BY MR. KROEGER:

Q. Was there a time, continuing on in this deposition, when Mr. Schwartz showed or confronted Ms. Talisma with the photographic lineup, which has been introduced as the Florida Bar's Exhibit 3?

A. Yes.

MR. KUEHNE: Move to strike the word "confronted."

THE COURT: Denied.

THE WITNESS: Yes.

BY MR. KROEGER:

Q. Can you describe how that happened?

MR. KUEHNE: Objection, the transcript speaks for itself.

THE COURT: Overruled. Don't just repeat what the transcript says, but if you have anything to add to the transcript, you may proceed.

THE WITNESS: Yes. So as I stated earlier, I was sitting at my desk, and the victim and Mr. Schwartz, they were sitting next to each other, across from me.

When Mr. Schwartz proceeded to ask her about the exhibit, Florida Bar Exhibit 3, he first -- first, he did not hand it to me so that I could review it before he would show it to the victim, as is customarily done in depositions.

But he was kind of like -- he basically was showing it to her. And since I was across from them, I couldn't really see the lineup very well. So at some point, I asked him: Can you please show it to me?

He ignored my request, and I had to

literally get out of my chair and go reach across to take the exhibit out of his hand because he wouldn't hand it to me. That's when I realized something was off.

BY MR. KROEGER:

Q. And just so we are clear, we are still referring to what's been introduced as the Florida Bar Exhibit Number 3?

A. Yes.

Q. When you were able to actually view that document, that photographic lineup, what did you, if anything, observe on it?

A. Well, even before I had an opportunity to look at the exhibit, from my -- from what I could see, something -- it looked originally like the state's lineup, but something was off.

And when I finally had an opportunity to review it, I saw that it looked exactly like the state's lineup, but the photo number 5 was basically photoshopped, if you will, and there was someone else's photo on it. But everything else looked like -- it looked like the state's lineup, except for that.

Q. You are using the phrase, it sort of looked like the state's lineup. What are some of the things that, to you, made it look like the state's lineup?

A. Well, it was -- basically it has the date of the identification, which is May 11, 2013, it had the detective's name, his signature, and it had the witness's name, initials and signature and also her selection, which the state's lineup, she selected photo number 5. And it also had the same circle, she had circled photograph number 5.

So basically, at first glance, it appeared like it was the state's lineup.

Q. And had Mr. Schwartz said anything in the deposition, either on the record or off the record, disclosing to you that there was something different about this lineup than what the state had provided in its discovery response?

A. No.

MR. KUEHNE: Objection, misstates the transcript. Mr. Schwartz clearly describes it as "my exhibit," not a state attorney exhibit or police-prepared

exhibit.

THE COURT: Denied.

BY MR. KROEGER:

Q. Let's talk about that.

THE COURT: Or if that was an objection, overruled.

BY MR. KROEGER:

Q. Mr. Kuehne is referring to page 25 of the deposition, beginning at lines 8 through 11. We discussed this before. The words used by Mr. Schwartz, according to this transcript, are, beginning at line 8:

"QUESTION: Was it like a piece of paper, like my Exhibit Number 2 over here?"

Q. What was going on when he said those words, in terms of any gestures or any movements when he said "my Exhibit Number 2 over here"?

A. Well, he was already -- when asking the question, he was already showing her the exhibit. And, to me, you know, when I realized that this wasn't the actual state's lineup, it was misleading.

MR. KUEHNE: Objection, move to

strike.

THE COURT: Granted, as far as the witness's situation. But you may proceed, if you didn't finish your answer.

Do you want her to read back --

THE WITNESS: Sure.

(Thereupon, a portion of the record was read by the reporter.)

THE WITNESS: That's fine.

BY MR. KROEGER:

Q. Was there a time during the deposition when there was another photographic lineup presented to the witness?

A. Yes.

MR. KROEGER: Your Honor, if I may present the witness with what the Florida Bar has marked as Florida Bar Exhibit D for identification purposes.

THE COURT: You may show her.

It's for ID.

THE WITNESS: Thank you.

BY MR. KROEGER:

Q. Do you recognize that document?

A. Yes.

Q. Can you tell us how you recognize

that document?

A. This was one of the exhibits that Mr. Schwartz presented the victim with in the deposition.

Q. Is this a true and accurate copy of one of the lineups Mr. Schwartz used during Ms. Talisma's deposition?

A. Yes.

MR. KROEGER: At this point, the Bar would seek to admit what's been marked as the Florida Bar Exhibit D into evidence as Florida Bar's Exhibit 4.

MR. KUEHNE: No objection.

THE COURT: Any objection?

MR. KUEHNE: No objection.

THE COURT: It's admitted.

THE CLERK: Florida Bar Exhibit Number 4 has been placed into evidence.

THE COURT: I regret we didn't get the testimony started until late, but we have to break at lunch because Judge Cueto is bringing his boxes at noon, or thereafter. And it's a good time to take a lunch break.

So if you can possibly finish soon, your direct, so they can cross her, so she doesn't have to come back after lunch, that would be great.

MR. KROEGER: Understood, Your Honor.

THE COURT: But we will resume the trial in the other chambers.

MR. KROEGER: Yes, Your Honor.

BY MR. KROEGER:

Q. Can you tell us how what has been introduced as the Florida Bar's Exhibit 4 was introduced or used in the underlying deposition?

A. Well, after he -- after Mr. Schwartz, I guess, showed the victim Florida Bar Exhibit 3, he then proceeded to show the victim Florida Bar Exhibit 4 --

Q. Did he show --

A. -- right after.

Q. -- you a copy of that before it was shown to the witness?

A. No.

Q. How were you able to have a chance to look at the document?

A. Well, I had asked him for it and he

didn't hand it to me, so I had to literally take it out of his hand.

Q. Did you make any objections at this point?

A. When I realized that these lineups were basically photoshopped, I objected, and I stopped the deposition so I could review it.

Q. And what was the basis for your objection?

A. Well, I thought that these lineups were very misleading.

MR. KUEHNE: Objection, the transcript speaks for itself. The transcript reflects the objection. She is being now asked to give her mental impressions of what she was thinking, but she did not articulate it at the deposition.

THE COURT: Sustained.

BY MR. KROEGER:

Q. What was different about this particular lineup, what's been introduced as the Florida Bar Exhibit 4, versus the Florida Bar Exhibit 3 and the lineup produced by the state?

A. Well, as you can see, with Florida Bar Exhibit 2, this is photo number 5, that's Virgil Woodson. You compare that to Florida Bar Exhibit 3, the photograph contained within the circle, Mr. Schwartz basically put someone else's photo on it and referred to him as Fritz. That's another man.

And then in Florida Bar Exhibit 4, it's the same person that Mr. Schwartz put in Florida Bar Exhibit 3, Fritz, but he also added Mr. Woodson's hair. So he basically manipulated the photo to have the defendant's hair, but someone else's face on it.

MR. KUEHNE: Objection, move to strike; speculation. That's not what the evidence reflects.

THE COURT: Overruled.

BY MR. KROEGER:

Q. Was there another photographic lineup that Mr. Schwartz attempted to introduce during the underlying deposition?

A. I believe he had another lineup -- yes, he had another lineup.

Q. I believe that was Exhibit 4 to the deposition; does that sound correct?

A. Yes.

Q. And can you describe how that lineup is different than Mr. Schwartz's Exhibits 2 and 3 or the Florida Bar's Exhibits 3 and 4?

A. Well, at the bottom of Exhibit 4 of the deposition transcript, there is nothing filled out. The victim's signature is not there, the detective's signature, nothing is circled. So that's the difference.

Q. Did you attempt to make any cross-examination of Ms. Talisma during the deposition?

A. Well, after Mr. Schwartz stopped -- or finished his direct examination, he immediately got up and left. So I basically said on the record that he left without me being able to do my cross-examination.

Q. Now, subsequent to this deposition, you filed a motion for sanctions in the circuit court before Judge Block; correct?

A. Yes.

Q. Did you speak with anyone in your office regarding the contents of that motion or the relief it was seeking before you filed it?

A. Yes.

Q. That motion was ultimately withdrawn by you; correct?

A. Yes.

Q. Why was that motion withdrawn?

A. Well, because the defendant accepted a plea offer, so basically after this deposition -- actually, during the deposition, I stopped the deposition a couple of times because I was looking for my supervisor to basically let my supervisor know what was happening in the deposition. I couldn't find her.

And then after the deposition was over, you know, I spoke to my supervisor about it. They basically told me --

MR. KUEHNE: Objection.

THE COURT: Sustained.

BY MR. KROEGER:

Q. Did you have the approval of supervisors to file the motion for sanctions?

MR. KUEHNE: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, they -- yes.

BY MR. KROEGER:

Q. And circling back to my other question, why did you ultimately withdraw the motion for sanctions?

A. Because the defendant accepted a plea offer on the case, and, you know, my supervisor basically said that we will address what had occurred in the deposition by filing a complaint, a Bar complaint.

Q. When you filed the motion for sanctions, did you do it in open court?

A. When I -- yes, I did it in open court.

Q. Did you ever, at the time, say anything to the effect of -- to any your colleagues -- like "we've got him now" or any sort of language indicating that you were happy to be able to file this motion for sanctions?

A. Not at all.

Q. Do you recall who of your colleagues were in the courtroom that day?

A. I don't recall exactly. Typically -- we had to go to court every morning, so usually my division chief would be there,

Eileen Keeley, and then the other division prosecutors. But at the time, I don't recall who was exactly in the courtroom.

THE COURT: What date would this have been around? A date, if you know.

THE WITNESS: I filed -- so I filed it March 13th.

THE COURT: Of?

THE WITNESS: 2015.

THE COURT: The Ides of March.

BY MR. KROEGER:

Q. What did the criminal case ultimately resolve to?

A. Well, basically I got approval -- I always have to get plea approval from my supervisors. And we ended up offering the defendant a youthful offender plea offer, which means that he would do boot camp and do a number of conditions, such as getting his GED, community service hours. But it was like a jail plea mitigated to boot camp.

Q. Do you recall what any previous offers would have been that were outstanding?

A. I don't remember off the top of my head right now.

Q. Boot camp seems like a pretty generous plea offer for the nature of this type of offense. Why was that the ultimate resolution?

MR. KUEHNE: Objection.

THE COURT: Sustained.

But can we -- can you possibly finish your direct?

MR. KROEGER: I'm trying, Your Honor, but, respectfully, would hate to be deprived of the ability to put everything in evidence.

THE COURT: Okay. Well, it looks like we are going to have to call you back after lunch.

THE WITNESS: That's fine.

MR. KROEGER: I will try, Your Honor.

THE COURT: Keep going.

BY MR. KROEGER:

Q. Was that plea offer by the state because of substantial evidence that Mr. Woodson had been misidentified?

A. No. Like, it was a combination of considerations. One, we -- you know, we didn't want to basically punish the defendant

for his lawyer's actions; and two, the victim, she was already tired of coming to the office several times. She had basically expressed to me that she, you know, couldn't keep on missing work, so that was a very big consideration.

Q. You mentioned earlier that you left the State Attorney's Office in, I believe, it was June of 2015?

A. July of 2015.

Q. Excuse me, July of 2015.

Before you left, did you happen to file a grievance with the Florida Bar regarding this deposition?

A. Yes.

MR. KROEGER: Your Honor, I'm going to show the witness what has been marked for identification purposes as Florida Bar Exhibit E.

THE COURT: You may.

BY MR. KROEGER:

Q. Do you recognize that document and the attachments to it?

A. Yes.

Q. If you could turn to the signature

page on the cover letter, whose signatures appear on that page?

A. Penny Brill, she was the chief of the legal division, and myself.

Q. Did you consult with Ms. Brill before filing this initial grievance?

A. Yes.

Q. And did Ms. Brill give, essentially, the go-ahead to proceed with it?

MR. KUEHNE: Objection.

THE COURT: She signed it. It speaks for itself.

MR. KUEHNE: Very well.

THE COURT: The cover letter.

MR. KROEGER: At this time, the Florida Bar would seek to move what has been marked for identification purposes as the Florida Bar Exhibit E into evidence.

MR. KUEHNE: No objection, Your Honor, to the exhibit being introduced as being the complaint, but object to the contents of the exhibit. So I agree that it's the Florida Bar's complaint --

THE COURT: Right.

MR. KUEHNE: -- but I do not concede

by agreeing to the exhibit that any of the contents are true or accurate or convey any accurate facts.

THE COURT: All right. Subject to further objection to its admissibility in total, I'll admit it at this point as the Florida Bar's Exhibit 5.

THE CLERK: 5 has been placed into evidence.

BY MR. KROEGER:

Q. And do you recall a time when you wrote another letter or made another submission to the Florida Bar?

A. Yes.

Q. And do you remember approximately when that was?

A. I don't recall the date, but it was a reply to Mr. Kuehne's response.

Q. I'm showing you what I've marked for identification purposes as the Florida Bar's Exhibit E.

MR. KUEHNE: What number is that?

MR. KROEGER: Excuse me, Florida Bar Exhibit F.

BY MR. KROEGER:

Q. Do you recognize that document?

A. Yes.

Q. Can you tell us who signed that document?

A. Fleur Lobree and myself.

Q. Had you discussed the contents of that letter with Ms. Lobree before you submitted it?

A. Yes.

Q. Who is Ms. Lobree?

A. Well, she was basically in the legal department at the time, and she was a former judge.

MR. KROEGER: At this point, the Florida Bar would seek to introduce what I marked as the Florida Bar Exhibit F into evidence.

MR. KUEHNE: Same position, Your Honor. I do not object to the document itself as being a document submitted to the Florida Bar, but I contest its factual allegations and assertions.

THE COURT: Subject to further objections, it's admitted.

THE CLERK: Florida Bar Exhibit Number 6 has been placed into evidence.

BY MR. KROEGER:

Q. As you sit here today, do you have any animus towards Mr. Schwartz?

A. Not at all. I'm just here as a witness. I basically felt like I had a duty to report what happened in deposition, and this is how the State Attorney's Office wanted to handle it.

MR. KUEHNE: Objection, move to strike. It wasn't the State Attorney that wanted to handle it. The witness is the complainant.

MR. KROEGER: Your Honor, if we could, perhaps, the nature of the speaking objections.

THE COURT: Yes.

So I'll sustain the objection as to the fact that Ms. Rundle didn't personally sign a cover letter like Ms. Brill, but I will admit this into evidence or -- oh, we already did that.

MR. KROEGER: My question had been whether Ms. Cabrera had any personal

animus towards Mr. Schwartz.

THE WITNESS: Not at all.

BY MR. KROEGER:

Q. Is there any particular discipline -- strike that.

THE COURT: So I believe I should deny your motion -- or grant it in part.

MR. KUEHNE: I think you granted it in part.

THE COURT: Okay, I'll grant it in part.

BY MR. KROEGER:

Q. Do you even care if Mr. Schwartz ends up being disciplined as a result of these proceedings?

A. No. I just felt I had a duty to report and that's it. I'm a witness here today. I'm just cooperating.

MR. KROEGER: The Florida Bar has no further questions at this point.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. KUEHNE:

Q. Good morning, Ms. Cabrera. I'm Ben Kuehne. I met you during your deposition not

that long ago in this case; right?

A. Yes.

Q. Now, you left the State Attorney's Office in early July of 2015?

A. Yes.

Q. And it was two and a half months or so after the Woodson case was resolved?

A. Well, almost four months. It was resolved in March, end of March, so April -- yeah.

Q. So it was resolved March 25th?

A. About three months.

Q. And after the Woodson -- you do agree that the Woodson case involved a defense claim of misidentification?

A. Yes.

Q. You understood that to be the defense?

A. Yes.

Q. You understood that from your inheriting the case from Ms. Dobbins?

A. I don't understand the question.

Q. You took depositions, at least one deposition, of a defense-identified witness who offered misidentification facts; isn't

that correct?

A. I believe she was an alibi witness.

Q. Okay. And you also looked at the transcripts of two other depositions taken by Ms. Dobbins of two different defense-furnished witnesses that offered testimony about Mr. Woodson not being the perpetrator?

A. Yes.

Q. After the Woodson case was resolved, you were involved in a prosecution of a Miguel Bustos, who served 48 days in jail, and was actually the wrong guy?

MR. SCHWARTZ: Bustos is the right guy.

MR. KROEGER: Objection; relevance, objection, compound.

THE COURT: Wait. Mr. Kuehne, are you going to take your client's correction?

MR. KUEHNE: I'll rephrase the question.

BY MR. KUEHNE:

Q. You, soon after the resolution of the Woodson case, were involved in a case where you prosecuted a man named Macias --

MR. KROEGER: Objection; relevance.
BY MR. KUEHNE:
Q. -- for a crime he did not commit; isn't that correct?
THE WITNESS: He objected.
MR. KROEGER: Objection; relevance.
THE COURT: Overruled.
THE WITNESS: I handled part of the investigation of that case.
BY MR. KUEHNE:
Q. You were the prosecutor on a state case against Mr. Macias, charging him with rape; weren't you?
A. Yeah, I was the prosecutor assigned to that case.
Q. And Mr. Macias was represented by a different defense lawyer, not Mr. Schwartz, but a defense lawyer named Mr. Eiglarsh?
A. At some point, yes, but before the public defender was appointed to the case.
Q. And Mr. Macias spent 48 days in jail until a supervisor at the State Attorney's Office not only dismissed the case, but asked the judge to seal immediately the case because Mr. Macias was not the perpetrator?

MR. KROEGER: Objection; compound question, hearsay, calls for facts not in evidence and speculation.

THE COURT: If you know, you can answer.

THE WITNESS: Basically I -- so I'm going to object to his question, just based on work-product privilege. I don't know what the status of the Miguel Bustos case is. And, you know -- but basically, we -- so at the time that I investigated that case, I spoke to my supervisor about it and we filed an information.

Then after the filing of the information, some new information arose and we took that action together.

BY MR. KUEHNE:

Q. You signed the information in the case against Mr. Macias, charging him with rape or a sexual battery; correct?

A. I did.

Q. And it turned out you brought charges against the wrong man; isn't that correct?

A. Well at the time that I filed the information, the investigation that had come

about basically gave us enough to file charges, but we found additional information after the fact, which made -- which, obviously, made us decide to dismiss the case.

Q. Let me make sure that you understand my question, Ms. Cabrera. I'm asking about you. You signed the information; correct?

MR. KROEGER: Objection; asked and answered.

THE COURT: Sustained.

BY MR. KUEHNE:

Q. You signed the information based on your decision, and actually referenced it, that you had cause to believe Mr. Macias committed the charge -- are you looking at the Florida Bar to make an objection? Is that why you were making hand signals to the Florida Bar lawyer?

A. Well, I answered your question, so --

THE COURT: Not yet.

THE WITNESS: I previously --

THE COURT: For the record, there was a glance over to the Florida Bar and a lifting of a hand. Whether it was meant to signal, that's another story.

MR. KROEGER: I'm going to object, again, based on relevance in keeping with my motion in limine.

THE COURT: You mean object for the first time to --

MR. KROEGER: The relevance --

THE COURT: -- this particular question? I don't think you responded to her hand; did you?

MR. KROEGER: I didn't.

THE COURT: Isn't that true?

MR. KUEHNE: Your Honor, I was thinking of my next question. I apologize.

THE COURT: Could you read back from the question?

(Thereupon, a portion of the record was read by the reporter.)

THE COURT: So I suppose at this point I should just instruct the witness -- I have no problem if you would like to object, since you are a lawyer, to the question on any grounds.

THE WITNESS: Okay.

THE COURT: And then don't say

anything. Unless he joins in, I'll probably will just wait for you to continue.

THE WITNESS: Okay.

MR. KROEGER: Just for the record, is the Bar allowed to make its objection based on relevance, as discussed in the motion in limine to the question?

THE COURT: I think now is the time to read back how we ended this. She clarified that the record was made first by Mr. Kuehne. I put in what I perceived -- I noted that you never objected to pursuant to her looking at you.

And I think we can proceed on, but for her benefit, since we've talked so much about this, I think we need to read back Mr. Kuehne's last question, and then you can answer, as I told you you may.

But in the future, don't look to him, or give Mr. Kuehne a chance to make a record of this kind of non-verbal response.

(Thereupon, a portion of the record was read by the reporter.)

THE WITNESS: I signed the information.

BY MR. KUEHNE:

Q. That charge that you brought against Mr. Macias was based on the victim of a crime having purportedly identified Mr. Macias from are Facebook photo; isn't that correct?

A. Yes, but there were other witnesses that also identified him.

Q. And you interviewed those other witnesses?

A. Yes.

Q. So in that case, you actually did a pre-filing of the actual witnesses?

A. Yes. From what I recall, yes.

Q. And you determined that Mr. Macias was not the culprit, not the suspect?

MR. KROEGER: Objection; asked and answered.

THE COURT: Overruled.

THE WITNESS: At what point?

BY MR. KUEHNE:

Q. Did you make the determination that Mr. Macias was not the culprit?

A. Myself and my supervisor.

Q. It is Ms. Hogue who made that decision?

A. It was all three of us. We handled the case together.

THE COURT: Could you name the third person; Ms. Hogue, you and the third person?

THE WITNESS: Eileen Keeley, who was the division chief.

BY MR. KUEHNE:

Q. And the defense lawyer had told you for a significant amount of the 40-plus days that Mr. Macias was in jail that you had the wrong defendant?

A. No. The public defender was appointed to the case. Prior to, I guess, the arraignment, I did my investigation. And after the information had been filed, based on our investigation and, you know, three witnesses identifying this defendant, then Mr. Eiglarsh went on the case, I don't remember exactly when, and he basically brought up for the first time all these witness -- these defense witnesses. And that's when we brought them in.

But we were able to get the DNA back a lot quicker than usually is done in any of these cases. Most of the time, the DNA takes a year and a half, two years, before we get it back. But in this case, we were able to get it quicker. And when we got confirmation that it wasn't him, and two other witnesses lied, that's when we dropped the case. And the correct defendant was arrested.

Q. You received from Mr. Eiglarsh text messages demonstrating Mr. Macias's alibi, that he could not have been where he was when the crime took place?

MR. KROEGER: Your Honor, just for the record, can I note a standing objection to questioning regarding the Macias case, based upon my motion in limine, that it doesn't have relevance to the guilt.

THE COURT: Yes. I'll note it, although I've heard -- I haven't read it, but there is a new case that you can't have standing objections.

Have you heard of this?

MR. KUEHNE: No. A 3rd?

THE COURT: I don't know.

MR. KUEHNE: I have to look.

THE COURT: Somebody argued it, but that doesn't mean it's true, but to the extent it's the law, I'll grant the standing objection.

MR. KUEHNE: I'm going to mark these two exhibits.

BY MR. KUEHNE:

Q. While I mark two exhibits, you tendered your resignation about two weeks before your conclusion of employment; is that about right?

A. Yes.

Q. And your last day was July 9, 2015?

A. Yes.

Q. And the Macias case was resolved at the end of April 2015?

A. Approximately, I believe. I don't recall the exact date.

Q. Now, you had worked in the State Attorney's Office up to the February 13, 2015 continuation of Talisma's deposition for multiple years. You had been there multiple years?

A. Yes.
Q. Worked your way up to an A prosecutor?
A. Yes.
Q. Attended numerous depositions?
A. Yes.
Q. By the way, is it normal for you, as you did in this deposition (sic), to signal people by hand, so it would not be reflected on the deposition transcript?
THE COURT: I think you misspoke. Didn't you mean in this hearing?
MR. KUEHNE: I'm sorry. I'll rephrase.
BY MR. KUEHNE:
Q. Is it normal for you in your practice as a prosecutor to use hand signals, like you did in this hearing, so that you could communicate without it appearing on the record?
A. It's a case-by-case basis.
Q. You use hand signals on a case-by-case basis?
A. I don't know what you are getting at.
THE COURT: Okay. What you are

saying may be --

THE CLERK: Exhibit A and B are in evidence.

MR. KUEHNE: Your Honor, this has relevance to our case, and I mentioned it in my opening.

THE COURT: Okay.

All right. Go ahead.

BY MR. KUEHNE:

Q. So when you made hand signals to the Bar lawyer when I posed a question to you during this hearing, you intended that that hand signal not be made part of the record because the court reporter could not get down your non-verbal communication; didn't you?

A. No.

Q. Take a look at Schwartz Exhibit A and Exhibit B. These are two newspaper articles about the Macias case. And tell me if looking at these newspaper articles refreshes your recollection as to the end of April 2015 being the time of the exoneration and resolution of Mr. Macias?

A. It doesn't state the exact date that the charges were dropped, but it was near the

end of April.

Q. You know that that case, the Macias case, got extensive publicity?

A. I mean, Mr. Eiglarsh, I guess, got the media involved.

Q. You saw publicity about this case; didn't you?

A. Yes.

Q. And these are among two of the many articles, media articles about this case; aren't they?

A. I don't know how many articles were written in this case.

THE COURT: About the Macias case?

MR. KUEHNE: Yes, the Macias case.

THE WITNESS: I can't tell you how many articles were written.

BY MR. KUEHNE:

Q. But those are two of the articles written about the Macias case at the time of the closing out of the case; aren't they?

A. Yes, they are two articles.

Q. And you read those and other articles as the case was getting media attention?

A. I remember seeing Schwartz Exhibit A,

that article.

Q. But you don't remember seeing Schwartz Exhibit B?

A. I don't recall if I saw that one, but I remember Schwartz Exhibit A.

Q. Now, I'll take these back.

You mentioned with the exoneration with Mr. Macias, another person was charged with that crime?

A. Yes.

Q. That was Mr. Bustos?

A. Yes.

Q. Did you prosecute the Bustos case?

A. No, I had left shortly thereafter.

Q. So the case involving that victim of that case against Mr. Bustos was prosecuted by somebody else in the office?

A. Yes.

Q. You do agree that Exhibit 1, the transcript of the Gerdie Talisma February 13, 2015 hearing is a complete transcript of every word spoken in that deposition; don't you?

A. No.

Q. Oh, there are parts on the transcript that don't appear -- parts that occurred in

the deposition that don't appear on the deposition?

A. I do not believe so. Because we were having issues with --

THE COURT: The judge is here. We have to quickly move.

(Thereupon, a brief recess was taken.)

THE COURT: Let's be in recess.

MR. KUEHNE: I just had one last question about Macias, and then I was moving on to the transcript of this case. So I can start up -- are we going to break now or continue?

THE COURT: Well, do you want to finish?

MR. KUEHNE: Okay, with my last Macias question.

BY MR. KUEHNE:

Q. Bustos, the person charged after the Macias case was dropped, was arrested and charged while you were in the State Attorney's Office?

A. I believe so.

MR. KUEHNE: Nothing further on that

subject, Judge.

THE COURT: All right, we will start over -- we will continue with cross, and I believe we start at -- is this scheduled to be a 2:00 start in the afternoon or did we tell you?

MR. KUEHNE: You did not say.

THE COURT: Did I discuss a schedule?

MR. KUEHNE: No, you just said we start at 9:00.

THE COURT: Any objection to a two-hour lunch break?

MR. SCHWARTZ: We just want to get it done, but --

MR. KUEHNE: Whatever the court wants to do. If the court wants to take less of a lunch break, that's fine with is. If two hours is what you want to do, that's fine.

THE COURT: Okay. I'm going to be democratic today and ask: Who wants an hour for lunch and who wants a two-hour lunch break? Those are the choices.

MR. KUEHNE: I'll say an hour.

MR. KROEGER: Hour.

THE COURT: Okay. We will be in recess until 1:05.

(Thereupon, a lunch break was taken from 12:01 p.m. to 1:03 p.m.)

*** Proceedings continued in Volume II ***

Filing # 75831763 E-Filed 08/01/2018 02:33:56 PM

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

SUPREME COURT CASE NO.: SC17-1391
THE FLORIDA BAR FILE NO.: 2016-70,106(11J)

THE FLORIDA BAR,

Complainant,

vs.

JONATHAN STEPHEN SCHWARTZ,

Respondent.
_____/

Lawson E. Thomas Courthouse
175 Northwest 1st Avenue
Miami, Florida 33128
Wednesday, April 4, 2018
9:04 a.m. - 4:37 p.m.

VOLUME II

Hearing in above-styled cause taken before the Honorable Celeste H. Muir, Judge of the above-styled court, reported by Rinele Abramson, Shorthand Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice filed in the above cause.

CERTIFIED COPY

(Proceedings continued from Volume I.)

THE COURT: You are still under oath.

And you may proceed, Mr. Kuehne.

CONTINUED DIRECT EXAMINATION

BY MR. KUEHNE:

Q. When you took over the Woodson case, your predecessor had done some work on the case?

A. Yes.

Q. And who was that?

A. Jessica Dobbins.

Q. That included taking some depositions?

A. Yes.

Q. And as far as you know, or having looked at the docket sheet, Mr. Schwartz and his law firm was the primary lawyer for representation of Woodson?

A. From what I recall, yes.

Q. So you know that Mr. Schwartz attended or somebody from his office attended the earlier depositions taken by your predecessor?

A. I would say -- I can't confirm. Most

likely, yes.

Q. Because you don't have any recollection of those transcripts?

A. I know depositions did occur, but I don't know who specifically from Mr. Schwartz's office appeared for the deposition.

Q. But you are confident that you did not speak with the arresting officer?

You did not speak with the arresting officer?

A. At what point?

Q. Well, when did you speak to the arresting officer?

A. I don't recall speaking to the arresting officer.

Q. Okay. So you didn't do the pre-filing in this case; that was done by either Ms. Dobson (sic) or somebody else?

A. Dobbins.

Q. And you did not do the original discovery package?

A. No.

Q. So you were not part of the discovery package that included the -- included a letter

that had been mailed to Ms. Talisma from the mother of Fritz returning the car keys?

A. Well, we didn't know where the letter -- who the letter was from, like who wrote the letter.

Q. Well, the letter -- you are aware that the letter that purports to be from Fritz's mother returning the car keys was mailed through the U.S. mail?

A. I'm not sure if that letter was from Fritz mother, like what you are claiming.

Q. Let me try to break it down.

The letter we're talking about was mailed through the U.S. mail; wasn't it?

A. I believe so.

Q. And it ultimately became a part of the State Attorney's file?

A. The letter, yes.

Q. And the letter had an envelope that had a return address on it; didn't it?

A. I believe so.

Q. And the return address had a name and an address?

A. You would have to show me the envelope to -- but I don't recall what was

exactly the document.

MR. SCHWARTZ: This is the envelope.

MR. KUEHNE: I know.

BY MR. KUEHNE:

Q. And you, not a predecessor, you made no effort to determine whether the name on the envelope was the mother of Fritz?

A. I did not know who that person was.

Q. Well, let's look --

THE COURT: Yes or no? You made no effort to -- and your -- you need to answer that yes or no, and then you can explain.

THE WITNESS: No, but at that point of the case, I don't recall, like, looking up the person's name that was on the envelope.

BY MR. KUEHNE:

Q. Florida Bar Exhibit 1, a document that you identified as being Ms. Talisma's transcript, it has the letter and the envelope attached as an exhibit to the deposition transcript; doesn't it?

A. May I please see the --

Q. Doesn't it?

A. I see that --

THE COURT: Okay.

BY MR. KUEHNE:

Q. So take a look at it.

A. Okay.

Q. You see that there is attached to the Talisma's deposition transcript -- by the way, this letter and mailed envelope was shown to Ms. Talisma during the deposition by the defense counsel; wasn't it?

A. Yes.

Q. And it shows a name and an address in North Miami, Florida?

A. Yes. The return address, yes, from a Nancy Baptiste.

Q. And your testimony is that you didn't know that Nancy Baptiste was the mother of Fritz?

A. I don't recall. I don't recall that person being the mother of Fritz.

Q. What effort did you make to investigate who Nancy Baptiste with an actual address in North Miami was?

MR. KROEGER: I'm going on object based on relevance.

THE COURT: Overruled.

THE WITNESS: I don't recall what I did in that regard.

BY MR. KUEHNE:

Q. Isn't the answer really that you did nothing to investigate whether this letter was legitimately from Fritz's mother?

A. No. Ms. Talisma stated that -- as she stated in the deposition, Fritz's -- I'm sorry, Mr. Woodson's family member basically was trying to -- wanted to send her her keys back, so it could have been from this person, Nancy Baptiste, it could have been from someone else. Anyone could have written that. I don't know who this Nancy Baptiste is. I don't recall.

Q. Exhibit 1, the transcripts of Ms. Talisma, says that Ms. Talisma claimed that Mr. Woodson's mother attempted to send the keys back to her? Is that your testimony?

A. What Ms. Talisma testified in her deposition is that she was approached by a family member of Mr. Woodson who was on the phone with Mr. Woodson's mother and said that she had found her car keys and some money in

her house where Mr. Woodson resides, and she was trying to apologize for what had happened with the robbery, and she wanted to return the keys to her.

Q. And that's in the transcript?

A. Yes.

Q. And you made no effort to determine if the letter from Nancy Baptiste mailed to Ms. Talisma was, in fact, the letter from Fritz's mother?

A. I don't recall.

Q. You were aware as of February 13, 2015, that Mr. Schwartz, the defense team, had reason to believe Fritz committed the charged crime; weren't you?

A. That's what he was claiming.

Q. And he wasn't just claiming that alone. Other witnesses, including one you had deposed, made that very claim to you?

A. But her story did not match up.

Q. You say that, but who was this person whose story did not match up?

A. I don't remember her name. I know that she was one of the defense witnesses.

Q. You know her to have been the

girlfriend of Fritz?

THE COURT: Yes or no?

THE WITNESS: I know that --

THE COURT: You know her to be the girlfriend?

THE WITNESS: I don't recall. I just know that I did interview a defense witness.

BY MR. KUEHNE:

Q. You deposed under oath with a court reporter and a defense lawyer present this defense witness; correct?

A. I would have to look at the transcript to refresh my recollection, but I don't recall.

Q. You don't know?

A. I don't remember who exactly -- what was the relationship of the defense witness to Fritz. I don't recall that.

Q. But what you do remember is her story didn't match up?

A. (Nodding.)

Q. Well, tell us about that the story that you claim didn't match up, of a defense witness who the defense lawyer had listed

because of a misidentification case.

A. I would need to read the transcript.

Q. So conveniently, you know that it didn't match up. You can't tell us what didn't match up; is that right?

A. I don't recall because this happened three years ago and I have not reviewed -- I haven't reviewed the file since then. I don't -- I would need to read the transcript to remember and to refresh my recollection.

Q. But you did testify on direct that the time line didn't match; you knew that?

A. It didn't match up. I didn't find the -- her testimony to be credible.

Q. The fact is, you blew off the defense position that you got the wrong guy with no investigation whatsoever; isn't that true?

A. No. What I was trying to accomplish at this point was to finish the deposition of the victim. That's all I was trying to do at this point on February 13, 2015.

Q. So before February 13th, the deposition that you took, that defense witness actually testified under oath that Fritz confessed to having committed this carjacking

robbery?

MR. KROEGER: Objection, facts not in evidence.

BY MR. KUEHNE:

Q. Isn't that correct?

A. I don't recall. I would need to review the transcript.

Q. Okay. You do remember the facts of the crime?

A. General summary, like summary of the facts of the crime.

Q. Ms. Talisma was accosted at night in a dark place by somebody wearing a hood who had a gun, took her car keys and stole her car?

A. Well, I mean, I remember the defendant did take her keys. I don't know if he drove away with the car or just took her keys and fled. I don't recall. I would have to look at the case file again. I haven't seen it in several years.

Q. And her phone was stolen?

A. I believe so.

Q. You testified that you don't know how many lineups were shown to Ms. Talisma?

A. When?

Q. Whenever. Counsel -- Mr. Schwartz's lineups. How many lineups were shown?

A. Could you be more specific with your question?

Q. Do you not understand my question?

A. I do not understand your question.

Q. How many police lineups were shown to Ms. Talisma?

A. I want to say definitely one. There may have been a second lineup shown -- a police lineup shown by the police.

Q. Did you even read the transcript that's Exhibit 1 in preparation for today's trial?

A. Yes, I did read it.

Q. So you know that Ms. Talisma, under oath with you there, testified to two different lineups at two different times; don't you?

A. I would have to review the transcript again.

Q. And this deposition took place in your office. Compare your office to the size of the presiding judge's chambers.

A. It's probably a third of this office.
Q. You were all situated around your desk in your office at the State Attorney's Office?
A. During the deposition?
Q. During the deposition.
A. Yes.
Q. There is no conference table that abuts the desk like there is in the presiding judge's chambers, that we are in today?
A. No, I just had my desk and chairs.
Q. And give us the relative size of your State Attorney desk and the presiding judge's desk?
A. It was definitely much smaller.
Q. Much smaller.
And how many people were gathered around your desk?
A. I think six total.
Q. Let's count: Christina Cabrera, one; intern, two; witness, three; court reporter, four; court interpreter, five; Jonathan Schwartz, six; Jodi Baker-McGuire, seven.
Fair?
A. Yeah.

Q. Seven people were seated, seated on chairs around your desk?
A. Yes.
Q. And that means that some were on the side facing you?
A. Yes.
Q. Some were sort of angled on the side?
A. Yes.
Q. And one was actually sitting on your side?
A. Yes, the intern.
Q. That was your intern?
A. (Nodding.)
Q. And by the way, how wide is your desk? Is it as wide as the presiding judge's desk?
THE COURT: From here to --
BY MR. KUEHNE:
Q. From where the person would sit at the desk to the opposite side.
A. I would say, more or less.
Q. About the same.
And by the way, was your desk cleared so that Mr. Schwartz and Ms. Baker could write on the surface of the desk using their tablets

or pads?

A. I always had my desk very organized, so I know I had the file, but probably some chocolates in a tray.

Q. So, plainly, Mr. Schwartz is seated at the desk, the opposite side of the desk. He's taking notes?

A. He's a few feet away from the desk.

Q. Oh, he is actually a few feet away from the desk, like I am now?

A. Yeah.

Q. Far away? He's not leaning on the desk, writing notes?

A. I don't recall him leaning on the desk, writing notes.

Q. So he is seated away. And by the way, where was the wall, then, if he's seated a few feet away from your desk?

A. Right behind him. The seats were against the wall.

Q. So he's leaning against the wall?

A. Not leaning, but the chair was positioned at the wall.

Q. Was the witness also seated several feet away from the desk?

A. Well, I mean, I would say 2 feet away.

Q. So your recollection is that nobody was actually at the side of the desk, as in using the surface of the desk?

A. No. They were not using the surface of the desk. Only I was.

Q. Only you.

A. No.

Q. How about the court reporter? Where did the court reporter stack up the exhibits?

A. What do you mean?

Q. How many exhibits were there at this deposition?

A. There were, I believe, five or six.

Q. And did the court reporter maintain custody of those exhibits?

A. Yeah, when the deposition was over. Yeah.

Q. How about during the deposition?

A. Mr. Schwartz had the exhibits.

Q. He kept the exhibits?

A. He had them.

Q. On his --

A. Lap.

Q. -- lap, 2 feet away from the side of your desk?

A. Approximately, yes.

Q. Did he have anything else on his lap?

A. I don't remember.

Q. Okay. And he was definitely not taking notes?

A. I don't remember him taking notes.

Q. Okay. So when we had broken, I was asking you about the Talisma deposition and you -- did you say anything at the deposition that did not get reported by the court reporter?

A. You mean during the breaks?

Q. Did you say anything during the deposition that did not get reported by the court reporter?

A. Did I say anything in the deposition? We took a few breaks during the deposition, but that was off the record. And then -- but when we were on the record, you know, I would hope that the court reporter was writing everything down that I was saying.

Q. You read the deposition. Did the court reporter write down everything?

A. From what I said, yes, I believe so.
Q. You filled out no errata sheet; right?
A. I did not fill out an errata sheet.
Q. And you made no corrections?
A. No, I did not.
Q. There was a break that you called during the deposition where you had two of the defense function lineups and questioned Mr. Schwartz about them.
A. Yes.
Q. And Mr. Schwartz told you who was pictured on those defense function lineups; didn't he?
A. Are you referring to, I guess, Exhibits 2 and 3 in the deposition transcript?
Q. Let me have you look at Florida Bar Exhibits 2 and 3 marked here.

Are those the two exhibits, photo lineups, that you had in your hand when you questioned Mr. Schwartz about them during an off-the-record discussion?

A. Well, Florida Bar Exhibit 2, that's the state's lineup.
Q. Okay.

A. And then the ones that I questioned -- this is one of the two lineups that I questioned Mr. Schwartz about.

Q. Okay.

A. I'm referring to Florida Bar Exhibit 3.

Q. So is it Florida Bar Exhibit 4 that you had?

A. Yes. So Florida Bar Exhibit 3 and Exhibit 4 were the ones that were -- that Mr. Schwartz created, and that's what I was questioning him about. I was asking him where he got these lineups and --

Q. So this is your off-the-record discussion, and Mr. Schwartz tells you that Fritz's picture is the one he put on those lineups?

A. No. I recall him telling me he didn't have to tell me where he got these lineups and why he has these lineups.

Q. That's your testimony?

A. Yes.

Q. That you had a break, you asked him about the lineups, and Mr. Schwartz refused to say anything about the lineups?

A. He said that he didn't have to tell me -- explain to me where he got these lineups from.

Q. And you are denying that Mr. Schwartz told you that Fritz is the picture he put onto those lineups?

A. He never said that.

Q. Let me ask you the question. Yes or no and then you can offer whatever explanation.

Did Mr. Schwartz tell you that Fritz's picture was on those two lineups?

A. I do not recall him telling me that.

Q. You don't recall?

A. No.

Q. Did he tell you that or did he not tell you that?

A. I don't remember.

Q. But you do know that in the deposition, he tells the witness that he's asking her about Fritz as being the potential perpetrator of the crime?

A. Later on in the deposition transcript, he does go into that saying -- I'm referring to Florida Bar Exhibit 1, page 24,

line -- okay, so lines 12 through 25. It says:

"QUESTION: The car was totaled, okay."

This is Mr. Schwartz saying:

"QUESTION: That's Exhibit 1.

"Now, did you ever know a boy by the name of Fritz Legene?"

And the victim responds:

"ANSWER: No, never."

And Mr. Schwartz says:

"QUESTION: Well, he used to live in your building ever (sic) there."

And then she answered:

"ANSWER: I don't know. Fritz?"

And then Mr. Schwartz said:

"QUESTION: His name is Fritz."

And then she says:

"ANSWER: Fritz Legene?"

And Mr. Schwartz says:

"QUESTION: Legene, yeah."

And then the victim responds:

"ANSWER: I don't know him."

And then Mr. Schwartz says again:

"QUESTION: Fritz Lan Joseph, have

you ever heard of the name before?"

And she says:

"ANSWER: No, I don't know that person."

Q. And this is before the defense function lineups were presented to her?

A. No, that was after.

Q. Oh, that was after?

And, of course, you are positive about your answer, it was after?

So if you go to page 25, the page after, do you see Exhibit Number 2 marked and introduced into evidence by the court reporter, line 17?

A. Oh. Yeah, so it was -- yeah, after page 25.

Q. So with your recollection refreshed, from a deposition that you've had lots of access to in preparation for the trial, it's clear that Mr. Schwartz asked the witness about the name and whether she knew the person he believed or he was asserting was the culprit before any photo lineups were presented?

A. Yes, but --

Q. Thank you.

THE COURT: You can continue.

BY MR. KUEHNE:

Q. Does it require more explanation?

A. No. What I'm trying to say is, yes, he did go into it, but that, you know, what I took issue with is the fact that he basically -- tampered with --

MR. KUEHNE: Your Honor, move to strike. I'm not asking about her --

THE WITNESS: -- the state's lineup.

THE COURT: Wait. One at a time.

Denied.

THE WITNESS: What I took issue with was the fact that Mr. Schwartz basically took the state's lineup and essentially photoshopped it. And, to me, it was very misleading that, you know, the victim's signature and the detective's signature is on there.

Everything -- it appeared as if it was the original state's lineup. I thought that was very misleading. So that's what I took issue with.

BY MR. KUEHNE:

Q. So you made no objection to Mr. Schwartz asking about Fritz Legene during the deposition; correct? You made no objection to Mr. Fritz -- Mr. Schwartz asking about Fritz Legene during the deposition?

A. At that point, no.

Q. You knew prior to the deposition that Fritz Legene had been identified, at least by some people, whether you believe them or not, as the perpetrator of the crime?

A. That's what they were saying.

Q. So the answer is: Yes, I knew that some people were identifying Fritz as the perpetrator of the crime?

A. There were defense witnesses, yes, that were saying it wasn't Mr. Woodson, it was Fritz Legene.

Q. And you had done no investigation of your own to determine if Mr. Fritz -- if Fritz was, in fact, the perpetrator?

A. It was still an ongoing -- it was an open case. It was ongoing. You know, part of --

THE COURT: Yes or no?

Do you want him to --

THE WITNESS: At that point, I don't believe I did any -- I looked into that, but, again, the case was open. And, you know, we were going through the discovery, and this is part of the discovery process that we were going through, finishing the victim's deposition, and, you know.

BY MR. KUEHNE:

Q. So the next page, after Mr. Schwartz asked about Fritz Legene, of the deposition, Mr. Schwartz then begins the process of using the photo lineups; do you agree?

A. I'm sorry, what page were you referring to?

Q. Page 25.

A. Could you restate your question?

Q. You were just reading from page 24; correct, about Fritz Legene?

A. Yes.

Q. And you mistakenly said that was after Mr. Schwartz had shown her the photo lineup?

A. Yes.

Q. But now you've corrected it, having

read the transcript, and see that it was before?

A. Yes, and part of my, I guess, confusion is that he continued talking about Fritz after.

Q. So you were confused in this deposition?

A. No. I needed to read the transcript again to just refresh the timing of the -- of when he was presenting these exhibits.

Q. So on page 25, Mr. Schwartz then begins asking about lineups; do you agree?

A. Yes, his lineups.

Q. Well, no, he asked about lineups?

A. Okay.

Q. And then on line 8, he says the following, I think you might have quoted already:

"QUESTION: Was it like a piece of paper, like my Exhibit Number 2 over here? Was it a piece of paper like that, or was it on, like, a cardboard inside, like a boxed set?"

And she answers, with the help of the translator:

"ANSWER: It was on a piece of paper like that."

Q. What were you doing during the time Mr. Schwartz posed that question?

A. What do you mean?

Q. You weren't objecting?

A. At that point, I didn't feel like I needed to object.

Q. You were in the room. Mr. Schwartz was 2 feet away from your desk with papers in his lap; is that right?

A. At that point, I thought what he was holding was the state's lineup.

Q. So you saw it?

A. That's what I thought. I saw a glimpse of it. I didn't get a full view. But later on, it became -- he basically was across from me and he was already like automatically like -- kind of like showing the victim. And from my view, at first, it appeared to be the state's lineup.

So I was going to give him a little bit of leeway, but then I realized that something was off on the paper, and that's when I realized that it wasn't the state's

lineup, that he had basically manipulated the state's lineup and put someone else's photo on it.

Q. So let's just walk through this, because this is your depo that we are talking about. You were there the whole time; right?

A. Yes.

Q. And, by the way, you know that when you make an objection, the court reporter writes down the objection?

A. Yes.

Q. So the witness answers:

"ANSWER: It was on a piece of paper like that."

Q. And your testimony is that he's putting this piece of paper in front of her?

A. She was sitting next to him and -- so if I'm Mr. Schwartz, and Ms. Talisma is to my right, he was basically just kind of showing her the exhibit, like that.

Q. 2 feet away from the table?

A. Ms. Talisma was next to him.

Q. Both 2 feet away from the table?

A. Approximately, yes.

Q. Okay. And so he says:

"QUESTION: A piece of paper like this?"

And she says:

"ANSWER: Uh-huh."

This is still on page 25.

Then he says:

"QUESTION: Let me show you what's marked Exhibit Number 2."

Q. Then the transcript reflects: Thereupon, Exhibit Number 2 was marked and introduced into evidence?

Do you see that?

MR. KROEGER: Objection, the transcript speaks for itself.

THE COURT: Overruled.

BY MR. KUEHNE:

Q. Do you see that?

A. Yes.

Q. Now, tell me about the process of Mr. Schwartz marking something, having it marked as Exhibit 2 by the court reporter and that document being introduced into evidence. How did that occur?

A. I don't recall. Like, I know that he had written out the exhibits -- this is his

handwriting, Exhibit 2 and Exhibit 3. And I'm referring to Florida Bar 3 and Florida Bar Exhibit 4. I know he had -- this was handwritten, but I don't recall if the court reporter at that moment went and affixed the exhibit stickers.

Q. So let's make this clear. You are reading the same transcript I'm reading, and the court reporter says: Thereupon, Exhibit Number 2 was marked and introduced into evidence.

And your testimony is, you don't recall if the court reporter did anything with the exhibit at that time.

A. I don't recall if she actually affixed the sticker at that time.

Q. Okay.

A. Sometimes you do it at the end of the deposition, sometimes you do it, you know, contemporaneously. I've seen it done different ways.

Q. Ms. Cabrera, I understand you were an experienced A prosecutor at the time. I'm really asking you what happened at this deposition, not what happened in all these

other depositions that you've taken, all right.

So my questions are focused on the Talisma deposition; fair enough?

A. Yes, and that's why I'm telling you that I don't recall when the court reporter actually placed the stickers on the exhibits.

Q. Now, Mr. Schwartz then says:

"QUESTION: Now, forget about what you did before. Now I just want you to look at Exhibit 2."

And you now interject; correct?

A. Yes.

Q. Before anything else happens, you interject. But you don't make an objection; do you?

A. No, I did not.

Q. You say: Sir, let me just clarify something.

You are not objecting, you are clarifying.

A. Uh-huh.

Q. And really, you want to question Ms. Talisma about what Mr. Schwartz is doing; right?

A. No.

Q. Well, let's try. Mr. Schwartz says: Huh? And Ms. Cabrera says: Can I clarify something with her? And without waiting for Mr. Schwartz to answer, you then say to her:

"QUESTION: When the detective showed you the photo lineup, was it in color or was it in black and white?"

Q. Right, you do that?

A. Yes.

Q. You don't wait for Mr. Schwartz to say, yes, you can clarify something. You speak directly to the witness; isn't that correct?

A. I mean --

THE COURT: Yes or no?

THE WITNESS: Yes.

BY MR. KUEHNE:

Q. By the way, this was during Mr. Schwartz's questioning of this witness?

A. Yes.

Q. So you then question the witness by telling her -- by asking her:

"QUESTION: Now, was the police lineup in black and white or in color?"

Q. Right?

THE COURT: Yes or no?

THE WITNESS: Yes.

BY MR. KUEHNE:

Q. "Now, this lineup that was my Exhibit Number 2, the defense exhibit, was in black and white."

A. Yes.

Q. And you were not referring to, when you told her about the color or black and white, you were not referring to Mr. Schwartz's exhibit; were you?

A. No.

Q. You were referring to the actual lineup that the police had shown to Ms. Talisma some long-time earlier?

A. Yes.

Q. And really, you knew that the original lineup was in color; didn't you?

A. No, I don't.

Q. Your testimony --

A. I don't recall.

Q. -- is that you don't know?

A. I don't recall if the original lineup was in color.

Q. How many photo lineup cases had you done as a state attorney prosecutor?

A. At the time, I couldn't give you a number.

Q. Let's say a lot?

A. I couldn't give you a number, you know.

THE COURT: "I don't know" is fine.

THE WITNESS: I had --

THE COURT: You don't have to answer if you don't know.

BY MR. KUEHNE:

Q. By the way, the case agency was Miami-Dade Police Department?

A. Yes.

Q. And you know Miami-Dade Police Department in 2013 used color photo lineups; didn't they?

A. Well, sometimes police officers just had it in black and white. I don't know if that was the practice of Miami-Dade County police department to only use color photo lineups.

Q. You knew at the time, February 2015, that Miami-Dade Police Department detectives

create lineups on their computer and they print out the lineups in color to show to victims of crime; isn't that correct?

A. No, not always, not in my experience.

Q. So what was done in this case?

A. I don't know. I don't remember, or I don't recall if there was ever a color photo lineup. I remember there only being a black-and-white copy of the lineup in the case file.

Q. So you invite to the witness to make a distinction between black and white and color, knowing that Mr. Schwartz is using a black-and-white; correct?

A. I wasn't sure if the police lineup was ever in color.

Q. And what you are doing at this time is to make sure the witness can distinguish between the exhibit Mr. Schwartz is using and the actual lineup the police showed her all that long time ago?

A. No, on the contrary. I thought he had the state's lineup because it looked like the one I had in my case file.

Q. You didn't say that; did you? Did

you say that on the record on page 25 or 26?

A. No. But what I'm saying is that at the time -- when Mr. Schwartz had this lineup in the deposition, I thought it was the state's lineup. I thought --

Q. And instead, the clarification you make --

A. -- and then I realized it wasn't.

Q. I apologize for interrupting.

The clarification you make with this witness, first before she even sees the lineup, right after it's marked and introduced into evidence, is reminding her that -- was it in color or black and white; right? That was your first clarification?

A. He was -- Mr. Schwartz was --

THE COURT: Yes or no?

THE WITNESS: No. He was actually -- as he was saying -- what Mr. Schwartz was doing in the deposition, he was kind of like already showing the victim the exhibit without first, you know, giving me an opportunity to review it. Like, he was already automatically showing it to her.

And I had to interject and ask him,

you know, to see it, and he wouldn't. So at some point, I took it out of his hand.

BY MR. KUEHNE:

Q. Ms. Cabrera, I understand that you have a lot to say, and we will get you a chance to say it. But I'm focused on what's happening in the deposition, not what you do later on after you talk to your supervisor, when you take a break. At the deposition.

So you clarify, and you just say that, "for clarification, black and white or color"; right?

MR. KROEGER: Objection; asked and answered, and the deposition speaks for itself.

THE COURT: Sustained.

BY MR. KUEHNE:

Q. And then Mr. Schwartz objects to your, I'll say it:

"MR. SCHWARTZ: I'm sorry. This is my depo. You can do your cross-examination when it's over, but this is my depo now."

Right? And you respond by saying:

"MS. CABRERA: I know, but I think

that she --

"MR. SCHWARTZ: Whatever. You can cross-examine her, but this is my depo. You can't keep interrupting my depo."

And you say -- you insist:

"MS. CABRERA: But I'm trying to clarify now."

You are still not making any objection; right?

A. I hadn't made an objection, but the reason -- this deposition was not going smoothly.

Q. Well, you say that. What part of the deposition transcript reflects you saying: Excuse me, Mr. Schwartz, something is amiss. You're moving too fast, you're interrupting the witness.

What part of the deposition transcript up to page 26 reflects that?

A. Well, one, I took -- we took a couple of breaks because, you know, basically there were times when the victim would say something in Creole, and I do not understand or speak Creole, and I just thought there were issues with the full translation what she was saying

in English, and there was interruption between Mr. Schwartz and the victim, the victim and Mr. Schwartz and the interpreter.

So I basically would go off the record to try to make -- try to make this deposition run smoothly. And my goal was to just finish the deposition because the victim was tired of coming in.

Q. So you then respond on page 26:

"MS. CABRERA: But I'm trying to clarify now."

And Mr. Schwartz says:

"MR. SCHWARTZ: You can't. You can't. That's not how we do depos. I'm sorry. We don't do depos like that. I do my questioning. You can do your questioning. But you don't interrupt my depo repeatedly. I'm sorry. I don't do that."

And you then say:

"MS. CABRERA: Well, I mean, I think if we --

"MR. SCHWARTZ: You are not interrupting my depo. I'm sorry. You have your right to ask her a question.

Just like in court, we do a cross-examination. You don't stand up in the middle of the case and start cross-examining a witness or, you know, I don't cross-examine your witness when you are doing a direct; do I?"

Q. That's what actually happened; correct?

MR. KROEGER: Objection, the deposition speaks for itself.

THE COURT: Overruled.

THE WITNESS: That's what Mr. Schwartz said, and I was going through transcript right now to point out, there were times when I had to interject, to remind Mr. Schwartz to please let the victim finish what she was saying in Creole, so the interpreter can translate.

Example, page 13, line 10, I said -- well, Mr. Schwartz, on line 8 said:

"MR. SCHWARTZ: All right, let's go back to where she" --

And I interrupted and said, "let her finish." Then Ms. Talisma finished responding to the question.

BY MR. KUEHNE:

Q. Okay. So that was your explanation for when you attempted to make the deposition go smoothly?

A. That's an example.

Q. Any other examples you want to give?

For example, as of page 13, you knew the word "objection"; right? I don't mean facetious, but you actually make an objection on the record; don't you, page 13.

A. I did make an objection on page 13.

Q. Now we are back on page 26, after the discussion, and Mr. Schwartz, 26 to 27 says, "Don't start cross-examining."

And this whole time, you make no objection. You say nothing about your apparent now-testified perception that there is something wrong with the photo lineup.

A. I did bring that up.

Q. We are on page 26 and 27, where you are giving, it seems a fair amount of speaking onto the record.

Do you see anything on pages 25, 26, 27 about your apparent confusion regarding the photo lineup?

A. No. But on page 28 is when I said something on the record.

Q. We will get to what you said.

Are you saying that you said on the record that there was a confusion about the lineup on page 28?

A. Page 28 is when I asked Mr. Schwartz for the exhibits because he didn't hand them to me.

Q. Well, that's not what you say.

A. I say on line 23, "Let me see." And that's --

Q. But no reference on the record to Mr. Schwartz not letting you see an exhibit, or not handing them to you. You just say "let me see."

Correct? On line 23, page 28, the line that you volunteered. You say "let me see."

A. Yes. And then Mr. Schwartz continued, you know, questioning, number one, and then I objected -- I'm referring to page 29, starting line 1. I'm going to object to this line of questioning. And Ms. Talisma --

Q. Answers the question.

THE COURT: Let her finish, please.

THE WITNESS: Ms. Talisma says:

"ANSWER: When he robbed me, I could not saw his face because he had on his hood.

"QUESTION: He had on his hood?

"ANSWER: Yeah."

And that's when he showed Exhibit 3. So he basically ignored me asking for the exhibit.

And so then I said on line 13, page 29:

"MS. CABRERA: Can you please show it to me before you show her?"

Because as I said earlier, he was already kind of like automatically showing her the exhibit instead of -- typically, you know, opposing counsel hands the exhibit to the other attorney before they present it to the witness. Mr. Schwartz was not doing that.

BY MR. KUEHNE:

Q. So your testimony is that after asking "let me see," your testimony under oath

is that Mr. Schwartz didn't show you the exhibit?

A. Correct. And then it wasn't until -- so on page 29, line 13, I said:

"MS. CABRERA: Can you please show it to me before you show her? Sorry, let me see the previous."

So I was asking for exhibit -- Florida Bar Exhibit 3. And so that's at the time that I basically took it from his hand and I asked him, "Where did you get this from?" And I asked to go off the record.

Q. Let me ask you about this. Mr. Schwartz is 2 feet away from the side of your desk. You are seated at the desk. You have to reach over the desk, go 2 feet and grab an exhibit out of Mr. Schwartz's hand?

That's your testimony?

A. Yes.

Q. How tall are you?

A. 5'2."

Q. And what's your arm length?

A. I don't know.

Q. But your testimony under oath is that

a desk this wide, right, the same width as the -- front to back as the judge's desk. You were seated where Judge Muir is seated. You reached all the way across the desk to a chair where Mr. Schwartz is seated 2 feet away from the desk and grabbed the exhibit out of his hand?

A. Yes, I reached over and I grabbed it.

Q. Wow. Was length was that?

A. I remember being able to get up and get the exhibit.

Q. Across your desk?

A. Yes.

Q. Okay, just like that. I won't ask you to demonstrate, but is it fair to say that the desk, from front to back, is 2.5 feet?

THE COURT: Do you want to come up closer?

THE WITNESS: Sure. I mean, I remember getting up and grabbing it. So I don't remember if I stayed -- basically, I may have moved a little bit to reach over, but I definitely remember taking it out of his hand because he wouldn't give it to me.

THE COURT: If these are 11 inches each, I would say it's probably -- 2.5 feet is a little conservative. More like 3 feet.

BY MR. KUEHNE:

Q. So fair, about 3 feet? I'm not asking you to be an engineer, but about 3 feet from front to back of the desk?

A. Maybe my desk was a little smaller.

Q. Now your desk is smaller, of course.

THE COURT: Mr. Kuehne, that's not necessary.

BY MR. KUEHNE:

Q. Was he still 2 feet away or was he closer?

THE COURT: Please have a seat.

THE WITNESS: I mean, I remember getting up and having to take it out of his hand.

So he was seated, and I got up and I took the papers out of his hand because he wouldn't hand them to me.

BY MR. KUEHNE:

Q. And you don't narrate any of that on the record?

A. Well, I said, "let me see."

Q. Did you narrate any of that on the record?

A. I did not say that specifically, but I said "let me see," and that's when I -- on page 29, line 13, I basically asked Mr. Schwartz to stop -- you know, please show me the exhibits before you show her, because he was already doing it. And that's, you know, when I grabbed the exhibits out of his hand. I asked him where, you know, where did he get this from, and then I asked to go off the record.

Q. Okay, we will get there. I think I'll need to ask you to read the actual transcript, so we know exactly what happened, but let's continue on page 27.

After you clarified to the witness black and white versus color, the witness then says, on her own, "I have a question."

Right, page 27?

A. Okay.

Q. You don't stop the witness from asking a question. You don't offer any interjection or clarification; correct?

A. Correct.

Q. And Mr. Schwartz says "okay."

Then the witness says:

"ANSWER: The question that you asked me, if I was a Seventh-Day Adventist when the lady was there, when we explained to her that I was a Seventh-Day Adventist and a Christian, and if I wasn't a Christian, I would die, after I told her that, then she said, I used to go to church. But I wasn't -- I saw that she was like fooling around and she wasn't telling the truth."

Right? And that was referring to an earlier question Mr. Schwartz had asked about Fritz Legene's mom; wasn't it?

A. I would have to review the transcript.

Q. Well, the transcript speaks for itself. I'll withdraw the question.

Now, Mr. Schwartz says:

"MR. SCHWARTZ: All right. Thank you very much for that. Appreciate that. Can you translate everything I said."

He's not talking to you; right? He's talking to the interpreter?

A. I'm sorry, what page are you referring to?

Q. Page 27.

A. Line --

Q. Line 16.

A. Okay.

Q. Mr. Schwartz:

"QUESTION: I happened to show you just Exhibit 2. When they were shown to you, was it in black and white or color?"

Right?

A. Yes.

Q. And then the witness says:

"ANSWER: When they show that to me, I don't remember whether the thing was in black and white or in color. And then when I show up, I saw Mr. Woodson."

And Mr. Schwartz continues:

"QUESTION: Now, some of the pictures they showed you and you did not identify, and some of the pictures you did identify. Do you remember that?

"ANSWER: No."

Now he is referring to the actual photo lineup; isn't he?

A. Presumably.

THE COURT: Which exhibit number is -- the actual photo lineup is which exhibit?

MR. KUEHNE: That's Bar Exhibit 2.

THE COURT: Okay.

MR. KUEHNE: The police version, we disagree that it's the actual version. The actual version was color, but that was the one produced to the defense in discovery.

BY MR. KUEHNE:

Q. Ms. Talisma then says:

"ANSWER: No.

"QUESTION: You do not, okay. No problem. Let me show you exhibit" --

And before he gets the word out, Ms. Talisma interrupts and says:

"ANSWER: They show me only one picture."

Do you see that?

A. I'm sorry. What page are we on now?

Q. Page 28.

A. Okay.

Q. You're attending this deposition;

right? You're there and listening to everything that's going on?

A. Yes.

Q. The witness says "they show me only one picture."

And Mr. Schwartz says:

"QUESTION: Only one, no problem.

"Let me show you Exhibit 2 and just ask you to look at it and just ask you to pick out the person, if you know, who was the one who robbed you. And if you can, tell me. And look at the pictures really carefully now. And if you are sure, then tell me if you can recognize or you can identify who was the person who robbed you on that day, if you can tell from this copy. If you can, you can; if you can't, you can't."

Right?

So that question is posed to Ms. Talisma: Look at the pictures. You clearly know what he's talking about. And she answers:

"ANSWER: The picture is so black, I can't even remember him. And the only

person I can see that I remember that looked like him was the first one.

"QUESTION: Number one?"

And then Ms. Cabrera says:

"MS. CABRERA: Let me see."

Is that a correct reading of the transcript?

A. Yes, but just to explain --

Q. And then --

THE COURT: Wait.

BY MR. KUEHNE:

Q. There is no explanation.

THE COURT: You can proceed.

BY MR. KUEHNE:

Q. And then Mr. Schwartz says, "Number 1." And now Ms. Cabrera, page 29:

"MS. CABRERA: I'm going to object to this line of questioning."

Q. Right? Fair?

A. I said, "let me see," at line 23, and that's because I realized that what Mr. Schwartz -- I originally thought he had the state's lineup, but then, you know, I realized that what he actually had -- and I'm referring to Florida Bar 3, Exhibit Florida

Bar 3, was -- basically it appeared as if it was the state's lineup. And, to me, it was misleading because basically he was making it seem like this is the lineup that was presented to Ms. Talisma by the police. But he actually, you know, changed Photo Number 5, but kept the victim's signature and the detective's signature.

So, to me, it was just very misleading.

Q. So, Ms. Cabrera, I get your explanation now. So let's look at what you said at the time, knowing a court reporter was there and knowing that every word you said would be captured forever, okay?

Fair enough?

A. Okay.

Q. So you say:

"MS. CABRERA: I'm going to object to this line of questioning."

And then the witness interrupts you and says:

"ANSWER: When he robbed me, I could not saw his face because he had the hood on his head."

And Mr. Schwartz says:

"QUESTION: He had a hood on his head?

"ANSWER: Yeah."

Then he says:

"QUESTION: Let me show you what's marked as Exhibit Number 3."

And then the court reporter: Thereupon, Exhibit Number 3 was marked and introduced into evidence.

Now Cabrera objects:

"MS. CABRERA: Can you please show it to me before you show her? Sorry, let me see the previous. Where did you get this from? Sorry, can I go off the record for a minute?"

Q. Fair? Fair reading? I've read it correctly?

A. Yes, and that's when I realized that, you know --

Q. So you could have --

THE COURT: Wait. Let her finish.

MR. KROEGER: Could the witness finish?

THE WITNESS: That's when I realized

that what Mr. Schwartz had was basically, to me, they are photoshopped lineups. They appeared to be the state's lineup, but he changed, you know, the photo, photo number 5, to put Fritz's picture on it, and then also Fritz's picture, but with Woodson's hair on it. And, to me, that was just very misleading.

BY MR. KUEHNE:

Q. So you make that realization. You say, "can you please show it to me before you show her?"

Now, your testimony is that he's already shown it to her?

A. Yes.

Q. So you didn't say: Wait, you can't show it to her before I see it. You say: Can you please show it to me before you show her?

Your words; right?

A. Yes.

Q. But your testimony now is that, well, well, well, he actually had shown it to her already?

A. He was doing that. And, for me, it just wasn't common. I didn't understand --

like, to me, he was basically just trying to get away with that, with showing her those lineups without me realizing what he was doing because, you know, all the depositions I've taken with other attorneys, it was just very customary to just always show opposing counsel an exhibit before you present it to the witness.

But the way he was going about it, he was doing things quickly and trying to --

Q. And none of that is reflected --

THE COURT: Wait. Let her finish.

THE WITNESS: And trying to make me not realize what he had done to the state's lineup.

BY MR. KUEHNE:

Q. And none of that is reflected so far in this transcript? You haven't said anything about: You're showing the witness before you show it to me?

A. I mean, we end up taking a break.

Q. Do you understand the question?

You have not said on the record yet: Mr. Schwartz, you're showing the witness before you show it to me. That's wrong, or I

object.

Correct?

A. Well, I said: Can you please show it to me before you show her? That's what I said on the record.

Q. Meaning, your words say he hasn't shown it to her yet. You want to see it first.

A. He was actually showing it to her.

Q. You just chose those words to use?

A. That's what I said on the record.

Q. By the way, you then go off the record.

Now, this is the off the record that you deny that Mr. Schwartz told you that Fritz was the guy pictured on those two exhibits?

A. I don't recall him telling me that.

Q. Okay, "asked and answered."

Thereupon, a brief discussion was held off the record, and then the deposition continued as follows.

So now you make a record; right? You say:

"MS. CABRERA: Okay, so let me just put this on the record. Mr. Schwartz is

showing the victim, Ms. Talisma, Exhibits 2 and 3, I guess, for the deposition. And the state is objecting to this line of questioning regarding these exhibits. Photo number 5 is significantly different from the photo lineup that was provided by the state from the police officers, and it appears that" --

And Mr. Schwartz says:

"MR. SCHWARTZ: She didn't identify that person.

"MS. CABRERA: Let me finish.

"And it appears that at the bottom of Exhibits 2 and 3 there is a handwriting from the detective and from Ms. Talisma where she selected photo number 5. So I think this is extremely misleading. And Mr. Schwartz is asking to have Ms. Talisma identify who was the robber in this case, based on Exhibits 2 and 3, and this is not, you know --

"MR. SCHWARTZ: He showed pictures that were not -- there were six people, not him. I showed pictures that are six people. Not him. It's exact the same

thing (sic).

"MS. CABRERA: So I'm objecting to that, and I will be bringing this in front of court.

"MR. SCHWARTZ: Okay."

Then Mr. Schwartz goes:

"QUESTION: All right. Let me show you Exhibit Number 3, and just ask you to look at them as if you've never seen them before, because I don't know whether you have or not, and the same question I asked you as Exhibit Number 2.

"MS. CABRERA: Okay. You know, we are going to have to stop this deposition right now. We are going to stop this deposition right now.

"MR. SCHWARTZ: Can I hear the translation?"

So far I'm reading it correctly; right?

A. Uh-huh.

Q. And you say, "no."

So you're not even allowing the translation to be made of whatever the witness said? Is that what you are saying "no" to?

A. I think he was asking for his question -- you know, what he said to be translated into Creole.

Q. He's saying "can I hear the translation" --

A. Okay.

Q. -- meaning, I want to hear the Creole words I just spoke? That's what you believe he meant at the time?

A. I don't see that the -- I don't know what he was -- I guess I don't know if Ms. Talisma was speaking at that moment.

Q. The fact is, Ms. Talisma had answered, and you prevented the interpreter from putting her Creole words into English so that the record could reflect what she said?

A. I don't recall.

Q. Let's continue.

"MR. SCHWARTZ: Can we hear the translation first?

"MS. CABRERA: Give me a moment.

"MR. SCHWARTZ: Can we hear the translation? Well, I need the translation on the record, what she said."

And the witness says:

"ANSWER: I cannot" --

"MS. CABRERA: Stop the deposition.

"THE WITNESS: I cannot identify. The picture is too black.

"MS. CABRERA: Make sure he doesn't ask more questions."

Thereupon a brief recess was taken, and the deposition continued as follows.

A. Okay.

Q. So he was clearly asking to have her words put on the record that she had spoken; right?

A. Okay. Yes.

Q. And you are stopping that from happening?

A. I mean, I -- he basically was able to say, translate what was being said.

Q. So you are attempting to stop the transcript from reflecting accurately what the witness had said in response to whatever she was responding?

A. I wasn't doing it to -- I wasn't -- at that moment, I felt that I needed to go speak to my supervisor about what was going on with the deposition.

Q. All right, and that's what you say.

Did your supervisor tell you anything about preventing a translator from putting a witness's statement on the record?

A. I didn't speak to my supervisor at that time. I was trying to locate her.

Q. You take a break. And then you come back on the record. Then you say:

"MS. CABRERA: We can go back on the record. Just so it's clear, the state would be objecting to any line of questioning regarding Exhibits 2 and 3. It's very misleading. Our victim is not required to make an identification in the deposition.

If you can, translate to her so she understands."

Q. So now you are instructing the interpreter to translate your objection, so that the witness could hear your objection; is that what you are doing?

A. Yes.

Q. So you are instructing the witness; right?

A. Yes.

Q. And you say:

"MS. CABRERA: And by trying to make the witness do this identification, you are trying to create evidence, so I'm going to keep objecting. I ask, Mr. Schwartz, that you refrain from this line of questioning. Continue on something else. If you are going to continue with this, I will continue objecting on the record.

"MR. SCHWARTZ: Okay."

And then Mr. Schwartz, he moves to a completely different exhibit; right?

A. Yes.

Q. You had objected to and said: We are not going to allow any more questioning on 2 and 3, and Mr. Schwartz complies with your directive, whether allowed or not, and moves to Exhibit 4?

A. Yes.

Q. And, by the way, has Exhibit 4 been secretly shown to the witness?

A. I mean, he never -- what I'm trying to say is, he never showed me any of these exhibits before showing the witness.

Q. Okay. That's --
A. He wouldn't do that.
Q. I understand your testimony. I'm asking about Exhibit 4.
Is he secretly showing it to the witness when he says "let me show you now what's been marked as Exhibit 4"?
A. He would show -- he would just automatically show her. He wouldn't -- typically you would show opposing counsel before you present it to the witness.
Q. So Exhibit 4 is the same, in your testimony?
A. Yes.
Q. Same process?
And then the court reporter says: Thereupon, Exhibit Number 4 was marked and introduced into evidence.
And you have no recollection if the court reporter actually took the exhibits, slapped an exhibit tab on at that point?
A. I don't remember if she did that then or did it after the deposition.
Q. And Cabrera says:
"MS. CABRERA: I will be objecting to

any line of questioning regarding Exhibit 4."

Had you seen this exhibit by this point?

A. I believe I did.

Q. Okay, so you saw this one. And you continue:

"MS. CABRERA: Again, I want to object to Exhibit 4. That was not provided by the state."

Q. So you saw Exhibit 4 and you reference an objection that you did not produce Exhibit 4 to the defense lawyer.

Is that a correct reading of the transcript?

A. Yes.

Q. Let's look at what is that Exhibit 4.

A. Uh-huh.

Q. In fact, you had provided Deposition Exhibit 4 to the defense lawyer; hadn't you?

A. Me, no. Personally, no.

Q. Okay, excuse me.

The state provided Deposition Exhibit 4 to the defense as part of discovery?

A. It may have. It may have, but when I

saw -- I guess when I -- during the deposition, I didn't think it was provided by the state.

Q. Well, you flat-out said "it wasn't." Not "I don't think it was." That it was not provided by the state. Right, that's what you said?

A. Yes.

Q. You didn't caution your statement or say I don't think it was provided by the state; right? You made a flat-out statement that Mr. Schwartz was showing -- using an exhibit that you had not provided -- "you" the state, had not provided; right.

A. That's what I said on the record.

Q. In fact, looking at it, then and now, you know that that exhibit was, in fact, provided by the state as part of discovery; don't you?

A. I'm not 100 percent certain it was. I would have to look at the file again, but I don't remember.

Q. So you've not done anything to clarify whether you affirmatively made a false statement on the record about an exhibit that

has a legend that it was provided by Miami-Dade Police Department, exactly the same as all of the exhibits, lineups, provided by the Miami-Dade Police Department?

A. I would have to look at the case file, but I don't remember -- I don't remember.

Q. So Mr. Schwartz then says:

"QUESTION: Let me show what's been marked as Exhibit 4. Do you ever recall seeing this document before?

"ANSWER: No, I've never seen that.

"QUESTION: You've never seen that document?

"ANSWER: No."

Q. Now, you are not objecting at this point; right?

A. Uh-huh.

Q. And then he says:

"QUESTION: Was there a time when the officer came by and showed you six pictures and asked you to identify one of the six pictures, and you said you couldn't identify anybody?"

Then you object:

"MS. CABRERA: I object to the form of the question.

"ANSWER: When the officer showed me this, Woodson wasn't there in the picture."

Q. Now, Mr. Schwartz has identified Exhibit 4, Deposition Exhibit 4, by asking her whether she has ever seen this document before; correct?

A. I'm sorry. Rephrase the question.

Q. Mr. Schwartz questions the witness about Exhibit 4 and asks her: Have you seen this document before?

A. Yes, he asked her that.

Q. And she says "no."

A. Yes.

Q. And he then quizzes her about a photo lineup that she made with the police, where she didn't identify anybody.

You were aware of that; right?

A. She said that after, yes.

Q. But you are aware that as the Case A prosecutor, there had been a photo lineup previously where the witness did not identify anybody?

A. I would have to look at the file again to recall that, but I -- I couldn't tell you for certain at the time.

Q. Okay. So the witness says:

"ANSWER: When the officer showed me this, Woodson wasn't there in the picture.

"QUESTION: Right. And so do you remember, then, him coming by and showing you six other pictures?

"ANSWER: I don't know how many pictures that the officer showed me, but he showed me some picture.

"QUESTION: Well, there are two different times where he asked you to make an identification, two different occasions.

"ANSWER: So the first time when he show up with the picture, Mr. Woodson wasn't on the picture. So the second time when he show up, I show him, I said, yes, there he is.

"QUESTION: He said Mr. Woodson wasn't in the pictures?"

There is a segment with the interpreter, and then Mr. Schwartz

continues.

Q. By the way, do you understand what's happening here, where the interpreter says "she said the first time when the officer" -- and Mr. Schwartz says, "no, no, no. I need you to translate for me. And the interpreter says "okay." And Mr. Schwartz says, "I'm not asking you, the interpreter, a question."

A. Uh-huh.

Q. And then Mr. Schwartz:

"QUESTION: The first time he said Woodson was not in the picture?

"ANSWER: He couldn't tell me anything because he was looking for Mr. Woodson. He couldn't find him yet.

"QUESTION: Well, when you made the identification of Mr. Woodson, did you know that he was the one who had been found already with your phone and money?"

Page 35:

"ANSWER: Yes.

"QUESTION: So one last time, Exhibit 4, can you look at it closely, and just ask you: Do you remember ever seeing this form ever before?

"ANSWER: No, I don't remember seeing something like that."

Q. Correct?

A. Uh-huh.

Q. And as you testified today, your testimony is you do not know that Deposition Exhibit 4 was actually part of the State Attorney discovery given to Mr. Schwartz?

A. I would have to look at the discovery packet.

Q. Then Mr. Schwartz moves on to Exhibit 5:

"QUESTION: I'm going to show you what's going to be marked as Exhibit 5."

Thereupon, Exhibit Number 5 was marked and introduced into evidence.

"THE COURT REPORTER: I'm sorry; did you answer?

"THE WITNESS: I did not remember.

"QUESTION: This is Exhibit 5. Have you ever seen this lady before?"

Q. And it's a picture of a lady who is represented to be Fritz's mom; right? That's your understanding?

A. I didn't know who this lady was at

the time.

Q. Okay. But this was not a document that had been produced by the State Attorney as part of discovery; was it?

A. No, it was the first time I saw that photo. I didn't know who that was.

Q. You didn't make a notation of that on the record, that he's showing a document that you've never seen before?

A. No.

Q. Mr. Schwartz says:

"QUESTION: This is Exhibit 5. Have you ever seen this lady before?

"ANSWER: No.

"QUESTION: You don't know who that lady is?

"ANSWER: No.

"QUESTION: You never saw her at your church anytime?

"ANSWER: No, never.

"QUESTION: Okay, that's Exhibit 5."

Then he moves to Exhibit 6.

"QUESTION: Let me show you Exhibit 6."

Thereupon, Exhibit Number 6 was

marked and introduced into evidence.

And he says:

"QUESTION: Have you ever seen Exhibit 6 before? This is the black-and-white version. I'll show you Exhibit 7 as well."

And Exhibit 7 is marked and introduced into evidence.

"QUESTION: Have you ever seen this fellow ever before?

"ANSWER: No, I never seen him. Where? Huh? Where?"

Interpreter issue.

Q. And, by the way, you know that the Exhibits 6 and 7 were not State Attorney produced discovery?

A. Yeah.

Q. They were, in fact, pictures of Fritz, the person who was identified by others as having committed crime?

A. That's what Mr. Schwartz was saying, that this is Fritz. I don't know if that's, in fact, the person, but --

Q. But you knew at that time in the deposition from having taken your own

discovery depositions, that Fritz was the person -- a man named Fritz was the person who had been identified by some as having committed the crime?

A. That's what they were saying, yes.

Q. And Mr. Schwartz says:

"QUESTION: What I'm asking you really is whether this guy is the one who robbed you. Because, evidently, we have a witness who says this is the guy, confessed to robbing you.

"MS. CABRERA: Just for the record, I'm objecting to this line of questioning. Again, defense counsel is asking for the victim to make an identification, and we would be objecting to that. He's trying to create evidence.

"MR. SCHWARTZ: I'm just asking. I didn't ask her anything.

"MS. CABRERA: And I'm going to bring it up to the court.

"MR. SCHWARTZ: And I just said, 'well, had she ever seen him?'

"MS. CABRERA: Let me finish, so the court reporter can write down what I'm

saying. And you could please explain that to the witness.

"ANSWER: I don't know that person.

"QUESTION: Well, you asked me why am I showing him to you.

"ANSWER: Why?

"QUESTION: I would like to be able to tell you.

"ANSWER: Yes.

"QUESTION: There is a girl who came in that Ms. Cabrera took the deposition of, so she knows what we are talking about.

"ANSWER: Okay.

"QUESTION: This girl says that she was with him, and he pointed out your house and said that he robbed you. Then he got killed a couple of months later. Unfortunately, he's dead right now. So that's why I asked you, is it possible that this was the boy, instead of Woodson, who actually robbed you.

"MS. CABRERA: Again, I will be objecting for the record. The victim does not -- she does not have to make an

identification at the deposition.

"MR. SCHWARTZ: All right. No problem. I'll withdraw the question."

Q. Right?

MR. KROEGER: I would object that the deposition speaks for itself. At this point, we are essentially just reading it into the record.

THE COURT: Sustained.

BY MR. KUEHNE:

Q. Now, you then contend that Mr. Schwartz abruptly left the room?

A. Yes.

Q. So the record -- the deposition reflects that Mr. Schwartz says: Goodbye. Thank you very much. Okay.

And Mr. Schwartz exited the room, and the deposition continued as follows. And you put on the record, "For the record, this is ASA Cabrera. I just wanted to put on the record that after Jonathan Schwartz asked the victim his last question, he immediately got up and left without giving me an opportunity to do cross-examination on this deposition. And I'll be bringing this up to the court.

All right, thank you."

So you don't ask her any questions?

A. No.

Q. You just put that on the record without Ms. Schwartz or -- was Ms. Baker there at the time?

A. No, she left with Mr. Schwartz.

Q. They both left, okay.

So you contended that during this deposition you were making non-verbal objections by using hand signals.

A. I was not -- I was not making -- basically what I was trying to do, because we had a messy -- you know, the deposition was getting a little messy because there were times when, you know, Mr. Schwartz would, you know, interrupt when the interpreter or the victim would be speaking, or the victim would interrupt Mr. Schwartz.

So there were a couple of times that I tried to basically -- and I had gone off the record a few times just trying to make sure that the deposition was going in an orderly fashion. And it really wasn't. It was a very choppy deposition.

So there are times that, like, I went -- I would see someone interrupting someone else, I would try to make a hand signal, like a stop, like, please let the other person finish speaking. That's the extent of it.

Q. So you prepared your complaint, it's Exhibit 5, in this deposition -- I mean in this hearing, Bar Exhibit 5. I have it here.

And you have, by the way, verified that information under oath by telling the Bar that you signed and verified that under oath; right?

A. Yes.

Q. So it's, as far as you're concerned, a sworn statement? Exhibit 5 is a sworn statement by you?

A. It's under oath, yes.

Q. And you proceed to describe the deposition on pages 2 and 3 using a number of descriptions, but you contend that, quote, as an attempt to not interrupt the transcription process, Ms. Cabrera was using hand signals to remind Mr. Schwartz to allow Ms. Talisma to finish answering the questions in Creole, allow the interpreter to listen to what

Ms. Talisma was saying in Creole, and allow the interpreter to translate exactly what Ms. Talisma was saying in Creole into English. Mr. Schwartz, however, ignored Ms. Cabrera's hand signals and left Ms. Cabrera with no choice but to interject on the record: Let Ms. Talisma finish her answer. See deposition transcript at page 13.

So what were these hand signals you were using instead of putting something on the record, so that a court reporter could accurately report what was happening in the deposition?

A. As I said earlier, you know, I raised my hand to basically signal, you know, please don't interrupt. Whoever was speaking, let them finish speaking first before you continue on with your questioning.

Q. So you were acting like a traffic cop? Stop. Holding up your hand. Stop. And then were you going like this (indicating), as in, come forward to the witness to answer? Were those the hand signals?

A. I just remember raising my hand like stop, just stop.

Q. And how about the hand signal you used to allow the interpreter to listen to what Ms. Talisma was saying in Creole? What hand signal did you use to convey to allow the interpreter to listen to what Ms. Talisma was saying in Creole?

A. Well, I think at that time Mr. Schwartz was about to ask another question, so, again, I did the stop, like, please refrain from asking your next question. Let Ms. Talisma speak in Creole to the interpreter. So let him listen to what she is saying, so he can translate.

Q. What hand signal did you use to convey -- allow the interpreter to translate exactly what Ms. Talisma was saying in Creole into English?

A. Basically the reference in the deposition transcript, I believe Mr. Schwartz was, you know, about to ask another question. And that's why I basically motioned to him like, please -- basically I raised my hand to like -- basically asking him to stop asking his next question because the victim was speaking and, you know, the Creole hadn't

translated. It wasn't on the record in English yet.

Q. Now, at any time during the deposition when Mr. Schwartz was using Bar Exhibits 3 and 4, you agree that Mr. Schwartz never identified Ms. Talisma's signature on either of those exhibits?

A. He did not point that out.

Q. Mr. Schwartz never identified the signature of the detective -- I can't read the name -- shown on either of those exhibits?

A. No, but he was showing her -- he was showing her that exhibit.

Q. Mr. Schwartz never pointed to any signatures on the exhibit; did he?

A. Not that I recall.

Q. He never pointed to any pictures on the exhibits?

A. I don't remember if he ever did that.

Q. You were there. Did he point to any pictures on the exhibits?

A. I don't remember him doing that.

Q. Did he point to any words on the exhibits that are in English?

A. I don't remember him doing any of

that. He was showing her the -- I know that he was showing her the exhibit. I don't remember what he was doing with his hand. But he was showing her the exhibit and --

Q. The fact is, you know he never pointed to any part of these exhibits; right?

A. I can't say 100 percent certain whether he did that or not.

Q. Okay. And he never identified either of these two exhibits, that's Florida Bar Exhibits 3 and 4, as the photo lineups presented to the witness by the police officers?

A. No. I think he actually -- he made it seem like it was. The sheer appearance of those lineups, it looks like the police lineup, because the victim's signature is on it, the detective's signature is on it, it's dated the date that she made the identification.

So, to me, it's misleading. It's basically trying to make the victim believe that that was the lineup that was presented to her by the police officer on May 11, 2013. To me, that's --

Q. Mr. Schwartz never pointed to any part of the exhibit; right?

A. I don't -- I've already answered your question, but I don't remember him pointing. I can't --

Q. Mr. Schwartz never identified either of those exhibits as the police lineup that she had viewed before?

A. I don't think in the deposition transcript he specifically said that, but it's clear, just by looking at the sheer -- just looking at the exhibits, Florida Bar Exhibits 3 and 4, you know, it looks as if it's the state's lineup based on the writing and everything.

This wasn't just like, you know, a regular like defense-created lineup where there is no -- you know, none of this at the bottom, you know, where this victim's signature is or detective's signature is on it.

So, to me, this was deceptive and misleading.

Q. Tell me about the other cases where you've had a defense-created lineup.

A. I'm pretty sure at some point, you know, there were other defense attorneys that created their own lineups. But I can't --

Q. Who are those defense lawyers?

A. I don't remember. I couldn't tell you. But I know that there are other defense attorneys that do lineups, but this -- I took issue with these two lineups, Florida Bar 3 and 4, with --

Q. So your testimony is that you don't --

A. -- how it's presented.

THE COURT: Wait. Let her finish.

BY MR. KUEHNE:

Q. I apologize. Finish.

THE COURT: Did the court reporter get the whole thing?

THE COURT REPORTER: I did.

THE COURT: You just were stepping on her last few words.

MR. KUEHNE: I apologize.

THE COURT: Do you want to add something? Do you want her to read it back?

THE WITNESS: Sure.

(Thereupon, a portion of the record was read by the reporter.)

THE WITNESS: Okay.

BY MR. KUEHNE:

Q. So you don't know who these lawyers are and you don't know what they did, but you do know that you have had cases where defense lawyers have created lineups?

A. I mean, I may have. I mean, I can't think right now of a specific case or defense attorney, but I felt -- and, you know, this whole Bar complaint, I went through a grievance committee, you know, and I think that there are multiple --

MR. KUEHNE: Your Honor, there is no question pending. She is making her closing statement that says, oh, I've been maligned in this process, and I object.

THE COURT: You don't need to make a speaking objection. I'll sustain the objection.

We need to finish the cross. But maybe this is a good time to take a five-minute break.

We will be in recess.

(Thereupon, a brief recess was taken.)

THE COURT: So you may wrap up, please.

BY MR. KUEHNE:

Q. The complaint you filed with the Bar came after you had withdrawn the filed motion for sanctions?

A. Yes.

Q. And the motion for sanctions is part of Exhibit E, Bar Exhibit 5? Do you have that in front of you?

A. No.

Q. It's right here.

A. Yes.

Q. It shows it as an attachment.

And the complaint you filed with the Bar was essentially a rewritten version of the motion for sanctions? Same underlying conduct?

A. Yes.

Q. Just involving the Ms. Talisma deposition. Same basis for the sanctions in front of Judge Block, and the same basis for the bar complaint; correct?

A. Pretty much, yes.
Q. Pretty much? What's different?
A. There may have been additional rules cited in the complaint.
Q. Is there anything other than the Talisma deposition conduct that is included in the motion for sanctions you filed with Judge Block?
A. That is contained in the complaint?
Q. No. In the motion for sanctions. Isn't it just about the Talisma deposition?
A. Yes.
Q. And you withdrew that complaint in open court?
A. I withdrew the motion for sanctions.
Q. The motion for sanctions.
Take a look at Schwartz Exhibit D. Let me keep these in order. I'm going to go out of order and use Schwartz Exhibit C.
This is the motion to suppress lineup identification that had been filed by Mr. Schwartz in the Woodson case before you took the Talisma continuing deposition?
A. I see the certificate of service is dated January 28, 2015, so before --

Q. Isn't this a copy of the motion to suppress lineup that was filed by Mr. Schwartz in the Woodson case prior to the continuation of the Talisma deposition?

A. It appears it is.

Q. And you were aware that Mr. Schwartz was challenging the lawfulness of the photo identification in advance of the continuation of the Talisma deposition?

A. Yes.

Q. Can I have that back?

Schwartz Exhibit D is a transcript of March 25, 2015. That is a transcript of a proceeding before Judge Block pertaining to the Woodson case; isn't it?

A. Yes.

Q. And it's the transcript that includes the boot camp plea agreement for Mr. Woodson, as well as the withdrawal of the motion for sanctions?

A. Yes.

Q. After Judge Block had asked about setting -- your intention on setting the motion for sanctions for hearing?

A. Say that again.

Q. You withdrew the motion to withdraw after the judge had mentioned "when did you plan to set that motion for a hearing"?

A. I believe the motion had already been set for hearing before this date.

Q. And the judge inquired about that?

A. Yes, on page 24, line -- I guess starting from line 10. Yes, he was going to set it, set the motion for hearing.

Q. And you withdrew the motion?

A. Correct.

Q. Now, you submitted a response to the Florida Bar after your complaint, and this was when you were no longer working with the State Attorney's Office; correct? It's --

A. What was the date?

Q. It's Florida Bar Exhibit 6.

A. Yes, on November 19th, so I had left before then.

Q. And that was done in response to Mr. Schwartz's October 5, 2015 response to the Florida Bar, responding to your original complaint; correct?

A. Yes.

Q. And that Schwartz Exhibit E is that

Schwartz October 5, 2015 response to the Florida Bar?

A. Yes.

Q. That was given to you by somebody, and you read it and assisted the State Attorney's Office in fashioning a reply?

A. Yes.

Q. You filed the motion for sanctions in open court?

A. Yes.

Q. And your testimony is that you made no congratulatory or celebratory conduct or hand signals at all accompanying that motion?

A. Correct, I never -- I wouldn't do something like that. That's --

Q. You deny high-fiving another prosecutor in the courtroom at the time of your filing that motion in open court?

A. Correct, I deny that. I've never --

Q. Who was present?

A. I wouldn't do that.

Q. Who was present when you filed that motion for sanctions in open court?

A. I cannot tell you specifically who was present at the time. But typically we had

calendar every morning, so the division chief would be there and the other division prosecutors. But if something is placed at the end of the calendar, which I believe this case was later on in the calendar, people may have left. I can't tell you who was there.

Q. You mentioned Jodi Baker McGuire as being one of the lawyers in this case. She was present in open court when you filed that; wasn't she?

A. Right, but I was referring to lawyers that were -- the prosecutors in the courtroom.

Q. And the Woodson matter was on the calendar that day when you filed that in open court?

A. Yes.

Q. And, by the way, was Mr. Woodson there? Was he brought over or was he on bond?

A. He was brought over.

MR. KUEHNE: All right, thank you.

Your Honor, I'll want to move in the exhibits that I have marked, I think A through -- is the last one E?

THE CLERK: A, B, C, D, E?

THE COURT: Any objections?

MR. KROEGER: No objection, Your Honor.

THE COURT: They are admitted.

THE CLERK: Exhibit C, D and E has been placed into evidence.

MR. KUEHNE: We had A and B?

THE CLERK: We already did that.

MR. KUEHNE: Great.

I tender the witness.

THE COURT: Redirect?

MR. KROEGER: Very briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. KROEGER:

Q. Ms. Cabrera, we discussed the presentation of what has been introduced as the Florida Bar Exhibits 3 and 4 during the underlying deposition, the two lineups created by Mr. Schwartz.

During the deposition, was there time for the witness to look at those lineups when they were presented to her by Mr. Schwartz?

A. When he originally was trying to show it to her?

Q. At any point in time during the

deposition.

A. She did have -- she did look at the exhibits.

Q. So she had an occasion to review them?

A. Yes.

Q. Did you, for instance, see her eyes cast downward to look at the documents?

A. Yes.

Q. Prior to the motion for sanctions that was filed in this case, have you ever filed a motion for sanctions against any other attorney?

MR. KUEHNE: Objection, relevance.

THE COURT: Sustained.

BY MR. KROEGER:

Q. Have you filed a grievance against any other attorney?

MR. KUEHNE: Objection, relevance.

THE COURT: Sustained.

BY MR. KROEGER:

Q. Have you ever experienced a situation while you were at the State Attorney's Office where a defense attorney had altered a lineup originally provided by the state and left all

of the markings that indicated a positive identification had been made?

MR. KUEHNE: Objection, relevance.

THE WITNESS: No.

THE COURT: Overruled.

THE WITNESS: No.

THE COURT: She answered already.

THE WITNESS: I'm sorry, but, no, this was my first time ever dealing with this situation.

BY MR. KROEGER:

Q. Did you leave the State Attorney's Office in good standing?

A. Yes.

Q. Was your decision to leave the State Attorney's Office influenced either by the Woodson case or the Macias case?

A. Not at all.

MR. KROEGER: I have no further questions.

MR. KUEHNE: Unfortunately, Your Honor, I do apologize. I missed an exhibit that we had talked about earlier.

It has nothing to do with this, but I totally missed it. I want to present the

next exhibit, which is the personnel file, so that the witness can identify it.

And then I will address, at an appropriate time, portions of the personnel file that we had discussed.

MR. SCHWARTZ: Can I speak to my lawyer for a second?

THE COURT: Any objection?

THE WITNESS: To the presentation of it, I don't have an objection, but in accordance with my motion -- excuse me, not my motion in limine, but as I expressed earlier today, I have several objections, depending what Mr. Kuehne attempts to actually introduce into evidence.

THE COURT: The motion in limine was denied, but she needs to identify it. And then if he is going to question her, you will have to make the objections item-by-item.

We need an ID number.

THE CLERK: Schwartz Exhibit 1A for ID only.

MR. KUEHNE: Just ID.

THE COURT: Yes, it has to be identified.

You are not stipulating to it?

MR. KROEGER: No, Your Honor.

RECROSS-EXAMINATION

BY MR. KUEHNE:

Q. Take a look at Schwartz A1, and I apologize for not bringing it up before. This was Exhibit 6 in your deposition.

This is a copy of your State Attorney personnel file; isn't it?

A. Yes, it appears it is.

Q. And among lots of other things, it starts with your application when you became an Assistant State Attorney, and ends with your resignation in or around July of 20th; right?

A. Yes. And, you know, I would like to express my concern. You know, I would not like for this to become public record, because I have, you know, a lot of private information here, so...

Q. All the parties fully understand that, and there is no intention of putting confidential identifier information into the

public record.

I just want you to confirm that, yes, to the best of your knowledge, that appears to be your State Attorney personnel file starting from when you started the job to when you completed the job.

A. Yes.

MR. KUEHNE: Okay, thank you.

Your Honor, I would then move this into evidence as her personnel file, subject to the actual use in these proceedings, just a number of documents that I don't need to show to the witness. I don't plan to ask her about them, but just to identify portions of the document.

MR. KROEGER: I would object that there is no relevance foundation for the admission of this information in bulk, as it's presented at this moment, into the record.

THE COURT: Can you remove everything that's not relevant and just have the clerk file it with a notice of confidentiality the items that you want to argue from or introduce through another

witness?

MR. KUEHNE: Sure, Judge. I can do that.

THE COURT: So for now, we will just admit it subject to it being reduced to the necessary pages.

MR. KUEHNE: I think I have five or six documents there, but I'll pull them out and show them to the Bar lawyer.

I have them marked in a different version of this.

THE COURT: Okay.

MR. KUEHNE: Nothing further, Judge.

THE COURT: Redirect?

MR. KROEGER: I had already rested before.

THE COURT: That's right. We opened it back up.

So you are excused.

THE WITNESS: Thank you, Your Honor.

MR. KROEGER: The Florida Bar, at this time, would rest, Your Honor. We have no further evidence or witnesses to call.

THE COURT: All right.

MR. KUEHNE: If the court would -- because I know we want to get as much evidence as we can done -- allow me to reserve any argument on motions as to the legal sufficiency of the Bar's case in chief, and reserve that argument which I would intend to make until after we finish the evidence, or at least get enough witnesses out of the way today who have been waiting.

THE COURT: Any objection?

MR. KROEGER: No, Your Honor.

THE COURT: To preserve the timing of his motion until later, and we will get right into his case in chief -- or his defense case.

Thereupon,

SUSAN MAHMOUD,

having been first duly sworn or affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KUEHNE:

Q. What is your name?

A. Susan Mahmoud.

Q. Spell your last name, please.

A. M-A-H-M-O-U-D.

Q. And for purposes of introduction, what do you do professionally?

A. I'm a court reporter.

Q. And were you a court reporter in connection with the proceedings that we're involved in; meaning, the State versus Woodson, circuit court criminal case?

A. Yes.

Q. And that means that you were the court reporter who reported Florida Bar Exhibit 1 in this case, continuation of the deposition of -- it says Gircie Talisma (sic).

A. Yes, that's mine. Yes, it is.

Q. So I will ask you a number of questions. But before I do, you executed an affidavit in connection with this very case, the Jonathan Schwartz Bar matter?

A. Yes.

Q. And you understood that the affidavit was prepared in connection with Mr. Schwartz's Bar matter?

A. Right. But I made the corrections to it.

Q. But you knew the purpose of the

affidavit was to present it as part of Mr. Schwartz's presentation against a Bar complaint?

A. Yes.

Q. And you knew that the complaint had to do with a complaint made by Cristina Cabrera, a prosecutor in the Woodson case?

A. Yes.

Q. Take a look at Exhibit F. Is that, in fact, your --

A. Yes.

Q. And is this affidavit, two pages, F, your own true and accurate description of events at the deposition?

A. Yes.

Q. Is it an affidavit that is your words and your affirmation of what happened?

A. Absolutely.

Q. Was this an affidavit just given to you in a form with instructions to sign under oath?

A. No.

Q. Did you participate in the drafting of this affidavit?

A. Yes.

Q. Now, the affidavit describes generally, and I'm going to ask you some questions, about the deposition. The Talisma deposition continuation, Exhibit 1, Bar Exhibit 1, you were present from the beginning of the deposition until the very end; weren't you?

A. Correct.

Q. And is there any part of the deposition, other than when parties went off the record and announced that, that you did not report or record?

A. No.

Q. If anything was said during the deposition audibly, did you report that?

A. Absolutely.

Q. And to the best of your knowledge, when you prepared that deposition transcript, that is Exhibit 1, Florida Bar Exhibit 1, was it true, correct and complete?

A. To the best of my ability, yes.

Q. Including, as reflected on the exhibit, a number of attachments or exhibits utilized during the course of that deposition?

A. Yes.

Q. Do you have some recollection of that deposition?

A. Yes.

Q. With the proceedings that have gone on, and your preparing the affidavit in this case, you've thought about that deposition a number of times?

A. I mean, I don't want to say I thought about it a number of times. It wasn't that big of a deposition. But I do recall it because I remember Mr. Schwartz saying that there was a Bar complaint. I think that's probably why it stuck in my head.

I reread the transcript, so I was refreshed in it, if you will, but there was nothing special for me to remember.

Q. How long have you been a court reporter?

A. Five years.

Q. Does that include doing work in all matters of legal cases?

A. Yes.

Q. Do you do court reporting for a wide variety of lawyers?

A. Yes.

Q. Is Mr. Schwartz your only client --
A. No.
Q. -- lawyer-client?
A. No. I think this is the only time I worked with him.
Q. You work either with or associate with court reporting agencies?
A. Correct.
Q. In this deposition, a number of exhibits were utilized. And let me walk over to you to point out some of them, because we've remarked them.

But Florida Bar 3 and 4 are exhibits that are part of your exhibit transcript. And you can actually see your exhibit labels, although it looks like they are ripped up a little bit.

A. Right.
Q. So I'm going to refer you to Florida Bar 3 and 4, but the actual deposition exhibits are in here, in Exhibit 1.
A. Okay.
Q. If you take a look at the transcript and go to page 25 -- now, there is a reference in the middle, and we've been through this

with another witness. But there is a reference in the middle to Exhibit Number 2.

Do you see that, starting at line 15, 16?

A. Right.

Q. And if you want to compare, if go to the back of the transcript, you will see Exhibit 2.

A. Okay.

Q. Take a look at lines 15 through 19. "Q" is Mr. Schwartz:

"QUESTION: Let me show you what's marked as Exhibit Number 2."

And then in parens: Thereupon, Exhibit Number 2 was marked and introduced into evidence.

Do you see that?

A. Yes.

Q. What was the process that was used to accompany this marking and introducing into evidence of Exhibit 2?

A. Well, as soon as the attorney will enter an exhibit in, I take it right away, place a sticker on it, mark the date and sign it. And I'll mark the number of the exhibit,

also if it's a composite or just a single exhibit. After I'm done marking it, I go ahead and pass it back to the attorney.

Q. With reference to this particular exhibit and this particular deposition, did you mark -- receive, mark and return that exhibit precisely as you explained?

A. Yes, always.

Q. In connection with this deposition, the Talisma deposition, were the exhibits pre-marked, meaning done in advance?

A. No, you can't do that.

Q. Were the exhibits marked, meaning labeled by you only after the deposition was over?

A. No, there is too many to do that.

Q. Did it occur exactly as you said for each exhibit? An exhibit is identified, you then physically take the exhibit, put a label on, date or sign it --

A. Sign it.

Q. -- put a number on it and then return it back to the questioning lawyer?

A. Correct.

Q. The Talisma deposition, you can tell

from the front page, took place at the State Attorney's Office.

A. Right.

Q. Do you recall that being in the individual office of Ms. Cabrera, Cristina Cabrera, the prosecutor who appears on that transcript?

A. Yes, it was in her office.

Q. It's been described already, but if you can, describe the confines of that office.

A. Measurement-wise?

Q. Compared to Judge Muir's chambers. Same size, significantly smaller?

A. No, no. I mean, it's the size of this table. It's a very small office. It's very, very small. There is a very big desk, computer. She had a file cabinet.

I mean, I would say like this area over here, and right here. But not as long.

Q. So you are pointing to a fairly confined space?

A. Very tiny space. Most of them are.

Q. And the witness has already identified, at least at various times in the deposition, a number of people. I'm going to

mention to you who they were and ask if you -- if that's consistent. The prosecutor was there, Ms. Cabrera; the witness was there, Ms. Talisma; the court reporter, you, were there; an interpreter was there; Mr. Schwartz was there and his associate, Jody Baker McGuire; and at least sometimes a state attorney intern was there.

A. Uh-huh.

THE COURT: That was yes?

THE WITNESS: Yes, I apologize. I should know better.

BY MR. KUEHNE:

Q. That's a significant number of people for a small room. Were conditions tight?

A. Very.

Q. Do you remember where people were sitting in relation to the prosecutor's desk during the deposition?

A. Yes.

Q. Could you describe that?

A. Okay. Let's pretend the window is behind me. I'm sitting against the window, by the plug. I have the interpreter to my left, which I always have to my left, because I'm

listening to him, not the witness. To the left of the witness -- to the interpreter, I'm sorry, is Mr. Schwartz. His assistant --

MR. SCHWARTZ: Associate.

THE WITNESS: And then to the front of the associate, because she is facing me, like Your Honor is facing me, is the witness. And then over here, behind her desk, is Ms. Cabrera, and sometimes the intern. She was constantly leaving.

BY MR. KUEHNE:

Q. So in relation to the prosecutor, was the witness, Ms. Talisma, situated relatively close to the prosecutor?

A. I would say 2 feet.

Q. Okay. And in relation to the witness, was Mr. Schwartz separated by anybody to get to the witness?

A. No.

Q. So it was Mr. Schwartz, the witness next to him --

A. Uh-huh.

Q. -- and the prosecutor next to the witness?

A. Right.

Q. In order for the prosecutor to approach the witness, would the prosecutor have to go across her desk?

A. Yes.

Q. How far?

A. Across her desk, I mean, 2 feet.

Q. Okay.

A. It was a very tight situation, where you grabbed anybody. If you reached over, you could touch anybody.

Q. Where were the lawyers situated in relation to the prosecutor's desk? Were they -- strike that first question.

Were they up at the desk, as in using the surface of the desk?

A. No. The prosecutor was at her desk. Mr. Schwartz was against the wall, but it's probably about a foot or two from his knee to her desk.

Q. Okay. And how about Jody Baker McGuire?

A. She was by the door.

Q. By the door.

And could the door open and close, have people come and go with everybody

situated in that room?

A. We would have to move.

Q. In order to get out of the room?

A. Right. If anybody wanted to leave, you had to move. Somebody had to move. Somebody had to move.

Q. In order for Mr. Schwartz to go through the process of having an exhibit marked, did he physically have to hand the exhibit in your direction?

A. Yes.

Q. And was there somebody between you and Mr. Schwartz?

A. Well, yes. I mean, the interpreter, the interpreter was.

Q. Okay.

A. And my machine.

Q. During the deposition, did Mr. Schwartz act to interrupt the witness or otherwise prevent her from answering questions?

A. No.

Q. There was an issue with the court reporter --

MR. SCHWARTZ: The interpreter.

BY MR. KUEHNE:

Q. I'm sorry, with the court interpreter that you reference in your affidavit. And I can point out your affidavit to you, if you want, Exhibit F.

A. Right.

Q. But you mentioned that there was a point of difficulty during the interpretation?

A. Yes. That's why, when you asked me that, I hesitated. Because when she would say something, the interpreter would look confused, so he didn't interpret. And she would start talking and Mr. -- Jonathan would turn to him and say "please interpret what she said before she starts again."

We constantly did that with him. So it wasn't the witness. It was the interpreter. He wasn't interpreting correctly whatsoever.

Q. And was it Mr. Schwartz causing that interpretation problem?

A. No.

Q. Was Mr. Schwartz cutting off the witness so that the witness couldn't say what she was going to be saying?

A. No, he was very nice to her.

Q. Okay. During the course of the deposition, for each of the exhibits that are attached to your deposition transcript, did Mr. Schwartz go through the same process of having those exhibits physically handled by you to be labeled, signed, and then given back to him?

A. Yes, has to.

Q. Now, you're looking at the witness during the deposition?

A. I'm looking at --

Q. Who is sort of facing you?

A. Well, she is facing me, but I'm looking at whoever is speaking to me -- whoever is speaking, I'm sorry -- because sometimes someone might mumble, and I'm looking at them, at their mouth.

Q. Okay. Did you observe Mr. Schwartz, at any time with the exhibits, attempting to show the exhibits to the witness before they were actually handled by you and marked and labeled?

A. No. I don't think so, no.

Q. Did you, at any time, observe

Mr. Schwartz acting as though he was hiding exhibits, so that the prosecutor could not see them?

A. No.

Q. When the exhibits were being used, were they within reach of the prosecutor?

A. Yes.

Q. Was there any time, that you recall during this deposition, that Mr. Schwartz refused to give exhibits to the prosecutor?

A. No.

Q. The occurrence of the deposition, was it a fast-paced deposition with Mr. Schwartz trying to move the deposition really fast to avoid the prosecutor being able to make an objection or make a statement on the record?

MR. KROEGER: Objection; calls for speculation.

THE COURT: Overruled.

THE WITNESS: Not at all. And just really quickly, the only problem the prosecutor had with the exhibits, I remember specifically, one of Mr. Schwartz's exhibits was super dark and it wasn't clear. So she -- I remember her

speaking off record saying that it's not a clear image, and that she did not want to allow it because it was dark.

BY MR. KUEHNE:

Q. Okay.

A. But nothing to the fact that she wasn't able -- because she was handed every exhibit.

Q. Did the prosecutor, on occasion, stop the deposition and leave the room?

A. Yes.

Q. When that happened, did the deposition stop?

A. Yes, absolutely.

Q. When that occurred, and the prosecutor stopped the deposition and left the room, did Mr. Schwartz continue to examine the witness?

A. No.

Q. If that had happened, would you have reported it?

A. Of course.

Q. "Report it," meaning take it down as a court reporter?

A. Of course.

Q. Mr. Schwartz's demeanor, was it mean, rude?

A. No, not at all.

Q. Was the deposition -- you've taken a lot of depositions up to --

A. Thousands.

Q. -- February of 2015?

A. Yes.

Q. Up to that time?

A. Yes.

Q. Did that deposition occur in an ordinary fashion?

A. Uh-huh. Pretty much, yes.

Q. Was there anything alarming about the deposition?

A. The interpreter.

Q. The interpreter didn't seem to --

A. The interpreter was horrible.

Q. How about anything unusual with regard to Mr. Schwartz's examination of the witness?

A. Neither Mr. Schwartz nor the prosecutor were behaving anywhere extraordinary.

Q. Did you, at any occasion, see the

prosecutor making -- using hand signals to convey information to Mr. Schwartz or anybody else in the room?

A. No.

Q. Did it appear to you, in your experience as a court reporter, that the prosecutor was able to make a record of whatever she chose to announce on the record?

A. Of course she was able to, and she did.

And keep in mind that we weren't looking at the prosecutor, we were looking at the interpreter. So our constant vision was this way.

Q. Okay.

A. So it was never towards her. It was always towards him.

Q. Towards the interpreter?

A. Towards the interpreter, because he was the one responding.

Q. And how about Mr. Schwartz? Did you get the impression that he did not speak or understand Creole?

A. What?

Q. Mr. Schwartz, did he rely on the

interpreter to learn what the witness was saying?

A. Absolutely, yes. The only thing we understood was "oui," which is "yes" in French, which a couple of times we stopped him because I remember specifically the witness saying "yes," and I would wait for him. And we would say: He said yes. We understand "oui." And he didn't -- and then he was like: Oh, yes. I was like: Oh, my God.

Q. Did you know at the time that the Woodson case was a first-degree felony, a serious crime?

A. No.

Q. The nature of the case was nothing that you were aware of?

A. No, I didn't know anything about the case. Typically if I have an attorney and I've work with them before, I might be familiar with the case, but I had never worked with him before. I don't look up any cases, ever.

Q. Did you have any prior experience with Ms. Cabrera?

A. No.

Q. Did you know, at the time, that she was an experienced prosecutor?

A. Did I know she was experienced? She didn't look like an experienced prosecutor.

Q. When you mean "look," you mean just visually or how she acted?

A. Well, from my own experience, I'm going to speak from my own experience, normally the younger generation comes in, and you can tell who has been there longer and who hasn't. She definitely appeared to me as being fairly new in the State Attorney's Office. But that's just my view.

Q. In terms of how she handled the deposition?

A. Yeah, absolutely.

Q. And how about Mr. Schwartz? You've seen a lot of defense lawyers?

A. Same thing. Seasoned. They have their questions straight, their objections straight.

Q. And that was Mr. Schwartz's style?

A. Absolutely.

Q. The deposition ends with the state attorney making an announcement on the record.

Can you turn to the last page of the deposition transcript?

A. Okay.

Q. Do you see that it -- we are looking at page 38.

A. Yes.

Q. Do you see Mr. Schwartz's last response? And I'm going to read it to you: It's all right. I don't have anything further. I appreciate it. I assume every witness of mine reads. No problem. Good to see you. We're done. That's it. Perfect. Thank you very much. Okay, thank you.

And then there is a parenthetical: Thereupon, Mr. Schwartz exited the room, and then the deposition continued as follows.

Do you see that?

A. Yes.

Q. Let me ask you about the ending of that deposition. Did it end abruptly?

A. No.

Q. Did Mr. Schwartz and Ms. Baker quickly pack up their stuff and walk out of the room before the prosecutor could ask any questions?

A. No.

Q. Could they have even done that, given the amount of people in that room?

A. No.

Q. Did it end as, in your experience, a regular ending of a deposition?

A. Yes. Because normally when the defense attorney finishes, I always turn to the assistant state attorney to see if they have questions. Typically they don't, they say "nothing further," but she didn't say anything, so then it ended.

Q. Then how did it happen that the prosecutor put something on the record after Mr. Schwartz left the room?

A. I don't have anything against either attorney. As I was packing up, she realized she didn't ask any questions. She said: I didn't ask any questions.

I just put my hands up like (indicating.) She's like: He didn't let me ask any questions. And I'm like: Oh, my God. She's like: Wait, I want to put this on the record.

And I just didn't want to get

involved. I said: Okay.

She went to talk to her supervisor and she came back and put it on the record. And I just felt out of place to even do that.

Q. Had the deposition, as far as you had understood, actually ended before she went to talk to her supervisor, came back and put something on the record?

A. Yes, because Mr. Schwartz starting packing up, I started packing up, he left. I started wrapping my wires and all the stuff we have to take and put it in my bag.

Q. During that process, was there any attempt by the prosecutor to do her cross-examination or examination of the witness?

A. No.

THE COURT: It was a Friday; wasn't it?

THE WITNESS: I can tell you now. Yes, it was.

THE COURT: Sounded like one.

THE WITNESS: It was one of those days, and it was at 2:30 in the afternoon.

BY MR. KUEHNE:

Q. You say on page 6 of your affidavit -- I'm sorry, on page 2, paragraph 6, of your affidavit that's in there, I just want you to read this into the record and tell me if that's accurate.

A. "I also do not recall seeing the prosecutor having to grab anything out of anyone's hands during the deposition."

Q. And that's an accurate statement?

A. Yes.

MR. KUEHNE: I tender the witness, Your Honor.

THE COURT: Cross-examination.

MR. KROEGER: I have no questions, Your Honor.

THE COURT: Thank you so much.

Does anyone want to take a break?

MR. KUEHNE: Judge, my next witness, and it's really just availability, because Mr. Schwartz has to be here anyway, my next witness is Barry Wax. Normally I would have him go after Mr. Schwartz, but he is a practicing lawyer, and due to things, I would like to get him on and

off. He's testifying. I'm going to tender him as an expert witness in a number of areas. One is --

THE COURT: Is he out there?

MR. KUEHNE: Yes, he is waiting. That's why I don't want to -- I just want to tell the court. It's normally out of order. I would have Mr. Schwartz go --

THE COURT: Any objection?

MR. KROEGER: Potentially. I'm not going to stipulate at this point.

THE COURT: All right. Well, do you want me to have the bailiff --

MR. KUEHNE: I think that Mr. Schwartz ran out. He was supposed to be sitting in the lobby area.

Thereupon,

BARRY WAX,

having been first duly sworn or affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KUEHNE:

Q. What is your name?

A. Barry Wax.

Q. How are you currently employed?

A. I'm the managing member of Barry M. Wax, PLLC, which does business as the Law Offices of Barry Wax, and I'm an attorney.

Q. Are you a member of the Florida Bar?

A. I am.

Q. Are you experienced in criminal law areas?

A. Yes, I am.

Q. What is the general nature of your law practice?

A. My law practice is about 85 percent state and federal criminal defense, and the remainder is professional licensing; Florida Bar complaints, disputes between Department of Business and Professional Regulation and its licensees and other various professional licensing issues.

Q. How long have you been a member of the Florida Bar?

A. I was admitted in September or October of 1985.

Q. And continuously in good standing?

A. Yes.

Q. In connection with your background, how did you come to the criminal law area as

part of your practice?

A. I never intended to be a criminal defense attorney. I was in the movie business. I went to UM law school because I thought that that would be a good way for me to increase my abilities in the film industry. In my second year of law school, I won the mock trial competition, and my professor, Terry Anderson, suggested I go to work for the Public Defender's Office, as a certified legal intern, which I did in 1984.

I had the pleasure of being trained by wonderful lawyers. I tried felony cases. They offered me a job, and I took it, and here I am today. You know what Yogi Berra says: When you come to a fork in the road, take it.

THE COURT: You graduated '84?

THE WITNESS: '85. I started as a legal intern at the PD's office in 1984.

BY MR. KUEHNE:

Q. In connection with your practice of law, have you been involved in any professional activities as a lawyer?

A. I'm very active in the Florida Association of Criminal Defense Lawyers.

I'm a past president of the Miami chapter of the FACDL from 2007 to 2008.

I currently serve on the board of directors of the Statewide Florida Association of Criminal Defense Lawyers as an elected director at large. I'm in my fourth term.

In the past, I was the chairperson of the annual Death is Different seminar, which the Florida Association of Criminal Defense Lawyers puts on, so that lawyers practicing in the area of death penalty defense can be certified to handle those cases. And I did that for about five years before passing the torch.

Q. In connection with your professional and professional organization activities that you mentioned, have you been involved in any projects that deal with the topic or topics of misidentification or eyewitness identification?

A. In my capacity as a member of the board of FACDL, we meet quarterly and we discuss matters, trends in the law, things that we need to become active in. We have a full-time lobbyist in Tallahassee who

represents our position on bills in front of the legislature, and also submits bills on behalf of our organization.

Some of the work that the board has done -- although I was not specifically on that committee, but was part of it -- led to the passage of Section 92.70, Florida Statutes, which is the new eyewitness identification procedure.

Currently, I'm on a committee, very actively on a committee, which is the Constitutional Revision Committee, Florida Association of Criminal Defense Lawyers committee, which is very involved in many of the propositions that the CRC is trying to get on the ballot for the elections to revise the Florida Constitution, most specifically Proposition 96 and other minor ones.

Q. You mentioned a Florida Statute 92.70.

A. Correct.

Q. And I'm going to show you a printout of that statute as Exhibit G.

Is this the statute you are referring to, just a printout of the statute?

A. Yes.

THE COURT: Do you want to hand it up?

MR. KUEHNE: He is a copy.

BY MR. KUEHNE:

Q. And that statute has an effective date; does it not?

A. Yes, it does.

Q. What was the effective date?

A. It was effective October 1, 2017.

Q. In connection with your testimony today, which is about Mr. Schwartz's representation in State versus Woodson case, that statute was not in place at the time?

A. That's correct.

Q. But in 2015, in February of 2015 and thereabouts, had there been any significant work done by FACDL and potentially other players in the criminal justice system about mistaken eyewitness identification?

A. Yes, there had been.

Q. Describe the nature of that.

A. Well, there was a movement in the course of challenging eyewitness identification to get expert witnesses, or to

grant the defense the ability to call expert witnesses, to testify in jury trials with respect to the problems with eyewitness identification, some of the issues with sensation and perception by the eyewitness and memory recall and suggestive lineups and identifications.

The Supreme Court -- in fact, the leading expert in that area was a professor by the name of Elizabeth Loftus. And Professor Loftus was really spearheading a movement across the country to revise eyewitness identification procedures.

The Florida Supreme Court had entered an opinion, I can't remember the name right now, but it was about 15 years or so ago, excluding that testimony, saying that that was not admissible testimony. And certainly, one of the things that they found was not admissible was that the expert could not comment on the eyewitness identification made in that specific case.

But they were also limiting the ability of the professor and other expert witnesses to come to and testify about issues

with eyewitness identification, statistical studies backed up by empirical data and the like.

Since that time, there has been a loosening of the reins in terms of the ability of experts to come in and testify as to those studies and the empirical data. And, ultimately, that was one of the things that led to the revision of the eyewitness identification procedures in the State of Florida, that led to the enactment of this particular statute last year.

Q. Have you also professionally been active or part of the FACDL involvement in the Innocence Project?

A. I really haven't. That's not an area that I've gotten into. I follow it closely. Many of my colleagues have chosen that as one of the things that they choose to get behind. I also get behind it, but I haven't been actively involved in that project.

Q. In connection with your experience in the eyewitness identification area professionally, have you been aware of and part of any organizational efforts to work

with the criminal defense function, criminal defense lawyer, to develop challenges to eyewitness identification?

A. Well, we always do that in our seminars. Whatever the cutting-edge topics are, those, we typically put on a seminar. So, for instance, when eyewitness identification was becoming a major issue -- we have an annual meeting every summer in June, and this was a topic at the annual meetings. Not just education, but training on how to address it. Very practical training, not just theoretical. So that's something that we are involved in.

Of course when I was chairperson of the Death is Different seminar, eyewitness identification was something that we dealt with in those seminars as well. And then we have a motions bank, which is available online to FACDL members, to get the benefit of the wisdom of the lawyers from all around the state, from Key West to the Panhandle to Jacksonville, and share that knowledge.

Q. Has FACDL or the criminal justice arena identified the potential use of mistaken

identification in obtaining convictions?

A. Yes, absolutely.

Q. Are you familiar with the research and the education on that particular topic, mistaken identifications and results in cases?

A. Yeah, this is something that dovetails with the Innocence Project, that you referenced earlier, because all of it is truly interrelated.

The Innocence Project really began as something that Barry Scheck -- and, oh, my God, I'm forgetting the name of his partner who did it. But they started when DNA technology was new. They went back and chose select cases where people had complained that they were wrongfully convicted, primarily based on misidentification, whether by a pretrial lineup procedure or in-court misidentifications.

And now that this new technology of DNA came, they were able to statistically analyze, through DNA evidence, they learned that people did not commit these crimes, even though they had been identified. So they were able to develop a statistical analysis of how

many wrongful convictions were based on misidentification.

And then that led to identification reforms that we are now experiencing throughout the country.

Q. And as a result of that type of data compilation, statistical reviews, scientific and educational review, has that been translated into efforts to educate or make criminal defense lawyers aware of the role of mistaken identification in cases?

A. Absolutely. Not just through FACDL. Through the national organization --

Q. What is that called?

A. National Association of Criminal Defense Lawyers, NACDL.

Even through local seminars, you know, the Public Defender's Office here in Miami puts on seminars on topics of interest, and have done eyewitness identification seminars. And, of course, all the legal journals and the case law, the evolving case law.

Q. You mentioned that part of your practice involves professional representation,

and part of that is Bar work, Florida Bar grievance work.

A. Yes, that's correct.

Q. And how long have you been doing that kind of work?

A. About 20 years.

Q. And you have, in the past, provided Bar counsel to Jonathan Schwartz?

A. Yes, I have.

Q. How many cases has that been in?

A. I think it was perhaps three.

Q. Okay.

A. I think. I'll give you a ballpark without going back and looking. Perhaps three.

Q. And you've represented other lawyers?

A. Many.

Q. Any idea?

A. How many lawyers I've represented before the Bar? Ballpark, 25.

Q. Over the course of a significant amount of time?

A. 20 years, because at the early stages, it was very minor. You know, when I say "25," I'm not talking about lawyers who

get a grievance letter and then retain me to go ahead and respond to the grievance and it gets dismissed. I'm talking about once it went beyond that process.

Q. Okay.

In connection with that aspect of your work, have you been involved in educational opportunities, Bar education to learn and become aware of the Bar rules and the cases that pertain to those Bar rules?

A. I'll tell you, I do that personally because I need to stay on top of what's going on, but it's not -- I don't attend seminars.

I did attend one seminar several years ago at the Eden Roc, here in Miami, that was put on by our colleague, Brian Tannebaum. I attended that. Primarily, now Brian does about 100 percent Bar representation.

Q. In connection with that aspect of your representation, do you consult, confer, speak with other lawyers who are known to have a practice of providing representation to lawyers in Bar matters?

A. Yes, I do.

Q. In connection with that, do you

discuss generally Bar procedures, Bar topics, how Bar activities move along?

A. We discuss issues in a case. Like, for instance, I'll have a particular issue that's stymieing me, for lack of a better word, in terms of how to really respond to the issue without hurting the client, without doing something that affects the client adversely, which, of course, is against the Bar rules.

So I'll consult with other attorneys when I have that sort of thing. If it's a novel issue, I'll consult with other attorneys. But I do that on my criminal cases also. I think it's just like a doctor calling up another doctor and saying "Am I missing something?"

Q. Let me move you to this case.

You've been called as a witness in the representation of -- in my representation of Jonathan Schwartz in this Bar matter; correct?

A. Yes.

Q. Have you reviewed a substantial amount of material pertaining to this case?

A. Substantial, yes. Yes, quite a bit.

Q. Give us a general idea. Are you generally familiar with the entirety of the Bar file?

A. I'm familiar with it.

If I can, can I look at my iPad?

THE COURT: Sure.

THE WITNESS: Because everything is listed on here, all of the documents I reviewed on here. So give me a second and I'll get that up.

Okay. So I reviewed everything, starting from the initial complaint to the answer and affirmative defenses, request for admissions, interrogatories -- and, by the way, that's both sides, the Bar's request for admissions in interrogatories and answers and the defenses. The witness lists, the documents list, the answers -- I believe I said the answers already -- to the complaint.

BY MR. KUEHNE:

Q. Right.

A. I've reviewed the underlying information from the case of the State of

Florida versus Roberto Woodson, specifically the lineups, the motion to suppress that was filed, the deposition of Ms. Talisma, the victim in this case, the motion for sanctions filed by the state attorney, the transcript of the change of plea.

Let me see what else.

Then I reviewed Mr. Schwartz's deposition in this case, that Mr. Kroeger took, and I reviewed the deposition of Ms. Cabrera, very cursorily, because I had read her complaint, which was pretty comprehensive. And then I read the case law that had been cited in the correspondence with the Bar.

Q. Focusing on the deposition of Girdie Talisma -- and it's before you as Florida Bar Exhibit 1.

A. Yes.

Q. You've seen that before?

A. Yes, I've read it a few times.

Q. And there are some attachments to it that are exhibits.

A. Right, which is about seven, I believe. Yes, everything from the letter that the state attorney received and disclosed in

discovery to the photo lineups to the individual photos of people, yes.

Q. I'm going to focus you and then, as an introduction, ask you: In connection with your engagement in this matter, have you been engaged to offer expert opinion regarding the practice utilized by Jonathan Schwartz in conducting his examination of the witness regarding photo lineups?

A. Yes.

Q. You've looked at the photo lineups?

A. Yes.

Q. Now, you mentioned looking at some case law.

A. Uh-huh.

Q. Are among the case law the Kuntsman case and the McWilliams that you are referring to?

A. It was limited to those two cases. I did not key cite those cases, Shepardize, which we grew up with. I didn't do that because I didn't want to go beyond the boundaries of what was already brought into the pleadings here.

MR. KUEHNE: And although these are

cited cases, I'm going to just have them marked for purposes of our examination.

Here is Exhibit H and I. So Exhibit H is State versus Kuntsman, K-U-N-T-S-M-A-N, 643 So2d 1172.

Mr. Kroeger has a copy, and I have a copy for Your Honor.

THE COURT: Thank you.

BY MR. KUEHNE:

Q. That's cited 643 So2d 1172, Florida 3rd DCA, 1994.

A. Uh-huh.

Q. You are familiar with that case?

A. I am.

Q. There is another case, State versus McWilliams, M-C-W-I-L-L-I-A-M-S, 817 So2d 1036, Florida 3rd DCA, 2002.

A. I'm familiar with McWilliams also.

Q. These two cases concern misidentification issues or challenging witness identification using photo arrays or lineups?

A. Correct.

Q. And does the Florida law allow defense counsel to challenge eyewitness

identification by testing their ability to identify a suspect, a witness, a perpetrator?

A. Yes.

Q. Does that include the ability to utilize forms of lineup or photo lineups?

A. Yes.

Q. And are there some restrictions on how that process of challenging a witness identification can be done?

A. Yes, there are.

Q. What's the status of Florida law on that?

A. Well, the status of Florida law on that is that you can show a lineup. There's several components to it. So the easy analysis is, you receive in discovery from the state a photo lineup. Traditionally, this was a six-person photo array.

Typically, they are given to the defense in black-and-white. They are just copied off of a copier. But, typically, the original photo lineup is in color, which the police have compiled.

You are allowed to show that lineup to the witness, and McWilliams tells us this,

but, I mean, it's pretty self-explanatory. You can show that to a witness and ask the witness the details of how they came to their identification. That's the first level of analysis here.

If you choose to show the witness a lineup, which you, as a defense attorney, have prepared, that is not identical to that which the state gave you in discovery, and that which the police prepared, you may do so.

Now, there is a couple of ways that you can do that. The first way that you can do it is, you can go to the deposition, you can show the witness the lineup at that point, and the witness can refuse to answer those questions or the witness can choose to answer those questions.

The prosecutor in the room can allow the witness to answer the questions or can object to the witness answering the questions and instruct them not to answer, at which point, you would then have to go to the court and file a motion before the court, a motion to compel, and show the court a strong and compelling reason for doing so.

If the court finds a strong and compelling reason, then the witness will have to submit to your questions on that lineup. If you do not, then the court will deny it.

That's one way to do it.

Q. Okay.

A. The second way to do it is, before you take the deposition, you want to do this: You would go before the court on a motion to compel or, you know, a ruling, perhaps a motion in limine or some other vehicle, and say: Judge, this is what I want to do and these are my reasons for doing it. Will you permit me to do it?

Now, that's the second way you can do it.

There is a problem with that procedure, with doing it that way. The problem with doing it that way, as a defense attorney, is, you are telling the state what you want to do before you do it, thereby, giving the state the opportunity to meet with the witness and discuss with the witness what you're going to do, which is entirely proper, that's not improper at all. But it taints the

witness's ability, or what you're trying to do, to give you a genuine identification.

So there is nothing in the case law that bars any of those procedures.

Q. Okay. You've looked at the transcript of the Talisma deposition?

A. Yes.

Q. And you've looked at the lineups, photocopy of lineups utilized in that deposition; haven't you?

A. They were black and white, the photo -- I think those are the exhibits to Exhibit 1.

Q. Now, you mentioned, in your experience, you've done a lot of state criminal cases?

A. Yeah.

Q. And cases that are investigated by Metro-Dade Police Department detectives?

A. Yes.

Q. And the process, is it your view that the police process of identification and preparing photo lineups is pretty sophisticated?

A. No, I don't think it's sophisticated

at all.

THE COURT: Only half-hour left today.

MR. KUEHNE: Yes, Judge.

BY MR. KUEHNE:

Q. In connection with that, is it your experience that Miami-Dade Police Department detectives use color photo lineups?

A. Yes, they do.

Q. By the way, are there some issues that you learn in the literature and the discussion about witness identifications regarding the value of color identifications versus black-and-white identifications?

A. Well, not just in the literature. I mean, let's talk about real life. Things happen in color. They don't happen in black and white.

Color photos typically -- and I'll go to Miami-Dade Police Department photo lineups, because that's what you asked about. Typically they obtain the photo from one or two sources, either mugshots from past cases or the driver's license database, which is called DAVID, which is really more commonplace

nowadays, because they can access that online. It's a color photo and they can just go ahead and print out a copy, whatever size they want, and use that photograph.

It's much more preferable to use a color lineup.

Q. Okay. Do you understand that in this particular deposition, Mr. Schwartz used a photocopy of the police lineups shown to the witness and replaced a picture of the defendant with a picture of a person who had been identified by others as a possible suspect --

A. Yes.

Q. -- or a possible culprit?

A. Yes, I understand.

Q. So you are familiar with that backdrop?

A. Yes, I am.

Q. From your review of the Woodson case, State versus Woodson case, did you determine whether the issue of eyewitness identification or misidentification was a legally sound issue? Not whether it's right or wrong, but whether it's an issue that was legitimately

presented in the course of the defense of that case?

A. Yes, I do.

Q. What did you base that on?

A. I based it on several factors. The first thing, of course, was the State Attorney's Office had received a letter from an individual that was in Creole, and stated, as I understand it, that a particular person committed this crime, not Mr. Woodson. That was the first thing.

The second thing I understood was that there was a young lady who had come into the State Attorney's Office and testified that a gentleman by the name of Fritz Lan Joseph, I believe, had confessed to committing the crime to her.

And then there was the issue of the actual six-person photo lineup that had been presented to the victim, Ms. Talisma, in this case, which has Mr. Woodson's picture in position number 5, which is the bottom center, with a light background and everyone else had dark backgrounds.

So based on that, it appeared that

not only was there an eyewitness identification issue, but that there was also a very, very viable defense that -- what we call alternate suspect -- that other people say "some other dude did it," the SODDI defense.

Q. And did you identify in the Woodson record some litigation, or at least the start of litigation, over the validity of the eyewitness definition?

A. Yes, it was present right there. But as I understood it, those issues had been brought before the prosecution well before that deposition took place.

In fact, I understood that there was an issue when the letter came from -- apparently Ms. Talisma received this letter in Creole. And Mr. Schwartz had tried to persuade the State Attorney's Office to investigate this as exculpatory evidence under Brady versus Maryland, and they refused. So he conducted his own investigation, which was incumbent on the defense in any event.

Q. Focusing on this deposition --

A. Right.

Q. -- in your view, Exhibits Florida Bar 3 and 4, which are the deposition exhibits, different numbers but deposition exhibits used by Mr. Schwartz in confronting or questioning Ms. Talisma about her identification, do these exhibits, on their face, appear to be deceitful, dishonest, fraudulent, or anything that, on its face, would be viewed as an improper activity by a lawyer?

A. The lineup itself, without looking at any extraneous factors, my answer is no.

Q. And the lineup itself -- understanding that the lineup I've showed you is a police lineup, a photocopy of a police --

A. Can I stop you for a second?

Q. Of course.

A. My phone has been blowing up for a long time, and I'm just wondering if it's an emergency. If I could just have one second --

THE COURT: Sure.

THE WITNESS: Okay, it can wait. I know one of them is my 12-year-old, and I'm sure he can reach his mother.

Sorry. Thank you, Judge.

Could you repeat your question? I'd

appreciate it.

BY MR. KUEHNE:

Q. You acknowledge that the exhibits are a black-and-white photocopy of a police lineup that has Mr. Fritz's picture in place of Mr. Woodson?

A. That's correct.

Q. Is the process of preparing that, exactly as these appear by criminal defense counsel in a case like you've described, itself, improper conduct?

A. No.

Q. Is the showing of such an exhibit to a witness during a deposition, just as I said, showing this document to a witness in the context we've described, itself, a violation of Bar rules regarding deceitfulness or misrepresentation or dishonesty?

A. No.

Q. You've looked at the deposition transcript in this case?

A. Yes.

Q. Is the process, the actual manner used by Mr. Schwartz, in bringing these exhibits to the attention of the witness, in

your view, misconduct, conduct involving fraud, dishonesty, deceit or misrepresentation?

A. While not the most preferable way to do it, I do not believe that it was improper.

Q. Is there any part about your having looked at the transcript that gives the appearance that Mr. Schwartz is attempting to mislead the victim in this case?

A. Not at all.

Q. Is there any part of Mr. Schwartz's description of these exhibits that appears to be misrepresenting to this witness what the exhibits are?

A. No.

Q. There is another exhibit, the last exhibit that is --

A. This individual photo?

Q. I think it's Exhibit 4.

A. Exhibit 4.

Q. It's hard to read, but Exhibit 4 in the Florida Bar Exhibit 1, which was also shown to the witness, Ms. Talisma.

A. Right.

Q. And have you also looked at that

exhibit in connection with your analysis today?

A. Yes. I looked at Exhibit 4, and obviously, the distinction with Exhibit 4, as best I can tell, and I think the court can see, this is very, very dark.

Q. Okay.

A. So I was never able to get a -- to make out images that were better or have them provided to me. But Exhibit 4 does not have the circle around photograph number 5, nor does it have the signatures of Ms. Talisma and the officer who showed her the photo lineup.

Q. And from your reading of the transcript and the file, is it your understanding that that exhibit you're looking at, the dark exhibit labeled Exhibit Number 4 for the deposition, was a photocopy of a lineup shown to the witness by the police that she could not identify anybody on it?

A. That was my understanding, that she was originally shown a lineup before Mr. Woodson had been apprehended that did not contain his photograph.

Q. Okay. Now, you've looked at the

Bar's complaint along with the complaint by Ms. Cabrera, the multiple filings with the Bar?

A. Right.

Q. And the essence, if I can summarize, is that she accuses Mr. Schwartz of misleading the witness, acting in a misleading manner, by using the police lineups that he substituted Mr. Fritz's picture for Mr. Woodson.

Do you understand that to be the nature of the complaint?

A. Yes.

Q. In your view as a lawyer handling Bar matters, handling criminal defense matters at the highest level, is there any credence or credibility to that position?

A. Repeat the question. I want to make sure I understand.

Q. In your view as a criminal defense lawyer and experience, a Bar leader, a lawyer involved in Bar representation, is her accusation or complaint that Mr. Schwartz, in this deposition, misled the witness or attempted to mislead the witness, accurate? Does it have foundation?

A. No. And specifically -- and I want to say that I believe that she did not follow the proper procedure if she had an issue with this lineup for stopping Mr. Schwartz.

I think that she really was either inexperienced or just taking things in a very laissez-faire sort of attitude in terms of addressing this issue. It appears that later, when she realized what she should have done, she was trying to remedy it to protect herself, so to speak.

Q. What is it about from the context here presenting exhibits -- these two Florida Bar exhibits, 3 and 4 -- to the witness, that you view as appropriate, not misleading, an appropriate criminal defense effort?

A. We have an individual who, it appears, made a misidentification. So it's incumbent on you as defense counsel to try to go through that.

When you give a witness a photo lineup where they've already made an identification, generally people are going to say to themselves, I did this, I don't want to be told that I'm wrong. That's the basic

instinct for self-preservation, which is wired into our DNA.

So you have nothing to gain by showing the witness -- essentially what you are doing is re-enforcing that person's identification by showing it to them again, with the knowledge that the prosecution has shown it to them if they did pre-deposition preparation of the witness, which they may or may not have done.

Also, if you show that lineup to them and ask them to make the identification again, you are actually violating the Bar rules because, at that point, what you are doing is something that is adverse to your client's interest.

You can go through the procedure: What did the police do? You know, ask them all of the things: Did they read you the lineup admonition? Did you understand it? Did you sign it? Did you feel pressured? Did the police officer tap the photo array? Did they make a face while you were looking at a particular photo? Did they do something to affect your identification? But that's all

separate and distinct from what's in the photo lineup.

This case -- and if we are talking specifically -- are we talking about specifically these lineups now?

Q. Yes.

A. All right. So these particular lineups, what Mr. Schwartz was trying to do was say: Here is a photograph of the subject who we have information to believe that he committed this robbery, to see if the witness could identify that person.

Now, at that point, if the prosecutor had a problem, the proper thing to do is to say -- is to look at it and say "I object, and I'm instructing the witness not to answer any questions with respect to this lineup. Move on." That did not take place.

The prosecutor did object, albeit, not very artfully at times, but she did object. But the rules of deposition are, when you state your objection for the record, the witness then answers the question. And that's what happened in this particular case.

THE COURT: So the prosector should

have asked for recess so she could have sought judicial review of impropriety of this procedure?

THE WITNESS: It could have been done by a recess, Your Honor, or it could have just been the equivalent of the old "let's certify the question," that we no longer have to do, and then we'll take those questions in front of the judge and see if the judge will allow the witness to answer, and then we bring the witness back.

Of course you could have recessed the deposition, and I believe it was during business hours, where Judge Block would have been available to make a ruling there. And from my perspective, there were strong and compelling reasons to permit these questions to be asked of the witness and to compel the witness to answer.

BY MR. KUEHNE:

Q. So the procedure under the case law that you've identified is a prosecutor could instruct the witness not to answer?

A. Clearly.

Q. And then it would require a judge to have to say, yes, defense counsel, you are allowed to do this or not?

A. Yes.

Q. In connection with cases in South Florida, your criminal defense cases in South Florida, is it your experience that both prosecutors and defense lawyers, as institutions, are attuned to mistaken identification cases?

A. Absolutely.

Q. And is it your experience that challenging identification in appropriate cases is something that is often agreeable to prosecutors?

A. Yes. It is often agreeable to a prosecutor because the prosecutor wants to do justice. You know, the idea is not to get a conviction, the idea is to do justice.

And if you have information that demonstrates that this individual may not have committed this crime, it's incumbent on a prosecutor to investigate that and encourage it.

I believe, from my perspective, if a seasoned prosecutor is confronted with this issue, that the thing that they should be doing is to contact the detective on the case and say: Listen, we might have a misidentification here. I would like you to create a lineup with the photograph of the individual who is this alternative suspect -- that they did not learn of from Mr. Schwartz, that they learned of from this letter, apparently, and this other witness who said this individual had confessed -- and to say to the detective: Let's go do another lineup with this person. Let's do it right and see what happens. And even tell the defense: I'm going to do that.

Because if, in fact, the witness does identify that person as the perpetrator, then they know they've got the wrong person. And if the witness says, no, that's not the person, then they know that it's not, and they are going to disclose that to the defense that way.

In this case, none of that was done.

THE COURT: We only have about ten

minutes left.

BY MR. KUEHNE:

Q. You are familiar with Rule 4-8.4(c), the misrepresentation, deceit requirement?

A. Yes.

Q. With your background and experience, in applying that rule to the conduct that is shown in this exhibit, did Mr. Schwartz engage in a Bar violation?

A. No. I don't believe he did something dishonest or intended to mislead the witness in any way, or perpetrate some sort of fraud on the court at all.

Q. Is the transcript reasonably construed as having Mr. Schwartz essentially telling the witness, "these are the police lineups you've looked at. I want you to look at them," and thereby, misleading the witness?

A. No, he never said that. In fact, he said "these are my exhibits. Forget everything that you saw before or you did before. I want you to look at my exhibits."

Q. And is that part of your analysis of reasonably effective and legitimate criminal defense challenge to eyewitness

identification?

A. Yes, I do.

I just want to say, you know, from my perspective, and if done properly, what's good for the goose is good for the gander.

The defense has equal access to witnesses. The defense doesn't have to take witness depositions, for instance. We can go interview a witness, if we chose, without taking a deposition of them and not give the state notice of that, and talk with them, just like the state attorney can or a detective can.

When you are talking about putting together a photo lineup, the police are permitted to do that, the defense are permitted to do that. It's the methodology. It's the way that it's done that is, I believe, what we are here talking about in this proceeding.

MR. KUEHNE: I tender the witness, Your Honor.

THE COURT: Was there anything unusual about using the -- I don't have Exhibit 4 -- using the -- there is one

that's really, really dark.

THE WITNESS: That's Exhibit 4, Your Honor, Exhibit 4 to the Bar's Exhibit 1.

Are you talking about the one, Your Honor, with --

THE COURT: That one.

Okay. Was there anything misleading about giving the information below here?

THE WITNESS: I think that's where the dispute arises here in the case, which is that the bottom of it was signed by the witness and signed by the detective, and the picture had been changed.

So one would look at that and say, well, you're suggesting to the witness that this is the lineup which you already -- where you identified the person in position number 5.

But Mr. --

THE COURT: But the witness didn't.

THE WITNESS: The witness didn't. And that's where I think -- I hate to keep using these cliches, but the proof is in the pudding. The witness clearly understood what Mr. Schwartz was doing.

MR. KROEGER: Objection; speculation.

THE COURT: The prosecutor never objected to using this at the deposition? "This" is --

THE WITNESS: Never objected.

THE COURT: -- the photo selected and the two signatures.

THE WITNESS: Correct, never objected.

So I think this is -- again, as I said earlier, I think at that point, the prosecutor is really backpedalling to try to somehow protect herself.

But at the end of the day, the witness said "that's not the person," so she clearly was not misled.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. KROEGER:

Q. Mr. Wax, we are on a time crunch, so I'll --

THE COURT: You can do your best. I won't cut you off too soon.

MR. KROEGER: Thank you, Your Honor.

BY MR. KROEGER:

Q. You mentioned about 15 percent of your practice is devoted to, essentially, professional responsibility among various disciplines; correct?

A. Correct.

Q. You mentioned you have previously represented Mr. Schwartz in disciplinary matters; correct?

A. Correct.

Q. In the course of that work, then, I presume you recall a case 2002, where Mr. Schwartz had pled guilty to violations in that case of 4-8.4(c), as well as 4-3.3, making a false statement of material fact or law to a tribunal, 4-4.1, making a false statement of material fact or law to a third person, as well as some other violations?

A. Was I the lawyer on that case?

Q. According to the report of referee, you were.

A. Okay. I would have to see it, it's been many years. But if it is, I'm sure that I --

Q. I'll provide you with a copy, if you

want to see this.

A. Yes, I remember this. This had to do with a dispute between Mr. Schwartz and his former partners.

And I think what happened here, just for what it's worth, is that I did represent him in the beginning and remained on the case, but Paul Remalo (phonetic) did inherit the case for the final disposition.

I didn't try it. I see that Judge Carney was the referee, so I know that I wasn't involved in that part of the proceedings.

Q. It appears it resolved with consent judgment, meaning Mr. Schwartz pled guilty?

A. Right.

Q. Are you aware of other occasions where Mr. Schwartz has pled guilty to similar violations, 4-8.4(c), 3-4.3, as is charged in this case, and other instances of pleading guilty to 4-3.1, candor towards the tribunal or truthfulness in statements to others?

A. Yes, I'm aware of those.

Q. You are, in fact, currently representing Mr. Schwartz in another

disciplinary matter that's actively pending as a result of a probable cause finding; correct?

A. Yes, an advertising matter.

Q. And last year, you also represented Mr. Schwartz in a case that resulted in a no probable cause finding by a grievance committee; right?

A. Correct.

Q. You rendered a number of opinions today. Can you tell me, as a basis for those opinions, what treatises or what publications or scholarly articles specifically are forming the basis for those opinions?

A. The opinions on the propriety of misidentification.

Q. So we are talking about Kuntsman and McWilliams?

A. Those cases, obviously, which are the primary leading cases on this.

Q. Just to be clear, those are the authorities you are relying on for your expert opinions today?

A. Correct.

Q. These two cases?

A. Correct.

Q. Let's look at McWilliams. Do you have a copy of that?

A. I do have a copy of McWilliams. If you give me second, I'll just put it up here on my iPad.

Okay.

Q. Can you show me where in McWilliams the 3rd District Court of Appeals says that it's permissible for a criminal defense attorney to use an altered police identification lineup in a deposition?

A. It does not say that specifically.

What happened in McWilliams, the facts of McWilliams and the holding of McWilliams is inapposite to this specific factual situation.

In McWilliams, what they wanted to do was use the actual police lineups to question the witnesses. For some reason, the state attorney objected, and Judge Dennis Murphy said, no, that's appropriate, and the 3rd District said that was fine. That was the holding of the case.

Q. So the holding, would it be fair to say that it's permissible for defense

attorneys to use the actual police lineups --

A. Correct.

Q. -- in the course their depositions?

A. Correct.

Q. It does not hold that it is permissible to use an altered version of a police identification lineup?

A. No. It cites back to Kuntsman.

Q. Correct.

A. And talks about Kuntsman and dicta.

Q. Where does Kuntsman say that it is permissible for a defense attorney, in the course of testing an identification, to use an altered police identification lineup?

A. Well, Kuntsman was -- while the facts of that was different in Kuntsman, what they had done, as you know, is they created a photo array, 38 photos from somewhere, and took four photographs of the four defendants and put them in the array to see if the witnesses could say which one of the defendants did what during the course of this crime.

The court said that that was improper under these circumstances unless you could show a strong and compelling reason for it.

They could not.

Judge Donner found that they did show a strong and compelling reason, and the appeals court disagreed. So the 3rd District in Kuntsman said, you can do something creative if you have a strong and compelling reason.

And remember, what Kuntsman also says is -- in dicta says, and if I can quote, it says: Rule 3.220 is not intended to provide defendants with the opportunity to build their cases during the discovery process by creating evidence, i.e., misidentification.

In this case, we're not trying to get a misidentification, you're trying to get an accurate identification.

Q. So it's --

A. There's a difference there.

Q. -- your contention that Mr. Schwartz taking the original lineup provided by the state attorney in the discovery response, black-and-white lineup, pasting a photo of the individual known as Fritz on top of Mr. Woodson's photo, but leaving all the other markings, asking the witness to look at it,

and asking if the witness can identify the person who robbed her, you're saying that does not pose the risk of a misidentification? That's your testimony?

A. I'm saying that it does -- anything can pose a risk of misidentification. The police lineup can pose a risk of misidentification. There's always a risk of misidentification in cases.

So in this particular case, though, they weren't trying to get a misidentification. They were trying to get an identification of an individual who had been implicated in committing this crime, which would not be a misidentification.

Q. If it were true that Mr. Fritz was the responsible person?

A. If it were true that he were the responsible person.

Q. Do you know that he was the responsible person?

A. I was not -- I have no way to know whether he was or was not. I just know that there was evidence to support what Mr. Schwartz did.

Q. Was he ever charged with a crime?
A. He had died, apparently, before --
Q. He was deceased?
A. -- so you can't charge him.
Q. And it's your contention, just because I want to make this clear, that showing these lineups that had been altered and had a photo pasted on top of them, did not create the opportunity for a misidentification?
A. You could say that it created the opportunity for a misidentification, that would be a very valid perspective. But first thing we know is that it did not. As a predicate to it, Mr. Schwartz did admonish the witness that these were his exhibits and to forget everything that she had done in the past, and the prosecutor did not object to the process.
Q. Is it your contention today that this admonition to disregard what the witness had done prior, sufficient to erase, if it were, her signature and the detective's signature and the circle around another individual?
A. Yes, and I will -- yes, and I can

explain that.

Q. By all means.

A. Because when she was shown it, and when the prosecutor was shown it, neither one of them said "What's all this? Is this the lineup I saw before? You just told me this is a different exhibit."

It's very clear that both the prosecutor understood it and the witness understood it.

Q. So it's your testimony that Mr. Schwartz's use of the possessive case "my," M-Y, was a sufficient disclosure that he had altered these two lineups?

A. When you combine that with his other admonition, which is "forget everything you've done with this," I believe that that's sufficient because we are looking at a cold transcript. We are not thinking about this in terms of people interacting with one another. As lawyers, we parse words. We are parsing today.

In my opinion, the witness's actions and responses demonstrate that she understood what she was doing.

Plus, remember another thing, she had received the letter that she turned over to the state that said there was another person.

Q. Have you, in your practice, taken an identification, a lineup provided by the State Attorney's Office, and pasted the photograph of another person on it and used it in a deposition, like Mr. Schwartz?

A. No, I have not.

Q. Can you tell me the names of other attorneys that have done that exact same thing?

A. I couldn't tell you that because it's not something that I have asked people about or anyone has told me about.

Q. But it is your testimony today, as an expert witness on misidentification practices and criminal defense practices, that this was a perfectly appropriate method of contesting the identification; correct?

A. I believe that it is not a violation of the rules regulating the Florida Bar.

Q. But I believe you said that not only was it not a violation, but it was appropriate.

A. Under the circumstances of this case. You said "perfectly appropriate."

Q. Forgive me.

A. The word "perfectly" means that it's absolutely the best possible way to do it.

I believe that under the circumstances, it was appropriate because of the information about the alternate suspect, which had been ignored by the prosecution.

Q. So let me rephrase the question.

It's your contention what Mr. Schwartz did, even though you've never done it, you're not aware of any other attorney that has ever done it, was appropriate in this case?

A. Well, let me backtrack on it. Obviously Scott Sakin did it because he was the lawyer in the Kuntsman case.

Q. I thought you said that was a different set of circumstances.

A. It's a different scenario.

Q. I'm asking specifically about pasting a photo on the lineup produced by the state in discovery.

A. I cannot recall that happening at

this time.

Q. How many times have you had the Miami-Dade Police Department or another local agency conduct a sort of brand-new lineup in a criminal case?

A. I've asked for it to be done probably three or four times in my career, but it would have been back in the days when I was doing death penalty cases. And I stopped doing those cases back in 2003. So I can't cite you to a particular case.

Q. Now, you've also testified that you basically believe that the state attorney in this case just sort of messed up her objections; is that correct?

A. For want of a better phrase, yeah. I agree with that.

Q. But is it not true that there are objections on the record that are, more or less, contemporaneous with Schwartz's presentation?

A. Absolutely.

Q. Did Mr. Schwartz ever file a motion with the court, based upon your review of the file, that Woodson filed to compel his ability

to question the witness regarding these identifications?

A. I don't believe that was done, but as a -- parenthetically, the witness -- there was no -- excuse me. It was not necessary to do that because the witness, on her own volition, said "that's not the person." So he accomplished what he had set out to do in getting the witness to look at the lineup and make an identification.

MR. KROEGER: All right. I don't believe I have any other questions, Your Honor.

THE COURT: Redirect?

MR. KUEHNE: Yes.

REDIRECT EXAMINATION

BY MR. KUEHNE:

Q. You mentioned that the process used in this case, you found acceptable and not a violation?

A. Yes.

Q. In asking you the question, and you referenced Mr. Sakin in Kuntsman, and you agreed that the Kuntsman facts are different than this?

A. Yes.

Q. What is your understanding of the law regarding the defensibility to create lineups, to create lineups and not just use what the state attorney has provided to them?

A. Well, just what I testified to on direct examination. You have the procedures. You have the one procedure where you can show the photo lineup the police used, you have the procedure where you can do it in deposition, if you create a new lineup, you can show it to the witness, and the state can allow you to do it or disallow it, and then you have the procedure where you can go in front of the judge before you do it and ask permission in advance.

Q. And is the method used by Mr. Schwartz in this case one of those allowable defense-created lineup opportunities that Kuntsman talks about?

A. It would be the second one that I discussed, which is doing it in deposition and letting the witness and/or the state attorney permit it or disallow it.

MR. KROEGER: Nothing further.

THE COURT: Thank you very much.

So you will have to call my office tomorrow and get dates, unless somebody is out there that can help you right now.

(Thereupon, the proceedings were concluded at approximately 4:37 p.m.)

REPORTER'S CERTIFICATE

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

I, Rinele Abramson, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 27th day of June, 2018.

Rinele Abramson

Rinele Abramson, Court Reporter

IN THE SUPREME COURT OF FLORIDA.

(Before a Referee)

The Florida Bar, Supreme Court Case No. SC 17-1391

Complainant,

vs. The Florida Bar File No. 2016-70,106(11J)

Jonathan Stephen Schwartz,

Respondent.

----------/

173 Northwest 1st Avenue
CHC 1116
Miami, Florida 33128
April 18, 2018
9:00 a.m. - 1:45 p.m.

VOLUME III

Hearing in above-styled cause taken before the Honorable Celest H. Muir, Referee of the above-styled court, reported by Sonnia Martinez, Shorthand Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice filed in the above cause.

CERTIFIED COPY

APPEARANCES:

ON BEHALF OF THE FLORIDA BAR:

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444 Brickell Avenue
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by: Thomas Allen Kroeger, Bar Counsel
and Stacy Hunter, Bar Counsel

ON BEHALF OF THE RESPONDENT:

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Miami, Florida 33131
by: Benedict P. Kuehne, Esquire

(Thereupon, the following was had.)

THE COURT: Okay, sir. We ended with an expert witness, I believe.

MR. KUEHNE: Right, Barry Wax.

THE COURT: And we are ready for which witness?

MR. KUEHNE: Your Honor, when the Bar rested the Court allowed the Respondent to reserve ruling on any motions affecting the Bar's case-in-chief so that we can move ahead with the witnesses; we were taking a bit more time than we had hoped.

And today I have submitted, and served on the Bar just this morning, a motion for directed verdict. I'm prepared to argue that today.

THE COURT: For nonjury, that's involuntary dismissal.

MR. KUEHNE: Right, it should be involuntary dismissal but I wasn't quite certain.

THE COURT: You weren't sure.

MR. KUEHNE: I looked through the rules and I wasn't sure in the Bar proceedings what the correct denomination

was.

THE COURT: What to call it, okay.

All right.

MR. KUEHNE: And I knew the Court would not reject something for lack of the right title, so....

THE COURT: Well, I may be wrong.

Is this terminology part of the Bar rules? This is a jury trial term to me.

MR. KROEGER: Correct.

Disciplinary proceedings operate under the Rules of Civil Procedure, so the document should be titled whatever is appropriate under the rules.

THE COURT: Okay.

All right.

MR. KUEHNE: So I'm prepared to argue or to proceed with evidence, recognizing that the Court can reserve. Whatever is best for the Court.

We do have a number of witnesses to present. We want to try to get the -- at least the evidence portion of the case on the grievance violation done today, so whatever is the Court's pleasure.

The motion for directed verdict is rather cut and dry, or we can move ahead and Mr. Schwartz would be the next witness. Whatever the Court decides.

THE COURT: Yeah, I should have just looked at your firm's name to find out if Michael was still with you.

Okay. So how about -- have you had a chance to read this?

MR. KROEGER: I have briefly reviewed it, yes.

THE COURT: Okay.

MR. KROEGER: In essence, the trial brief, which the Bar filed yesterday, could serve as -- could function as a response to the motion for a directed verdict. So if Your Honor wants to perhaps to review the pleadings.

THE COURT: I think rather than take time -- I apologize if these have been sitting here since you arrived this morning and I should have done it before, but I was working on other matters.

Okay. So I think I'll just reserve on both of those to read and we'll proceed

with where we left off.

MR. KUEHNE: Thank you, Judge.

Mr. Schwartz, in his affirmative case, calls Jonathan Schwartz as a witness.

THE COURT: Okay.

MR. KUEHNE: Respondent witness.

THE COURT: And I'll go ahead and re-swear you in.

Thereupon,

Jonathan Schwartz,

having been first duly sworn or affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KUEHNE:

Q. Please tell us your name.

A. It's Jonathan Stephen Schwartz.

Q. Jonathan, you are the Respondent in this trial, these proceedings?

A. Correct.

Q. And have been since the initiation of the case?

A. That is correct.

Q. How long has this matter, meaning the complaint brought against you, been pending?

A. For three years and sixteen days.
Q. And that was initiated with the former prosecutor's complaint to the Florida Bar?
A. That's correct -- well, initially, I suppose, when the motion for sanctions was filed in front of Judge Bloch and then later withdrawn.
Q. Tell us, just briefly, you're a practicing lawyer.
A. That's correct.
Q. In good standing with the Florida Bar?
A. That is correct.
Q. How long have you been a member of the Florida Bar?
A. Since August of 1986, but I've been a practicing lawyer since June 1st of 1985 with the Public Defender's Office, I did a CLI program.
Q. Let's talk a little bit about your history. From what institution did you matriculate?
A. My undergraduate agree was in something called linguistics. I'm still

trying to figure out what that is. That was from a school in Connecticut called Weslyan University.

I then went to graduate school in psycholinguistics in Chicago at the University of Chicago, the masters program there.

And from there I went on to law school in New Orleans at Tulane University.

Q. You received a JD?

A. I did receive a JD. And subsequent to that I've had a couple other schools I went subsequent to that, if you want to hear.

Q. They're just classes?

A. Subsequent to that, I went to a school in New York City, it was a seminary, called the New Seminary, in order to become an ordained interfaith minister, and that was around -- between 1998 and 2000.

And when I graduated I went on sabbatical pursuant to the studies of the New Seminary.

And then about five years ago I had the inkling that I wanted to perhaps either add or change careers and become a Ph.D. psychologist, a clinical psychologist, so I

took a number of courses. I had quite a few psychological courses in undergraduate and masters. So I went back to school here in Miami-Dade, took a series of courses to qualify, took the GRE, applied for Nova Ph.D. program, got in, and went for the first semester.

And then I came to my senses and back to the law. But it was all a very good experience and it certainly made me a much better lawyer.

Q. Tell us about your professional history. You graduated from law school and then you mentioned you joined the Public Defender's Officer as a certified legal intern?

A. I would say I joined law school in order to become a public defender and I'm still one now, is what I would say.

Q. Okay. So tell us about your career trajectory in the law.

A. My career trajectory is I went to law school to defend the public. I have always had a, what I call, a public defender heart. I joined the public defender clinic as soon as

I had gotten to the school there. I practiced in the -- what we call, if you can believe it, the Mardi Gras Clinic, which particularly was active during Mardi Gras but many other times.

I was interested in criminal law really from the beginning, emphasized criminal law and public defense. And when I got out of law school I applied to the public defender office, Washington, New York, Chicago, Philadelphia, Boston and Miami. I got into the majority of them and chose what at that time we sort of jokingly called Miami Advice, for a number of different reasons. So I ended up here in Miami.

I had interned here in 1984. I had gotten quite a stellar recommendation from Judge Hastings at the time in order to be a public defender and evidently I had a good hiring confidence and I was a public defender for upwards of around six and a-half years until I opened up my private firm in 1991.

Q. So you worked actually as an Assistant Public Defender for how long?

A. No, June 1, 1985. I was an intern before that in 1984 for several months and --

until approximately July of 1991, so six years.

Q. And since that time you've been in the private practice of law?

A. But for three years where I've taken three different sabbaticals during the last 33 years that I've been practicing law.

Q. And with your practice, private practice of law, do you gravitate toward the criminal law area?

A. Yes.

Q. And is that exclusively what you do?

A. No.

Q. You have a law firm?

A. I do have a law firm.

Q. What's the name?

A. It's usually been called Schwartz & Associates, although I've had various inclinations over the years.

Q. So you practice as Schwartz & Associates. And do you have other lawyers who are part of your law firm?

A. That is correct.

Q. What type of work do you do besides criminal defense, does your law firm do?

A. All types of different things. Certainly we have an extensive traffic business. We probably have thousands of traffic tickets open right now.

We also do divorce and family, anything to do with family and child support or anything to do with psychology, really, psychological problems between families, custody agreements or custody problems. Anything to do with family law. We have a couple bankruptcies open right now. We have two probate cases.

And as to the Judge knows, I have one probate case that I've had upwards of ten years that I've been working with an individual. And some contract disputes.

Q. Do you involve yourself in pro bono Bar activities and representations?

A. We have many pro bono cases that I represent at any given time. Most -- yes?

THE COURT: Your probate case is the Gorchoff case which I recused on because I thought he needed a guardian, so I thought that was conflicting.

But he doesn't have a guardian,

right, he just has the trust?

THE WITNESS: It's a guardian -- well the guardian -- right, the trust is -- the guardian, Mr. Messer, is officially the guardian ad litem.

THE COURT: Okay.

THE WITNESS: Between all of us we take care of them.

BY MR. KUEHNE:

Q. So you do a component of pro bono representations?

A. That's right. The most recent one was this woman who was charged with bringing drugs into a federal prison as a yoga teacher. That was very close to my heart, I'm starting the Yoga Prison Project and so that's the most recent one. Fairly high profile press case, but there's been many in any given year.

Q. Are you also involved --

A. I think the Judge has a question.

THE COURT: Can we go off the record?

MR. KUEHNE: Of course.

(Thereupon, there was a discussion off the record.)

THE COURT: Back on the record.

BY MR. KUEHNE:

Q. In addition to your extensive pro bono activities, are you involved in Bar professional organizations?

A. Yes.

Q. And criminal defense organizations?

A. Mostly just the Florida, the NACDL and on the FACDL.

Q. So that's the FACDL, Florida Association for Criminal Defense Lawyers?

A. Correct.

Q. And the NACDL, National Association of Criminal Defense Lawyers?

A. That is right.

Q. Have you utilized that involvement for both professionalism, training and education?

A. Of course.

Q. And do you, in the course of your practice, attempt to stay abreast of relevant criminal law topics and areas?

A. Absolutely.

Q. Do you consider yourself to be a trial lawyer in the criminal law arena?

A. I am a trial lawyer.

Q. What part of your practice is in the trial lawyer area?

A. I am in the court, in motions, in trial cases, I'd say, these last 33 years, or 13000 days, I'd say there are a handful of days where I'm actually not in the court at least for part of the day. I'd say almost every single day I'm in court litigating one case or another, mostly in the Metro Justice building.

Q. So the Metro Justice Building is for state criminal cases?

A. That is correct.

Q. Do you do criminal cases outside of the Miami-Dade County?

A. Of course.

Q. Such as?

A. I have many cases open right now in many, many counties, including Monroe, Broward, Palm Beach, Martin, St. Lucie, Collier, Lee, Alachua.

Q. Have you been fortunate to do any work outside the State of Florida?

A. I have. We have a case right now in Nebraska. I've done cases in New York, New

Jersey, Georgia, Alabama.

Q. Criminal law matters?

A. Yes. Washington, D.C.

Q. And in the course --

A. And federal cases.

Q. In the course of your practice, do you also get involved in federal criminal cases?

A. Yes, of course.

Q. Is that a smaller portion of your practice?

A. No doubt.

Q. But nonetheless significant?

A. That's correct.

Q. Within your practice --

A. Probably ten federal cases in the last year. Maybe ten a year.

Q. Within the practice you've mentioned --

THE COURT: For the record, your name, please?

MS. HUNTER: I'm sorry. It's Stacy Hunter.

THE COURT: Thank you.

Go ahead.

BY MR. KUEHNE:

Q. And in the context of the kind of work your firm, do you focus on primarily the criminal law area?

A. That is correct. And family.

Q. And family. And within the criminal law area, do you handle any significant type of matters or do you cover everything in the firm?

A. No, there's just too many cases for me to cover anything except the more serious cases. If someone is charged with a murder or armed robbery or rape or trafficking, those are the more major crimes that I'm personally involved with.

In most of the rest I'm directing other lawyers. We have several lawyers in the firm, several lawyers out of the firm that work on contracts on a weekly basis, monthly basis.

Q. And you have a senior associate, Jody Baker McGuire?

A. Jody McGuire.

Q. Jody McGuire. That leads us to the representation of Mr. Woodson.

A. Yes.

Q. Was that a serious state criminal case?

A. Of course, armed robbery, life felony.

Q. How did you come -- or when in the course of the case did you come to provide representation to Mr. Woodson?

A. Maybe about six to eight months into the case. I'm very fortunate to have extensive referrals from old clients. I've been doing this for a long time and I have a lot of happy customers and happy clients. And the mother of Mr. Woodson, I represented her and family members, for many, many years, so she had called my again to represent, now, her son, but I've represented various family members for various things for years, as I have many, many of my clients.

Q. So she did a referral to represent Mr. Woodson.

A. Uh-huh.

Q. And you mentioned eight months, did that mean eight months after the case had been initiated?

A. That is correct. He was arrested -- in juvenile, he was placed in juvenile. The case was what we call direct filed. He was then transferred to Dade County Jail, he had been held on no bond, and I was then hired to take over the case at that point.

Q. So he was a juvenile in the Dade County Jail. State Attorney direct files, meaning they file in adult court.

A. That is correct.

Q. And you then get brought in to be the principal counsel?

A. I'm estimating around October or November of 2014 or so.

Q. And what was the basic charge against Mr. Woodson?

A. Armed robbery of a woman outside the apartment near her car of keys and money, based on a signal identification, and based on property that was found in his possession a couple days later.

Q. You mentioned that you were able to obtain a bond for Mr. Woodson in a non-boundable offense.

A. Well, at that time there was case law

-- there was a lot of litigation the last several years regarding the 8th Amendment ruling, cruel and unusual punishment, life sentences, had come out requiring resentencing of juveniles and making the death penalty and life sentences illegal for juveniles.

And so, yes, there was a case out there which indicated that juveniles were entitled to bond, as a matter of right, because they could no longer get the life sentence.

So I put that on, showed it to the judge, and the bond was obtained; he was released.

Q. So the client gets released on bond, and during the course of your -- the remainder of your representation to the conclusion, did your client remain on bond?

A. No.

Q. What happened?

A. He had gotten arrested. Again, there a problem, he was out on a bracelet and he had violated the bracelet, he ended up cutting it off and disappearing for a couple of weeks until he was picked up.

Q. So he had another case --
A. That is correct.
Q. -- in addition to the robbery case, another case arose during the course of your representation?
A. That's correct, tampering with a mechanism, cutting it off, criminal mischief, various charges relating to fleeing.
Then a third case.
Q. Then a third case unrelated to the first?
A. That is correct, while in jail.
Q. Okay.
A. Involving another prisoner.
Q. So Mr. Woodson had the primary case, the robbery, and then two other cases?
A. That is correct.
Q. Did you primarily provide the representation to Mr. Woodson?
A. Yes.
Q. Who else in your firm assisted?
A. Ms. Baker now, Ms. McGuire at the time, and Ms. Mooreheim(phonetic), who is also Ms. Liberman(phonetic) now.
Everybody is getting married in my

firm, including me.

Q. An associate on the case?

A. That's right. So we had two associates and myself.

Q. When you began representing Mr. Woodson, who was the Assistant State Attorney?

A. Jessica Dobbins, D-O-B-B-I-N-S.

Q. And Ms. Dobbins, did you have some dealings with Ms. Dobbins about the case?

A. Yes.

Q. Did you present to the State what your basic intention or theory was in this case?

A. Alternative suspect.

Q. Tell us what that means.

A. Alternative suspect is a case where you feel that your client is actually innocent and you have some garnered evidence that your client is actually innocent and that you have an alternative suspect, of which we had, I believe, four different sources of evidence in this case indicating that Fritzlan Joseph was the actual perpetrator, and I believe he is the perpetrator to this day.

Q. So did you tell the State Attorney, Ms. Dobbins, that was your defense?

A. Absolutely.

Q. Were you open and frank about that?

A. Well, of course, there was so much evidence to suggest that. It was an open discussion anytime the case was discussed.

Q. In the course of your presentation of your actual innocence alternative suspect defense, did you facilitate the State access to witnesses to prove the alternative suspect issue?

A. That is correct. It was a rare case. We actually had witnesses who had statements from the, we believe, guilty party, the alternative suspect, Mr. Joseph, and they were provided as a list of defense witnesses. They were set for deposition and I brought them both in and they were duly deposed by the State Attorney.

Q. Okay.

A. One was a girlfriend and --

THE COURT: Could I interrupt one second?

(Thereupon, there was a discussion

off the record.)

THE WITNESS: Yes, there was two witnesses that we brought in to support that.

And then, of course, was a letter that was sent to Ms. Tellisma, which she provided to the State and they provided it us as Brady material.

BY MR. KUEHNE:

Q. Okay. So you facilitate the State having access to witnesses. And did those witnesses confirm the status of the alternate suspect as the perpetrator?

A. Absolutely.

Q. And as a result of that presentation, what did you do in the case?

A. Well, we brought in Kim Williams, she was the girlfriend. She testified that the -- Mr. Joseph had confessed to the crime and described it in some detail.

We brought in Mr. Reagan, Stanley Reagan, who testified that Mr. Joseph had sold the telephone of Ms. Tellisma to my client and that's how he became in possession of it.

And we sought them to drop the

charges against my client because there was overwhelming evidence that my client was innocent, along with the fact that the actual identification in this case was grossly suggestive.

Q. Was that based on a suggestive police lineup?

A. Absolutely.

Q. Did you discuss with the State Attorney, Ms. Dobbins, your concern about the impropriety, constitutional impropriety of the police lineup?

A. Yes, although it was obvious to any criminal lawyer that this was one of the most unduly suggestive lineups that anyone had ever seen, so it was sort of a -- it was an assumption, really, in this case, because it was so obviously suggestive, due to the backgrounds of the lineup -- or at least the copy that we were provided of it.

Q. You mentioned that in this particular case you had not only information about your client's actual innocence, but significant information about the actual or likely actual perpetrator.

A. Yes.

Q. Had you ever had a case where you had significant evidence that another person identified did the crime?

A. Certainly not to the extent of this case here. This was, by far, a case where it seemed to me obvious that my client was actually innocent and that the case should be dropped.

There have been cases where there have been indications that it was someone else, but never this clear.

Q. And did you --

A. I wish. It would be a joy to represent actual innocent people more often.

Q. This was an unusual confluence of events for you in representing Mr. Woodson?

A. Absolutely.

Q. Did there come a time when --

A. The police generally arrest the right person 99.9 percent of the time. I've come to believe as a criminal lawyer that 99 percent of the time they get arrested for a darn good reason.

So it's rare, you know, a case where

you have someone arrested on less than good evidence and there was substantial evidence that it wasn't him. So not only was it not good evidence that it was him, there was substantial evidence that it wasn't him, and that's once in a career case.

Q. Did there come a time when the assigned prosecutor changed?

A. That's correct.

Q. And was that just a normal rotation, as you understood it?

A. Sure. I think Mr. Dobbins, Jessica, had left the office. I think she had gotten another job or she became a federal prosecutor. And, you know, I think prosecutors were leaving the office pretty quickly at that time and so much younger prosecutors were moving up fairly quickly.

Q. And the new assigned prosecutor was Cristina Cabrera?

A. That's right.

Q. The complainant against you.

A. That's right.

Q. You had any dealings with Cristina Cabrera before, as far as you recall?

A. No. I don't recall any other cases prior to this case.

Q. Did you begin the process of attempting to educate the new prosecutor about your concerns --

A. As always.

Q. -- regarding the case?

A. As always.

Q. So you talked to the prosecutor?

A. Sure, of course.

Q. All right.

A. Especially in a case like this, where I have a client who is actually innocent. A case like that, you know, we have maybe 130 or 140 open, what we call, major cases of felonies and family court cases. And of those, that I would say open right now, I think I have zero of people who I think are actually innocent.

So when we have one that comes around once every couple of years, obviously, that becomes a primary focus.

Q. Did you make an effort to educate the new prosecutor about the discovery activity you had mentioned involving Ms. Dobbins --

A. Yes. And including --
Q. -- the exculpatory letter and the exculpatory witnesses?
A. Yes. And she actually was the -- was the State Attorney who took the deposition.
So before, during and after the deposition of Kim Williams, there was extensive discussion regarding the actual innocence with Ms. Cabrera, which had taken place weeks before Ms. Tellisma's deposition.
Q. In the process of coming to know the new assigned prosecutor --
A. Yes.
Q. -- did you try to get any helpful information about her?
A. Well, certainly. And once I saw that she was not receptive to an actual innocence case and that it was more important, I believe, for her to win, rather than to --
MR. KROEGER: Objection, speculation.
THE COURT: Overruled.
BY MR. KUEHNE:
Q. Was that your view in dealing with her?
A. It was my view that, despite the

strong evidence of innocence, that her view was, anything that interferes with, you know, the strength of her case was a personal insult, frankly.

Q. Did you -- strike that.

You mentioned doing work at the Justice building.

A. Yes.

Q. Metro Justice Building. Did you communicate with other lawyers who might have had dealings with her or worked in that division?

A. Yes. But it's not just this case. It's a matter of course, I think, with all lawyers, certainly in criminal, but I believe in most fields, if there is a new lawyer in the Justice building that takes over a case, and especially if it's a major case, it's a murder or armed robbery case, certainly it's my practice to talk to the public defenders and talk to many, many lawyers that I see everyday. It's a very small and tight and close family over there in the criminal courthouse, everybody knows each other, we've been working together for 30 years. And when

a new lawyer comes in that's a brand new lawyer, certain -- and something unusual is happening, certainly our practice is to ask around. But not just in this, but in every case.

Q. So let's focus, so I understand, your practice is to learn who your opposition is.

A. Of course.

Q. And in this particular case, the Woodson case, did you do that?

A. Of course.

Q. And what became your view of her reputation, talking to people who dealt with her, worked with her in the same venue?

MR. KROEGER: I'm going to object based on relevance and based upon the motion in limine the Bar previously filed.

MR. KUEHNE: Your Honor, I would just offer that reputation evidence as admissible. I believe I've laid a foundation.

THE COURT: Isn't that as to credibility issues? And don't -- I need to read the rule.

MR. KROEGER: I mean, the Bar's

position would be, notwithstanding the potential inadmissibility, that it simply is not relevant. It is not probative as to the material allegations of this case.

MR. KUEHNE: And I would offer two responses, Your Honor. First, as to the witness, she has testified and I believe has put her entire explanation at issue.

And, number two, the relationship between the two lawyers, Mr. Schwartz and the prosecutor, forms what happened in this case. The Bar is claiming there is intentional deceit. And our position is that there was no misconduct whatsoever, much less intentional deceit.

THE COURT: Okay. I'll sustain the objection.

I think your view of her as wanting to win got in. I'm not sure her reputation --

MR. KUEHNE: Fine.

THE COURT: -- does as far as relevance.

You can proffer that, of course, later, but go ahead.

BY MR. KUEHNE:

Q. Did you speak with other members of the State Attorney's Office who knew about this new prosecutor?

A. Yes, I did.

Q. So give us a sense. You spoke with people in the Public Defender's Office, people in the State Attorney's Office and other defense lawyers?

A. That's correct.

MR. KROEGER: I'm going to object, Your Honor, to this line of questions on the same basis. This is an attempt to elicit either inadmissible reputation evidence or improper character or propensity evidence.

THE COURT: Overruled.

You can get in what you did to defend your client.

BY MR. KUEHNE:

Q. Did that discussion, as you've described, those discussions, help inform you in your representation of Mr. Woodson and your handling of the matters with Ms. Cabrera?

A. Certainly. And everything I had

learned was confirmed by her behavior both in the deposition and throughout the case.

Q. That leads to a deposition --

A. She's a young lawyer, this is one of her first depositions.

Q. She was an A-prosecutor?

A. A-prosecutor. She had just become an A-prosecutor. I didn't get the sense that she had done many of these depositions before.

Q. This gets us to the Tellisma deposition continuation.

A. Yes.

Q. That's Florida Bar Exhibit 1. We've talked about it extensively, February 13, 2015.

A. Yes.

Q. Mr. Cabrera is the prosecutor on the case.

A. Right.

Q. You and Ms. McGuire were the defense lawyers on the case.

A. That's correct.

Q. At the time of the deposition, had Ms. Cabrera given you an offer, a plea offer for the resolution of Mr. Woodson's case?

A. Both Ms. -- in a case like this where things are -- where I believe the plea is divorced from justice, we usually go to the next level, and that is what we call the Pod Chief.

Q. So you may have misunderstood my question.

Did Ms. Cabrera, at the time of the Tellisma deposition, give you or discuss with you the State's offer to resolve the case?

A. Yes.

Q. And what was that offer?

A. Approximately ten years in prison.

Q. And --

A. There was a lot of different offers, but that's my recollection as to the basic offer.

Q. And did you -- and your client declined that offer?

A. That's correct.

Q. Mr. Woodson was -- was he still a juvenile?

A. He was -- I don't recall whether he was a juvenile or just recently 18.

Q. Okay. So he had never been, as far

as you know, to state prison?

A. No, he had not.

Q. The Tellisma deposition, February 13, 2015, is a continuation?

A. That's correct.

Q. You had deposed Ms. Tellisma previously?

A. Approximately one year before.

Q. And that was during the tenure of Ms. Dobbins?

A. That is correct.

Q. And was it basically a courtesy to Ms. Tellisma that that deposition did not complete?

A. That is correct, she was -- she got ill and she requested that it be reset.

Q. And you accommodated her?

A. Yeah, we accommodated her.

Q. And during that approximate one-year time between the first deposition and the continued deposition --

A. A lot happened.

Q. -- were you actively working on the case?

A. Absolutely.

Q. And attempting to convince the State of the -- to see the case differently?

A. Well, witnesses were located, witnesses were listed, witnesses were brought in. I don't recall exactly when the letter came of light, but there was extensive investigation regarding the source of the letter, finding -- investigation trying to find the mother of -- the actual person who wrote the letter. So, yeah, there was a lot of investigation that took place.

There was a lot of requests for investigation taking place.

Q. Let me just refer you. The letter you're talking about is a Creole letter that was produced to the defense by the State Attorney --

A. That is correct.

Q. -- as Brady material.

A. That is correct.

Q. And that's found as an attachment to the Tellisma deposition.

A. That's the first thing that I asked her about.

Q. It's actually Exhibit 1 to the

Tellisma deposition, that's Florida Bar's Exhibit 1.

A. Right. Written by the alternative suspect's -- purportedly written by the alternative suspect's mother, Ms. Baptist.

Q. And upon receiving that letter from the State Attorney as Brady, did you, then, in your representation of Mr. Woodson, attempt to track that down, figure out what that was?

A. Yes.

Q. And did that confirm -- did that letter confirm or corroborate your position that the other suspect was, in fact, the perpetrator?

A. That is correct.

Q. And did you discuss that letter with Ms. Cabrera?

A. Moreover -- yes, of course. And I had thought that when you get a letter from the mother of a suspect saying, my son did this crime, here's the keys, we're real sorry, that the first thing that they would do is send out a detective. It did have a name of a person on the letter and so we were more than jumping up and down trying to get the State to

investigate the source of the letter.

Q. Did the State not investigate?

A. They did not. As we heard from Ms. Cabrera --

Q. Did you --

A. They ignored it.

Q. Did you instead do a defense investigation?

A. We did.

Q. And present that information to the State Attorney?

A. We did.

Q. By the way, is that all part of the process of effectively representing a client?

A. Absolutely.

Q. But you're not required to provide evidence to the State Attorney.

A. Yes and no. I would say under 3.220, under Reciprocal Discovery Rules, once we invoke the reciprocal discovery we have 3.220 obligations as well, so yes.

Q. So Ms. Tellisma gets set for deposition for the second time.

A. Uh-huh.

Q. And you primarily take her

deposition?

A. Wholly, yes.

Q. It's at this deposition that the allegations of misconduct erupt.

A. That's correct.

Q. The allegations of misconduct don't arise then, but the conduct in the deposition is what gave rise to this Bar complaint, right?

A. That's right, the construction of the lineup.

Q. Okay. So did you have a purpose in going through the second deposition?

A. Yes.

Q. What was that purpose?

A. To test the witness's ability to identify.

Q. In setting that deposition --

A. And to suggest the alternative theory from beginning to end.

Q. In setting that deposition, had you discussions with Ms. Cabrera about why you wanted to continue her deposition, meaning, take a second deposition or a continuation of the deposition?

A. Yes.
Q. And what did you explain?
A. Well, it centered around the identification. We had just filed an actual -- even without taking her deposition, which is unusual, we had filed, because the case was coming to a head and continuances were ending, and so we had already filed a motion to suppress the evidence based on an unduly suggestive and unconstitutional lineup.

And, as I said, it's unusual, I think, prior to taking the deposition, but it was so clear in this case. Sometimes you don't want to signal the prosecution that it rises to the level that you're going to file a motion, but it was so clear in this case, we had filed it. And so there was discussion, yes, that the rest of the deposition needed to take place and it was assumed that the primary area would be regarding the motion to suppress.

Q. So you had a motion to suppress filed --
A. Two or three weeks before.
Q. -- during the time of Ms. Cabrera's

representation of the State?

A. That's correct.

Q. And had you discussed the name of the alternate suspect with Ms. Cabrera at anytime prior to the Tellisma deposition?

A. Yes. But, of course, she knew since it was in the letter and --

Q. So the answer is, yes, you did discuss it?

A. Yes, of course.

Q. Okay. And it was also in the State's Brady exculpatory letter?

A. And the depositions.

Q. Did you, in preparation for the deposition, the Tellisma continuation deposition --

A. Yes.

Q. -- put together any materials to test or challenge the identification?

A. Yes, what we're calling the defense function lineup, yes.

Q. So you --

A. As, in fact, we're constructing this week on another case.

Q. So you prepared a -- some lineup

tests --

A. That's right.

Q. -- for the witness?

A. That's right.

Q. And how many?

A. Well, there was, I think, seven exhibits altogether, but regarding the lineup, there was three actual lineups and several different pictures.

But the whole idea was to test her ability on the alternative suspect, it's to see -- to test our theory, which everybody openly knew was Fritzlan Joseph. I showed her pictures of Fritzlan Joseph, Fritzlan Joseph's mother, to see if she recognized her from church, she's in the church.

And I showed her two lineups with Fritzlan Joseph in it. And I showed her the lineup that purportedly she had seen before and she didn't pick anybody.

Q. Okay. In preparing for that questioning of the identification, were you familiar with -- with Florida law on challenging a witness identification?

A. Yes, of course.

Q. So you're aware of the case State versus Kuntsman, K-U-N-T-S-M-A-N?

A. That's correct.

Q. And also there's a case called State versus McWilliams, M-C-W-I-L-L-I-A-M-S?

A. Yes.

Q. And you're aware of that entire line of cases?

A. I think any lawyer who's done the volume of cases that I've done, who's had a public defender type of practice for 30 years, inevitably the number one source of misidentification -- of people in jail for -- that they're innocent on misidentification, it's the number one overwhelming reason. It's the foundation of the Innocence Project.

Anybody who is a criminal defense lawyer knows or should know, certainly, the law regarding the ability to construct lineups, and McWilliams and Kuntsman really are the foundation of that.

Q. In connection with your understanding of the law and knowledge of these cases, you mentioned that you have been active in FACDL and NACDL. Is the issue of misidentification

a major focus of what you have done and learned in the NACDL/FACDL arena in the last 10, 15 years?

A. If not the major focus, as we all know now and has been discussed previously, even a republican governor has now signed revolutionary, I believe, new law into state right now completely changing the procedures by which an officer is allowed to do an identification, wherein the identification in this case wouldn't even be close to being lawful. Now they administer what we now call blind administration.

And we can only pray that the rest of the country follows suit so we have less actual innocent people in jail.

Q. Has the defense effort that you -- and understanding that you've developed, getting up to Tellisma, include NACDL and FACDL seminars and programs on probing identification and misidentification?

A. Absolutely.

Q. You mentioned the --

A. Actual innocence?

Q. You mentioned the actual innocence --

the Innocence Project, is that something --

A. Yeah.

Q. -- through FACDL or NACDL you've been involved in?

A. Well, not directly involved in, but in any lawyer who does eyewitness cases and has sought to have national experts, like myself, testify about it, it's a resource. And it's certainly -- it provides information regarding appropriate procedures and certainly gives a good idea about how frequent people have been released through their efforts as a result of misidentification.

Q. And up to the time of the Tellisma deposition, had you consulted with, not necessarily in Woodson, but general misidentification cases, consulted with experts on issues pertaining to misidentification, eye --

A. Many times --

Q. -- eyewitness misidentification?

A. Many times throughout my career.

Most notably the one that Mr. Wax mentioned, which I believe is the national expert, which I've gone to many times for her

advice, and that's Dr. Elizabeth Loftus, who I believe is the national expert. I've consulted and hired her several times regarding eyewitness identification, have listed her as a witness both when I was a public defender and as a private lawyer.

Q. And that's L-O-F-T-U-S, Loftus?

A. That is correct.

Q. And did all of that information that you've discussed, about your educational learning, help inform you in preparing for the Tellisma deposition?

A. I hope so.

Q. Okay. So you developed defense photo lineups?

A. Uh-huh.

Q. They are identified in this Bar proceeding and they are identified in the Tellisma deposition.

A. (Witness shakes head.)

Q. The exhibits that we have in the case are black and white.

A. That's correct.

Q. Did you utilize black and whites for your photo lineup examination?

A. That's correct.

Q. Now, was that different from the actual photo lineups -- strike that.

Were there multiple photo lineups to Ms. Tellisma by the police?

A. As we understand. Although, Ms. Tellisma seems to suggest otherwise. And the State seems to suggest otherwise today, but that's what we were all told and I believe is the truth of the case, too.

Q. And that the photo lineups by the police occurred on separate -- completely separate occasions?

A. That is correct.

Q. And you had contended that the photo lineup that included Mr. Woodson was highly suggestive and unconstitutional.

A. For a number of different reasons.

Q. And that's your motion to suppress.

A. That's correct.

Q. But, from this case, did you have an understanding whether the police lineups actually shown to Ms. Tellisma were like your copies, in black and white, or instead in color pictures?

A. No. There's no question in my mind that they were in color. There's no lineup that's ever existed that is a black and white lineup that a police officer has ever done in the history of Dade County office.

Q. Well, history goes back a long time, so --

A. That's I'm aware of. Not in my practice.

Q. Okay. So you've done, you mentioned, a lot of cases at the Justice building.

A. Uh-huh.

Q. This was a case investigated by Miami-Dade Police Department, MDPD?

A. That's correct.

Q. And you can tell from your photocopied defense lineups that they are MDPD generated.

A. That is right, they have a -- they have their signature on them.

Q. Well, the legend.

A. It looks like -- the legend, yes.

Q. It's a computer legend.

A. That's right.

Q. Meaning it's printed from Miami-Dade

Police Department records.

A. That's correct.

Q. And it's your understanding, at the time, that the photo lineups used by Miami-Dade Police Department for Tellisma, and anything else around that time, are color photos.

A. Color photos with probably a manilla cardboard -- with photos placed in a manilla cardboard box.

Q. Okay. Was that confirmed by your discussions with State Attorney, Ms. Dobbins?

A. Both Ms. Dobbins and Ms. Cabrera.

Q. But you did not --

A. She has a question.

THE COURT: Yeah. So you don't get a lineup in photograph form, you get individual photographs in a box and then when they make copies for the defendant they line them up and mail them out?

THE WITNESS: No. When -- may I explain?

THE COURT: Sure.

THE WITNESS: When we're in trial -- this is how we know -- and the

identifications are actually shown in trial, what they show is like a cardboard manilla folder. It could be like a folder like this color right here.

And there's cutouts, there's boxes, that are cut out and then the pictures are pasted on the back of the boxes.

THE COURT: Okay.

THE WITNESS: And so you'll have one, two, three, four, five, six.

Inevitably the defendant is in Number 5.

THE COURT: And that's based on your practice and experience?

THE WITNESS: Yes.

THE COURT: Is there any rationale for having the defendant Number 5.

THE WITNESS: Or Number 2.

It's always been Number 2 or Number 5, from my experience, because it seems to be that's the most likely chance that someone is going to pick someone out, because they don't want to pick out the first or last, and evidently, psychologically, they want to pick

somebody in the middle.

BY MR. KUEHNE:

Q. Now, is such a practice, however it is used, contrary to the new statute, 92.70 Florida Statute?

A. That is correct.

Q. That's part of what you called the new reform for eyewitness identification?

A. That is right.

Q. Completely changes the process by which law enforcement is allowed to conduct photo lineups or even actual lineups.

A. That is right.

Q. This process in Woodson predated that statute?

A. Yes.

Q. And the practice is not even close to what's in the statutory --

A. That's correct, in several ways.

THE COURT: And what's this current statute, 9 --

MR. KUEHNE: 92.70. And we have a copy, Your Honor. I think it might have introduced as an exhibit in the case, but I'll have to look at my notes.

THE WITNESS: Most importantly, the administrator can't know who is the suspect. So it has to be a blind administrator. And, number two, it has very specific directions as to what to say. And certainly excluded is, we have arrested the perpetrator and he's in the lineup, as was done in this case.

MR. KUEHNE: Your Honor, this statute is Exhibit -- Respondent's Exhibit G in evidence in the case.

That's the statute, yes.

BY MR. KUEHNE:

Q. So you prepare defense lineup sheets in black and white?

A. A copy -- alleged copy, yeah, in black and white.

Q. Well, part of the -- part of the Tellisma deposition, Exhibit 2, is one of the defense lineups, photo lineups that you used?

A. That's right.

Q. So using this, your Exhibit 2 as an example, in an actual -- in the usual police lineup --

A. Yes.

Q. -- used by the police in the Tellisma case --

A. Yes.

Q. -- are the photographs colored photographs --

A. Yes.

Q. -- meaning full color photographs?

A. Yes.

Q. You just have a black and white set.

A. That's correct.

Q. Your defense-created lineup changed a picture.

A. From what was the original, absolutely.

Q. Okay. So yours is in black and white, not color --

A. Right.

Q. -- and you changed a picture. Do you use a color picture or a black and white picture?

A. All black and white.

Q. And what did you do for changing the picture?

A. I substituted in Mr. Joseph's picture for Mr. Woodson's picture.

Q. So you --
A. I took the alternative suspect and I put him in the spot where Mr. Woodson was.
Q. You took a picture that you had of Fritz?
A. Fritzlan Joseph.
Q. Fritzlan Joseph, the alternative suspect that had been identified by other witness --
A. Right.
Q. -- and put it in place of the picture of Mr. Woodson?
A. Of course.
Q. And what was your intention in doing that?
A. Testing the witness's ability to identify. And to see -- to test her ability to identify the perpetrator and to see if yet another witness, other than my client, Mr. Reagan and Ms. Williams, would provide even more evidence against Mr. Joseph.
Q. Did you ever --
A. And to test her ability to really -- and, as it turns it out, what we found out, from here, number one, is that she said that

the person had a hood on and she couldn't see the face.

And number two, even while showing what purportedly was the same, or similar or a copy of the lineup, picked out Number 1.

So just to test her ability to identify.

Q. In the process of using your defense-created lineup, did you have any intention to mislead Ms. Tellisma?

A. Of course not.

Q. Or anybody else?

A. Of course not.

Q. Did you have any intention to misrepresent what you were doing?

A. No.

Q. Did you have any purpose to act deceitfully or dishonestly or fraudulently in doing this?

A. Of course not. I am representing a client doing what I can to do my job, to zealously represent my client.

Q. Did you --

A. Particularly under these circumstances, where the State is not

listening.

Q. Did you at anytime in the course of the deposition attempt to hide what you were doing from the prosecutor?

A. Absolutely not.

Q. Did you ever attempt to keep the prosecutor from seeing, viewing, examining exhibits that were marked and introduced into evidence in the deposition?

A. That's preposterous.

Q. Is that yes or no?

A. That is absolutely no.

Q. Did you at anytime attempt to mislead the prosecutor as to what you were doing in using your defense-created lineup?

A. Absolutely not.

Q. Did you ever attempt to mislead Ms. Tellisma in using your defense-created lineup?

A. Absolutely not, as it was borne out, I believe, by every word of the deposition.

Q. Did you, at anytime in the course of the deposition, represent to Ms. Tellisma, or anybody else in the deposition, that you were showing her the police lineups that she had

seen previously and identified?

A. No. I think quite the contrary. I contrasted it and I said, this is my defense lineup, this is my Exhibit Number 2.

Q. Did you ever refer to your defense-created lineups, the photo lineups, the black and whites, as the lineups she had been shown by the police?

A. Quite the contrary. I told her, assume that you have never seen this lineup before.

Q. Did you ever -- strike that.

Now, the --

A. And focus on the faces, the pictures.

Q. The first defense-created lineup that you presented to the witness is your Deposition Exhibit 2 --

A. That's correct.

Q. -- Tellisma Deposition Exhibit 2.

And we've looked at it a number of times. I'm not going to show you.

This is a black and white photocopy of what you've testified is the original a color lineup with color pictures on it.

A. Uh-huh.

Q. And, in other respects, you've made it black and white by photocopying it, right?
A. Okay. Yes.
Q. The discovery you actually got from the State was in black and white.
A. That is correct.
Q. The originals are in color.
A. That's right.
Q. The State gave you black and whites.
A. That's right.
Q. So you photocopied the exhibit the State had given to you?
A. That's correct.
Q. And created your own defense lineup --
A. Yes.
Q. -- by substituting a different suspect, perpetrator, for Mr. Woodson?
A. That's correct.
Q. In all other respects, besides the black and white, you utilized what the State had given you in discovery.
A. Yes.
Q. And that includes information written down at the bottom of the photo lineup that

says, showing photo display with some instructions and then signatures on it.

A. I didn't change anything else.

Q. And a circle around Picture 5.

Was that on the original State discovery exhibit?

A. Yes.

Q. So you just changed one black and white picture?

A. That's right.

Q. At anytime in presenting what you identified to Ms. Tellisma as your exhibit in Defense Exhibit 2, did you point to or identify any aspect of the lineup to refer to her actual lineup?

A. Quite the contrary. I told her just focus on the pictures and if she can pick someone out, it's too dark. If you can, you can; if you can't, you can't.

Very explicit to her.

Q. Did you either state or identify that she had signed the document that you were showing her?

A. No. Nor do I think that she remembered, as she indicated, ever even seeing

anything like this before.

Q. And now, the document has writing, that writing is in English.

A. That's right.

Q. The witness was using a Creole interpreter?

A. That's right.

Q. Did you have any appreciation, during the course of her two depositions, that she read and understood English?

A. I don't believe she does.

Q. In fact, there was some issues during the deposition about her making a halfway attempt to try to respond in English and it not coming out very well.

A. That's right.

Q. And that's the clarification with the court reporter on the record?

A. That's right. She sometimes would try to respond in English and it created some problems with the interpreter.

Q. Did you --

A. And the interpreter created problems.

Q. Did you at anytime, in showing the exhibit to the witness, as marked and

introduced, point to anything on the exhibit at all?

A. Of course not.

Q. Did you point to signatures?

A. Of course not.

Q. Did you point to checkmarks?

A. No.

Q. Did you point to circles?

A. No.

Q. Did you even point to pictures?

A. No, not at all.

Q. Did you point to Number 5, Mr. Fritz --

A. She had the document in --

Q. -- and say is that --

THE COURT: Wait, wait, you interrupted your client.

Do you want to read back --

THE WITNESS: She had the document in her hand.

BY MR. KUEHNE:

Q. Okay. Did you point to Picture Number 5, for Fritz, the substitute picture, and say, is that the person?

A. Of course not.

Q. Did you do anything in an effort to suggest to the witness who she was supposed to identify?

A. No.

Q. In fact, did she look at Exhibit 2 defense photo lineup --

A. She did.

Q. -- in black and white, and did she identify anybody?

A. Yes.

Q. Did she identify Fritz?

A. No, she did not.

Q. Who did she identify?

A. She said it was pretty dark and that Number 1 looked most like the perpetrator. And then shortly thereafter she said she didn't see the face because the perpetrator had a hood on.

Q. She mentioned that the defense exhibit that you created was dark, right?

A. That's right.

Q. Meaning the photocopy was not particularly clear.

A. Right.

Q. That's what you understood.

A. No doubt.
Q. And she certainly did not identify Number 5, Mr. Fritz.
A. She did not.
Q. She did not identify the picture that was in the circle?
A. She did not.
Q. But she said Number 1 was somebody she had seen before?
A. Looked most like the perpetrator.
Q. Okay.
THE COURT: And was your client on that grouping?
THE WITNESS: No, of course not. I think it would be malpractice to have my client in a lineup showed to the alleged victim of a case and to have her emphasize and to have that used against him at trial. I believe that would be malpractice for a defense lawyer to show a lineup with his client in it so that it would get reemphasized that she had picked him out before and it can be used against the defendant, so of course not.
BY MR. KUEHNE:

Q. So you --
A. That would be Rule Number 1, to make sure your client is not in the lineup.
Q. You made certain --
A. She has a question.
THE COURT: Yeah. So you've done this before?
THE WITNESS: Not like this. There's no case I've ever had like this before, but I have -- as I said, we're constructing one for tomorrow. But at no time would I put my client's picture in there for the witness to reidentify if she's identified that person before.
THE COURT: Okay.
BY MR. KUEHNE:
Q. So did you make an effort, when you were preparing the defense lineup, to not include a picture in one of your defense lineups of Mr. Woodson?
A. Of course.
Q. Okay. And you said the reason is?
A. I think it would be malpractice and against the rules and I'd be up here on a different grounds.

Q. Meaning if you assisted the State in corroborating that your client was, in fact, the perpetrator, when you believed he was not or the client believed he was not?

A. Exactly.

Q. Okay. You then used a second defense-created lineup, and that is your Deposition Exhibit 3.

A. That's correct.

Q. And it is similar to your defense-created black and white Exhibit 2 but you changed the Number 5, Fritz's picture?

A. That is correct.

Q. And what did you do in this one?

A. Well, there was evidence previously in her deposition, and elsewhere in the case, that whoever was the perpetrator at least had his hair covered. And so one of them simply had Fritz complete and the other one had Fritz's face with the same hair that was there previously, so changed just the face.

Q. All right. And was Ms. Tellisma able to identify anybody in your second, Exhibit 3, defense-created lineup?

A. I don't believe she was allowed to.

I think she said it was either too dark or we moved on because Ms. Cabrera objected.

Q. Okay. And did you, in using that second defense-created lineup, have any intention of misleading the witness --

A. Of course not.

Q. -- or making misrepresentation?

A. Quite the contrary. I was trying to bring to light the fact that there was an alternative suspect and that was the correct perpetrator and to see if she could recognize his face, to see if that face jogged a memory of the actual perpetrator.

Q. In the context of the deposition, and you can look at if you need to, it's -- it's in the 25 to 26 area.

A. Uh-huh.

Q. There's some dialogue between you and the prosecutor, but does the prosecutor remind the witness during your examination that the original lineup was in color?

A. That's correct, she attempts to.

Q. How did that come up?

A. Well, she was continually interfering, interrupting the deposition and

trying to insert her questions during the course of the deposition and I think this was the sixth time, that I've counted from page one, and she indicates that she wanted to clarify and indicates that the detective actually showed you something that was in color, up on page 26.

Q. So the prosecutor makes a point of reminding the witness that the -- what the detective had done was in color.

A. That's right.

Q. And your item was in black and white.

A. That's right.

Q. And had you ever referred to your item as something the detective had shown you?

A. No.

Q. Did you understand from that dialogue that the prosecutor was attempting to educate the witness, that the prosecutor was quite aware that the original was in color and this was different from the actual lineup that the police had used for the witness?

A. Absolutely.

Q. And you proceeded to then question the witness about that first defense-created

exhibit, Exhibit 2.

A. That's right.

Q. And then you move on to Exhibit 3.

A. Uh-huh.

Q. And then you move on to Exhibit 4, which is another photocopy of a lineup and that is a photocopy unchanged of a -- a black and white photocopy of a lineup unchanged that was provided to you by the State in discovery?

A. Exactly.

Q. And the prosecutor objected to that one as well?

A. Well, she said it wasn't provided by the State and that it wasn't a police provided lineup. She objected to it.

Q. That was untrue?

A. It was false.

Q. And did you, at anytime, attempt to require the witness to make an identification or not be able to make an identification when the State objected and instructed the witness not to make an identification?

A. No. I followed the rules of Kuntsman and McWilliams, as they had done.

Q. And what do you understand that rule

to allow you to do?

A. Well, in both Kuntsman and McWilliams, various lineups were attempted to be shown during the course of a deposition by the defense attorney to a witness. The State Attorney objected and in both of those cases -- at that point the question was certified, it was then presented to the trial judge. And in both of those cases the trial judge ruled that it was allowable, that the defense-constructed lineups, the 38 pictures in Kuntsman, of which four of them were defendant, was allowed. And in McWilliams the -- similar to Exhibit 4, the police-constructed lineup, was admissible.

Both cases were taken up on appeal and there was opposite results. Kuntsman's case was reversed, saying they did not show proper and substantial reasons why it should be allowed under specific facts, that there was no good cause or substantial reasons to show under that case.

And under McWilliams, they showed that there was substantial good cause.

And so that, then, is the standard,

as we understand it to be, is defense lineup is admissible, as was done in both of those cases, that the State can object, and if it goes up on appeal or it goes to the trial judge, that the question should be answered with the standard of whether there is good and substantial reasons as to why it was in the interest of justice to allow this lineup in this particular case.

Q. And did you believe in this particular case you had good and substantial reasons for utilizing a lineup procedure?

A. I had no doubt about it.

Q. And you did understand from the case law, as you understood it, that using a defense-created lineups was perfectly permissions --

A. No question.

Q. -- in the appropriate case?

A. No question about that.

Q. In the course of all the education and training and experience you've had and being part of FACDL and NACDL, have you ever come across any case that says a defense lawyer cannot or violates Bar rules by taking

a police lineup and making it a defense exhibit by changing it?

A. No. But nor would I ever do it again.

Q. You would not do it again?

A. No.

Q. Why not?

A. Obviously, it's a state -- I'm in a position in my life that's been turned inside out now for over three years right now. My life has been completely -- I'm paralyzed, my life has been on hold for three years and I would never possibly even come close to creating a lineup which wasn't pre-approved by the Florida Bar, as we're doing this week.

Q. Okay. Now, there came a time -- by the way, let me in continue. In the course of the deposition there are a number of other pictures that you showed. You showed a picture of Fritz's mom, what purports to be Fritz's mom, and that was to help -- was that to help refresh Ms. Tellisma's recollection, that she knew or had associated with Fritz's mom from her church?

A. Well, the representative -- the

representation in the letter was that they had known each other from the Seventh Day Adventist Church.

Q. Okay. And then you also -- and, by the way, did the State object to your showing Fritz's mom as a picture?

A. At that point she objected to me showing anything.

Q. And then you have a picture -- your Exhibit 6 --

A. Of Fritz.

Q. -- and seven are two pictures of Fritz, a smaller and a large?

A. That's correct.

Q. And did you show those two pictures just by themselves to Ms. Tellisma?

A. Yes.

Q. To see if she could identify Fritz?

A. Yes.

Q. And she was not able to?

A. She was not. She indicated that she could not.

Q. Was the deposition in all respects ordinary?

A. Yes is generally the answer, but the

interpreter was off.

Q. Now, the room has been described as pretty small.

A. Yes.

Q. It's a small State Attorney Office?

A. Very small.

Q. And I think we determined at the last hearing that there were seven people in the room.

A. That's -- yes.

Q. And you being one of them.

A. Yes.

Q. And Jody McGuire being another defense lawyer.

A. Yes.

Q. And the prosecutor, Ms. Cabrera, was sitting at her desk, just like the judge is sitting at her desk?

A. But with a big computer between us.

Q. Okay.

A. And a telephone.

Q. And during the course of the deposition was the prosecutor at all times attentive to the deposition?

A. No. But that's not unusual.

Q. What do you mean?

A. Well, most of the times on A cases, this was an A Case, a first-degree felony case, armed-robbery case, the prosecutors are often present but not willingly, and so they're doing other work, they're typing on their computer or they're listening with half an ear or on their telephones, especially what you and me would call the younger generation.

Q. So in this deposition you're in -- in Ms. Tellisma's deposition, you're in Ms. Cabrera's office.

A. That's right.

Q. She has her office set up however she normally does.

A. Uh-huh.

Q. You're crowded around her desk.

A. Uh-huh.

Q. There's no separate conference table to work from.

A. No. Just like the judge's, maybe a little smaller.

Q. And while you're doing the deposition do you observe Ms. Cabrera doing other things, other work in the course of the deposition?

A. Well, until there was the identification of Number 1 she was doing something on her phone.

Q. Okay. Did at anytime during the deposition, whether she was busy with something else or not, did you ever not make your exhibits available for her to see?

A. No, absolutely not. And, as I said, we were on the same desk, and so the exhibits were about a foot away from her. So for me to put the exhibit -- there's no way she couldn't see the exhibit because it's almost right in front of her from where it was on the desk.

I was that close.

Q. With regard to the exhibits, you've seen the transcript and the transcript reflects that the court reporter marks the exhibit, introduces it into evidence, and you see that each of the exhibits has a stamp on it, an exhibit tag.

A. Uh-huh.

Q. Right?

A. That's correct.

Q. Explain the process that involved the court reporter putting the tag on the

exhibits.

A. Standard operating procedure in this case. I would take the exhibit, hand it across the table to the interpreter -- with the court reporter right here, she would have her stickers, put the sticker on it, sign the sticker, and then -- pointing to the court reporter here because it was similarly situated from where I was, I'm just closer to her here.

I would hand her the document, she would put her sticker on it, her signature on it, and handed it back to me, whereupon, I handed it to the witness.

Q. In the process of doing that, did you slide the exhibit toward the witness so that the witness could secretively see it?

A. No.

Q. Or so that the prosecutor could not see it?

A. Absolutely absurd.

Q. Is there any part of having the exhibit marked by being handled by the court reporter and then sent back to you that made the exhibit unavailable to be reviewed by the

prosecutor?

A. No.

Q. Did you make any effort to prevent the prosecutor from seeing the exhibits before you had them marked and introduced into evidence?

A. Never.

Q. And did you start off this deposition with these exhibits premarked, meaning you had the stamps on them and numbered by the court reporter already?

A. No, sir.

Q. In fact, on your actual exhibits you have handwritten on the top in your writing Exhibit 2, Exhibit 3, etcetera.

A. That's correct.

Q. That's your writing?

A. That's right.

Q. That was not writing that was on the original color photo lineups used by the police.

A. Of course not.

Q. And then your writing is separate from the court reporter tagging the exhibit.

A. That's right.

Q. Okay. So I want to ask you to look at the -- look at the deposition.

A. Sure.

Q. I want you to take a look at page 28.

You see this, this is the part where you mention that the -- the witness testifies when you're showing her the defense lineup in Number 2, she says in Line 18: "The picture is so black I can't even remember him, and the only person I can see that I remember, that looked like him, was the first one."

And you say, "Number 1."

A. Yes.

Q. Then there's Ms. Cabrera who says, "Let me see," you see that?

A. That's right.

Q. And does she take a look at the exhibit --

A. Absolutely.

Q. -- at that point?

A. Absolutely.

Q. The exhibit is not being kept from her by her witness or by you?

A. There's no question about that.

Q. And the witness is sitting pretty

close to her --

A. That's when the deposition changed.

Q. But the witness is sitting pretty close to the prosecutor.

A. We were all sitting on top of each other.

Q. So you then respond, "Number 1."

And then Ms. Cabrera says, "I'm going to object to this line of questioning," on page 29.

And then the witness says, "When he robbed me I could not saw his face because he had the hood on his head," you see that?

A. Yes, sir.

Q. At no time does she tell the witness not to use the exhibit.

A. Of course not, otherwise I would have followed the dictates of Kuntsman and taken it to the judge.

Q. She makes an objection.

And then you move on to Exhibit 3.

A. That's correct.

Q. And now, here's where I want you to look, Exhibit 3, you talked about Exhibit 3, this is page 29 of the transcript, Line 9.

You have a question: "Let me show you now what's marked as Exhibit Number 3.

"Thereupon, Exhibit Number 3 was marked and introduced into evidence."

So that process is, as you've explained, giving the exhibit to the court reporter, the court reporter putting a sticker on it, giving it back to you.

A. Exactly.

Q. And the prosecutor is in the room.

A. Right.

Q. And the prosecutor --

A. The prosecutor is right next to the court reporter.

Q. The prosecutor says, "Can you please show it to me before you show her? Sorry, let me see the previous."

You see that?

A. That's right.

Q. Had you shown the witness Exhibit 3 yet?

A. Of course not.

Q. And she asks to see the exhibits before you show the exhibit to the witness.

A. That's right.

Q. She meaning the prosecutor.
A. That's right.
Q. And did you comply?
A. Of course.
Q. You showed her the exhibit.
A. Again, she had seen Exhibit 2 already. She wanted to see them again.
Q. Well, she wanted Exhibit 3, and then she says, "Sorry, let me see the previous.
"Where did you get this from? Sorry, can I go off the record for the moment?"
A. And then I told her it was Fritz.
Q. So -- the question is not pending.
A. Okay.
Q. So at this time you have Exhibit 3 marked by the court reporter, right?
A. That's right.
Q. The prosecutor asked to see the exhibit before you show it to the witness.
A. That's right.
Q. Do you comply?
A. Of course.
Q. Meaning the prosecutor gets the exhibit before you show it to the witness.
A. (Witness shakes head.)

Q. And then the prosecutor asks for Number 2 again.
A. That's right.
Q. And you give her that?
A. Of course.
Q. And then you go off the record.
A. (Witness shakes head.)
Q. Now, you were here when Ms. Cabrera testified about her off-the-record discussions.
Do you have a clear recollection of what happened during the off-the-record?
A. Yes.
Q. An off-the-record that, by the way, Ms. Cabrera asked to have.
A. Yes.
Q. Okay. You're experienced enough, you know that going off the record means there is no record of the proceedings.
A. That is correct.
Q. And is it your practice to ordinarily go off the record to do things that are evidentiary in nature?
A. No.
Q. Okay. But the prosecutor asked to go

off the record and so do you have some discussion --

A. I'd say my practice is quite the contrary, I'd say it's usually everything on the record.

Q. Okay. So the prosecutor asked to go off the record. And, by the way, when this off-the-record activity takes place, you're having a discussion in the same room with the prosecutor?

A. That's right.

Q. Is the interpreter interpreting your discussion with the prosecutor?

A. No.

Q. No. And are you speaking English?

A. We are.

Q. Is it your understanding still at that time that Ms. Tellisma's primary language is Creole?

A. No doubt.

Q. That she was unlikely to understand a prosecutor to defense lawyer speaking in English about the case?

A. I'd be shocked if she did.

Q. Okay. And what happens during the

State's off-of-record discussion?

A. Well, she clearly realizes there's two different exhibits, one is Exhibit 2 and one is Exhibit 3, and that they're different and I'm showing two different documents.

Q. And do you discuss that with her?

A. And she asks me, where did you get the documents, because obviously there's a difference between two and three.

Q. Okay.

A. She asks me, what's the difference and -- and where did you get the document.

Q. Okay.

A. I said, I created it, that's Fritzlan Joseph.

Q. You told her that was Fritzlan Joseph?

A. Absolutely. The entire deposition is about Fritzlan Joseph.

Q. So in this off-the-record called-by-the-prosecutor discussion you tell her, that picture is Fritzlan Joseph.

A. Yeah, it was no surprise to her or anybody.

Q. And that was what your deposition was

all about, to see if the witness --

A. No doubt.

Q. -- the victim had actually been robbed by Fritzlan Joseph?

A. Almost every question in the depo is about that.

Q. You didn't attempt to hide the identity of that defense picture on the lineups, on the defense lineups?

A. No.

Q. Did you tell her you're not answering any of her questions or giving her any information?

A. That's a lie.

Q. So you did not tell her that?

A. No.

Q. But she claims you did.

A. I know.

Q. What was your purpose in telling her that you had created these lineups and that was Fritzlan Joseph, the alternate suspect or the actual perpetrator, what was your purpose in telling her that?

A. Well, certainly wasn't going to misrepresent or mislead her, but to

reemphasize that -- my theory of the case.

Q. Did you have any intention of hiding anything from her?

A. No.

Q. Or not revealing things that were necessary to be revealed?

A. Of course not.

Q. And then you go back -- she goes back on the record.

A. But I certainly felt like I had no obligation, quite the contrary, to tell her prior to the deposition. It would have defeated the entire purpose of what we were trying to do.

Q. And did you have an obligation, as you understood it, to announce to the witness when you're using the defense-created lineups, that -- anything to the effect that this is a lineup without the picture of the defendant and you want her to see if she could identify somebody other than the defendant?

A. Quite the contrary. I think that would be against my obligations.

Q. Okay. This is, after all, cross-examination?

A. Cross-examination. I'm here not to provide evidence for the State. I'm the advocate for the defense.

Q. But you're certainly not -- as your discussion off-the-record reflects, or as you've testified, you're certainly not attempting to not reveal things to the prosecutor.

A. Of course not. I brought in witnesses. I had been arguing to her and to anyone that would listen above her who the actual perpetrator was.

Q. Okay.

THE COURT: Who would listen about her?

THE WITNESS: Above her.

THE COURT: Above her, okay, sorry.

THE WITNESS: The Pod Chief above her, either Ms. Houge or Mr. Arojo.

Oftentimes, it's not usual, that I might send emails or arrange meetings or telephone calls with supervisors when the result I'm seeking from what we call the pit lawyers, in the pit, is not happening, as we did in this case.

BY MR. KUEHNE:

Q. So at the bottom of page 29, after the prosecutor finishes the off-the-record discussion with you, she makes an objection to Exhibits 2 and 3?

A. She does.

Q. And then she makes her record about her objections, right?

A. That's correct.

Q. And then --

A. Based on what I had just told her, Photo Number 5 is different.

Q. Based on what you had told her.

A. Exactly.

Q. And she's repeating that to the -- or summarizing that on the record.

A. Sure.

Q. And then at the bottom of page 30 you continue with the exhibit -- with the examination and she, next page, stops, announces she's going to stop the deposition.

A. And she leaves.

Q. Okay. Then she leaves to -- actually leave the room?

A. She does leave the room.

Q. Okay. And is that shown on page 32?

"Thereupon, a brief recess was taken and then the deposition continued as follows."

A. Yes.

THE COURT: All right. Maybe this is a good chance to take a five-minute break.

MR. KUEHNE: Oh, sure.

THE COURT: All right. We'll be in recess, five minutes.

(Thereupon, a recess was taken.)

THE COURT: All right.

MR. KUEHNE: Back on.

BY MR. KUEHNE:

Q. Mr. Schwartz, we were looking at page 32 and you referenced that that's where a break was taken and the prosecutor left the room.

A. Uh-huh, that's correct.

Q. By the way, that description from the court reporter is significantly different from the off-the-record description that we had before where it says you went off of record, this one says a brief recess was taken.

A. That is correct. It was pretty long, about 15 minutes.

Q. Okay. And did the deposition continue when you -- when the break ended?

A. That's correct.

Q. With this announcement by the prosecutor?

A. Yes.

THE COURT: What page are you on?

MR. KUEHNE: We're on page 32.

BY MR. KUEHNE:

Q. So the prosecutor takes a break.

Were you privy to what was going on during the break, during the recess?

A. Not exactly, but I think she did come back and forth and it was clear that she was looking for someone of authority, a supervisor or someone in the legal division, to try to find out what was the law in the area and what was a possible objection. It was pretty clear that's what she was doing, as was made clean when she returned and put the objection on the record.

Q. Okay. And then that objection is essentially -- did you understand that to be the Kuntsman objection?

A. Yes.

Q. And when that objection, which basically said I'm objecting to your using a lineup with the witness --

A. Uh-huh.

Q. -- that's what you understood, right?

A. That's right.

Q. Do you persist?

A. No. It's same thing as when a defendant invokes his right to remain silent, okay, and we moved on to the next exhibit.

Q. And the next witness was that Exhibit 4 that's actually just a photocopy of one of the police lineups, a black and white photocopy?

A. Precisely.

Q. And there's an initial objection that you're showing her evidence that is not part of discovery, which was not true and was part of discovery.

A. That's correct.

Q. Okay. And you get through Exhibit 4, right?

A. That is correct.

Q. And then you ask questions about multiple lineups?

A. That is correct.
Q. And she responds that she was shown a lineup the first time without Woodson and sometime later a lineup with Woodson?
A. Because she was told he had not been arrested, that's correct.
Q. Okay. And then you move, on page 35, you go to Exhibit 5, and that's the picture of Fritz's mom.
A. That's correct.
Q. And there is no objection to that --
A. No.
Q. -- to that picture.
And then you go to Exhibit 6 and then Exhibit 7, those would show just a single picture of Fritz?
A. That's correct.
Q. And no objection to those?
A. Also correct.
Q. And the --
A. Well, there is an objection on page 36.
Q. Okay. Page 36.
A. When I'm trying to explain to her why I'm doing this process, so she understands the

evidence that we actually have.

Q. So you're actually explaining to the witness on page 36 what it is, why it is that you're questioning her?

A. That's right.

Q. And was there a reason for that?

A. Sure. I want her to understand the strength of -- of actual innocence.

Q. Was that an effort to trick her, mislead her, be dishonest or deceitful with her?

A. Absolutely not.

Q. Did you make any misrepresentations to her?

A. No, I did not. It's quite the contrary, just so that she understands that, despite her identification, there's several people who claimed that it's another person.

Q. Was that your indication to her you were not trying to trick her?

A. That's correct.

Q. That you were trying to be open and transparent with her?

A. No doubt.

Q. And did she seem to understand?

A. Sure.

Q. Okay. And then a couple pages later you finish the deposition.

A. That's correct.

Q. Now, there's an item at the end of the deposition, page 38, where you close, Line 14, saying you don't have anything else. "I appreciate it. I assume every witness of mine reads. No problem. Good to see you. We're done. That's it. Perfect. Thank you very much. Okay. Thank you."

And then a parenthetical, "Thereupon Mr. Schwartz exited the room and then the deposition continued as follows," I want you to focus on the end of the deposition.

A. Yes.

Q. Did you hurriedly leave the room so that the prosecutor could not ask any questions?

A. Of course not. It wasn't just me.

Q. What do you mean it wasn't just you?

A. Ms. McGuire was there as well.

Q. The two of you --

A. She had to pack up, we had to move chairs, because she couldn't open the door.

There were so many people in the room, one of the chairs was directly against the door. People had to get up, we had to pack up our things, we had to move around the table, get to the door, exit and....

Q. There was nothing hurried about leaving?

A. No.

Q. And this was still in her office?

A. Correct.

Q. And did you try to get out of there to prevent her from asking questions?

A. Of course not.

Q. Did she indicate at all, during the conclusion of the deposition, that she was going to ask questions?

A. Of course not.

THE COURT: Well, wait, could you explain "of course not." Typically they don't ask?

THE WITNESS: I say of course not because if a State Attorney -- it may very rarely happen, Number 1, that a State Attorney is there. And it would be very rare for a State Attorney to say, okay,

well, I have some questions.

But that would occur exactly after I finish the deposition. At no time did she tell me that she had questions. At no time did she indicate to me or to Ms. McGuire that she had questions and that she wanted to ask questions, whereupon, of course, we would remain.

That's why I say of course, but it would be indicated on the record and I would -- we would have stayed.

BY MR. KUEHNE:

Q. In your experience, in these serious cases, A-felony cases, first-degree felony cases, do prosecutors ordinarily ask their own witnesses questions in a deposition?

A. I can't recall a case. And this last year we've taken a couple hundred depositions and the State has access to the witness 24 hours a day, seven days a week. I have the 60-minute period here. They can ask their witness questions all the time. There would be no reason for it, in general.

Q. By the way, when the State does that, talks to their witnesses, are you entitled to

be there?

A. No.

Q. So the State can talk to Ms. Tellisma, as you understood it, at anytime they want?

A. Of course.

Q. Ask anything or talk to them about anything --

A. Of course.

Q. -- without you being there?

A. Of course.

Q. And did Ms. Cabrera, at anytime, indicate that she was going to question Ms. Tellisma?

A. No.

Q. In the process of ending the deposition, did you -- did it appear to you that the court reporter was also finishing up her work?

A. Sure. Yeah, she had probably a lot more to pack up, you know, with the machines and the computers and the tapes and things like that that they use.

Q. When was the first time you realized that Ms. Cabrera, without your presence, put

on the record what's shown on page 38 and 39, that you immediately got up and left without giving me an opportunity to do cross-examination on this deposition and I'll be bringing this up this to the court?

A. When we got the transcript back.

Q. Did she ever bring that up to the court?

A. No.

Q. But she did bring something up to the court soon after this deposition.

A. Motion for sanction.

Q. Motion for sanctions, that's an exhibit in the -- in our Bar case, right?

A. That is correct.

Q. That is Respondent's Exhibit 12.

And you're aware of the motion for sanctions.

A. Yes.

Q. That was filed in open court?

A. That was.

Q. Were you there when the motion was filed?

A. I sure was.

Q. Was there something in the Woodson

case going on that time?

A. It was a report in reference to a plea negotiation -- report re: plea, as it regularly happens.

Q. A normal hearing.

A. Regarding trial dates.

Q. So you show up. Is Ms. Baker McGuire there as well?

A. She is there.

Q. And the prosecutor is there, Ms. Cabrera?

A. As well as other prosecutors, yes.

Q. Usually that's the case, there are other A, B, and C division prosecutors?

A. Three or four prosecutors.

Q. Maybe a felony division chief.

A. Yes.

Q. And was the document itself filed in open court?

A. It was.

Q. And did anything happen at the time the prosecutor filed the motion for sanctions?

A. Well, it's frankly embarrassing, not to me, but the two prosecutors high-fived each other and said, "now we've got him."

Q. Referring to the motion for sanctions?
A. Yes.
Q. And is that Ms. Cabrera?
A. That is correct.
Q. And another prosecutor in the room?
A. That is correct.
Q. And who else was there on your team?
A. Ms. McGuire.
Q. Okay. Did anything happen with the motion for sanctions that day?
A. No. I believe it was just filed and -- I can't recall, but probably it was just filed and reset for a couple weeks for possible response.
Q. Okay.
THE COURT: Those are not often filed, right, you don't usually see those, right?
THE WITNESS: Never. First time in my career, that I can recall, that someone files a motion sanctions for something I did on a deposition.
THE COURT: I don't recall, I was not in felony very long, but --

THE WITNESS: It does not happen on an everyday basis, to say the least.

THE COURT: I don't recall any, but my experience is irrelevant.

Go ahead.

BY MR. KUEHNE:

Q. The assigned judge was Jason Bloch?

A. It was.

Q. As a result of the sanctions motion being filed against you, did the representation staffing of the Woodson case make a change?

A. Yes.

Q. What was that?

A. I turned over primary responsibility to Ms. McGuire, because I thought that there might possibly be an issue of a conflict between me and the prosecutor and I didn't want that to interfere with the conclusion of the case, which was about to come to fruition and I didn't want the defendant sitting there on no bond for months waiting for another attorney to come up to speed.

Q. Okay. And was it your belief that there was some animosity directed by the

prosecutor against you?

A. Well, I can only surmise when they file a motion for sanctions against you.

Q. So was the change in staffing designed to continue to provide effective representation to the client?

A. Absolutely.

Q. And you did not want to the prosecutor's animosity toward you to be meted out against the client.

A. Of course.

Q. And was your associate, Ms. Baker McGuire, able to resolve the case?

A. Of course.

Q. And I think we've have some testimony in the record already, but ultimately Mr. Woodson resolved all three of his cases with a boot camp resolution?

A. Yes. Boot camp means you go for four to six months in custody in a structured program and then you're released on probation.

Q. And this was a first-degree felony where the offer had been, at the time of the Tellisma deposition, ten years in State prison?

A. It's a ten-year minimum mandatory.
Q. So the answer is yes --
A. Yes.
Q. -- it was a ten-year. And it was broken down to a boot camp on three cases?
A. Youthful offender sentence under 958, as I understand it, and a boot camp program.
Q. Okay. Did there come a time when the Woodson case was resolved, plea, sentence, etcetera?
A. I believe it was March 25, 2015, about a month after the deposition.
Q. And who handled those negotiations for resolution?
A. Ms. McGuire, largely, but we're in consultation.
Q. At the time of the case resolution, were you expecting that the motion for sanctions would ultimately be resolved by the judge?
A. Of course.
Q. Were you at all concerned about the allegations in the motion for sanctions?
A. Well, I'm always concerned. Just as I'm terribly concerned about -- anytime

there's an allegation I've done something unethical I have to be terribly concerned, I take it very serious. But did I think there's merit, no, and that's why I didn't respond and I didn't think it was worthy of a response.

Q. Okay. Did the judge actively inquire about setting the matter for a hearing?

A. As he did.

Q. And in the course of that, did -- did you get any understanding as to whether the judge had read the pleading or was aware of the substance of the proceeding or any knowledge the judge had about the submission, the motion?

A. Yes, of course. But Judge Bloch was very, very studious, complete judge who knew seemingly every document in every case, not just my came. So I'm sure -- he exhibited intimate detail of every....

Q. And did he make any comment or reaction about setting the motion for hearing?

A. I really don't recall, but it certainly wasn't my impression that he, like I, was giving it much credence, frankly.

Q. Okay. Did the prosecutor pursue that

motion?

A. They did not.

Q. What happened?

A. They withdrew the motion after the plea, so the transcript says. I was not there.

Q. Okay. According to the transcript they withdrew the motion?

A. Yeah.

Q. And did that motion revisit itself?

A. Here we were.

Q. It essentially became the Bar complaint sometime later --

A. A Bar complaint the week of her leaving the State Attorney's office.

Q. Okay. And the leaving State Attorney's Office was soon after the Woodson case got resolved?

A. Woodson and Masias, I think, is what led to her dismissal.

MR. KROEGER: Objection, speculation.

THE COURT: Sustained.

BY MR. KUEHNE:

Q. You're aware of the Masias case?

A. Yes, it was the subject of national news.

Q. And that was an actual innocence case handled by Ms. Cabrera?

A. The same prosecutor who, again, filed charges and maintained a -- filed an information based on little to no evidence, as was proved in that case.

Actually, I think the Judge has a question.

THE COURT: Ms. Cabrera testified she left the officer under her own choice.

THE WITNESS: She did.

THE COURT: Okay. All right.

THE WITNESS: I don't believe that to be true and I think an examination of what's in evidence in her personnel file --

MR. KROEGER: Objection, assuming facts not in evidence.

THE COURT: All right. Okay. So that's what I was getting at, whether he knew differently than what she told us.

BY MR. KUEHNE:

Q. Did the fact of the prosecutor

withdrawing the motion for sanctions prevent you from being able to have a hearing and a resolution of this very issue by Judge Bloch?

A. No doubt.

Q. And is your understanding of Bar rules and procedures that certain judges have authority to enforce Bar rules?

A. Yes.

Q. And from your understanding of how this case developed, is it your view that was an intentional decision by Ms. Cabrera --

A. It is.

Q. -- and to prevent Judge Bloch from ruling on her motion for sanctions?

A. I do, because I believe that he did signal that it was going to be denied.

Q. And was Judge Bloch -- you mentioned Judge Bloch's --

THE COURT: Could you tell us "signal," what does that mean?

THE WITNESS: I have no evidence to support that.

THE COURT: Okay.

THE WITNESS: It was my impression, from the way that Judge Bloch was handling

it, that he didn't give it anymore credence than I did.

I had been in front of Judge Bloch on many case since the day he became a judge and I had an excellent relationship in that courtroom; had litigated many serious and sensitive cases with the judge.

BY MR. KUEHNE:

Q. You mentioned that Judge Bloch was a serious judge who read everything in his docket.

A. Yeah. He's from the civil world.

Q. Was he -- from your experience with Judge Bloch --

THE WITNESS: She has a question.

THE COURT: Okay. I just want to say that he may come from civil, but as a County Attorney he was always concerned with criminal defense expert witness fees and he would also be involved with bond estreature issues.

THE WITNESS: Yes.

THE COURT: And so he had some experience in representing the public in matters involving misbehavior, shall we

say, in the criminal justice world, which -- the one case I remember was -- and it's funny because it's -- the issue was eyewitness ID. There was a Dr. Tic Tac, everybody called, because during jury trials -- he's a jury selection expert and authorized the defense, I think, to hire him. But he just sat there eating Tic Tacs. And when his bill came in there was an objection from the County.

So I know that Judge Bloch probably was quite interested in the role of a felony judge.

And I know you were looking at the Bar rules, and I'm aware that those rules are not supposed to be used to get an advantage in a litigation, so it's --

MR. KROEGER: Correct. What I --

THE COURT: You know, whether the circuit judge assigned need take the matter up is an open issue.

MR. KROEGER: According to the rule, it's the forum the person asserts the disciplinary jurisdiction.

MR. KUEHNE: Which, as you know from

our presentations, we say that was the circuit court, because the motion and the complaint was made and the judge indicated his intention to hold a hearing and then it was taken away from him, even though he plainly had jurisdiction to continue with that matter.

MR. KROEGER: That's separate and apart from a disciplinary proceeding. That is a sanction proceeding. The two are two different animals. Unless the judge evidenced some attempts to conduct disciplinary proceedings under the rules regulating the Florida Bar, he did not have jurisdiction over the disciplinary case.

THE COURT: Okay. All right.

MR. KUEHNE: That's a legal argument.

Given that the entirety of the motion for sanctions is violation of Bar rules and professional conduct and the judge's indication that he was directing the parties to schedule a hearing, he clearly took jurisdiction over a complaint involving Bar violations of rules of

professional conduct, but I don't want to delay the evidence part of it. That's an argument for the Court.

THE COURT: Okay. So it is covered in your trial memorandum or in your motion for directed verdict or --

MR. KUEHNE: Not in my motion for directed verdict. I believe that's a subsequent motion that I will raise when the case is finished.

THE COURT: Okay.

MR. KROEGER: The only --

THE COURT: Well, we'll -- let's move on.

BY MR. KUEHNE:

Q. With regard to your interaction with Judge Bloch in connection with the Woodson case, was it obvious that -- to you, that he was aware of the issues percolating in the Woodson case?

A. Absolutely.

Q. That it was a misidentification, actual innocence case?

A. Yes.

Q. And how did that come to his

attention?

A. Well, when we were doing the reports on the case we have to report what's the status of the case. The last report that he we had done, motion to suppress had already been filed, so we reported to him -- I don't have the transcript of that date, but -- and I'm speculating at some level. But the report, the February report would have been that motion to suppress is filed and that needs to be set for and argument.

But prior to that being set for an argument we need to finish the deposition of the victim and then we'll come back next month for the motion to suppress. And by the time the next month came, we were on the trial calendar wherein the motion to suppress would have preceded the trial and that's where we were at. Whereupon, the case negotiated a settlement. If it didn't settle and it didn't plea on the date that it pled, it would have gone to the motion to suppress and then to trial if the State was successful.

And it was the setting of the trial and the setting of the motion to suppress, I

believe, that resulted in -- and the taking of this deposition and the answers in this deposition, which resulted in the resolution of the case.

Q. The Woodson matter gets resolved, he gets his sentence, the Bar -- the Bar complaint is later filed and then you respond through your counsel, correct?

A. That's correct.

Q. Okay. In the course of your representation of Mr. Woodson, did you make any misrepresentations whatsoever, whether on the identification issue or anything else?

A. I don't believe so.

Q. Did you act with any intention to deceive, be dishonest, misrepresent?

A. For sure, no.

Q. Did you intentionally fabricate any evidence in this case?

A. No.

Q. Did you do anything with a purpose to trick the witness?

A. Absolutely not. And I think the very specific questioning bears that out.

Q. To trick the prosecutor?

A. No.
Q. To --
A. The very first time she asks me what's the exhibit, I tell her.
Q. To trick anybody in connection with this case?
A. No, sir.
Q. Did you act in good faith throughout your representation?
A. I believe I did.
Q. Did you cross over any lines of propriety, that you understood, in exercising your criminal defense function?
A. I really don't think I did.
Q. Now, you have had a number of Bar matters before.
A. I have.
Q. And in all of those other cases have you accepted responsibility --
A. I have.
Q. -- for transgressions?
A. Yes.
Q. And I'm sure --
A. Without a hearing.
Q. I'm sure you could explain them all,

but you resolved them by consent agreements with the Bar each time?

A. That's correct.

Q. And was that because, in those circumstances, you recognized that your conduct was not what it should have been?

A. Yes.

Q. And in this particular case you defended this case.

A. The first one.

Q. And why is it that you're defending this case, the allegations of deceit, fraud, dishonesty and misrepresentation?

A. Because I feel what happened in this case here was absolutely necessary in order to perform the defense function and that this is an attack on what it means to be a defense attorney, particularly in a case like this. And there was absolutely no intent on my part in order to deceive the witness or the State.

Quite the contrary, what I was doing was trying to effectuate justice in this case and by doing what occurred in the deposition, I believe did result in justice on the case.

Q. At anytime, prior to the Tellisma

deposition and through today, have you ever found any law, any legal authority, any article, any writing that says or suggests that the procedures you used in presenting a defense-created lineup was improper or not allowable?

A. No. Not that I would ever do it again or not that it could have been better done.

MR. KUEHNE: I tender the witness, Your Honor.

THE COURT: Cross-examination.

MR. KROEGER: Briefly, Your Honor. Thank you.

CROSS-EXAMINATION

BY MR. KROEGER:

Q. Good morning, Mr. Schwartz.

You testified at length today that the lineup that was shown to Ms. Tellisma by the Miami-Dade Police was in color, correct?

A. Yes.

Q. Have you ever seen that lineup?

A. I don't believe so.

Q. Did you take --

A. I don't recall.

Q. -- the deposition --

A. I may have seen it when we took the deposition of the detective, but I don't recall at this time.

I'm pretty sure he brought it in on the deposition and we questioned him. It would be standard operating procedure for them to bring the original lineup, so it's probable.

Q. But you have no independent recollection?

A. No. It would be the first case in my 30-year career that there wasn't a color lineup.

Q. And the two lineups that you created for Ms. Tellisma's deposition --

A. More accurately, we all in the office created it together. There was discussion among the lawyers and, you know, of course, the younger lawyers are much more technically capable than me, so, yes.

Q. So you had a discussion at your firm and arrived at --

A. That's right.

Q. -- the lineup ultimate used --

A. That's right.
Q. Please let me finish the question --
THE COURT: Wait, let him finish the question.
BY MR. KROEGER:
Q. -- since we all know the importance of a clear transcript.
You, as senior partner of your firm, along with your associates, decided that the lineups you used in this deposition were what you wanted to have, correct?
A. Yes.
Q. Tell me how you did it. How did you make your Exhibits 2 and 3?
A. Well, as I said, it was a collective effort.
THE COURT: Wait. You're jumping on his questions.
THE WITNESS: I'm so sorry.
THE COURT: Wait for the court reporter to get it all.
Do you think you got the question?
THE COURT REPORTER: Yes, I got it.
THE COURT: All right.
Go ahead.

Do you remember the question?

THE WITNESS: Yes.

The picture was taken from Facebook, as I recall. I believe it was the actual Exhibit Number 6. And that picture was reduced, I believe, on the computer or I instructed somebody that this is what we wanted to do and to replace Mr. Woodson with a similar-sized picture, if we could get that picture down to the size of the copy of the lineup.

BY MR. KROEGER:

Q. How was that picture reduced?

A. I assume on a computer, just put the same photo on the computer and push reduce.

Q. And how was this reduced photo of Fritzlan Joseph imposed on top of Mr. Woodson's photograph?

A. I'm sure -- I'm assuming with either tape, just Scotch Tape, and then copied.

Q. So it was just taped on?

A. Just taped on and then copied.

Q. In the case of your Exhibit Number 3, which is the Florida Bar's Exhibit Number 4 in evidence in this proceeding, how did you

preserve Mr. Woodson's hairline?

A. I believe we made the decision just to cut out the face and then just put in just a smaller picture in the face.

Q. And given sort of the level of detail that's being used to create these two lineups, is it possible you could have changed other parts of the original lineup that the State had provided?

A. Could we? Should we? With 20/20 vision, I would have. If I had known that my life and -- was going to be turned upside down for three years and I was going to worry about whether I was going to be a lawyer in the future and whether I was going to, frankly, go bankrupted and whether I was going to have my entire practice come tumbling down over a picture, obviously I would have done it completely differently, certainly.

Q. You could have --

A. More notably, I would have --

THE COURT: Wait, wait, wait, let him finish.

THE WITNESS: More notably I would say I would have, you know -- Tom, you

know, at the time I'm trying to do the simplest thing possible and to change it as little as possible. And what occurred to us was, as a threshold, we have to remove the defendant's picture and we have an alternative actual innocent suspect, and to put the picture of the actual person there. That's what seemed the most natural course. To completely alter it and to change it and to try and white out a line, as you suggest now, or to change the signature, it's just didn't occur to us. It wasn't that much of a discussion. It was much simpler.

We have the perpetrator. Change the defendant for the perpetrator. See if the witness -- show it in front of the witness and test whether she could identify the person or not.

BY MR. KROEGER:

Q. You just said you -- are you finished?

A. Yes.

Q. You just said you wanted to, quote, change it as little as possible, end quote,

why?

A. Well, we weren't thinking about whether -- it just wasn't a thought pattern among us to completely change the document.

I mean, we're aware of Kuntsman, we're aware of McWilliams and, you know, under Kuntsman we know you can't just start from scratch and create something willy-nilly.

And under McWilliams you know that you can use the lineup for sure.

So what we're doing in this case, here, we obviously wanted to test the witness, test our alternative theory, and this is the decision in the moment that we made that -- with what we knew at the time, that was our best decision.

Looking back, having 20/20 hindsight, three years later, would we have done it the same way, obviously not.

Q. So it's your contention that Kuntsman stands for the proposition that you can't use a defense-created lineup?

A. No, not at all. It's just, again, Kuntsman's basic ruling, first of all, has to do with compelling a witness to identify,

doing different types of physical examinations and it concentrates on physical examinations. And they liken the creation of a completely new 34-picture lineup not containing the defendants to compelling to do physical examinations and only stands for the proposition that you have to have substantial and compelling reasons, which we felt, undoubtedly, we had in this case to create whatever kind of lineup we wanted.

We had compelling and substantial reasons in this case; it can't be argued otherwise.

Q. So if you had good cause and compelling reasons, under Kuntsman, a defense attorney could use a defense-created lineup and ask the prosecution witness questions about that lineup, correct?

A. Well, that's the standard on appeal.

Any defense attorney, like in both Kuntsman and McWilliams, use their lineup as they do every day to test the theory and then when it goes up on appeal the standard for the circuit judge we now know is substantial and compelling. I don't think that's necessarily

our standard, that we have to look at it.

We do the best we can we. We show the lineup, the State has the procedure to object. And then if we decide to take it to the judge, the judge knows what the standard is, do they have a substantial and compelling reason. In this case we would have argued, of course we do.

Q. But you never did that in this case.

A. Nor did we need to, as a result of the answers that the witness gave.

The witness and the exhibits show that the witness didn't see the face and identified the wrong person, so --

THE COURT: And the exhibit she was looking at had a circle around the person that you expected her to pick out.

THE WITNESS: That they had previously picked out, which they didn't pick out. And the witness didn't seem to have any memory whatsoever of being shown anything like this, let alone color or not color.

And, frankly, Mr. Kroeger, I had seen this witness before. I had taken her

deposition before and I knew that she had cognitive problems. I know that she had cognitive deficits, and not just with identification.

So I thought the witness was suspect on a number of different grounds.

And, frankly, I didn't expect her to remember anything that happened in this case.

BY MR. KROEGER:

Q. Did you ask her any questions about her cognitive deficits in this deposition?

A. No, and we've been through every single line of this deposition many, many times. Nor do I think it would be appropriate nor do I think it would sustain an objection.

Q. So just so I understand the stage here, you're taking the deposition of a witness whom you think has cognitive deficits and you are swapping out the picture that is contained in Number 5 and then presenting it to her and asking her if she recalls who the perpetrator is, is that roughly correct?

A. Well, I am swapping out the picture.

She had been told that Mr. Woodson is

in this lineup and that he's been arrested and was shown this lineup and has fixated on his face. My job was to challenge that in the best way that I can, by suggesting her that other people had said otherwise, by showing her the picture of Fritz, by showing her the lineup that she picked out. And yes, by showing her the swapped out picture, that was my intention, yes, by doing all of that.

By showing her the letter, by asking whether she knew the lady. All of that was for that one purpose of trying to test my theory of what many witnesses had said, three witnesses and the letter said.

Particularly in this case when the prosecutor in this case was not listening, did not care.

Q. So again, I just want to make it clear for my own edification, you harbored a subjective belief that Ms. Tellisma suffered from cognitive deficits, correct?

A. Well, it's not exactly subjective. Like I said, I do have fairly extensive psychological training and was raised in a home where my mother is a psychologist and I

did go to psych school, so it's not like it's completely subjective. I have worked with people psychologically for 30 years.

Q. So you have almost a clinical opinion that Ms. Tellisma suffers from cognitive deficits, correct?

A. It's not quite clinical, I'd have to do testing.

Q. You're harboring a suspicion based upon your --

A. Harboring a suspicion, if I did testing I think it would probably bear out, but I have no clinical opinion without doing sufficient objective testing. No clinician makes a decision based on his subjective opinion.

If I was going to do a mental status examination on her, that would probably be my opinion, if I just doing a mental status examination just based on the patient's mental history.

As is evidenced, I think, by this deposition, frankly.

Q. And turning to the lineup that you did receive from the State in its discovery

response that depicted a positive identification of Mr. Woodson, based on your experience, would you say that is essentially a copy of whatever combination of color and cardboard cutouts the detective had used?

A. A combination you said?

Q. In other words, would you say that the photographic lineup provided to you by the State would show Mr. Woodson had been identified as the perpetrator --

A. A copy of it.

Q. -- is that -- that's my question, would it be your experience and your conclusion in this case that that is simply a copy of what the police detective showed Ms. Tellisma?

A. Yes, of course. As in every case.

Q. So the original document, however it is assembled --

A. Yes.

Q. -- would have contained all of that same information.

A. I don't know if it was a piece or part of it, but I assume, yes, it would.

Q. It would have contained her

signature?

A. Yeah. I didn't doubt that it was a precise copy, if that's the question.

Q. Yes, that is my question.

A. Yeah, I don't -- didn't doubt that there was other pieces and parts of the document that weren't effectively captured by the copy. I believe it was a complete copy.

Q. So you took this --

A. That's consistent with the past, yes.

Q. So you took this precise copy and swapped out the photographs in Number 5?

A. I did. For, I believe, a good substantial and compelling reason in this case.

Q. And is it your testimony today that you did not do this for the purpose of having Ms. Tellisma identify Mr. Fritzlan Joseph as the perpetrator?

A. No, I wouldn't say that. I was saying that it was for the purpose of testing her identification, one way or another. Whether she identified him or -- in this case or not, in this case whether she identified him or identified somebody else, I wanted to

test her ability to actually look at a photo lineup and to make or not make some sort of identification, which I believe I'm entitled to since it's the essential issue in the case.

It's my theory of defense, and, as such, I am allowed to test her ability to identify somebody from a lineup.

And, as a result of what happened in this case, the case was resolved, and we found out she didn't see the face and we found out she's not able to make an accurate identification, because even on a photo lineup where the -- her previous identification evidently was circled with her signature, she doesn't identify the same person.

So the goal of what I wanted to achieve was actually achieved, and that was through the creation of the lineup and by the very precise questioning which in no way was misleading to her. Quite the contrary, I specifically said this is my lineup, I specifically told her, focus on the pictures.

And this isn't the first time I've done a lineup and I've questioned a witness before. And I am very specific of my wording

and very specific with when I ask a witness to be fair, frankly, unlike what I imagine happens with officers, who do have a vested interest in making sure, as we can see from the construction of this lineup.

Q. Sure, let's talk about those specific words --

A. Okay.

Q. -- you used. On page 25 of the deposition you asked her if the police officer had showed her a photographic lineup, correct?

A. That is correct.

Q. And then you asked her at Line 8: "Was it like a piece of paper, like my Exhibit Number 2 over here, was it a piece of paper like that, or was it like on a cardboard inside like a box?"

A. Right. And she says, "It was on a piece of paper like that," which I knew was absolutely false and was not the case.

And she obviously was confused, it was more evidence of her confusion because that did not occur.

Q. But her testimony in this deposition is that what she had viewed from the police

was like your Exhibit Number 2, correct?

A. That's right, but it was, again, mistaken, and I knew that that was a mistake immediately. Everybody knew that that was a mistake and there's no way that she was ever shown any kind of an exhibit like my exhibit.

Q. Right, because you knew, since you had altered this, that there's no way she could have seen that exhibit before.

A. That's right. Or anything like it, or anything remotely like my exhibit.

She had to see cardboard cutout boxes out of a manilla envelope or a dark envelope, something that looked completely different, with full colored pictures, as we all well knew. So when she said that we all knew, again, that's evidence of her either memory problem or cognitive problem.

And then I tell her, "Forget what you did before. Focus on the faces. Focus on the pictures. If you can, you can. If you can't, you can't."

Q. Again, you knowing full well that this is not a document she's ever seen before.

A. Of course. I say, "Forget about what

you did before," in Line 20.

Q. And it's your testimony that because of the answers you elicited in this deposition, your firm was able to resolve this case?

A. I had said in part. One was, of course, when you're on a trial calendar and you're set for a motion to suppress evidence and the government has to make a decision about whether proceeding on a motion, which I think all parties agreed they were extremely likely to lose in this case and the case would have been dismissed.

I, in fact, had argued with both my team and with the mother of the defendant not to take the plea.

Q. Because, ultimately, even though you testified Mr. Woodson was actually innocent, he is now adjudicated guilty of armed robbery, correct?

A. And a free man, clear of all the consequences at this point right now. And he still maintains he's innocent until this day.

Q. Notwithstanding that he pled guilty.

A. With three cases to resolve. At the

time it was a package deal and he had -- he was a child listening to this mother, so there was a lot going on there.

Q. Now, you mentioned previously that you've had some prior issues with the Florida Bar.

A. Yes, I have.

Q. The first of these instances was in March of 1995; is that correct?

A. Some 23 years ago.

Q. And in that case you received admonishment for a minor misconduct, is that correct?

A. Can I see the document you're referring to?

Q. Of course.

MR. KUEHNE: Thank you.

THE WITNESS: Yes. In this case here a motion was filed -- I'm refreshing my recollection. Again, I did have an associate at the time named Mr. Preston and evidently a motion was filed. At the time that the motion was filed we represented -- or he represented on my behalf that the defendant, Sergio Reyes,

was in custody. He had been arrested on several cases in several different counties, as I remember, long ago, again, this is a 1994 case.

We had represented -- he had been in custody for a good long while. This case here was up in Brevard County. He had been getting arrested up and down the coast. He was in jail and when we filed the motion for continuance we were under the impression, one, that he was still in jail; and, two, we had no idea of his -- of him -- he never contacted us since he got out of jail, evidently, on July 25th and evidently some six weeks later we represented that he was still in jail.

So it certainly was not intentional for us to tell the judge something that wasn't true. We had a good faith belief to believe that Mr. Reyes was in custody and we had had no contact with him, so yes.

And, as a result of that, I did agree to a minor misconduct.

BY MR. KROEGER:

Q. And there was a contempt hearing held by the presiding judge, correct?

A. It does say that. And I -- refreshing my recollection and what it says, it's says I wrote a letter of apology to Ms. Ruiz.

THE COURT: Was that the judge?

THE WITNESS: No. It was a paralegal and I had to do a hundred hours of community service to a minority group and pay $250.

I had just come back from New Orleans and that's what happened.

BY MR. KROEGER:

Q. And just so I understand the procedure here, so this was brought to the attention of the court which held the contempt proceeding, correct?

A. Yes.

Q. And then subsequent to that -- well, strike that.

A. I'm not sure if it was actually held but I think he -- I think....

Q. According to the document it appears the court withheld adjudicating you in

contempt.

A. I don't think that there was a finding of contempt. I think he decided not to hold me in contempt.

Q. Right, that's what I said, withheld adjudicating you in contempt.

A. Right. I didn't think there was any withhold or finding whatsoever.

Q. And then subsequent to those circuit court proceedings this Bar disciplinary matter --

A. Correct.

Q. -- happened. There also appears there was a second count that you were threatening to telephone your associate and advise his employer at that time that he was a liar. According to this report you did call his employer but you didn't actually end up speaking with anyone.

Do have any recollection of that?

A. I do not.

Q. There was another matter in 1997 where you received a public reprimand from the Supreme Court.

MR. KUEHNE: Thank you.

BY MR. KROEGER:

Q. Do you recall this matter?

A. If I can -- yes -- refresh my recollection for a moment.

Yes.

Q. This apparently involved issues about your failure to appear in court on some scheduled hearings; is that correct?

A. That's correct.

Q. And there was an order to show cause and a hearing held on that order.

A. There was.

Q. And in this case you were found in indirect criminal contempt for your repeated failures to appear?

A. That's correct.

Q. And --

A. Can I explain?

Q. Sure.

A. It's a case where I sent an associate to set aside a bench warrant and the associate went, the associate went to set aside the bench warrant and the defendant in the case didn't show up. The associate, Mr. Finkelstein, called me, indicated that she

wasn't there. I told him if she's not there then go to the clerk and have the case be taken off calendar, which is what happened.

Mr. Finkelstein took the polygraph, passed the polygraph, we all testified, and the judge found me in contempt and then I entered into this consent, so yes.

Q. And in this case you pled guilty to violations of Rule 4-3 --

A. That's correct.

Q. -- 3.3(a), a lawyer shall not knowingly make a false statement of material fact or law to a tribunal; Rule 3-4.4(c), a lawyer shall not knowingly disobey an obligation under the rules of a tribunal; and Rule 4-8.4(c), a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

A. That's correct. The behavior was not a representation, it was allegedly not showing up.

THE COURT: So the clerk took a motion to set aside a bench warrant off the judge's docket at the defense counsel's request because her client

didn't show up and then it was treated as a misrepresentation?

THE WITNESS: Contempt.

THE COURT: Misrepresentation?

THE WITNESS: That's correct.

THE COURT: Because you're not allowed to take it off, is that --

THE WITNESS: Well, the judge said that that didn't occur. The judge said we never appeared. The judge claimed we didn't appear. This was my theory and my conversation with my associate, which is supported by his polygraph.

THE COURT: Okay.

THE WITNESS: He said that didn't occur.

THE COURT: Okay.

THE WITNESS: We had put it on calendar and we had taken it off calendar.

The judge agreed we put it on calendar but says no one showed up to take it off calendar. We disputed that version.

THE COURT: Okay.

THE WITNESS: It was Judge Diaz.

BY MR. KROEGER:

Q. And then in June of 2002 you received another public reprimand.

A. Correct.

Q. And I can provide you with a copy of the court's order.

This was one of the cases that Barry Wax represented you on?

A. Okay.

Q. Well, I'm asking if you recall.

A. This arose out of a dispute between former another associates who left the firm and it doesn't -- the record doesn't show exactly what the dispute was about, but rest assured they left the firm and it was an uncomfortable separation after they had removed all the client files and contacted all the clients and tried to have the clients hire them. There was litigation regarding that. One of the lawyers was soon disbarred a year or two years after this occurred.

Q. And in this case you pled guilty to a number of violations.

A. The main violation is when there was a discussion in court regarding what I

considered to be the theft of a client and the client had come to court saying, this is what happened, and the judge said, who's client is this client, now they have competing firms.

And I inappropriately said I thought that the attorneys were trying to steal my clients and -- and I admitted culpability for improperly saying that.

Q. Right, but you admitted --

A. It was in the heat of the moment.

Q. I'm sorry. You admitted that you violated 4-3.3(a)(1) to make a false statement of material fact or law to a tribunal.

A. They weren't technically guilty of theft.

Q. You admitted guilt to that rule violation; is that correct?

A. That's correct.

Q. As well as 4-4.1(a) make a false statement of material fact or law to a third person; is that correct?

A. That's correct.

Q. As well as 4-8.4(c) engage in conduct involving dishonestly, fraud, deceit or misrepresentation?

A. That's correct.

Q. Okay. And then in May of 2012 you received a 90-day suspension from the practice of law.

A. That's correct.

Q. And take a moment to look at the court order and report of referee in that case.

A. I don't need it.

Q. You're familiar with this matter?

A. Certainly. The case arose out of an a pro bono representation of a family court client. She had given birth to a child from a very famous baseball player. And I had represented many women who have had children with famous football or baseball players before and, ultimately, at the end of the case, it's not so unusual that there's a resolution which includes attorney's fees.

In this particular case there was a lot of pressure being placed on my client, she was homeless at the time, and I inappropriately gave her $4,000 for living expenses. The reason why it became a Bar complaint is because I listed that on her

financial affidavit. And at the time I did not know that that was a violation of the Bar complaint and I admitted my responsibility for that.

Additionally, she had to go back to her home country of Venezuela, she had sent me a financial affidavit on the phone, she signed it, I got it on the fax and I notarized it.

And, again, I unfortunately was not aware of all the technical details of a notary and the person actually being in front of you in order to notarize it.

And based on the notary, based on the improper loan, I accepted a guilty plea.

And, frankly, at the time, I was in psychology school.

Q. And in this case, like in several of the others, you pled guilty to a violation of 4-8.4(c); is that correct?

A. Again, Mr. Kroeger, you know, the actual -- I'm telling you what happened. The specifics of what rules that you say it violates, whatever the Bar sent me, whatever was the resolution and the list of Bar rules, this is what happened. I gave money to a

client, a pro bono client who I represented for fee for a good long while and ended up losing my license for it. There was no misrepresentation to a court.

I have done nothing in my entire career -- there was no intentional misrepresentation to the court nor did anything for -- or motive, quite the contrary.

Q. But you did also plead guilty in this case to a violation of 4-3.3(a)(1) --

A. I did.

Q. -- a lawyer shall not knowingly make a false statement of fact or law to a tribunal.

A. And I would ask, frankly, you, Mr. Kroeger, what was that false statement?

What was the false statement?

Q. I don't believe I'm not the one on trial today.

A. There was no false statement. I --

Q. Well, my question was: Did you plead guilty to that rule violation?

A. Yes.

Q. As well as 4-4.1(a), in the course of representing a client, a lawyer shall not

knowingly make any false statements of material facts or law to a third person?

A. I accepted full responsibility for what happened.

And I think I was sentenced extremely harshly as a result of what happened in that case.

MR. KROEGER: I have no further questions at this time.

THE COURT: All right.

Redirect?

MR. KUEHNE: Yes, Your Honor.

Thank you.

REDIRECT EXAMINATION

BY MR. KUEHNE:

Q. Mr. Schwartz, you were asked about the prep process for putting together the defense-created lineups, do you remember those questions?

A. Yes.

Q. Was this a protracted process?

A. No.

Q. In reference to the deposition on February 13, 2015, when did you put the lineup together?

A. I'm sure the day before.
Q. In preparation for the deposition?
A. Right. We have so many cases, so many things we're doing, there's no way for us to focus even a couple of weeks.
Q. And you mentioned when you were questioned that you would certainly do the process differently in the future given these allegations that you were trying to mislead somebody.
A. Will and am.
Q. Have you had occasion to put any lessons you learned from this allegation into practice in other misidentification cases?
A. Certainly.
Q. Such as?
A. Well, as I said, we have one immediately right now we're constructing and, you know, we're trying to -- we have a case right now where there is a series of photographs that was provided, series of six, series of another six, and so the construction -- one of the possible constructions is to show all of the pictures without showing the one for the defendant one by one by one by

one.

Q. All right.

A. Or to take them and to put them into a lineup form. Or to possibly create an entirely new lineup. All of which I think are permissible.

Q. You haven't done that yet in the case?

A. No.

Q. And is that a real misidentification case?

A. It is.

Q. Do you think there are substantial compelling reasons in that case --

A. No question.

Q. -- to construct a defense-function lineup?

A. Similar to this case.

Q. You were also asked some questions about the witness or maybe your answers were about the witness having cognitive deficits.

A. That's right.

Q. Did you utilize the lineup process in an effort to trick her or take advantage of what you thought were some cognitive deficits?

A. No, quite the contrary.
Q. Did you try to take advantage of her in any way as a result of your perception of how cognitive deficits?
A. No, not at all.
Q. You were asked questions about whether you asked the witness to confirm any cognitive deficits and you said you did not.
A. I would never do that.
Q. Would that likely have been viewed as harassing a witness?
A. And offensive.
Q. And offensive.
A. And certainly you don't want to -- you use as much sugar as you can in a deposition. Vinegar doesn't seem to be a good method. You don't want to offend your witness by calling her crazy or to have cognitive deficits.
Q. Did you attempt to treat Ms. Tellisma with respect and dignity at all times?
A. No doubt, as I'm sure she would say if they brought her in.
Q. Now, you were asked a question about the picture in Number 5 and the circle around

it, that the circle had been from the original police lineup, the color police lineup.

A. Yes.

Q. You said that the witness did not pick out Picture 5?

A. She did not.

Q. Was there any effort on your part, when you presented that photo lineup, to suggest that she was supposed to pick out Number 5?

A. Quite the contrary, no.

Q. And she didn't?

A. And she did not.

Q. Okay. You were --

A. In either lineup.

Q. You were asked to go through parts of the -- parts of the transcript and reviewed your introduction of the exhibits to the witness.

A. Yes, sir.

Q. Was it your intention to convey to the witness that the exhibits you were using were your exhibits, not State exhibits, not exhibits she had seen before?

A. Yes, sir.

Q. And did you do that?
A. I think it's clear from the record.
Q. And was it your understanding that she understood that, those directions?
A. My impression from reading the entire deposition is she that didn't believe she had seen anything I showed her or other anything like it previously.
Q. Okay.
A. So yes.
Q. And did you have an understanding after the going off-the-record discussion that the prosecutor understood what you were doing?
A. There's no question.
Q. She did?
A. Of course.
Q. You were also asked --
A. She said so on the record, that it's -- well, that it was different, because I told her.
Q. You were also asked questioning toward the end about your prior discipline.
A. Yes, sir.
Q. In all of those cases --
A. Yes.

Q. -- that involved consent judgments --
A. Yes.
Q. -- did you acknowledge and accept responsibility for your conduct?
A. I sure did.
Q. Did you attempt to deny your conduct in resolving those cases?
A. Never.
Q. And was your explanation for those cases any attempt to deny your conduct?
A. No. Not at all.
MR. KUEHNE: Nothing further, Your Honor.
THE COURT: Okay. Thank you.
(Witness excused.)
THE COURT: So does the defense rest?
MR. KUEHNE: No, Ms. Baker McGuire is here.
THE COURT: Okay.
MR. KUEHNE: She's the associate.
THE COURT: Do you want to break for lunch or do you want go to through lunch?
MR. KUEHNE: I think it's going to be pretty quick.
THE COURT: Okay.

MR. KUEHNE: I'm going to narrow her to the deposition and the high-fiving.

THE COURT: So I do need to work over lunch to get ready for the rest of the day and tomorrow morning's calendar, so I guess I should give you a cutoff at 1:00 and we're done today.

MR. KUEHNE: Okay.

THE COURT: So if you can try to organize your rest of the hour.

If you can go get the witness. Or I can call the bailiff and she can do it.

MR. KUEHNE: I'll get her.

THE COURT: Good afternoon.

Raise your right hand.

Thereupon,

Jody McGuire,

having been first duly sworn or affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KUEHNE:

Q. What is your name?

A. Jody McGuire.

Q. And you are a lawyer?

A. Yes.

Q. Since?
A. September 2011.
Q. You are an associate with Schwartz & Associates?
A. Correct.
Q. And you've been a member in good standing since 2011?
A. Correct.
Q. What law school did you attend?
A. University of Miami.
Q. Did you, after graduation, pass the Bar?
A. Right.
Q. And did you begin, then, working with Mr. Schwartz?
A. I started working with Mr. Schwartz around February of 2012.
Q. Okay. What did you do between law school and Mr. Schwartz?
A. I had a few different contract jobs with some -- two or three other family and criminal defense attorneys.
Q. What is the primary nature of your practice with Schwartz & Associates?
A. Primarily criminal defense.

Q. And the reason we're here today is a criminal defense case, right?
A. Right.
Q. The Woodson case?
A. Yes.
Q. You were cocounsel in that case?
A. Yes.
Q. You attended a deposition on February 13, 2015?
A. Correct.
Q. And if I may show you the exhibit, it's Florida Bar Exhibit 1, in this case --
A. Okay.
Q. -- but you've looked at it before.
A. Yes.
Q. And you executed an affidavit in connection with Bar proceedings in this case?
A. Correct.
Q. Respondent's Exhibit 7, that's your affidavit?
A. Yes, it is, sir.
Q. And it was true?
A. Yes.
Q. It focused on the conduct and the allegations against Jonathan Schwartz

regarding the Gurdy Tellisma deposition?

A. Correct.

Q. Did you work up the case with Mr. Schwartz on behalf Mr. Woodson?

A. Yeah, pretty much every case in our office we kind of do it as a group.

Q. And ultimately you were responsible for resolving Mr. Woodson's case --

A. Yes.

Q. -- is that right? And was that due to a decision in the office that you should take over primary responsibility for the Woodson case?

A. Correct.

Q. And was that to better represent the client?

A. That was to make sure that there was no issue with our client, that there was no -- yes, that there was no question over any conflict or any sort of issue.

Q. Conflict meaning there was some bad blood between the prosecutor, Cristina Cabrera, and Jonathan Schwartz?

A. Exactly.

Q. And you wanted to make sure that bad

blood would not be used adversely to Mr. Woodson?

A. Yes, of course.

Q. And you were able to ultimately resolve the case very favorably?

A. Yes.

Q. Okay. The Tellisma deposition, is it fair to say that the principal defense in this case was not just misidentification but you really had an idea of who the culprit was?

A. Absolutely.

Q. An alternate suspect?

A. Absolutely.

Q. And this matter of alternate suspect had been played out transparently to the State Attorney's office?

A. Multiple emails back and forth, conversations back and forth trying to get the prosecutor to look into this alternate suspect.

Q. Okay. And was Ms. Cabrera at all interested in that information?

A. No.

Q. You had that perception?

A. It was almost blind ignorance for

that information.

Q. Were you around the same amount of years as Ms. Cabrera as a lawyer, do you know?

A. I don't know when she passed the Bar. I don't know when she started. She seemed like we were the age but, to be honest, I can't be sure.

Q. But you had been doing criminal offense for quite sometime?

A. Yes.

Q. Since you graduated in 2011?

A. Right.

Q. Did you assist Mr. Schwartz in going through the process of creating a defense or defense lineups?

A. The lineups? Yeah, I think it was kind of a group effort. I'm not sure exactly -- I don't remember exactly who did what in making up lineups but, yes.

Q. If you need I'll show you the lineups, they're part of the exhibit for the deposition.

But in putting together that lineup, those lineups, was there any intention on your part or Jonathan's part, if you know, to put

together a lineup that would be purposely or intentionally misleading to the witness?

A. Absolutely not.

Q. Or to the prosecutor?

A. Absolutely not.

Q. And, by the way, was the -- I've handed you the exhibit that is the Gurdy Tellisma deposition --

A. Yes.

Q. -- with attachments.

A. Yes.

Q. So if you need to refer to that you can look at that.

A. Okay.

Q. In the course of the deposition, was it made plain to the prosecutor that the defense lineups were, in fact, created by the defense?

A. Absolutely. I mean, from the transcript itself and my memory, Jonathan specifically said, this is my lineup, you have not seen this before, something to that effect, trying to make it as clear as possible that this was not something that she had seen before or that she had used before or that the

State had provided.

Q. Was there a time in that deposition -- it doesn't show in the transcript because there's an off-the-record called by the prosecutor -- where you and Jonathan specifically informed the prosecutor, when she asked, that this picture is of Fritz, the guy we know did it or we think it?

A. Yes.

Q. That was not hidden from her?

A. No.

Q. That was not a secret?

A. Not at all.

Q. By the way, when that conversation was taking place, since it's off the record, it doesn't appear in the transcript --

A. Of course.

Q. -- there was no interpreter interpreting that so that a Creole speaking witness could understand what you were talking about, was there?

A. Not that I remember.

Q. So there was no effort to try to suggest, as far as you understand, to the witness that she should pick Fritz as the guy

who you or the defendant thought did the crime?

A. No, not at all.

Q. We have some testimony that the deposition took place in a relatively small State Attorney office.

A. Yes.

Q. Everybody crowded together.

A. Uh-huh.

Q. There was a process of marking and introducing exhibits into evidence.

A. Correct.

Q. And then presenting them to the witness.

A. Correct.

Q. You were a part of that process, correct?

A. Yes.

Q. Was there anything unusual about that process?

A. Nothing unusual. Nothing was premarked, which is pretty much standard practice for how we've been doing for it for last six plus years --

Q. Meaning the court reporter

actually --

THE COURT: Wait, wait, you're stepping on her answer.

THE WITNESS: Yeah, no, we never really pre-mark anything for depositions, any -- we're not sure what we use in what order, so it's kind of done at the time.

BY MR. KUEHNE:

Q. And in this case do you recall the court reporter actually affixing a stamp, a sticker to the exhibit before it was presented to the witness?

A. Yes.

Q. Was there any conduct on the part of Jonathan Schwartz to not let the prosecutor see these exhibits before he used them?

A. No, there was no concealment of any sort.

Q. Was it even possible in a room that size with the way the people were positioned for the prosecutor to have things hidden from her?

A. No, not at all. Everything -- I think even they were out laying on the table and the table was smaller than the width of

this table, so she was sitting pretty much where Jonathan was and Jonathan was sitting almost where I was and could easily have seen everything.

Q. Okay. Did you get the impression that the State Attorney, throughout the deposition, was focused on this deposition?

A. She was jumpy, she seemed like she was in and out, it didn't seem like she was completely zoned in.

Q. She was doing other things?

A. She was checking back notes, I do remember that. She just didn't seem like completely there the whole time. She kind of kept asking wait, wait, wait, what just happened, you know. Things weren't really going fast or anything, we were going normal speed -- actually not fast at all.

Q. Was Mr. Schwartz respectful at all to times?

A. Of course.

Q. Was he trying to hurry through the deposition?

A. Not at all.

Q. Did you guys just pick up your bags

and leave quickly so the prosecutor could not ask any questions?

A. No, we were sitting there, I had to put everything back into my bag before I even stood up. We were sitting there a -- a minute or two in silence while we packed up and left.

Q. Did the prosecutor indicate at any time that she wanted to ask questions --

A. No.

Q. -- and you then prevented her from doing that?

A. No.

Q. The exhibits themselves, the defense-created exhibits came from a photocopy of the police lineups, correct?

A. Correct.

Q. And, essentially, is it fair to say the change to those, the defense creation was to put the alternative suspect in the lineup --

A. Correct.

Q. -- in place of Mr. Woodson?

A. Correct.

Q. And was the exhibit presented to the witness in a way that conveyed to the witness

that this was in fact the police lineup?

A. No. Actually the opposite. Mr. Schwartz said, you have not seen this lineup, do -- like only pay attention to the photos, not anything else on the sheet of paper.

Q. And there was a discussion in the transcript -- I don't know if you recall it, I can point it out, where the prosecutor alerts the witness in the form of an objection to the fact that the witness had seen the original lineup in color and this was a black and white, do you remember that?

A. Yes.

Q. Did that seem like it was an intent to -- or it was intended by the prosecutor to reaffirm to this witness that these were not the police lineup?

A. It seemed like she was leading at that point.

Q. To inform the witness something about what the witness had actually seen from the police lineup.

A. Right.

Q. And with that question or observation

having been made, did Mr. Schwartz then follow up to question the witness to distinguish the defense lineups from what the witness had actually done?

A. I believe so.

Q. And did that seem like it was a method to let the witness know that the defense lineups were completely different, a different examination, a different effort to identify?

A. Yes.

Q. Okay. And ultimately the witness did not pick out Mr. Fritz --

A. Right.

Q. -- from the defense lineups?

A. Right, she actually picked out -- I want to say it was Number 1.

Q. But definitely not the person who the defense was posturing with evidence was the actual perpetrator.

A. Correct.

Q. Now, is it fair to say, having read the transcript, that when the prosecutor objected that appears on the record?

A. Yes.

Q. There was some accusation that Mr. Schwartz ignored hand signal objections that the prosecutor was making during the course of the deposition, you're aware of that allegation?

A. Right, right.

Q. Did that occur?

A. No. She may have made some hand signals but in no means was that an objection or anything. It was more nerves, it looked like. It didn't seem like she was trying to interject to object to anything. I don't know what she was doing with her hands, frankly, but it did not appear like Mr. Schwartz was trying to ignore some sort of hand gesture objection.

Q. In your experience up to that time, up to 2015 --

A. Yes.

Q. -- had you been aware of A-Division prosecutors being unable to put objections on the record?

A. No, that would be my first.

Q. And A is fairly higher level of prosecutor, maybe not so senior but they

handle top criminal cases?

A. Right.

Q. Did you then participate in a hearing during which the prosecutor filed a motion for sanctions against Mr. Schwartz?

A. Yes, I was there.

Q. Did anything unusual happen at that hearing?

A. Yes. I want to say it was right before the hearing started, Cristina came up to me and was like -- said some comment like this is not anything against you, to that effect. And then I think it was right after she filed the motion she and another prosecutor high-fived each other saying something like, we got him.

Q. And you were there?

A. Yes.

Q. And that plainly took place?

A. Yes.

Q. Did you find that unusual?

A. Absolutely.

Q. And yet she had cautioned you at the very beginning that, hey, this has nothing to do with you?

A. Right.

THE COURT: Was this in front of the judge or before the judge took the bench?

THE WITNESS: That I don't remember, offhand.

THE COURT: It doesn't matter.

Go ahead.

BY MR. KUEHNE:

Q. As a result of the motion for sanctions and the rule of caution that it had nothing to do with you, did that change the staffing of this case, is that what did it?

A. Yes.

Q. And then you took over the responsibility?

A. Correct.

Q. And you're aware that the case got resolved?

A. Yes.

Q. But at the time the case got resolved the judge, Judge Bloch, was intent on getting the parties to get a hearing on the motion for sanctions?

A. Right.

Q. But the prosecutor withdrew the

motion for sanctions?

A. Right.

Q. And was that part of your discussions with the prosecutor for resolution of the case?

A. I don't remember offhand, I don't remember.

Q. Did you have any understanding that the prosecutor's intention was to take the Bar violation away from the judge and file it separately with the Bar?

A. No.

Q. That came as a surprise?

A. Absolutely.

Q. In the course of having thought about this case, prepared for being a witness in this case, worked on cases, do you have any sense that Mr. Schwartz, as the lead defense lawyer, intended to do anything wrong whatsoever?

A. He absolutely did not intend to do anything wrong.

Q. If -- you were part of the -- part of the team, let's say, lead by Mr. Schwartz in preparing for this deposition.

A. Right.
Q. You were a four-year lawyer at the time?
A. Right.
Q. So somewhat lesser experienced.
A. Right.
Q. Did you have the confidence back then in 2015 that if you thought Jonathan was doing something over the line that you would have said, whoa, hold on?
A. Yes.
Q. Have you and Jonathan Schwartz, other lawyers you work with, talked through tough issues before?
A. Absolutely.
Q. And is it fair to say that you believe you have a good appreciation for the rules?
A. Yes.
Q. And what a criminal a defense lawyer is allowed to do?
A. Yes.
Q. By the way, is it the general philosophy in the Schwartz & Associates office that defense lawyers can go to any lengths if

they have what is perceived to be an actually innocent client?

A. Within the bounds of what's allowed by the Bar and by the law.

Q. So there's never an effort to just the ends justify the means at Schwartz & Associates?

A. No.

Q. And was any effort to go beyond what you thought was allowable done in this case?

A. I would have told Mr. Schwartz that I didn't feel comfortable with that.

Q. And you did not tell him that?

A. No.

Q. Because you did not feel uncomfortable?

A. No.

Q. And at the time, and certainly now, you were aware of the Kuntsman and the McWilliams case, the whole process of challenging witness identifications?

A. Yes.

Q. Is it your understanding, from the law, as you know the law, that the process used here was absolutely allowable?

A. That was my understanding, yes.
Q. Under legal standards.
A. Yes.
Q. And how about under ethical standards?
A. It was my understanding there was no intention to mislead the witness, it was a viable question over -- it was, out of any case that I've handled, the biggest case that we've had where misidentification and a specific viable witness that we thought was the actual suspect was that prime issue.
MR. KUEHNE: I tender the witness, Your Honor.
THE COURT: Cross-examination.
MR. KROEGER: I have no questions, Your Honor.
THE COURT: Okay. Thank you.
THE WITNESS: Thank you.
THE COURT: You're excused.
(Witness excused.)
MR. KUEHNE: Your Honor, with regard to the case, Mr. Schwartz rests his case for purposes of the evidence in the case.
We would ask the opportunity to, if

mitigation is needed, to have a separate short hearing to bring mitigation witnesses in, but we would like to end our presentation on the case at the present time.

THE COURT: Okay.

MR. KROEGER: May I just ask a housekeeping matter, Your Honor?

THE COURT: Sure.

MR. KROEGER: If you could just clarify what, I guess, evidence has been introduced from your part, because I've heard you using numerals today and my notes I had letters corresponding to your exhibits from the last time we were here.

And maybe I'm mistaken, but perhaps we can --

MR. KUEHNE: We'll have to clarify with the judge. I thought I was using what the clerk --

THE COURT: He was probably referring to deposition numbers.

And the clerk gave --

COURT CLERK: You were using these numbers instead of these numbers.

THE COURT: Wait. I'm talking, please don't overtalk the Judge.

COURT CLERK: Sorry.

THE COURT: In his questioning the witnesses today I think he was using deposition numbers from the Tellisma deposition, the Number 2 Tellisma deposition.

And she would have given the respondent A, B, C, so you're right.

MR. KROEGER: No, no, no, I'm just trying to -- just so I understand, so just for my own clarification.

THE COURT: And you can correct me --

MR. KUEHNE: The Bar is absolutely right. I was using the wrong numbers, not converting them to the As, and I can -- we can state in the record if need to, but I was mis-numbering. So, for example, when I used Exhibit 2, I should have used a letter, instead.

So my references were incorrect.

MR. KROEGER: No, that's fine. Maybe I can just take a look before -- just so I --

THE COURT: Sure.

MR. KROEGER: Just so I have my own recollection.

MR. KUEHNE: I'm going to hand him -- these are the actual exhibits there.

I'm going to do the same thing during a break, to look at them, to make sure I got them right.

THE COURT: Well, I'd rather just -- we only have 40 more minutes, so I'd rather just proceed.

I'll reserve for him to provide mitigation, but are you ready for final argument? Or do you want a break?

MR. KROEGER: May we can just take a quick -- just a five-minute break just to look through the exhibits so we're all on the same page.

THE COURT: Sure. Five minutes.

(Thereupon, a recess was taken.)

THE COURT: Okay.

MR. KUEHNE: Your Honor, I do have, having looked at the exhibits, I do have three that I wanted to put in the Respondent's exhibits, mentioned but

apparently I didn't move them in.

One is the Jody McGuire affidavit that she identified. I just did not mark it or move it in.

The other is the affidavit of Don Corasmin, who is the interpreter.

And the third is the motion for sanctions that was filed by the State Attorney.

MR. KROEGER: I mean, technically the motion for sanctions, I don't have a problem being introduced separately, but I believe it was already part of the Florida Bar's Exhibit 5, which was the initial complaint submitted by Ms. Cabrera.

THE COURT: I don't mind if we mark it separately.

MR. KROEGER: Yeah, I have no objection if you just want to mark it separately. And I think --

THE COURT: Any objection to the two affidavit?

MR. KROEGER: No objection. I mean, I think those affidavits are also in as part of your Exhibit E, which was --

MR. KUEHNE: Right, they're part of my response.

MR. KROEGER: -- the response, but to the extent you want to introduce it separately, I have no objection.

THE COURT: Okay. Unless the clerk says uncle, I don't want to scan them twice, I'll admit them separately.

MR. KUEHNE: And then the only other item, Judge, is I haven't had a chance yet to review the about 15 pages of Exhibit A1, which is the personnel exhibit with the Bar lawyer; I just ran out of time. I've tabbed them but I haven't gone over them. So I would just move subject to argument and then review once he has a chance to go through them.

MR. KROEGER: I mean, I had a chance to look quickly, if you want to address it now.

THE COURT: Okay.

MR. KROEGER: It looks like there are three tabs; is that correct?

MR. KUEHNE: Three tabs. You and I have her typed application.

I have one reference in the reference just -- the Bar understands it, but the one reference is during her interview a lawyer who was interviewing her identifies her as having either no knowledge of Brady or lack of knowledge of Brady, and I believe that's a theme throughout the course of the case.

And the third is the timing of her resignation. She announces her resignation, then she hands in her resignation with no reasons given for the resignation.

Those are the three items.

MR. KROEGER: My response, briefly, you know, in terms of the -- it appears the first tab here is her application itself to the State Attorney's Office.

I just don't know that I see what relevance the application itself has. We know -- she's testified that she starting in August of 2011. If Mr. Kuehne wants to just admit the first page, which has the date she's available to start, I wouldn't have an objection, but I don't think we

need the whole application packet.

MR. KUEHNE: That's fine, Judge. I just want something in the record that shows that -- not just her testimony -- that she was an assistant state attorney at some point.

THE COURT: All right. I'll admit the first page of the employment file and I'll -- your basis for sustaining the lack of knowledge in a 2011 interview or around that time is --

MR. KROEGER: Well, my basic objection is that her application for employment doesn't really have any relevance to these proceedings.

THE COURT: Well, what about the interview notes?

MR. KROEGER: Okay. So that's moving on to the second document that Mr. Kuehne has tabbed. I would argue that that is (a) not relevant, and (b), more prejudicial than probative, because these are interview notes at the time that she first --

THE COURT: I'll sustain a relevance

objection.

MR. KROEGER: -- applied for employment.

THE COURT: That at the time she didn't know Brady.

Okay. So you want to offer the first page of the personnel file and then --

MR. KUEHNE: And then the last set is her resignation documents. She tenders her resignation, her resignation is established, and it shows the date of, I think, June 29th or around that time.

THE COURT: And -- okay.

MR. KROEGER: I mean, other than perhaps being a bit cumulative, I don't think there's any dispute that she left the office at the end of June or July of 2015.

THE COURT: All right. I'll --

MR. KROEGER: Beyond being cumulative, I don't have any objection.

THE COURT: All right. Is she the one that filed the Florida Bar complaint or did the State Attorney's office file it?

MR. KROEGER: The initial complaint document was signed by her and another attorney from the State Attorney's office. She has been the primary complainant throughout the course of the proceedings.

THE COURT: Well, I'll admit the resignation documents just to show the timing of the withdrawal of that complaint before the judge and then her -- whatever involvement she had as the complaining witness.

MR. KROEGER: Okay. I mean, I don't know that these documents show her reflecting involvement in the disciplinary proceedings, but....

MR. KUEHNE: You know, that's in the disciplinary proceedings, those are already in there because she signs them in the disciplinary proceeding, she signs those.

This establishes the date frame --

THE COURT: Right.

MR. KUEHNE: -- which she was at the State Attorney's office through.

THE COURT: Okay.

MR. KUEHNE: And, Judge, just -- I know you've ruled and I just want to make sure the Court understands the record.

With regard to the interview observations, the lack of Brady was the reason that supervisor interviewing her recommended non-hiring.

And it's been our position that the fact that this issue revisited itself during the her career, coupled by her soon thereafter resignation, has consequence, that this is a person who started out at the office without understanding Brady and acted like that as a prosecutor, as the evidence has reflected, and with a couple alarming cases, then leaves the office soon thereafter. So we think that that is something that has significant relevance to her credibility and believability in terms of blaming misconduct on Mr. Schwartz's part.

MR. KROEGER: I mean, a couple of issues --

THE COURT: This is a motion to reconsider my sustaining the objection on

the Brady interview issue?

MR. KUEHNE: Correct.

THE COURT: I don't know that I need a response, I'll just deny it.

MR. KUEHNE: Okay. Thank you, Judge.

THE COURT: All right. Let's go.

MR. KROEGER: Thank you, Your Honor.

I think it's important for us to establish at the outset what this case is and is not about.

This case is about whether Mr. Schwartz, by virtue of creating and utilizing the lineups, which have been introduced as the Florida Bar's Exhibit Number 3 and Exhibit Number 4, constitutes dishonesty, deceit or misrepresentation, within the meaning of Rules 3-4.3 and 4-8.4(c) of the rules regulating the Florida Bar.

This case, the most relevant and material evidence, is contained in about ten pages of the deposition transcript and the accompanying exhibits.

This case is not about whether the State Attorney's office routinely

prosecutes misidentified defendants or actually innocent defendants.

This case is not about whether Ms. Cabrera prosecutes innocent defendants or misidentified defendants.

This case is not even about whether Mr. Woodson was misidentified or actually innocent.

All of those things could be true or they could be false, but they have no relevance to what Mr. Schwartz is alleged and has admitted to doing in this case, namely, altering these lineups in such a manner that they are intrinsically, inherently, on their face, misleading documents.

In order for the Bar to establish this, it must show that Mr. Schwartz possessed the requisite intent. But it is important to keep in mind that the standard established by the Supreme Court for intent, in a context of misrepresentation and deceit, a Rule 4-8.4(c) analysis, is that the Bar must only show that the conduct was deliberate

or knowing.

The two buzz words are deliberate and knowing.

In essence, the Bar must prove that Mr. Schwartz deliberately and knowingly altered these lineups and used these lineups in such a way that they were misrepresentative and an act contrary to honesty.

The Bar would submit that this has most certainly been proven.

The evidence in this case has made clear that a lineup was done, an out-of-court identification was conducted with Ms. Tellisma by a Miami-Dade County Police Department detective.

She made a positive identification.

That positive identification was of Mr. Woodson.

Again, whether that identification was constitutionally improper or suggestive, whether Mr. Woodson is innocent or whether that was a misidentification, that is irrelevant to what Mr. Schwartz did.

A copy of that lineup was provided by the State to Mr. Schwartz as part of the discovery response. That is the Florida Bar's Exhibit Number 2, what I will refer to, for lack of a longer and more specific description, as the original lineup.

Mr. Schwartz took that original lineup, and, as he told you today, pasted a copy of Fritzlan Joseph on top of Mr. Woodson's head, on top of Photograph Number 5, that comprised what in his deposition was Exhibit 2, in this case the Florida Bar's Exhibit Number 3. And then did it again, but left Mr. Woodson's hairline, as the Florida Bar's Exhibit 4 and his Exhibit Number 3 in the deposition. This issue has been discussed repeatedly.

But the lineups still contain a circle around the photograph, they still contain Ms. Tellisma's signature, still contain her name, they still contain the detective's signature and his name, they still have a box checked next to whether a positive identification was made and the

corresponding date.

The mere creation of that document and its attempted use in a deposition is inherently misleading. The face of that document purports to reflect that the person who looked at it made a positive identification and circled the individual contained in Number 5, as the photograph in Number 5. Both of these documents indicate that someone has made an identification of these two different photos of Mr. Joseph as the perpetrator.

That is not the case. No one made that identification.

The mere fact that they were created in this manner is inherently misleading.

We've heard from Mr. Schwartz that his intention was to question the witness about her identification. He even looked at the transcript which has been belabored, he was asking her to make an identification. He asked her to look at the photos, forget what she had done before, and to make an identification.

And common sense would tell you that

if a witness is going to look at this document, as everyone has testified she did, it would certainly appear that she might say, well, that individual who's in the circle, the circle that I drew, and this document that has my name and the detective's signature, I guess maybe that is the person who did this. That's the risk in this case.

Now, that didn't happen.

Mr. Schwartz is not charged with a violation of having prejudiced the proceedings by producing this identification under these circumstances.

I mean, this would be a much more serious case if Ms. Tellisma had made this identification of Mr. Joseph, if respondent had essentially created yet another out-of-court identification and then attempted to use it in the proceedings to his client's benefit.

Now, he did not go that far because -- I shouldn't say because, we don't know. What we do know is that Ms. Tellisma didn't make an identification of

Mr. Joseph as the perpetrator. But the risk of prejudice to the proceedings certainly existed.

The case law that Respondent's expert witness, Barry Wax, talked about, State versus Kuntsman and the State versus McWilliams, simply do not stand for the proposition that what Respondent did is appropriate under substantive criminal law.

McWilliams says that a defense attorney can use a police lineup. But the problem in this case is this isn't really the police lineup. It had been altered in a subtle yet very significant way. If it were the original police lineup, if it were the police lineup that had been turned over in discovery, it would have had Mr. Woodson as the individual in Number 5, but it had been altered.

So McWilliams doesn't authorize this.

And Kuntsman merely stands for the proposition that defense attorneys could create a lineup and question a witness about it, and receive permission from the

court to do so if there is a compelling reason.

Now, perhaps there was a compelling reason in this case, but what's left unsaid in Kuntsman is that a defense attorney could use a misleading or a deceptive lineup to question the witness.

And that's where this moves from a mere violation of the criminal procedure rules into a violation the ethical rules.

You know, the criminal rules and indeed the dicta in Kuntsman is clear, Rule 3.220 of the Rules of Criminal Procedure, is not designed to allow defense attorneys to create evidence. The Rules of Criminal Procedure are merely designed to let the defense attorneys avail themselves of the same information that is known to the prosecution.

In McWilliams there is a footnote which is a caution from the Third District Court of Appeal, basically instructing the defense attorneys that they cannot go so far as to try and force the witness to participate in another identification.

Setting aside just for a moment the issues of misrepresentation and dishonestly, it's clear that Mr. Schwartz was trying to elicit more identifications from the witness.

You know, he also presented her with the third lineup, which was an accurate copy of one of the police lineups and the Bar has no issue with that, that's -- there's no problem, as McWilliams says, with showing the witness the actual lineups used by the police.

But that isn't what Mr. Schwartz did here. It sure looked like it. One could easily be forgiven for mistaking on first glance that these lineups were the original lineups, but they weren't. They had been altered in an inherently deceptive and misleading way.

There is no Supreme Court case law which directly addresses the issue of photographic lineups or defense-created photographic lineups in the context of the rule violations. But what there are, are a number of cases which have held that

lawyers cannot engage in misrepresentation and deception in the discovery process.

I have some case law that I can provide later on to Your Honor and to opposing counsel. It's contained in my trial brief which you'll have an opportunity to look at.

But some of the more relevant cases include the Florida Bar versus Forrester, which is 818 So.2d 477, cited in 2002.

And in that case a lawyer was found guilty of violating Rule 4-8.4(c) for his conduct -- excuse me, her conduct in a deposition. In that case Forrester represented a defendant corporation, the president of which sat for a deposition. During the deposition, the plaintiff's attorney presented the witness with an exhibit and there was some dispute over who owned that exhibit or who had a proprietary interest in that exhibit. After that dispute, the attorney took the exhibit off the table and put it under the table, either in or near her briefcase. The plaintiff's attorney specifically

asked the respondent in that case where is that exhibit and her response, although technically truthful, was, quote/unquote, I'm not seeing it. Even though it was truthful, because she could not see under the table where she had placed the document, obviously that was a deliberate and knowing statement that tended to mislead the plaintiff's attorney. And for that, the Court noted that "It was intended to mislead because she, in fact, knew where the document was located and failed to disclose that information."

As we've heard in this case, Mr. Schwartz plainly knew that the lineups he was showing to Ms. Tellisma were not lineups she had ever seen before. But instead of disclosing that, he feigned ignorance saying, I don't know whether you've seen these or not before, just take a look at them again as if you have never seen them before. But he knew full well that there was absolutely no way she could have ever seen them before because he created them.

And as we have heard today, he suspected that Ms. Tellisma suffered from serious cognitive -- excuse me, cognitive deficiencies which would have impacted her recollection and memory of this out-of-court identification.

It would be one thing to question her specifically about the identification, showing the original lineup, asking, for instance, you know, how certain are you, can you apply a percentage, or can you tell me how it happened, can you describe what the detective asked you, what did the detective show you. But instead, Mr. Schwartz presented her with an inherently deceptive, an altered lineup and then pretended as if he didn't know whether she had seen it or not and just asked her to make another identification.

That is the type of deceptive conduct sanctioned by the Supreme Court in the Forrester case.

And there are others, in the Florida Bar versus Head, H-E-A-D, 84 So.3d 292, decided in 2012, a lawyer received a

91-day suspension for, among other misconduct, creating a letter which purported to reflect that a civil lawsuit had been filed and included a fictitious case number on that letter.

The Head case involved a commercial tenant dispute. Mr. Head represented the landlord and they were seeking to evict the tenant. What Mr. Head did, in order to prevent the tenant from having access to the property, was paste a letter on the front door saying that an action for distress rent had been filed, and then included a case number, which led credibility to the representation that a complaint had been filed.

But, in fact, no complaint had been filed and the case number was either fictitious or was drawn from some other unrelated case.

In that case the court found a violation of 4-8.4(c) --

THE COURT: Oh, dear, I see it's already 1:00. So how much longer do you have?

MR. KROEGER: Probably another five to ten minutes.

THE COURT: Okay. You think you can hold up with no lunch?

How's the court reporter doing?

MR. KUEHNE: The lunch is -- if the Court needs a break --

THE COURT: No, that's okay.

MR. KUEHNE: Then we're prepared to continue to finish today.

THE COURT: Okay. So if you can wrap up.

MR. KROEGER: Yes, Your Honor.

In that case the Court held that that conduct, essentially fabricating this letter, constituted a violation of 4-8.4(c) in that it was deliberate and knowing and provided the opportunity for the attorney to obtain a tactical advantage for his client. And those deliberate, intentional actions were fabricating that letter, creating it, showed the necessary intent it required to show that an attorney had misrepresentation, dishonesty or deceit.

Finally, there's a similar decision in the Florida Bar versus Miller, 863 So.2d 231, decided in 2003, where the lawyer represented a client in an employment discrimination and sexual harassment action. In that case the Equal Employment Opportunity Commission had sent the client a letter basically stating you have a right to sue and you have 90 days to do it. There was a second letter, which came sometime later in time, which again purported to give the 90-day window.

But the issue is that the attorney failed to file the action within the first 90-day period.

At a subsequent deposition of the client, the attorney had essentially aided in a misrepresentation, because when the client was asked if she had ever received the first letter she said no, and then turned over a file which purported to be the complete file of everything she had received in the case and it missed -- it did not include that original letter. And as a result of the attorney's involvement

in assembling that file and participating in that deposition, the Court found that the attorney had violated 4-8.4(c).

Although the attorney argued he had no duty to produce that letter to the opposing counsel, a claim which was flatly rejected by the Court as irrelevant, the Supreme Court ultimately found that he deliberately concealed that he was aware of the existence of the first notice, which demonstrated that his actions were an intentional and prolonged pattern of deceit.

As these cases demonstrate, deception and misrepresentation in the discovery process constitutes significance and severe misconduct and the Bar would submit that that is what we are dealing with here.

This case is not a case of constitutional dimension. If you look at the Kuntsman case, the Court in dicta notes that there aren't even, in most cases and in most states, a right to discovery depositions. In that case the

Third District noted that the attempt to elevate the issue of defense counsel showing new lineups to these witnesses could not convert it into a case of constitutional dimension.

I would submit that we're dealing with the same situation here. This case is not about the Bar prohibiting an attorney from engaging in effective and zealous representation of his client. This is not a case about the Bar trying to prohibit defense attorneys from rigorously questioning witnesses about their out-of-court identifications.

What this case is, stands for the proposition that a lawyer must do so, as Ms. Baker testified today, within the bounds of the law and within the bounds the rules regulating the Florida Bar.

The problem in this case, even though Mr. Schwartz is engaged in a noble endeavor representing the criminally accused, is that you cannot do it in such a way that it violates the rules.

In this case the evidence is clear

and distinct, he manufactured and created a lineup inherently deceptive on its face and then used it in the deposition without disclosing -- essentially an active omission, without putting anyone on adequate notice that this was a document that he had altered in this way.

With all due respect to Mr. Schwartz's testimony, the fact that in a deposition he says, look at my Exhibit 2, did the original lineup look like my Exhibit 2 or was it something else, that just isn't sufficient. That doesn't cut it to put everyone on notice that this lineup had be altered in this subtle yet incredibly significant way.

It is the Bar's basic premise and allegations in this case that these acts were knowing and deliberate and, therefore, constitute a violation of Rules 3-4.3 and 4-8.4(c).

THE COURT: And the prosecutor just had to sit there? She couldn't interrupt the deposition to say, we've got to take this to the judge?

MR. KROEGER: Again, what the prosecutor may or may not have done in this case is irrelevant to Mr. Schwartz's actions.

THE COURT: Okay. Response.

MR. KUEHNE: Although the Bar contends that this case is not a challenge to the right of defense lawyers to use lawful mechanisms to appropriately challenge a victim's identification, that's exactly what the Bar is doing.

The Bar says, this document on its face, without any explanation, is inherently misleading, is inherently a representation of what it is not, is inherently a violation of the Bar rules. And the Bar says that without the slightest foundation of case law, discussion, commentary.

The Bar essentially creates a new de facto/de jure rule, fact, changing a police lineup is de facto and de jure, as the law and fact, intrinsically misleading and, thereby, violates the Bar rules. And that's just not the case.

Not only does no law say that. Not only does the constitution not allow something like that. But the Florida Bar rules make it clear that that's not the test in deciding if a lawyer has engaged in misconduct.

And the motion for directed verdict or judgment in favor of Respondent makes it very clear, that the rule, the specific language of the rule that says a lawyer shall not -- this is Rule 4-8.4, Misconduct, the operative rule, Sub C, shall not, quote, engage in conduct involving dishonesty, fraud, deceit or misrepresentation, end quote.

This rule has a definition. And the definition makes clear that the conduct itself has to be intentionally deceptive and done with a purpose. It says, and I'm quoting, fraud or fraudulent denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

That last clause, by the way, is

important because three times in the Bar argument the Bar says something to the effect, well, he should have done this or this would have been, meaning Mr. Schwartz failed to apprise another of relevant information. We disagree with the Bar's factual submission, but it demonstrates that that clause has importance.

But then the definition, the actual Bar rule definition continues, "fraud, when used in these rules, the term fraud and fraudulent refers to conduct that has a purpose to deceive. This does not include merely negligent representation or negligent failure to apprise another of relevant information."

And then it concludes by saying, "for purposes of these rules, it's not necessary that anyone has suffered damages or relied upon the misrepresentation or failure to inform."

Then the Bar cites a case, and with the most respect to the Bar, the assertion is simply that all the Bar has to do to prove by clear and convincing evidence --

a very powerful standard. Not a preponderance of the evidence. Not slightly more. Clear and convincing.

Although not beyond a reasonable doubt, as the prosecution would have had to use in the case against Mr. Woodson, but clear and convincing evidence.

And the Bar says, matter of factly, and incorrectly, that the intent element is satisfied by merely showing that the conduct was deliberate or knowing. So the Bar says, as long as Mr. Schwartz intended to present this document to the witness, that establishes intent to deceive, as opposed to the accident of leaving it on the table and the witness seeing it by accident. And that's just not an accurate, correct interpretation of the actual case that they cite.

In the actual case that they cite, Florida Bar versus Fredericks, and I have a copy of it, 731 So.2d 1249, and particularly 1253, and I have highlighted it, it says at the end of Footnote 4 -- or Headnote 4, at the end of Headnote 4 it

makes very clear -- and I'm going to read the entire two sentences. "Regardless of the possible motive for Fredericks' misrepresentations, Winston testimony supports a finding that Fredericks knowingly and deliberately made the allegedly misrepresentation. Further, nothing in the record indicates that the misrepresentations were made negligently. Accordingly, we approve the Bar Referee's recommendation."

It is that the misrepresentation has to be made knowingly and deliberately, not the act of using a document. The misrepresentation.

So that begs the question, what is the misrepresentation here? There certainly is no -- and the Bar concedes -- no affirmative misrepresentation.

The Bar, although in a misdirected way suggests there was a misrepresentation, which I'll get to, but with regard to the exhibit and the introduction to the exhibit, the Bar concedes there is no misrepresentation.

Mr. Schwartz said nothing that -- made any statement that this document was anything that it was not.

Never said this is the police lineup. Never said you saw it before. Never said, hey, I just want to check your reference to what you did before. Instead, it was exactly the opposite, just like you've never seen this before look at the pictures. Then, interestingly -- that's Exhibit 2. And the Court doesn't need me to read the transcript, but Mr. Schwartz was dutiful in his effort to make it clear to the witness that this was his exhibit and he was asking her to look at it for the first time and just look at the pictures, that's it, because that's what this was all about, look at the pictures. Not any reference to anything else.

But then, for Exhibit 3, which was another version of the defense-created lineup, this is where the prosecutor first says -- and this is page 30 -- first says on the record, on the record, making it clear -- and I'm going to read this

because this is important -- for Exhibit 3 -- the prosecutor has both exhibits. She is looking at them and she states for the record -- knowing that these were created by Mr. Schwartz because he tells her -- "And it appears that at the bottom of Exhibits 2 and 3 there's a handwriting from the detective and from Ms. Tellisma where she selected Photo Number 5, so I think this is extremely misleading.

"And Mr. Schwartz is asking to have Ms. Tellisma identify who was the robber in this case based on Exhibits 2 and 3 and this not, you know" --

Mr. Schwartz says, "He showed pictures that were not. There were six people, not him. I showed pictures that are six people, not him. It's the exact same thing."

She says, "So I'm objecting to that and I will be bringing this in front of the Court."

Mr. Schwartz says, "Okay."

And then, so what's the prosecutor's done with the two exhibits she's

identified, and, since this is, by the way, an objection and on the record, an objection on the record, this is being translated to the witness. So the prosecutor knows the witness is hearing all of this. Whether that's appropriate conduct is not before the Court.

Then Mr. Schwartz says, "All right. Let me show you now Exhibit Number 3 and just ask you to look at them as if you've never seen them before, because I don't know whether you have or not. And the same question I'll ask you as Exhibit Number 2."

Careful phrasing, because the prosecutor has now told this witness that you've seen this exhibit before. The prosecutor has now acknowledged that she knows, because Mr. Schwartz told her, that this is the police exhibit that has a different Photo 5. So, damned if he does, damned if he doesn't.

If he says to the witness, you've never seen this before, the Bar says, well, that's a lie, because she has seen

this before. She's seen this document in color. She's seen Photo 1, Photo 2, Photo 3, Photo 4, Photo 6, so the Bar would claim he's lying, he is misleading her.

Instead, he says, because his view is this is a completely different exhibit, he's told her that, "just look at the pictures." So rather than validate the prosecutor's statement to her, the witness, that this was a police lineup, he says, "no, it's not," because she had in fact seen part of this before, but that was not the point that Mr. Schwartz was making.

He made the correct representation, exactly what the Bar guidance says is apprising another of relevant information. He did not not apprise the witness of relevant information. He apprised the witness of relevant information with the context that, and in this is really critical, the context that the State Attorney's office knew all of this. That's why we have a record of demonstrating why -- what caused the State

Attorney to make this representation on the record for the witness to know.

So that brings up not just the issue of a misrepresentation. No affirmative misrepresentation whatsoever. And is there a non-affirmative representation, a representation by conduct?

The entire effort by Mr. Schwartz to put something before the witness solely for the purpose of making an effort to see did she get the wrong guy was done with nothing that can be viewed as a misrepresentation. Cautionary apprising information, my exhibit, look at the pictures like you've never seen them before, forget what you did before.

By the way, before, referenced by the State Attorney, not by Mr. Schwartz.

Everything he could do to let this witness know, "All I'm doing is asking you to look at the pictures, because that's what I want to know."

And then she looks at the pictures.

The fact that his submission is not intrinsically misleading is proven by the

fact that she didn't pick out Number 5. She picked out Number 1. She was wrong but picked out Number 1, a picture she had seen before. Not Number 5.

So we have no affirmative misrepresentation. No affirmative conduct that's misleading. And we have no matter-of-fact conduct that has to be construed as misleading.

But then there's more in this case, the Bar says -- and the Bar takes issue with what is and has been for more than 20 years allowable defense practices. The Bar completely mis-cites and misreads Kuntsman and McWilliams. And, obviously, the Bar doesn't do criminal defense cases, but McWilliams and Kuntsman stand for the very clear -- and in fact Mr. Wax testified as an expert that this is what defense lawyers do. Defense lawyers know two things from those, if you have a real case of identification, compelling evidence of misidentification, it's your obligation to pursue testing the victim witness. You can't make a victim witness

do that, which is why there was an objection and the witness is instructed don't do it. The State Attorney makes those instructions. The State Attorney's job, not the defense lawyer's job. And then the matter goes to the judge for the judge to make the rulings.

But what Kuntsman and McWilliams tell defense lawyers on defense-function lineups, one, you can absolutely create defense-function lineups and you can use actual police lineups. And the clear application of this is where you have a real case, you do it, you don't have to go to the Judge for permission first. If the State Attorney shuts you down then, if you want to pursue it, you have to show the judge. Judge, I have witnesses who identified somebody else as committing the crime.

And here's where the fallacy in the State's understanding of these cases comes into play. The State utilizes the language of 3.220, that's the discovery rule in criminal cases, to say, no, the

purpose of defense discovery is not to create something new but to utilize information that the parties have.

Mr. Schwartz, before doing any of this, affirmatively gave to the prosecution the evidence of Fritz, affirmatively gave to the prosecution a description from the witnesses that Fritz had committed the crime, affirmatively gave to the prosecution all the evidence that was then going to be used to validate the examination of identification. Nothing hidden whatsoever. The documents reflect it. And, not only that -- so the Bar says, wait, the defense lawyer is using things that the State Attorney knows nothing about. Not true, the case law, the footnote in McWilliams, the Kuntsman case makes clear that here the defense lawyer disclosed all of this to the prosecution. Not only that, inside the deposition, before there was any suggestion of misleading anybody, the prosecutor takes the two exhibits and goes sidebar, essentially, goes off the record,

and Mr. Schwartz and Ms. Baker McGuire say, that's Fritz, the same guy we've been talking about all this time.

And then it's confirmed, because that's what the prosecutor says on the record when she basically telegraphed to the witness, hey, that's a different Picture 5.

So that demonstrates that the document itself was not intrinsically misleading. The document was not proffered or presented with anything suggesting misleading. And the defense lawyer had a very narrow reason for doing something fair and balanced, and that was to establish did she get the person wrong.

Quite a simple issue, did she get the person wrong. Could she have mistaken Mr. Woodson for the guy who really did the crime, who had been identified by three other people.

For the defense lawyer not to do that would probably result in the same kind of problem that led to the Innocence Project and the Eyewitness Identification

Commissions. The lawyer's doing the same roadwork.

As the Florida Bar has said, oh, there's nothing wrong with the defense showing a picture of the actual lineup and asking the witness questions about that lineup. Of course there's nothing wrong with that.

Is that really going to be the kind of probing cross-examination or was that really going to be nothing more than the witness reconfirming what the witness had done before? Probably, in this case, as a result of a suggestive police lineup procedure, of course. And of course a lawyer is allowed to reasonably cross-examine a witness.

This is almost on the prosopus of the Bar saying -- making the assertion that vigorous cross-examination of a witness is an effort to mislead a witness. It's not.

The constitutional cross-examination process is known as a truth-testing process; not an affirmatively misleading process. This was a truth-testing

process. But it begs to differ whose side you're own. A witness, of course, thinks, because we've done this before, and I'll surmise that there have been cases in Your Honor's court where witnesses accuse the lawyer, why are you trying to make me out to be a liar. Is the lawyer trying to do that or is the lawyer just trying to ferret out the truth? That's what was going on here.

The Bar at least concedes that there is no case on point. And we suggest there is no case even close to on point. Because the cases the Bar raises -- and it's helpful if the Court thinks about these cases --

THE COURT: Okay. I don't think I need the cases distinguished.

MR. KUEHNE: Okay.

THE COURT: I think we need to recess. It's already 1:25. And let me read everything and -- if you could just wrap up.

MR. KUEHNE: I will wrap up, Judge.

THE COURT: Okay.

MR. KUEHNE: So on the whole, the evidence from the Bar's evidence, adding the undisputed, unimpeached evidence of Mr. Schwartz, Barry Wax, the court reporter, who's probably the most critical in this case because she is the most independent, Ms. Mamood, who saw nothing that was even close to anything sneaky or misleading, and Ms. Baker McGuire.

Mr. Schwartz acted in good faith. He acted purposely but purposely to challenge a witness' questionable identification. He's engaged in no overt misrepresentation. He's engaged in no overt deceit. He engaged in no silent misrepresentation.

He made affirmative disclosures that clarified any potential for confusion.

And not only was it done for a valid purpose -- motive is not the key here. But not only was it done with compelling evidence, but the State Attorney was vested with all that same information Mr. Schwartz had and allowed the case, the process to continue, because the State

Attorney knew this was a real misidentification case.

Mr. Schwartz, of course, is not going to do this process again because he's not going to go through this again, but is going to continue to vigorously, as you heard, and properly challenge eyewitness identification.

There is no clear and convincing evidence of wrongdoing in this case of a Bar violation of intentional, purposeful deception and we ask for a ruling in Mr. Schwartz's favor.

THE COURT: Rebuttal.

MR. KROEGER: Just very briefly, Your Honor.

I would just emphasize that the Bar is not attempting to weigh into the manner in which defense attorneys conduct and test eyewitness identifications.

Again, the particular facts of this case with respect to Mr. Woodson and the possibility that the actual suspect was Fritzlan Joseph, again, are irrelevant.

The question in this case, the

central question Your Honor must decide is whether Respondent's actions in creating this lineup and using this lineup -- and you have the evidence in front of you, I don't need to belabor it, you know how he created it and you know how he used it. The question is, given those two facts, does his action rise to the level of a violation of 3-4.8 and 4-8.4(c).

I would note that Mr. Kuehne's recitation of the definitions of fraud or fraudulent activity are not technically within Rule 4-8.4(c). Those are definitions that are provided in the, almost, the preamble, if you will, to Chapter 4 of the rules regulating the Florida Bar.

I would encourage Your Honor to look at the case law which strictly interprets Rule 4-8.4(c) and how the Supreme Court has defined intent and how the court has utilized the deliberate and knowing standard.

And the Florida Bar would contend that upon consideration of the applicable

case law you will come to the conclusion that Mr. Schwartz's creation of this lineup by cutting out Fritzlan Joseph's head and pasting it on the defendant's head and then presenting it to the witness who he believed or thought had cognitive deficiencies was a misleading and deceptive act. It doesn't have to be fraud. Rule 4-8.4(c) can be violated if there is deception or misrepresentation.

The Bar doesn't have to prove that Mr. Schwartz engaged in fraudulent conduct. The Bar has to prove that he knowingly and deliberately engaged in conduct which is tantamount to misrepresentation, deception and dishonestly.

I believe those are the three words most applicable to this case.

And it's the Bar's contention that the evidence establishes that he did that by clear and convincing evidence.

THE COURT: The document speak for itself. It wasn't an attempt to mislead the witness but to get the truth, his

version of the truth out, and he did it in a way he won't do it again.

The credibility of the two lawyers, the prosecutor and Mr. Schwartz, there was more weight to be given Mr. Schwartz in saying, we were too close together, there was no misleading, there was no hiding of evidence.

So I believe that the Court will be addressing this, but I ask both of you to prepare proposed findings of facts and conclusions of law and if you want to enlighten me about any of those thoughts that I have, I'll be glad to entertain them in post-oral argument submissions.

How long do you need?

MR. KROEGER: My problem is that I will be out of the office all next week, I have to travel for my grandmother's funeral.

THE COURT: Oh, I'm so sorry.

MR. KROEGER: Thank you.

I'm not going to be available for basically the next --

THE COURT: The Florida Supreme Court

has a deadline for this?

MR. KROEGER: Correct. I believe it's in the middle of --

THE COURT: I think it's --

MR. KUEHNE: Is it May 28th?

THE COURT: Yeah, it's in about a month or less.

On its surface it looks like this is a problem, you're -- you're going to attack the lineup this way months later after an armed robbery, which is inherently difficult to prove for the State. But -- this issue of him using his expertise in psychiatry. If you look at the rule on competency for witnesses, it says any person is competent to testify.

I don't think you can create a higher standard for attorneys not to keep quiet about their, perhaps, perception that the witness may have cognitive problems to prevent them from cross-examining the way he did. And to disclose his suspicion that there was some mental illness or cognitive function of her brain, I would say I should disregard all that.

He didn't -- he explained you don't -- you be sweet to your witnesses, but he also had a privacy concern, he couldn't reveal what he thought without violating her rights.

So I think we have to be careful when we start calling things maybe -- you didn't say that -- being violations of the Bar rules when, as professionals, we shouldn't take advantage of a situation where you might, because of your previous education and training, perceive a defect and you don't disclose that to anybody in the case other than, you know, maybe co-counsel. You know, I think he couldn't have raised it or asked her about it or done anything with it, because the rule of evidence says any person can be competent to testify.

MR. KROEGER: The Bar is not suggesting that he should have. The Bar's argument, with all due respect, is not that.

THE COURT: Okay. Well, I just wanted to say something about that.

Okay. We'll be in recess.

MR. KUEHNE: Thank you, Judge.

So when do you think, with Mr. Kroeger's issue --

THE COURT: Oh, his problem, okay.

When is this service?

MR. KROEGER: It's next week.

THE COURT: All right. So May 10th? That might be a weekend.

Okay, May 10th.

MR. KUEHNE: Thank you, Judge.

THE COURT: If after reading any of the submissions that I didn't read before, I will email you, but just base it on your evidence.

MR. KUEHNE: Of course.

THE COURT: And I'll look forward to hearing from you both.

MR. KUEHNE: Thank you, Judge.

THE COURT: Do you want to reserve time to respond or a deadline to respond?

MR. KROEGER: I'm sorry, we're preparing essentially a proposed report of referee, correct?

THE COURT: Yes.

MR. KUEHNE: Simultaneously?

THE COURT: Yeah. You're going to submit one finding for you and you're going to submit one finding you, is that the way you want to do it?

MR. KROEGER: Well, I'm just a little confused.

What is it you would like, Your Honor?

THE COURT: Well, did I not make -- are you -- were you --

MR. KROEGER: So essentially you're making a ruling --

THE COURT: Were you thinking that only you had to respond?

MR. KUEHNE: No, no, we thought simultaneous proposed orders. The Bar one of their proposed findings for the Bar and --

THE COURT: And you say that, you know, everything he raised in defense was irrelevant and, you know, why I should rule in your favor and he provides one that's --

MR. KROEGER: Correct.

THE COURT: -- in his favor, and then I'll make my final decision.

MR. KROEGER: Correct.

MR. KUEHNE: Okay.

THE COURT: Okay. Thank you very much.

And then if -- we wouldn't have a period of time to object to the proposals from each side.

MR. KUEHNE: I don't --

THE COURT: As being off the record or not.

MR. KROEGER: I believe it would be up to Your Honor to then craft your own report of referee, adopt it in part or adopt it in its entirety, whichever you report you choose.

THE COURT: Okay. May 10th, I'll look forward to May 10th.

MR. KUEHNE: Thank you, Judge.

(Thereupon, following was outside the hearing of the Court and counsels.)

COURT CLERK: The affidavit of Jody McGuire is Schwartz Exhibit J in evidence.

Affidavit of Don Corasmin,

C-O-R-A-S-M-I-N, as Schwartz Exhibit K into evidence.

A motion for sanction as Schwartz Exhibit L into evidence.

(Thereupon, the hearing was concluded at 1:45 p.m.)

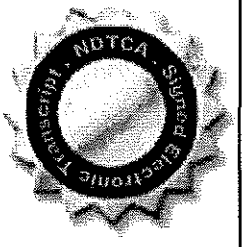
CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF BROWARD

I, Sonnia Martinez, Court Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings; and that the transcript, pages 306 through 535 is a true record of my stenographic notes.

DATED this 28th day of June, 2018.



Sonnia Martinez,

Court Reporter
NOTARY PUBLIC
MY COMMISSION #FF960975
EXPIRES: 03/10/2020

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	**Supreme Court Case No. SC17-1391**
Complainant,	
v.	**The Florida Bar File No. 2016-70,106 (11J)**
JONATHAN STEPHEN SCHWARTZ,	
Respondent.	
_____/	

CORRECTED RESPONDENT'S DOCUMENTATION
EXHIBITS FOR SANCTIONS HEARING

Respondent Jonathan Schwartz submits the attached documentation exhibits for consideration as mitigation at the sanctions hearing.

1. **Scott M. Weinstein, Ph.D**. letter. **(Schwartz Mitigation Documents-1).** Florida licensed psychologist providing therapy and treatment as recommended by FLA (Florida lawyers Assistance).

2. **Stella Schwartz** letter. Respondent's wife. **(Schwartz Mitigation Documents-2-3).**

3. **Michelle Clarke** letter. Senior Legal Assistant, Schwartz & Associates. **(Schwartz Mitigation Documents-4-5).**

4. **Dr. Beverly Carter Remy** letter. Dade County Schools principal and mother of client. **(Schwartz Mitigation Documents-6-7).**

5. **G. William Heck** letter. Close friend. **(Schwartz Mitigation Documents-8-9).**

6. **Gloria Heck** letter. Friend and client. **(Schwartz Mitigation Documents-10).**

7. **Rosa Villadamigo** letter. Client. **(Schwartz Mitigation Documents-11).**

8. **Nelsi Betancourt** letter. Wife of client. **(Schwartz Mitigation Documents-12).**

9. **Crystal Beale** letter. Legal Assistant at Schwartz & Associates. **(Schwartz Mitigation Documents-13-14).**

10. **Patricia Rossato** letter. Client and family friend. **(Schwartz Mitigation Documents-15).**

11. **Teo Castellanos** letter. Friend, performance artist, and spiritual minister. **(Schwartz Mitigation Documents-16).**

12. **Nancy Browne** letter. Friend, client, and CEO of Acupuncture College. **(Schwartz Mitigation Documents-17).**

13. **Pamela Barrett** letter. Mother of Virgil Woodson. **(Schwartz Mitigation Documents-18-19).**

14. **Louis Beale** letter. Client. **(Schwartz Mitigation Documents-20).**

15. **Eugene Rosov** letter. Friend and Insurance Executive. **(Schwartz Mitigation Documents-21).**

16. **Dr. Richard Browne** letter. Close friend and client. **(Schwartz Mitigation Documents-22-23).**

17. **Arthur Brown** letter. Client. **(Schwartz Mitigation Documents-24).**

18. **Rufus Dean** letter. Client and father of client. **(Schwartz Mitigation Documents-25).**

19. **Kifah Mekled** letter. Client. **(Schwartz Mitigation Documents-26).**

20. **Will Clark** letter. Client. **(Schwartz Mitigation Documents-27).**

21. **Christopher Burke** letter. Client. **(Schwartz Mitigation Documents-28).**

22. **Michelle Sternberg** letter. Mother of client. **(Schwartz Mitigation Documents-29).**

23. **Jonathan Patterson** letter. Client. **(Schwartz Mitigation Documents-30).**

24. **Anthony Fabian** letter. Client. **(Schwartz Mitigation Documents-31).**

25. **Lazaro Dearmas** letter. Client. **(Schwartz Mitigation Documents-32).**

26. **Rebecca Sinclair** letter. Client. **(Schwartz Mitigation Documents-33).**

27. **Maike Acosta** letter. Client. **(Schwartz Mitigation Documents-34).**

28. **Lorna Burke Castellanos** letter. Friend and sister of client. **(Schwartz Mitigation Documents-35).**

29. **Alfred Teger** letter. Friend. **(Schwartz Mitigation Documents-36).**

30. **Jo Ann Mayer** letter. Friend. **(Schwartz Mitigation Documents-37).**

31. **Carmen Gaskell** letter. Friend. **(Schwartz Mitigation Documents-38).**

32. **Janet Palacio** letter. Mother of client. **(Schwartz Mitigation Documents-39).**

33. **Yoga flyers**. **(Schwartz Mitigation Documents-40-41).**

Respectfully submitted,

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By: S/ *Benedict P. Kuehne*
BENEDICT P. KUEHNE
Florida Bar No. 233293
MICHAEL T. DAVIS

Florida Bar No. 63374

CERTIFICATE OF SERVICE

I certify this document was efiled on August 21, 2020, to:

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S/Benedict P. Kuehne
BENEDICT P. KUEHNE

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(954)818-0888
(954)568-0803

August 20, 2020

To Whom It May Concern,

I am submitting this letter at the request of Mr. Jonathan Schwartz. Mr. Schwartz contacted me in January of this year seeking to voluntarily join a weekly facilitated support group to help him process that emotional impact of his ongoing Bar disciplinary proceedings. Jonathan candidly discussed the matter that led him to seek the group's support after a favorable referee's finding sent to the Supreme Court of Florida was remanded back to for a new trial.

For some, the group experience is an opportunity to discuss shared professional experiences and is treated more like a weekly consultation meeting. For others, the experience takes on a deeper meaning whereby the individual utilizes the group process to explore all areas of one's life.

From the onset, Mr. Schwartz demonstrated a willingness to understand his contribution to the Bar's inquiries. Throughout his participation in the group, Mr. Schwartz continuously accepted the feedback from his peers and utilized the collective experience of the group members to explore his approaches to lawyering.

Mr. Schwartz's matter was supposed to be taken up sometime in the spring, but because of the COVID-19 pandemic is was delayed. The lengthy delay created an increased sense of trepidation in Mr. Schwartz. He requested individual sessions to supplement the group therapy in a further attempt to acquire a deeper understanding of himself and to explore alternative career paths should he be prevented from practicing law.

In my many years working with legal professionals, I have seldom come across an

individual so willing to avail himself to personal and professional scrutiny while facing the possibility of severe Bar sanctions. As he told the story of the case in question, he demonstrated both a deep commitment to a determined advocacy of his then client while also accepting the idea that he challenged the limits of the profession. While he admitted to pushing the boundaries, he firmly believes they were never crossed.

I believe that Jonathan's motive are without malice. Further, he is willing to actively examine his practice strategies, recognizing his enthusiastic advocacy for his clients may be seen by some as overly zealous. He has expressed a desire to maintain his therapeutic relationship which I believe will be helpful in his attaining his goals.

Respectfully Submitted,

Scott M. Weinstein
Scott M. Weinstein, Ph.D.
Florida Licensed Psychologist
Lic# PY4789

SCHWARTZ & ASSOCIATES

ATTORNEYS AT LAW

200 SOUTHEAST 1ST STREET
SUITE 505
MIAMI, FLORIDA 33131

TELEPHONE: 305.523.2250
FACSIMILE: 305.523.2231

JONATHAN S. SCHWARTZ, ESQ.
JSSLaw@hotmail.com

August 10, 2020

Dear Judge Martinez

My name is Stella Schwartz. I have been more than fortunate and blessed to have known Jonathan Schwartz for almost 6 years and married for 2 and a half years. It may seem a short time, but being around him and his very good friends and family whom have known him for over 30 years, I have seen how much love, respect and appreciation they have for him in addition to the hundreds of clients that I had talked to. I now know that I was right when I entrusted him has my partner many years ago.

Every day, I wake up and see a passionate, hardworking, dedicated, creative and compassionate man; always willing to help others, but especially the unfortunate ones. He is a fighter, a true fighter, for human rights and for equality for all.

My husband is a man that not only works hard (some would say too hard) to defend others but he works even harder to be a better person every day. That's why he studied and mastered yoga, tai chi, group therapy, family therapy as well individual therapy, and many others spiritual practices. Being around him has changed my life dramatically, daily ... as it has for his lawyers, his staff, his clients, and his friends. He inspires people to be better.

I myself have learned to be more patience, and to meditate and to trust people again. He truly has shown me the profound kindness of living with heart.

I have tremendous respect and admiration for his creativity and his "out-of-the-box" mentality and persistent approach to saving lives; and I have seen his commitment, care, and dedication to every single case, every single client. This has only increased my admiration for the work he does which I am witness to: Fighting for equality and getting into the "good trouble" John Lewis lived and died for.

Please, Judge, help us continue the work we do. He has learned so much from all of this. We have lived with this case for 5 years. We have lived with tremendous uncertainty and pressure that comes with the cloud of this case. Sometimes we just don't know whether we are coming or going. I believe it has been penalty enough. Whatever he does comes from a place of pure heart. He is a man of deep spiritual convictions, and I would humbly say, because I see him, I see him every day,

he is a man of pure soul. The great deeds he does these last 35 years far outweigh the mistake he made here. A suspension is neither needed nor warranted. And many people will be effected, not only his clients whom have deposited their trust in him and his firm, but equally, our family of employees who work side by side with him in saving lives.

Especially now in this challenging time, we have being working harder than ever trying to get people out of jail, trying to prevent our clients form getting sick and sometimes worse. The threat of this disease is such where no one is safe, no one is immune. In fact, I myself am still in recovery from Covid-19 these last two months And as difficult as my struggle has, it pales in comparison to that with which we have struggled these last 5 years with this case.

Stella Schwartz

Wife of Jonathan Schwartz

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JONATHAN S. SCHWARTZ, ESQ.
JSSLaw@hotmail.com

To whom it may concern,

My relationship with Mr. Schwartz is beyond profound. I am now one of his Senior Legal Assistants and have helped run the office for many, many years. Let me start by saying that I have 4 lovely boys; one of which was the ring bearer at his wedding a few years ago. We are like family. 2 of my boys were born the last few years, and when I became pregnant twice within a short span of 3 years, Mr. Schwartz did not hesitate to pay for maternity leave for 12-14-16 weeks twice! Otherwise I don't know how we would have survived. He profoundly affects my life daily, weekly, hourly. While he speaks Spanish fairly well, I often translate for him in order for the client to understand his advice 100%.... And this has given me a window into the amazing work that he does these last several years. And his advice changes people's lives; allows them to cry, allows people to feel their deep emotions (makes me cry all the time). He has the gift for seeing people, for knowing what they feel and for quickly going to the root of someone's problem. He is truly a counselor... he counsels people. While our clients come to us for legal advice, he regularly imparts spiritual, emotional, practical advice in an effort to improve their lives. He establishes close and profound relationships with a whole host of all kinds of different people.

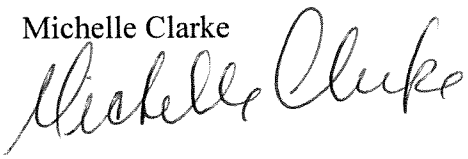
He does house calls every day. He goes to their houses and speaks to them wherever they are at because this is his life's work. He goes to the jails on most Sundays. In my several years working here, it is unheard of for him to take a day off or call in sick. In the office, he demands everyone respect each other, fosters an atmosphere of creativity and openness... and I have to say.... He makes everything fun (even in the most serious of cases). There are countless events, lunches, and gatherings that he organizes.

He endlessly imparts information and knowledge about other religions and holidays that come up as he is an ordained interfaith minister. And I cannot end this letter without telling you that he is simply a fountain of creativity. He seems to be flowing with new ideas, new motions to suppress, new approaches to cases and we, his team, are all racing to make his vision happen. And at the heart of his vision, now our vision, is to be honest, to tell the truth (to ourselves, to each other, to our clients), to foster understanding between people, between family members, to broaden people's awareness, to broaden their individuality, creativity, flexibility and ultimately to foster compassion and peacefulness. It has been a joy to work with Mr. Schwartz; I hope to be able to continue on with our Mission for many years to come, because, we are just getting started.

Please consider the amazing work that we are doing every day… The thousands of cases we have had the honor to resolve since this case started some 7 years ago… and I think if you do, and consider his career and his daily dedication to improving and saving lives, you will see and agree that it far outweighs the mistake he made regarding this exhibit.

Sincerely,

Michelle Clarke



SCHWARTZ & ASSOCIATES
200 S.E. 1st Street • Suite 505 • Miami, Florida 33131 • Tel: 305.523.2250 • Fax: 305.523.2231

Dr. Beverly Carter Remy

20190 NW 9th Drive
Pembroke Pines, FL 33029
954-895-6564
bremy01@gmail.com

April 9, 2020

Attorney Jonathan S. Schwartz
200 SE 1st Street Suite 505
Miami, FL 33131

Dear Attorney Schwartz,

I want to stop and personally thank you for your legal representation and commitment to my family, over the past two plus years. It has been quite a mind boggling two plus years but with your assistance and skill as an attorney, we feel assured that we have the best legal team in south Florida representing us.

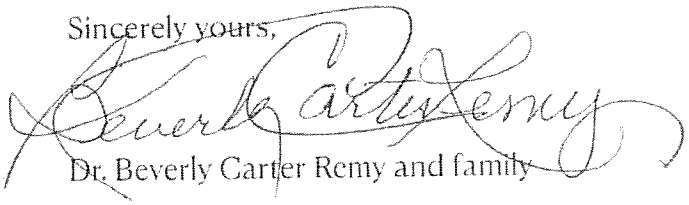
Not all law firms provide clients with support at all hours of the day and night. Not all law firms provide Sunday office appointments in order to meet the needs of clients. The flexible office hours make it easy because of our distance and work schedules. We appreciate meeting with you on Saturdays and Sundays. We appreciate having the ability to reach you by cell or by text. We really do appreciate you responding.

Over the past two plus years we've had so many questions and concerns. Some of those questions were asked hundreds of times. You provided us with answers each of those times. We've had concerns hundreds and hundreds of times and you addressed those concerns each time. We feel, as all families may, that our case is special and that you solely represent our family. We appreciate the fact that you've had the ability to make us feel as if we are your sole clients. This is important because it provides the reassurance that we are getting the time and attention that we feel we deserve.

In closing, we really appreciate your professionalism. We know that we have an attorney client relationship and we feel that we are represented by a 1st class rated law firm.

We know that you work hard. We know that you work fair. We appreciate all that you are doing to assure us the best possible representation. At the end of the day, we have no doubt that our best interest has been considered and we have been represented by the law of the Court.

Sincerely yours,



Dr. Beverly Carter Remy and family

May 20, 2020

G. William Heck
5991 NW 66th Way,
Parkland, FL, 33067

Re: Letter of Character and Recommendation for Jonathan Schwartz

Dear Judge Martinez;

I am pleased to write a recommendation for my good friend, for my brother, really, for my extended family member Jonathan Schwartz. Our friendship dates back some 33 years. We first met studying Tai Chi in 1987. There, for several years, we learned the Martial art of moving meditation. This was just the beginning of his relationship with meditation and other stress reducing therapies that he would go on to learn and incorporate into his career as a lawyer, first as a public defender when I met him to the fine lawyer he is today with his Law Firm Schwartz & Associates.

They have been at the forefront of what is possible when we speak of "Counselors at law." Jonathan is not only one of the more creative lawyers I have ever met, he is one of the most creative people period; and in my 75 years I have had the good fortune to meet more than a few. But I couldn't begin to describe all of the events we shared over the years: the birthdays, Thanksgivings, Passovers, New Year's, Cinco de Mayos. Mr. Schwartz has been my partner with Season tickets for the Miami Heat where we have spent years attending games and commiserating. I know there is no one more dedicated and passionate about his profession, no one more concerned about his clients....

At one of the games he introduced me to a client that he had been mentoring for almost 2 years in an effort to understand the case. He said that he was trying to understand what happened and that it took 2 years of taking this client to Heat games, to lunches, to dinners, texting, establishing a relationship to begin to get to the truth of the case. This was far beyond what I have witnessed any lawyer would ever do. As it turned out, this client, a 19 year old young kid, had actually shot his father (ostensibly in self defense), but had so much trauma that it took over 2 years to begin to actually get the story, so that he could be properly defended. This kind of persistence and commitment is Jonathan's life.

Jonathan has great vision and wisdom and is a counselor to all, and he doesn't pull any punches. He tells the truth, whether you want to hear it or not. A few years back he even took a year off and applied and got into PHD Pysch school at Nova to improve his understanding of psychology; all in an effort to be a better lawyer and to work more profoundly with his clients suffering with psychological issues. He is truly a warrior for justice and has persistently and creatively found the doorway to stand for what's right and for what's just, sometimes against forbidding odds, for nearly 4 decades.

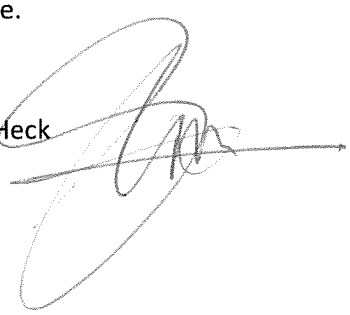
We also are connected deeply on a spiritual level as music is central to both of our lives, me as a singer and guitar player and he as an amazing Guitarist in the fields of Classical, Flamenco and Ragtime music. He truly is a gifted musician and a joy for all to listen to whenever we get the opportunity.

In a word, Jonathan is about helping people. He is patient and takes all calls from all clients, much to the chagrin of family and friends, and when he is not working or playing music he is teaching yoga or meditation & stress reduction to kids in crisis at SOS children's homes; to prisoners in Dade county jail; to women at the Lotus House (where he was recently volunteer of the month), to after school kids at

Branches church in North Miami. He also ran a well known project in Peru for 20 years working with preserving important Amazonian medicines being grown in the jungle and working with medicine people there.

I am proud to call Jonathan my friend, my very special friend, and I am so worried for him and his wife, and his legion of faithful clients who have counted on him and his team for decades. I know that this is a just court and that you will find mercy for him for what led to what happened in this case, for no one deserves mercy and justice more than him who lives and breathes mercy and justice with every second of his existence.

G. William Heck



June 7, 2020

RE: Jonathan Schwartz, Esquire

To Whom It May Concern,

When one thinks of our legal system, one thinks of a system meant to protect the innocent and punish the guilty. We now realize that our system is fatally flawed and only those with proper legal representation receive justice. I have known Jonathan for over a decade and during this time I have to come know him, respect his integrity and appreciate his passion for serving our disenfranchised populations.

When I think of Jonathan, I see a Renaissance man who embraces innovation, art, culture, religions and philosophies. He doesn't judge a person by their appearance, he listens with an open mind to their story, using his years of experience and discernment to decide how to move forward.

Jonathan has spent his life defending those in our criminal system who were unjustly accused and didn't have the means to state their case. He has nobly fought for those whom no one would defend and he has given himself to improve the lives of many. Our judicial system needs people like Jonathan, now more than ever to help heal the systemic discrimination that must be remedied.

I am proud to call this person my friend and I would highly recommend Jonathan for any endeavor he chooses to pursue.

Sincerely,

Gloria Heck

May 27, 2020

My journey through the legal system, and how I was able to prevail by being represented by such an exemplary criminal attorney in Florida by the name of Jonathan Schwartz. I violated probation with new charges, and they were serious felonies. I was looking at 15 years in prison and I also had other prior convictions. This is not a circumstance anybody would want to find themselves in because my fate was being held by a thread. The state prosecutor took my case very personal in a way that persuaded the judge and intimidated several private attorneys I had acquired about because the prosecutor was adamant about the 15-year sentence. not to mention I was pregnant.

Several private attorneys gave me a grim outcome. no one was driven to proceed with my case, I needed someone with a ethical mind set who was able to go against the prosecutor that's when an acquaintance of mine introduced me to Jonathan Schwartz, one thing that made Jonathan stand out was his confidence and his approach on how he wanted to processed with my criminal case. I knew he was the attorney to retain, he explained everything in great detail. Jonathan is brilliant at his craft and his intelligence of the law on any criminal case is beyond compare. Regardless of what you're case entails Jonathan is one attorney that you want on you're side because he will go to bat for any of his clients, Jonathan has a strong eye for detail he has won a large majority of his cases, mainly because he is extremely thorough in his due diligence and outshines the prosecution. He has a presence about himself that is extraordinary Jonathan is one of a kind attorney. He showed compassion towards me, even after he represented my case. Arrangements were made by him to have his amazing wife Mrs. Stella Schwartz pick me up from the county jail. I was already 6 months pregnant words can not express how grateful I am till this day on how she treated me after an exhausting experience. The first thing she offered me was water and snacks. This hospitality was unexpected but highly appreciated. I felt very welcomed and Mrs. Schwartz took me to probation to report and soon after that, she took me out to eat. It was a blessing to receive such kindness even after the lengths Jonathan went through to assist me with my case.

Mr. Jonathan Schwartz, you're such a brilliant lawyer. I am forever grateful for you are passion, dedication and professionalism and a special thanks to his wife Mrs, Schwartz for her generosity. I've hired lawyers before, but Jonathan you are truly the best I have ever worked with and I'm able to raise my son thanks to you.

Sincerely:

Rosa Villadamigo

To whom it may concern;

I am very impressed with the work of Mr. Jonathan Schwartz and his team; they are honest and very straightforward. They tell it like it is and are genuinely looking for the best result for their clients. Their communication was outstanding throughout the whole process from the attorney to the legal assistants. I am being very sincere here, if you are in trouble, don't think about it, he is your best options and their Price-to-performance ratio is unbeatable. He also will give you a payment plan if you can't afford to pay up front.

I will just add one more thing that really impressed me: when I called the attorney on a Sunday while he was on vacation; he answered the phone and he had the patience to talk as long as I needed and answer any questions. I felt calm and hopeful after I spoke with him and that by Monday morning when he came bac, he came to visit my husband in jail.

We're forever grateful to Mr. Schwartz who is an Angel sent by heaven. This case was an extremely serious case because my husband was wrongfully charged with a mandatory life felony sexual abuse case. The issues were extremely complex and the lawyers were fighting bitterly in court, and in the end, all sex charges were dropped and my husband is at home, and thanks to Mr. Schwartz, the issue has been resolved. I truly feel no one could have done what Mr. Schwartz did for us in this case and we will be forever grateful.

Nelsi Betancourt.

SCHWARTZ & ASSOCIATES

ATTORNEYS AT LAW

200 SOUTHEAST 1ST STREET
SUITE 505
MIAMI, FLORIDA 33131

TELEPHONE: 305.523.2250
FACSIMILE: 305.523.2231

JONATHAN S. SCHWARTZ, ESQ.
JSSLaw@hotmail.com

Dear Honorable Judge Martinez,

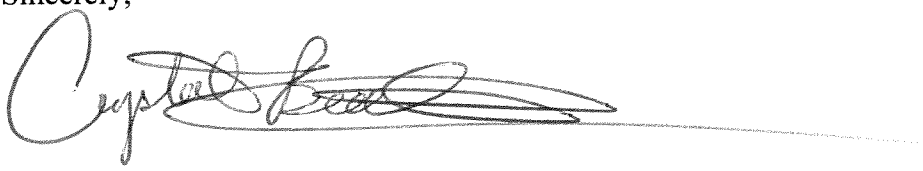
I have had the pleasure of working with Jonathan Schwartz since 2013. He has known my family since before I was born. He has helped my father countless times over the last few decades, along with several close friends of mine.

I have always had the utmost reverence and admiration for Mr. Schwartz because of his unique personality and demeanor. He treats his entire staff with so much appreciation and respect for the work that we collectively do. He has this innate ability to remain in a state of calm which seems to travel to whomever he is speaking to. I believe this is part of the reason why so many of our clients seek his advice (even when it may not be related to legal matters). He is much more than an attorney- he is a counselor and a spiritual guide for many.

I have learned more than I could imagine by being a part of this firm and I can say it has definitely shaped me into the young adult that I am today. I admire the compassion that he imparts in all aspects of his life. He is available at all times of the day and night for his clients, and for his staff as well. I don't know anyone that works as hard as he does. Our mantra has often been termed, "an unreasonable demand for excellence". In my seven years of working here, I have

seen him persist and pave ways to make miracles happen for our clients. I truly hope that we can continue to do just that, because there is much more work to be done.

Sincerely,



Crystal Beale

SCHWARTZ & ASSOCIATES
200 S.E. 1st Street • Suite 505 • Miami, Florida 33131 • Tel: 305.523.2250 • Fax: 305.523.2231

May 25, 2020

To Whom may concern:

This letter is to acknowledge the legal services I received from Attorney Jonathan Schwartz. He began my case in April 2018, and successfully terminated my probation in July 2019. It is hard for me to even begin to find the proper words and the gratefulness to describe my appreciation for his altruistic and professional legal services which literally saved my life.

I had been working in the prison system for some time teaching meditation and stress reduction in one of the programs that began as a result of his work with Freedom Yoga in Dade County Jails some years ago. My case was a highly publicized case involving going into the prison with a radio which unbeknownst to me contained contraband. As a fellow prison yoga worker, he took my case "pro-bono" from beginning to end. It was an extremely complex litigation which involved various conversations with the State Attorney which led to the successful prosecution of the actual guilty parties. He was more than supportive and understanding every step of the way. Both he and his wife have become close personal friends and they are both very, very special people dedicated to healing and therapy and peace and justice. Personally I open my mind and soul to thank him, his amazingly inspiring team, and the Heavenly Light that connected me with this Special professional Angel Attorney.

If you need more future information please do not hesitate to contact me.

Best regards,

Patricia Rossato

Quantum Self Harmony

REIKI MASTER SINCE 1994
MAGNIFIED HEALING MASTER TEACHER-1st, 2nd &3rd Phases
QUANTUM HEALING/ STRESS RELEASE
RECONNECTION and
RECONNECTIVE HEALING
MINDFULNESS AND SERVICE
UBM MINISTER
305-301-4533 (hablamos español)

Teo Castellanos

D-PROJECTS

p.o. box 557845 Miami FL 33255
p:786.271.2076 e:teocastellanos@me.com
teo castellanos, *artistic director*
www.teocastellanos.com

To whom it may concern:

I write this letter in support of Jonathan Schwartz. I have known Jonathan for approximately 30 years. We met in an acting class where creatives gathered to work on their craft. Since then I have always known Jonathan to be kind, loving and compassionate. He has always taken interest in being of service to others and to his community. Jonathan has shown up in court, (many times pro bono) to help my brother in law who struggles with mental health issues and has rotated in and out of jail and institutions for years. I've also known Jonathan as part of the spiritual community, taking interest and practicing Buddhism and yoga. His mission has always been to help the less fortunate and the falsely accused, always seeking justice for those on the fringes of society. I hope that Jonathan will continue his mission in the service to those who need his help, expertise and compassion. If you have any questions please do not hesitate in contacting me.

Thank You,

Teo

Nancy Browne

9255 S.W. 99th Street
Miami, Florida, 33176

BrowneNanc@gmail.com
786 543-8800

May 23, 2020

To Whom It May Concern:

I am Nancy Browne, former CEO of Acupuncture and Massage College. I have known Jonathan Schwartz since 1987 as a student, close friend and our personal and business attorney. Jonathan is a brilliant attorney, always thinking out of the box and thereby resolving cases that seemed unresolvable to others.

Not only does he look at a case creatively, he also brings his heart and soul into everything he does. He is passionate to help those who are in need in the criminal justice system. He has taught Yoga to inmates and even during this current Covid 19 pandemic, risked his life to go into the local prisons to help get as many prisoners released as was appropriate.

Jonathan has an incredible knowledge base which coupled with his ethical and spiritual character makes him the finest lawyer I have ever worked with. As I've said, he has been the lawyer for our College and for us personally for over 30 years and has represented us on countless cases and in each case, his command of the case both legally and ethically was beyond reproach.

He also provided legal advice in countless areas that did not result in lawsuits. Both myself and my husband trust Mr. Schwartz implicitly. In each case, Mr. Schwartz is always concerned with what is right and just and not with financial remuneration. It would be a tremendous loss to the legal community of South Florida as well as his firm's countless clients who have relied on his firm for decades if he were, God forbid, suspended from the practice of law.

Most sincerely,

Nancy Browne

Nancy Browne
Former CEO of Acupuncture and Massage College

Dear Judge;

Words cannot begin to express my gratitude to Mr. Schwartz for saving my child because I know but for his work and help and wise counsel, my son would be dead as are so many of his friends or in prison for a long time. Virgil's dad, Virgil senior had been in prison a few times, and it looked like his son, my pride and joy, my life, would follow in his footsteps, but Mr. Schwartz would not let that happen. It has already been 7 years since my son who was only 17 years old, (he's 25 now) was arrested for an Armed Robbery that he did not commit. To us, thank god, it is ancient history, and its amazing to me that 7 years later the prosecutors are still talking about a picture of Fritz and my son's lineup.

The State attorney in this case wanted to put my son in prison for 10 years to life, and it seemed that no matter what Mr. Schwartz did, she would not budge. And I know that this is what Mr. Schwartz is all about because I have referred many, many cases to him and his law firm. His team cares deeply about people, are accessible 24 hours and have always come up with a fair and just solution to each case I have referred him. He truly excels above them all. Finally, he was able to resolve my son's case which has resulted in saving his life.

I understand that Mr. Schwartz made a lineup with the actual robber who's name was Fritz who was an acquaintance of Virgil's and did look a lot like him. Fritz grandmother sent a letter to the lady who got robbed explaining that Fritz had confessed to her and that enclosed was the keys that he had stolen. Finally, in the end justice was served for me and my son, and I can only pray that God is good and that justice will be served here with Mr. Schwartz who is more dedicated, more passionate,

more creative than any lawyer or person I have met. God forbid, myself and so many others would not even know where to begin to find another lawyer of his caliber that we could call. My son is home right now; he is working hard and has stayed out of trouble has enrolled in Strayer University in Business Administration and is on the path to greatness; all of which would not have been possible without Mr. Schwartz. How many countless mothers are similarly grateful for his working in saving lives, because that's what he does everyday.

Sincerely yours,

Pamela Y Carter Barrett

910 Burlington Street

Opa Locka, Fl. 33054

786-320-2391

11

Louis Richard Beale

14520 SW 148th Court

Miami, Florida 33196

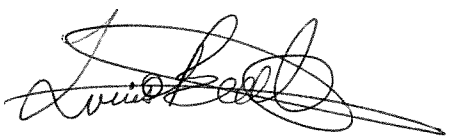
305-815-8221

To whom it may concern,

I have had the pleasure of knowing Jonathan Schwartz for close to thirty years. He has helped me countless times over the last few decades with legal matters. I am proud to say that I named my first born child after him. Jonathan has always managed (no matter how bleak the situation) to put my mind at ease. He is an excellent attorney and friend.

I can say without question that he fights relentlessly for his clients and always has their best interest at heart. Unlike many other attorneys, he is available at all hours to answer any concerns, or to even offer advice whether it be legal or personal. His flexibility with payment arrangements allows his services to be extended to clients of all economic statuses. I find this quite respectable, because it gives more people the opportunity to have the proper representation that they are in search of. His patience, professionalism, and desire to help others is what makes him both unique and highly admirable.

Sincerely,



Louis R. Beale

Utopia Agency, LLC

June 8, 2020

To Whom It May Concern

RE: Letter of Recognition and Recommendation for Jonathan Schwartz, Esq.

As the founder, President and CEO of two registered insurance companies, I have worked with dozens of top-notch attorneys on hundreds of civil cases. Having taken public 3 development-stage companies (on the NYSE and the NASDAQ), I've also had the opportunity to consult with some of the nation's most respected firms on complex legal, regulatory and litigation matters. In my eleemosynary activities I've worked with many government counselors, and in two presentations to congressional subcommittees my co-presenter was Ralph Nader, one of America's most respected (and feared) lawyers. In short, I'm no stranger to experiencing and evaluating legal ability.

I consider Jonathan Schwartz one of the most able, honorable and skillful attorneys I've ever had the pleasure to know. Beyond his considerable legal abilities, Jonathan has studied psychology and linguistics, and matriculated from such noteworthy institutions as the University of Chicago, Tulane Law School, and Wesleyan. His philanthropic and conservation activities are well-known and highly respected in non-profit circles, and his commitment to botany and preservation in the Peruvian Amazon has been a 25-year passion.

Mr. Schwartz has handled several cases for protégés of mine - with stellar success.

As to his client commitment, honor and trustworthiness I cannot name, do not know, and have not heard of any attorney with stronger ethical values and genuine reliability.

I have lived for twenty-two years in Miami (nearly long enough to be considered a "native"); prior to that I lived, worked and studied in New York City and Cambridge MA (at Harvard, Class of '68). In my 50 years in business, if I had to name one attorney who stands head-and-shoulders above others in areas in which I've needed assistance, that man would be Atty. Jonathan Schwartz.

Please do not hesitate to contact me for any further insights about Mr. Schwartz. I'd be happy to provide additional information.

Sincerely,

Eugene A. Rosov, Pres.
Utopia Agency, LLC

Dr. Richard Browne
9255 S.W. 99th Street, Miami, Florida, 33176
DrBrowne523@gmail.com 786 877-7470

May 23, 2020

To Whom It May Concern:

My name is Richard Browne and I have just recently retired from running an Acupuncture College in Miami, Acupuncture and Massage College, for the last 30 years. This letter is written on behalf of my friend, former Tai Chi student and personal lawyer, Jonathan Schwartz. I met Jonathan in 1987 while teaching classes in Tai Chi Chuan. At the time Mr. Schwartz was employed as an attorney for the Public Defender's Office. Shortly after opening his private firm Schwartz & Associates in 1991, I found myself in need of legal representation on two separate occasions. Both times I approached Mr. Schwartz and two other attorneys that also happened to be students in my class, Burt Harrison and Dennis O'Connor. Mr. Harrison was a very successful attorney and Mr. O'Connor was the head of the Law Department at the University of Miami.

In both cases Jonathan was the attorney who devised the strategy that was used to "save the day." The two senior lawyers, Mr. Harrison and Mr. O'Connor, gave great praise to Jonathan's ability to think outside out of the box. From that moment on, Mr. Schwartz has acted as my personal and business attorney and has represented us on countless matters.

I have witnessed Mr. Schwartz's growth and development as a concerned citizen and an expert in the legal system. I remember when he told me he wanted to become a Certified Yoga Instructor so as to be able to go into the prisons and teach Yoga to the inmates. He took a grueling six-month course to become a certified Instructor and was able to achieve his goal of teaching Yoga to the inmates, which has now expanded to teaching battered woman, foster kids, and various afterschool programs. Most recently, since the Covid 19 pandemic, I have witnessed his drive and determination to facilitate the release of inmates from prison based on humanitarian concerns.

I have relied on Mr. Schwartz for advice for decades and each time his passion, his creativity, his vast knowledge and commitment to justice has resulted in a fair and equitable results. Simply put, he is a gift and an angel from heaven for those who have the good fortune to know him.

I have been proud to call Jonathan both my friend and my personal attorney. For a character reference, I would give him an A++.

Very truly,



Dr. Richard Browne

June 15- 2020

RE: To whom it may concern

My name is Arthur Brown I am writing this letter as a recommendation for my attorney Jonathan Schwartz. He asked me to give a recommendation as an attorney, but I first have to say that he is my friend and someone I rely on to steer me in the right direction. During this case, I have spoken with him more than 100 times. He has often come to my house to speak and counsel with me regarding the situation between me, my wife and the subject of this case, my poor girlfriend who has now tragically passed.

In the past years I found myself in a situation with the legal system were I was in the threat of spending many years of my life back in jail after having been free for a long time. The State wanted 5 years in prison, but thanks to Jonathan and his hard work, he kept me out of jail with a probation deal. Mr Schwartz is a good man: he is always seeking for justice for everyone, doing what other people think would be impossible to get his clients out of jail. He makes the impossible possible. He simply doesn't give up no matter what.

I pray to God I will never again be in a legal trouble but if for god's way that something happened I know that I can count on Jonathan skills as an attorney, and on his commitment and wisdom to help me resolve any issue and not just with the case. He has also become close with my wife and now, even later in life, he has taught me how to stay out of trouble and be a man.

As a person of color, I have witnessed Jonathan Schwartz fighting for all human beings to have an equal right, and for those who fear not getting justice and only have found despair in the system. I have seen a lot of people and he is one of the few that I feel really does not see color.

Any concern about this letter feel free to contact me

Arthur Brown

Jonathan has been my attorney for over 25 years and will be my attorney forever. He is very honest, professional, knowledgeable and down to earth. He is not only thorough but also easy to work with and always willing to take the time to discuss my concerns and respond to questions.

The staff is responsive, creative and a pleasure to deal with. The attention and service are personalized, and you are always made to feel like your business is important to them

Jonathan is like my family and I can ALWAYS count on him to do a GREAT job

Five stars and beyond

Rufus Dean

June 3, 2020

Recommendation Letter- Jonathan Schwartz

To Whom it May Concern:

Please accept this letter as a formal recommendation letter for Jonathan Schwartz. I have known Mr. Schwartz approximately three years when I hired him as my defense attorney and since then Mr. Schwartz became our family lawyer. During our interactions, Mr. Schwartz has proven to have the professional, hardworking and intellectual requisites to advance professionally in the criminal-justice field. As an attorney Mr. Schwartz has a lot overall commitment and provides the best legal advice. Provides excellent customer services and on his responsiveness via email or text. I proffer my support without reservation.

If you have any questions regarding the content of this letter, please feel free to contact me.

Kifah Mekled
Regards,
Kifah Mekled
786-260-8076

clarkwmarketing@gmail.com Wed, Feb 26, 9:06 PM (13 hours ago)

to me

To whom it may concern,

My name is Will Clark,
Jonathan Shwartz represented new in multiples cases over the years. He has been an indespensible asset in defense as well as friendly advice or consultation on various other matters.

He went above and beyond to perform his duties for me, both as a attorney and a friend. Sometimes it was easy and sometimes it wasn't, but I never heard him complain. I reccomend him to everybody I can.

He has my trust and that really is the best
I can say because it is so hard to trust people these days.

Thank you so much Jonathan, you changed my life.

24

Christopher Ian Burke
4226 S.W. 62nd Avenue
Miami, FL 33155

To Whom It May Concern,

I don't think I would be alive today, if it wren't for the help I've received, over the years, from Jonathan Schwartz. My history of mental illness was no deterrent for Jonathan. He has stuck by me no matter what my struggles. Thanks Jonathan for being true to me and so many others. You are appreciated and treasured.

Jonathan Schwartz is a gift.

If you have any questions, please feel free to contact me.

Thank You,

Christopher Ian Burke

25

Dear Johnathan Schwartz.
I can't even put into words how indebted I am to you. Two years ago you helped my son and you were there every step of the way and thankfully everything wound up with a very happy ending. In my heart, I know that was because of your diligence. Recently I needed your services and not only did you answer your cell phone on a Saturday you got my son out on a Sunday. You are not only a great attorney but a wonderful man with a giant heart. I explained that I adopted my son as a single mother and could only afford to make small payments and you were so gracious and accepted my offer. I would highly recommend you to anyone I know if they need a lawyer.
Thank you so much,

Michelle Sternberg

Electrolysis & Laser By Michelle.Has MOVED TO Angels Nails:
2305 East Hallandale Beach Blvd 33009
786-306-7987

Jonathan Patterson
jrpatterson94@gmail.com
305.399.4489

To whom it may concern,

My experiences with Jonathan Schwartz & Associates were stupendous through and through. All of my family's Traffic Tickets, Traffic violations, criminal & misdemeanor cases have been handled by Jonathan Schwartz with utmost care and professionalism. Available 24/7, when you need him most he is there. I can say my life has been re-directed by Schwartz & Associates, they definitely know their craft and walk the extra mile for you. I appreciated working with people that care for you on a personal level instead of just handling you as a "case". Highly recommend.

Thank you Jonathan! You bring peace to my life with every conversation!

Sincerely,

Jonathan Patterson

Mr. Jonathan Schwartz is dedicated to his clients. I was in need of his firm for 3 different legal battles and they went above and beyond my expectations. He, along with his firm, are well spoken individuals who'll patiently explain in detail what follows after every action taken with your case. Once Mr. Schwartz understands your situation, all you have to worry about is following his guidance. I never felt a moment of confusion, I felt reassured from beginning to end. Thank you to Mr. Schwartz and his firm for helping me out. 10/10 would recommend

- Anthony Fabian

Character reference letter

05/22/2020

To whom it may concern:

I Lazaro Acosta Dearmas am writing this letter to express my sincere gratitude and admiration towards Mr. Jonathan Schwarts. Mr. Schwarts is a very respectful and dedicated man in his line of work. He always strives to provide good service and is very reliable. In my past experiences with Mr.Schwarts, he's always made sure to answer any questions as soon as possible and if not at the moment. He has always been concerned with my court dates and always kept me up to date with up coming dates and procedures. He is friendly and very thorough with his work. I would definitely recommend him and trust him with my eyes closed.

Lazaro Acosta Dearmas
786-259-3199

From: **Rebeca Sinclair** <rsinclair080@outlook.com>
Date: Sat, Mar 21, 2020 at 8:35 PM
Subject: Jonathan Schwartz testimonial
To: mdepaz.sb.law@gmail.com <mdepaz.sb.law@gmail.com>

I was represented better than I could have ever imagined. My needs were put first. My opinions were valued and my doubts were always reassured. My nerves were calmed and the process was always explained. [My attorney] fought hard for me. He went above and beyond and did everything he could to ensure a great outcome. I couldn't have asked for a better attorney. A job well done!

Rebeca Sinclair

Hello I'm Maike Acosta, I'm Jonathan Schwarts client, he is my lawyer and he is very caring of his clients. Jonathan keeps in contact with me here and there to catch me up on my cases and to remind me of my court dates. He is a lawyer that cares about his client and he is very on top of his duties. He is a great lawyer and he has done an excellent job with being my lawyer. I am very satisfied with him and his work.

Lorna Burke Castellanos
4226 S.W. 62nd Avenue
Miami, FL 33155
(305) 804-2086
lanatj@yahoo.com

To Whom It May Concern,

My name is Lorna Burke Castellanos. I have known Jonathan Schwartz for over thirty years. During this time, he has remained true to friends, family, and clients. He is an exceptional person with a big heart.

Several years ago, I saw Jonathan at the Courthouse. On this particular occasion, I was with my bi-polar brother who was addressing one of many problems. Jonathan took one look at my face, turned and looked at my brother, and then said, " Do you need help?" He not only offered assistance, but has continued to render services, at no cost, over the years.

Jonathan is passionate about helping others. He is selfless and will never give up on you, even when the going gets tough.

Thanks for your time. If you have any questions, please feel free to call.

Grateful,

Lorna Burke Castellanos

Alfred Teger
2843 S. Bayshore Drive, Apt 6C
Coconut Grove, FL 33133

Phone: (732) 322-3139 E-mail: fteger@gmail.com

May 18, 2020

To Whom It May Concern:

Re: **Jonathan Stephen Schwartz**

I am writing this letter in support of Jonathan Stephen Schwartz, who I have personally known for over ten years. During this period of time, I have gotten to know Mr. Schwartz quite well.

I have found Mr. Schwartz extremely ethical and trustworthy, and entirely dedicated to his law practice and clients. His personal integrity is beyond question. He is very concerned with the well being of others, and often will go out of his way to assist people in need.

I would totally trust Mr. Schwartz with any legal and financial responsibilities given him, and would have no hesitation in dealing with him on any of these matters.

Thank you,

Alfred Teger

Alfred Teger

Jo Ann Mayer, PhD

2843 S Bayshore Drive, Unit 6C

Miami, FL 33133 USA

Cell: +1 732 763 8195 email: jamayer986@gmail.com

May 28, 2020

To Whom it May Concern:

RE: Character Reference for Jonathan Stephen Schwartz

I am writing this letter in support of Jonathan Stephen Schwartz. I met Jonathan through mutual friends when I moved to Miami in 2010. We have become good friends, and I enjoy his friendship and stimulating intellectual discussions. I admire his passion for honesty and truth.

Over the years, as we have shared more of our philosophies and professional careers, I have come to see how passionate and caring Jonathan is of his clients. Jonathan is dedicated to his client's case, frequently postponing his planned events to be there for his client. He often assists not only with legal needs but their personal needs as well. This level of concern and responsibility is often missing in today's professionals.

Jonathan holds himself to the highest ethical standards in the practice of law. He is honest and trustworthy. I highly recommend him for handling any legal and financial issues.

With regards,

Jo Ann Mayer, PhD
International Medical Strategy Consultant

Carmen Civieta Gaskell

10611 SW 77th. Terrace
Miami, FL 33173
cacivieta@gmail.com
305-297-4407

May 26th. 2020

To Whom It May Concern:

It has been an honor and a privilege to have known Jonathan Schwartz for the last 20 years or so. Throughout these years, his deep involvement with social issues and going the extra mile to defend and help the less fortunate, has become apparent. He regularly visits the jails to make sure the prisoners are being treated justly and know about their rights and responsibilities. He does this on a pro-bono basis.

Recently, when the COVID19 outbreak began, Jonathan was working day and night to help the prisoners, whom he knew had committed lesser degree crimes, appear before the judge, and possibly, facilitate their release in order to be sent home to spare them from being infected in the crowded environment of the jails.

Jonathan is a man of many talents. He is equally at ease and does not mind the extra effort of going and teaching Yoga to the inmates, knowing this will help them improve their self-esteem, or learning how to read music, so he can play one of his beautiful Spanish guitars. He does it all this without ever boasting about it, or mentioning it.

It is my pleasure -

Sometimes the phrase "Thank You" is said and repeated many times over. However, sometimes that phrase is just not enough. I cannot begin to express my sincere gratitude for the handling of my son's case. Mr. Schwartz in not only a brilliant and skillful attorney, he is a conscientious one as well. One of Miami's best, a rare breed indeed. He and his staff are always willing and able to offer guidance and help 24/7 and their level of care and concern is second to none!

Janet Palacio

Guest & Employee Legal Services
ROYAL CARIBBEAN CRUISES LTD.
Legal Department
305 539-6133
jpalacio@rccl.com

"Life is 10% what happens to us and 90% how we react to it."

CLASS DESCRIPTION

A typical 90-minute class can be divided into six areas of focus (our classes thus far, however, have been limited to 60 minutes)

Centering - the beginning 5-10 minutes of the class is devoted to establishing the foundation for mindful awareness by disengaging from preoccupations of the mind and initiating the conscious breath work that is integral for the class.

Opening - the experience of centering is enhanced by engaging in a series of static poses that are held for longer periods while maintaining focused awareness on the breath and sensations arising in the body.

Create - after the vital areas of the body are opened they are then 'flushed' through a vigorous set of continuous, moving postures that require concentrated breathing to facilitate the body through this energetic cleansing process.

Resiliency - this period involves building core physical, mental and emotional fortitude through a set of poses that require physical strength, balance and stamina.

Closing - this section of the class is dedicated to 'sealing' the benefits achieved through a set of seated or reclining postures intended to release any remaining blocked energy.

Integration - the final segment of class is devoted to surrendering into stillness, in both lying and seated positions, while being guided through a process of integrating the physical, mental and emotional benefits of practice

APPLICATION OF YOGA FOR REHABILITATION

The practical application of Yoga for developing self-discipline, emotional intelligence and impulse control is another important goal of Freedom Yoga, particularly as it applies to addiction recovery and violence prevention (numerous studies confirm the effectiveness of Yoga in supporting addiction recovery).

The most often reported benefits from students having taken classes are:

(1) Reduction of stress

(2) More able to focus on the positive rather than the negative

(3) Support in addiction recovery

(4) Greater mental clarity

(5) Pain relief

(6) Improved sleep

(7) Better able to deal with the mental and emotional strain of prison

(8) Greater access to inner peace

FREEDOM Yoga

200 S.E. 1ST ST., MIAMI, FL 33131

305-799-8106

FREEDOM Yoga



FREEDOM YOGA MISSION STATEMENT

The Mission of the Freedom Yoga Prison Project is to expand the practice of Yoga and Mindfulness Meditation to prisons and rehabilitation facilities, and to provide training for Yoga instructors interested in teaching to at-risk populations in prisons, residential rehabilitation facilities, and community programs.

GOALS OF FREEDOM YOGA

The goal of the Freedom Yoga Prison Project is to help people to shift unconscious behavioral patterns of reacting into conscious ways of responding by teaching the skill of clearly witnessing their moment-to-moment experience. Learning this fundamental behavioral shift can make the difference between a person committing a crime or not.

DEVELOPING MINDFUL AWARENESS

Mindful awareness, or Mindfulness, is at the core of the Freedom Yoga program. Mindful awareness can be practiced in seated meditation and while engaging in Yoga practice. It is designed to promote a general mind/body consciousness that can strengthen the capacity for self-reflection, self-acceptance and change.

WHY YOGA IN PRISON?

Prison is a breeding ground for mental, emotional and physical distress and a repository for those suffering from Post Traumatic Stress Disorder. Experiences of anxiety, depression, agitation, hopelessness, grief, fear and rage can be greatly increased under incarcerated conditions. Psychiatrists, psychologists and clinical social workers acknowledge that embodiment practices such as Yoga can greatly help people alleviate the symptoms that lead to both reactive behaviors and stress related disease. Learning a practice in prison for mindful awareness and embodiment is not only important for supporting behavioral rehabilitation but also critical for physical and emotional well-being.

Most men in prison have become disassociated from their feelings and bodies as a result of backgrounds of neglect or abuse, violent behavior, and/or the overuse of alcohol and drugs. Freedom Yoga helps students to reclaim a sensitivity to themselves through a practice of self-awareness and self-control that instills non-reactivity and self-acceptance.

The classes help to free the mind and body from confusion and distress allowing one to be at peace and receptive to learning new ways of thinking by engaging students in an appealing yet challenging practice of postures (asanas), conscious breathing (pranayama), and short periods of meditation. Discipline of the mind and body is emphasized as integral for developing positive behavioral habits and impulse control. The ethical code of conduct and behavior that defines a Yoga practitioner's way of life is underscored. The program also promotes non-competitiveness and intentionally fosters community building through cooperative group participation.



TESTIMONIALS FROM CURRENT AND FORMER PRISONERS IN PRISON YOGA PROJECTS

"Now that I'm out, I wanted to let you know that I am practicing Yoga every day. It really helps me to calm down and helps me to deal with my addiction issues." - A.B.

"I used drugs and alcohol for many years basically to kill the pain of my life. Yoga has helped clear my mind, deal with the pain, move into the present and just love myself and who I am." - J.B.

"I have a strengthened identity with self and a sense of something universal. It has given me the ability to affect my own well being and peace without dependency upon someone else or chemical substance." - T.W.

"In my opinion the teacher has thrown a pontoon to a bunch of swimmers who believe they are not going to make it because we can't see the shore. Yoga is remarkable." - M.S.

"I have experienced decreased anxiety and improved ability to deal with stress. I have also been able to relieve back pain and in general manage pain and injuries." - S.L.

"I came in contact with yoga before I came to prison but always thought it was for hippies or older folks. But now that I have taken yoga, I feel less physical pain, I sleep better and I'm more at peace with myself." - D. W.

Scott M. Weinstein, Ph.D.
2335 East Atlantic Blvd.
Suite 410
Pompano Beach, Florida 33062
(954)818-0888
(954)568-0803

August 20, 2020

To Whom It May Concern,

I am submitting this letter at the request of Mr. Jonathan Schwartz. Mr. Schwartz contacted me in January of this year seeking to voluntarily join a weekly facilitated support group to help him process that emotional impact of his ongoing Bar disciplinary proceedings. Jonathan candidly discussed the matter that led him to seek the group's support after a favorable referee's finding sent to the Supreme Court of Florida was remanded back to for a new trial.

For some, the group experience is an opportunity to discuss shared professional experiences and is treated more like a weekly consultation meeting. For others, the experience takes on a deeper meaning whereby the individual utilizes the group process to explore all areas of one's life.

From the onset, Mr. Schwartz demonstrated a willingness to understand his contribution to the Bar's inquiries. Throughout his participation in the group, Mr. Schwartz continuously accepted the feedback from his peers and utilized the collective experience of the group members to explore his approaches to lawyering.

Mr. Schwartz's matter was supposed to be taken up sometime in the spring, but because of the COVID-19 pandemic is was delayed. The lengthy delay created an increased sense of trepidation in Mr. Schwartz. He requested individual sessions to supplement the group therapy in a further attempt to acquire a deeper understanding of himself and to explore alternative career paths should he be prevented from practicing law.

In my many years working with legal professionals, I have seldom come across an

individual so willing to avail himself to personal and professional scrutiny while facing the possibility of severe Bar sanctions. As he told the story of the case in question, he demonstrated both a deep commitment to a determined advocacy of his then client while also accepting the idea that he challenged the limits of the profession. While he admitted to pushing the boundaries, he firmly believes they were never crossed.

I believe that Jonathan's motive are without malice. Further, he is willing to actively examine his practice strategies, recognizing his enthusiastic advocacy for his clients may be seen by some as overly zealous. He has expressed a desire to maintain his therapeutic relationship which I believe will be helpful in his attaining his goals.

Respectfully Submitted,

Scott M. Weinstein
Scott M. Weinstein, Ph.D.
Florida Licensed Psychologist
Lic# PY4789

SCHWARTZ & ASSOCIATES

ATTORNEYS AT LAW

200 SOUTHEAST 1ST STREET
SUITE 505
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TELEPHONE: 305.523.2250
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JONATHAN S. SCHWARTZ, ESQ.
JSSLaw@hotmail.com

August 10, 2020

Dear Judge Martinez

My name is Stella Schwartz. I have been more than fortunate and blessed to have known Jonathan Schwartz for almost 6 years and married for 2 and a half years. It may seem a short time, but being around him and his very good friends and family whom have known him for over 30 years, I have seen how much love, respect and appreciation they have for him in addition to the hundreds of clients that I had talked to. I now know that I was right when I entrusted him has my partner many years ago.

Every day, I wake up and see a passionate, hardworking, dedicated, creative and compassionate man; always willing to help others, but especially the unfortunate ones. He is a fighter, a true fighter, for human rights and for equality for all.

My husband is a man that not only works hard (some would say too hard) to defend others but he works even harder to be a better person every day. That's why he studied and mastered yoga, tai chi, group therapy, family therapy as well individual therapy, and many others spiritual practices. Being around him has changed my life dramatically, daily ... as it has for his lawyers, his staff, his clients, and his friends. He inspires people to be better.

I myself have learned to be more patience, and to meditate and to trust people again. He truly has shown me the profound kindness of living with heart.

I have tremendous respect and admiration for his creativity and his "out-of-the-box" mentality and persistent approach to saving lives; and I have seen his commitment, care, and dedication to every single case, every single client. This has only increased my admiration for the work he does which I am witness to: Fighting for equality and getting into the "good trouble" John Lewis lived and died for.

Please, Judge, help us continue the work we do. He has learned so much from all of this. We have lived with this case for 5 years. We have lived with tremendous uncertainty and pressure that comes with the cloud of this case. Sometimes we just don't know whether we are coming or going. I believe it has been penalty enough. Whatever he does comes from a place of pure heart. He is a man of deep spiritual convictions, and I would humbly say, because I see him, I see him every day,

he is a man of pure soul. The great deeds he does these last 35 years far outweigh the mistake he made here. A suspension is neither needed nor warranted. And many people will be effected, not only his clients whom have deposited their trust in him and his firm, but equally, our family of employees who work side by side with him in saving lives.

Especially now in this challenging time, we have being working harder than ever trying to get people out of jail, trying to prevent our clients form getting sick and sometimes worse. The threat of this disease is such where no one is safe, no one is immune. In fact, I myself am still in recovery from Covid-19 these last two months And as difficult as my struggle has, it pales in comparison to that with which we have struggled these last 5 years with this case.

Stella Schwartz

Wife of Jonathan Schwartz

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JONATHAN S. SCHWARTZ, ESQ.
JSSLaw@hotmail.com

To whom it may concern,

My relationship with Mr. Schwartz is beyond profound. I am now one of his Senior Legal Assistants and have helped run the office for many, many years. Let me start by saying that I have 4 lovely boys; one of which was the ring bearer at his wedding a few years ago. We are like family. 2 of my boys were born the last few years, and when I became pregnant twice within a short span of 3 years, Mr. Schwartz did not hesitate to pay for maternity leave for 12-14-16 weeks twice! Otherwise I don't know how we would have survived. He profoundly affects my life daily, weekly, hourly. While he speaks Spanish fairly well, I often translate for him in order for the client to understand his advice 100%.... And this has given me a window into the amazing work that he does these last several years. And his advice changes people's lives; allows them to cry, allows people to feel their deep emotions (makes me cry all the time). He has the gift for seeing people, for knowing what they feel and for quickly going to the root of someone's problem. He is truly a counselor... he counsels people. While our clients come to us for legal advice, he regularly imparts spiritual, emotional, practical advice in an effort to improve their lives. He establishes close and profound relationships with a whole host of all kinds of different people.

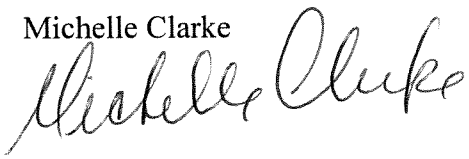
He does house calls every day. He goes to their houses and speaks to them wherever they are at because this is his life's work. He goes to the jails on most Sundays. In my several years working here, it is unheard of for him to take a day off or call in sick. In the office, he demands everyone respect each other, fosters an atmosphere of creativity and openness... and I have to say.... He makes everything fun (even in the most serious of cases). There are countless events, lunches, and gatherings that he organizes.

He endlessly imparts information and knowledge about other religions and holidays that come up as he is an ordained interfaith minister. And I cannot end this letter without telling you that he is simply a fountain of creativity. He seems to be flowing with new ideas, new motions to suppress, new approaches to cases and we, his team, are all racing to make his vision happen. And at the heart of his vision, now our vision, is to be honest, to tell the truth (to ourselves, to each other, to our clients), to foster understanding between people, between family members, to broaden people's awareness, to broaden their individuality, creativity, flexibility and ultimately to foster compassion and peacefulness. It has been a joy to work with Mr. Schwartz; I hope to be able to continue on with our Mission for many years to come, because, we are just getting started.

Please consider the amazing work that we are doing every day… The thousands of cases we have had the honor to resolve since this case started some 7 years ago… and I think if you do, and consider his career and his daily dedication to improving and saving lives, you will see and agree that it far outweighs the mistake he made regarding this exhibit.

Sincerely,

Michelle Clarke



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Dr. Beverly Carter Remy

20190 NW 9th Drive
Pembroke Pines, FL 33029
954-895-6564
bremy01@gmail.com

April 9, 2020

Attorney Jonathan S. Schwartz
200 SE 1st Street Suite 505
Miami, FL 33131

Dear Attorney Schwartz,

I want to stop and personally thank you for your legal representation and commitment to my family, over the past two plus years. It has been quite a mind boggling two plus years but with your assistance and skill as an attorney, we feel assured that we have the best legal team in south Florida representing us.

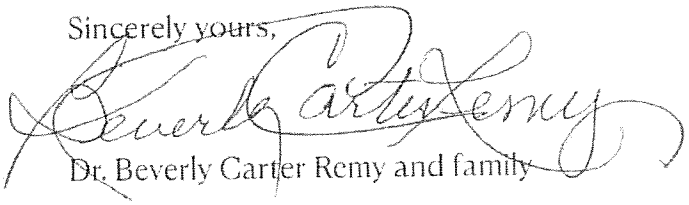
Not all law firms provide clients with support at all hours of the day and night. Not all law firms provide Sunday office appointments in order to meet the needs of clients. The flexible office hours make it easy because of our distance and work schedules. We appreciate meeting with you on Saturdays and Sundays. We appreciate having the ability to reach you by cell or by text. We really do appreciate you responding.

Over the past two plus years we've had so many questions and concerns. Some of those questions were asked hundreds of times. You provided us with answers each of those times. We've had concerns hundreds and hundreds of times and you addressed those concerns each time. We feel, as all families may, that our case is special and that you solely represent our family. We appreciate the fact that you've had the ability to make us feel as if we are your sole clients. This is important because it provides the reassurance that we are getting the time and attention that we feel we deserve.

In closing, we really appreciate your professionalism. We know that we have an attorney client relationship and we feel that we are represented by a 1st class rated law firm.

We know that you work hard. We know that you work fair. We appreciate all that you are doing to assure us the best possible representation. At the end of the day, we have no doubt that our best interest has been considered and we have been represented by the law of the Court.

Sincerely yours,



Dr. Beverly Carter Remy and family

May 20, 2020

G. William Heck
5991 NW 66th Way,
Parkland, FL, 33067

Re: Letter of Character and Recommendation for Jonathan Schwartz

Dear Judge Martinez;

I am pleased to write a recommendation for my good friend, for my brother, really, for my extended family member Jonathan Schwartz. Our friendship dates back some 33 years. We first met studying Tai Chi in 1987. There, for several years, we learned the Martial art of moving meditation. This was just the beginning of his relationship with meditation and other stress reducing therapies that he would go on to learn and incorporate into his career as a lawyer, first as a public defender when I met him to the fine lawyer he is today with his Law Firm Schwartz & Associates.

They have been at the forefront of what is possible when we speak of "Counselors at law." Jonathan is not only one of the more creative lawyers I have ever met, he is one of the most creative people period; and in my 75 years I have had the good fortune to meet more than a few. But I couldn't begin to describe all of the events we shared over the years: the birthdays, Thanksgivings, Passovers, New Year's, Cinco de Mayos. Mr. Schwartz has been my partner with Season tickets for the Miami Heat where we have spent years attending games and commiserating. I know there is no one more dedicated and passionate about his profession, no one more concerned about his clients....

At one of the games he introduced me to a client that he had been mentoring for almost 2 years in an effort to understand the case. He said that he was trying to understand what happened and that it took 2 years of taking this client to Heat games, to lunches, to dinners, texting, establishing a relationship to begin to get to the truth of the case. This was far beyond what I have witnessed any lawyer would ever do. As it turned out, this client, a 19 year old young kid, had actually shot his father (ostensibly in self defense), but had so much trauma that it took over 2 years to begin to actually get the story, so that he could be properly defended. This kind of persistence and commitment is Jonathan's life.

Jonathan has great vision and wisdom and is a counselor to all, and he doesn't pull any punches. He tells the truth, whether you want to hear it or not. A few years back he even took a year off and applied and got into PHD Pysch school at Nova to improve his understanding of psychology; all in an effort to be a better lawyer and to work more profoundly with his clients suffering with psychological issues. He is truly a warrior for justice and has persistently and creatively found the doorway to stand for what's right and for what's just, sometimes against forbidding odds, for nearly 4 decades.

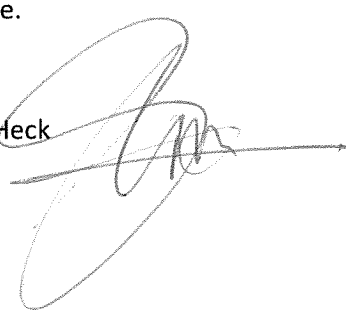
We also are connected deeply on a spiritual level as music is central to both of our lives, me as a singer and guitar player and he as an amazing Guitarist in the fields of Classical, Flamenco and Ragtime music. He truly is a gifted musician and a joy for all to listen to whenever we get the opportunity.

In a word, Jonathan is about helping people. He is patient and takes all calls from all clients, much to the chagrin of family and friends, and when he is not working or playing music he is teaching yoga or meditation & stress reduction to kids in crisis at SOS children's homes; to prisoners in Dade county jail; to women at the Lotus House (where he was recently volunteer of the month), to after school kids at

Branches church in North Miami. He also ran a well known project in Peru for 20 years working with preserving important Amazonian medicines being grown in the jungle and working with medicine people there.

I am proud to call Jonathan my friend, my very special friend, and I am so worried for him and his wife, and his legion of faithful clients who have counted on him and his team for decades. I know that this is a just court and that you will find mercy for him for what led to what happened in this case, for no one deserves mercy and justice more than him who lives and breathes mercy and justice with every second of his existence.

G. William Heck



June 7, 2020

RE: Jonathan Schwartz, Esquire

To Whom It May Concern,

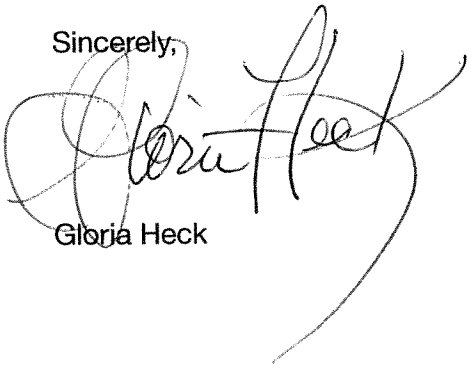
When one thinks of our legal system, one thinks of a system meant to protect the innocent and punish the guilty. We now realize that our system is fatally flawed and only those with proper legal representation receive justice. I have known Jonathan for over a decade and during this time I have to come know him, respect his integrity and appreciate his passion for serving our disenfranchised populations.

When I think of Jonathan, I see a Renaissance man who embraces innovation, art, culture, religions and philosophies. He doesn't judge a person by their appearance, he listens with an open mind to their story, using his years of experience and discernment to decide how to move forward.

Jonathan has spent his life defending those in our criminal system who were unjustly accused and didn't have the means to state their case. He has nobly fought for those whom no one would defend and he has given himself to improve the lives of many. Our judicial system needs people like Jonathan, now more than ever to help heal the systemic discrimination that must be remedied.

I am proud to call this person my friend and I would highly recommend Jonathan for any endeavor he chooses to pursue.

Sincerely,



Gloria Heck

May 27, 2020

My journey through the legal system, and how I was able to prevail by being represented by such an exemplary criminal attorney in Florida by the name of Jonathan Schwartz. I violated probation with new charges, and they were serious felonies. I was looking at 15 years in prison and I also had other prior convictions. This is not a circumstance anybody would want to find themselves in because my fate was being held by a thread. The state prosecutor took my case very personal in a way that persuaded the judge and intimidated several private attorneys I had acquired about because the prosecutor was adamant about the 15-year sentence. not to mention I was pregnant.

Several private attorneys gave me a grim outcome. no one was driven to proceed with my case, I needed someone with a ethical mind set who was able to go against the prosecutor that's when an acquaintance of mine introduced me to Jonathan Schwartz, one thing that made Jonathan stand out was his confidence and his approach on how he wanted to processed with my criminal case. I knew he was the attorney to retain, he explained everything in great detail. Jonathan is brilliant at his craft and his intelligence of the law on any criminal case is beyond compare. Regardless of what you're case entails Jonathan is one attorney that you want on you're side because he will go to bat for any of his clients, Jonathan has a strong eye for detail he has won a large majority of his cases, mainly because he is extremely thorough in his due diligence and outshines the prosecution. He has a presence about himself that is extraordinary Jonathan is one of a kind attorney. He showed compassion towards me, even after he represented my case. Arrangements were made by him to have his amazing wife Mrs. Stella Schwartz pick me up from the county jail. I was already 6 months pregnant words can not express how grateful I am till this day on how she treated me after an exhausting experience. The first thing she offered me was water and snacks. This hospitality was unexpected but highly appreciated. I felt very welcomed and Mrs. Schwartz took me to probation to report and soon after that, she took me out to eat. It was a blessing to receive such kindness even after the lengths Jonathan went through to assist me with my case.

Mr. Jonathan Schwartz, you're such a brilliant lawyer. I am forever grateful for you are passion, dedication and professionalism and a special thanks to his wife Mrs, Schwartz for her generosity. I've hired lawyers before, but Jonathan you are truly the best I have ever worked with and I'm able to raise my son thanks to you.

Sincerely:

Rosa Villadamigo

To whom it may concern;

I am very impressed with the work of Mr. Jonathan Schwartz and his team; they are honest and very straightforward. They tell it like it is and are genuinely looking for the best result for their clients. Their communication was outstanding throughout the whole process from the attorney to the legal assistants. I am being very sincere here, if you are in trouble, don't think about it, he is your best options and their Price-to-performance ratio is unbeatable. He also will give you a payment plan if you can't afford to pay up front.

I will just add one more thing that really impressed me: when I called the attorney on a Sunday while he was on vacation; he answered the phone and he had the patience to talk as long as I needed and answer any questions. I felt calm and hopeful after I spoke with him and that by Monday morning when he came bac, he came to visit my husband in jail.

We're forever grateful to Mr. Schwartz who is an Angel sent by heaven. This case was an extremely serious case because my husband was wrongfully charged with a mandatory life felony sexual abuse case. The issues were extremely complex and the lawyers were fighting bitterly in court, and in the end, all sex charges were dropped and my husband is at home, and thanks to Mr. Schwartz, the issue has been resolved. I truly feel no one could have done what Mr. Schwartz did for us in this case and we will be forever grateful.

Nelsi Betancourt.

SCHWARTZ & ASSOCIATES

ATTORNEYS AT LAW

200 SOUTHEAST 1ST STREET
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MIAMI, FLORIDA 33131

TELEPHONE: 305.523.2250
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JONATHAN S. SCHWARTZ, ESQ.
JSSLaw@hotmail.com

Dear Honorable Judge Martinez,

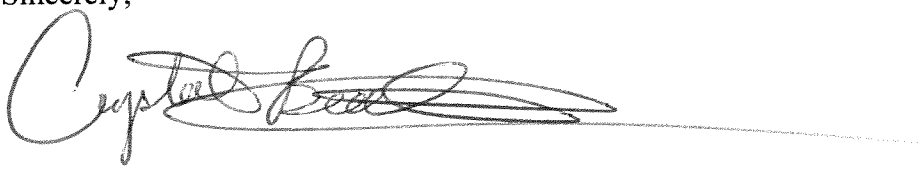
I have had the pleasure of working with Jonathan Schwartz since 2013. He has known my family since before I was born. He has helped my father countless times over the last few decades, along with several close friends of mine.

I have always had the utmost reverence and admiration for Mr. Schwartz because of his unique personality and demeanor. He treats his entire staff with so much appreciation and respect for the work that we collectively do. He has this innate ability to remain in a state of calm which seems to travel to whomever he is speaking to. I believe this is part of the reason why so many of our clients seek his advice (even when it may not be related to legal matters). He is much more than an attorney- he is a counselor and a spiritual guide for many.

I have learned more than I could imagine by being a part of this firm and I can say it has definitely shaped me into the young adult that I am today. I admire the compassion that he imparts in all aspects of his life. He is available at all times of the day and night for his clients, and for his staff as well. I don't know anyone that works as hard as he does. Our mantra has often been termed, "an unreasonable demand for excellence". In my seven years of working here, I have

seen him persist and pave ways to make miracles happen for our clients. I truly hope that we can continue to do just that, because there is much more work to be done.

Sincerely,



Crystal Beale

SCHWARTZ & ASSOCIATES
200 S.E. 1st Street • Suite 505 • Miami, Florida 33131 • Tel: 305.523.2250 • Fax: 305.523.2231

May 25, 2020

To Whom may concern:

This letter is to acknowledge the legal services I received from Attorney Jonathan Schwartz. He began my case in April 2018, and successfully terminated my probation in July 2019. It is hard for me to even begin to find the proper words and the gratefulness to describe my appreciation for his altruistic and professional legal services which literally saved my life.

I had been working in the prison system for some time teaching meditation and stress reduction in one of the programs that began as a result of his work with Freedom Yoga in Dade County Jails some years ago. My case was a highly publicized case involving going into the prison with a radio which unbeknownst to me contained contraband. As a fellow prison yoga worker, he took my case "pro-bono" from beginning to end. It was an extremely complex litigation which involved various conversations with the State Attorney which led to the successful prosecution of the actual guilty parties. He was more than supportive and understanding every step of the way. Both he and his wife have become close personal friends and they are both very, very special people dedicated to healing and therapy and peace and justice. Personally I open my mind and soul to thank him, his amazingly inspiring team, and the Heavenly Light that connected me with this Special professional Angel Attorney.

If you need more future information please do not hesitate to contact me.

Best regards,

Patricia Rossato

Quantum Self Harmony

REIKI MASTER SINCE 1994
MAGNIFIED HEALING MASTER TEACHER-1st, 2nd &3rd Phases
QUANTUM HEALING/ STRESS RELEASE
RECONNECTION and
RECONNECTIVE HEALING
MINDFULNESS AND SERVICE
UBM MINISTER
305-301-4533 (hablamos español)

Teo Castellanos

D-PROJECTS

p.o. box 557845 Miami FL 33255
p:786.271.2076 e:teocastellanos@me.com
teo castellanos, *artistic director*
www.teocastellanos.com

To whom it may concern:

I write this letter in support of Jonathan Schwartz. I have known Jonathan for approximately 30 years. We met in an acting class where creatives gathered to work on their craft. Since then I have always known Jonathan to be kind, loving and compassionate. He has always taken interest in being of service to others and to his community. Jonathan has shown up in court, (many times pro bono) to help my brother in law who struggles with mental health issues and has rotated in and out of jail and institutions for years. I've also known Jonathan as part of the spiritual community, taking interest and practicing Buddhism and yoga. His mission has always been to help the less fortunate and the falsely accused, always seeking justice for those on the fringes of society. I hope that Jonathan will continue his mission in the service to those who need his help, expertise and compassion. If you have any questions please do not hesitate in contacting me.

Thank You,

Teo

Nancy Browne

9255 S.W. 99th Street
Miami, Florida, 33176

BrowneNanc@gmail.com
786 543-8800

May 23, 2020

To Whom It May Concern:

I am Nancy Browne, former CEO of Acupuncture and Massage College. I have known Jonathan Schwartz since 1987 as a student, close friend and our personal and business attorney. Jonathan is a brilliant attorney, always thinking out of the box and thereby resolving cases that seemed unresolvable to others.

Not only does he look at a case creatively, he also brings his heart and soul into everything he does. He is passionate to help those who are in need in the criminal justice system. He has taught Yoga to inmates and even during this current Covid 19 pandemic, risked his life to go into the local prisons to help get as many prisoners released as was appropriate.

Jonathan has an incredible knowledge base which coupled with his ethical and spiritual character makes him the finest lawyer I have ever worked with. As I've said, he has been the lawyer for our College and for us personally for over 30 years and has represented us on countless cases and in each case, his command of the case both legally and ethically was beyond reproach.

He also provided legal advice in countless areas that did not result in lawsuits. Both myself and my husband trust Mr. Schwartz implicitly. In each case, Mr. Schwartz is always concerned with what is right and just and not with financial remuneration. It would be a tremendous loss to the legal community of South Florida as well as his firm's countless clients who have relied on his firm for decades if he were, God forbid, suspended from the practice of law.

Most sincerely,

Nancy Browne

Nancy Browne
Former CEO of Acupuncture and Massage College

Dear Judge;

Words cannot begin to express my gratitude to Mr. Schwartz for saving my child because I know but for his work and help and wise counsel, my son would be dead as are so many of his friends or in prison for a long time. Virgil's dad, Virgil senior had been in prison a few times, and it looked like his son, my pride and joy, my life, would follow in his footsteps, but Mr. Schwartz would not let that happen. It has already been 7 years since my son who was only 17 years old, (he's 25 now) was arrested for an Armed Robbery that he did not commit. To us, thank god, it is ancient history, and its amazing to me that 7 years later the prosecutors are still talking about a picture of Fritz and my son's lineup.

The State attorney in this case wanted to put my son in prison for 10 years to life, and it seemed that no matter what Mr. Schwartz did, she would not budge. And I know that this is what Mr. Schwartz is all about because I have referred many, many cases to him and his law firm. His team cares deeply about people, are accessible 24 hours and have always come up with a fair and just solution to each case I have referred him. He truly excels above them all. Finally, he was able to resolve my son's case which has resulted in saving his life.

I understand that Mr. Schwartz made a lineup with the actual robber who's name was Fritz who was an acquaintance of Virgil's and did look a lot like him. Fritz grandmother sent a letter to the lady who got robbed explaining that Fritz had confessed to her and that enclosed was the keys that he had stolen. Finally, in the end justice was served for me and my son, and I can only pray that God is good and that justice will be served here with Mr. Schwartz who is more dedicated, more passionate,

more creative than any lawyer or person I have met. God forbid, myself and so many others would not even know where to begin to find another lawyer of his caliber that we could call. My son is home right now; he is working hard and has stayed out of trouble has enrolled in Strayer University in Business Administration and is on the path to greatness; all of which would not have been possible without Mr. Schwartz. How many countless mothers are similarly grateful for his working in saving lives, because that's what he does everyday.

Sincerely yours,

Pamela Y Carter Barrett

910 Burlington Street

Opa Locka, Fl. 33054

786-320-2391

11

Louis Richard Beale

14520 SW 148th Court

Miami, Florida 33196

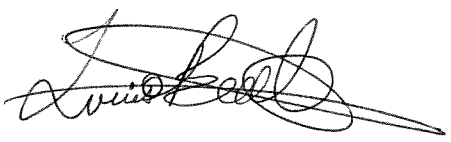
305-815-8221

To whom it may concern,

I have had the pleasure of knowing Jonathan Schwartz for close to thirty years. He has helped me countless times over the last few decades with legal matters. I am proud to say that I named my first born child after him. Jonathan has always managed (no matter how bleak the situation) to put my mind at ease. He is an excellent attorney and friend.

I can say without question that he fights relentlessly for his clients and always has their best interest at heart. Unlike many other attorneys, he is available at all hours to answer any concerns, or to even offer advice whether it be legal or personal. His flexibility with payment arrangements allows his services to be extended to clients of all economic statuses. I find this quite respectable, because it gives more people the opportunity to have the proper representation that they are in search of. His patience, professionalism, and desire to help others is what makes him both unique and highly admirable.

Sincerely,



Louis R. Beale

Utopia Agency, LLC

June 8, 2020

To Whom It May Concern

RE: Letter of Recognition and Recommendation for Jonathan Schwartz, Esq.

As the founder, President and CEO of two registered insurance companies, I have worked with dozens of top-notch attorneys on hundreds of civil cases. Having taken public 3 development-stage companies (on the NYSE and the NASDAQ), I've also had the opportunity to consult with some of the nation's most respected firms on complex legal, regulatory and litigation matters. In my eleemosynary activities I've worked with many government counselors, and in two presentations to congressional subcommittees my co-presenter was Ralph Nader, one of America's most respected (and feared) lawyers. In short, I'm no stranger to experiencing and evaluating legal ability.

I consider Jonathan Schwartz one of the most able, honorable and skillful attorneys I've ever had the pleasure to know. Beyond his considerable legal abilities, Jonathan has studied psychology and linguistics, and matriculated from such noteworthy institutions as the University of Chicago, Tulane Law School, and Wesleyan. His philanthropic and conservation activities are well-known and highly respected in non-profit circles, and his commitment to botany and preservation in the Peruvian Amazon has been a 25-year passion.

Mr. Schwartz has handled several cases for protégés of mine - with stellar success.

As to his client commitment, honor and trustworthiness I cannot name, do not know, and have not heard of any attorney with stronger ethical values and genuine reliability.

I have lived for twenty-two years in Miami (nearly long enough to be considered a "native"); prior to that I lived, worked and studied in New York City and Cambridge MA (at Harvard, Class of '68). In my 50 years in business, if I had to name one attorney who stands head-and-shoulders above others in areas in which I've needed assistance, that man would be Atty. Jonathan Schwartz.

Please do not hesitate to contact me for any further insights about Mr. Schwartz. I'd be happy to provide additional information.

Sincerely,

Eugene A. Rosov, Pres.
Utopia Agency, LLC

Dr. Richard Browne
9255 S.W. 99th Street, Miami, Florida, 33176
DrBrowne523@gmail.com 786 877-7470

May 23, 2020

To Whom It May Concern:

My name is Richard Browne and I have just recently retired from running an Acupuncture College in Miami, Acupuncture and Massage College, for the last 30 years. This letter is written on behalf of my friend, former Tai Chi student and personal lawyer, Jonathan Schwartz. I met Jonathan in 1987 while teaching classes in Tai Chi Chuan. At the time Mr. Schwartz was employed as an attorney for the Public Defender's Office. Shortly after opening his private firm Schwartz & Associates in 1991, I found myself in need of legal representation on two separate occasions. Both times I approached Mr. Schwartz and two other attorneys that also happened to be students in my class, Burt Harrison and Dennis O'Connor. Mr. Harrison was a very successful attorney and Mr. O'Connor was the head of the Law Department at the University of Miami.

In both cases Jonathan was the attorney who devised the strategy that was used to "save the day." The two senior lawyers, Mr. Harrison and Mr. O'Connor, gave great praise to Jonathan's ability to think outside out of the box. From that moment on, Mr. Schwartz has acted as my personal and business attorney and has represented us on countless matters.

I have witnessed Mr. Schwartz's growth and development as a concerned citizen and an expert in the legal system. I remember when he told me he wanted to become a Certified Yoga Instructor so as to be able to go into the prisons and teach Yoga to the inmates. He took a grueling six-month course to become a certified Instructor and was able to achieve his goal of teaching Yoga to the inmates, which has now expanded to teaching battered woman, foster kids, and various afterschool programs. Most recently, since the Covid 19 pandemic, I have witnessed his drive and determination to facilitate the release of inmates from prison based on humanitarian concerns.

I have relied on Mr. Schwartz for advice for decades and each time his passion, his creativity, his vast knowledge and commitment to justice has resulted in a fair and equitable results. Simply put, he is a gift and an angel from heaven for those who have the good fortune to know him.

I have been proud to call Jonathan both my friend and my personal attorney. For a character reference, I would give him an A++.

Very truly,



Dr. Richard Browne

June 15- 2020

RE: To whom it may concern

My name is Arthur Brown I am writing this letter as a recommendation for my attorney Jonathan Schwartz. He asked me to give a recommendation as an attorney, but I first have to say that he is my friend and someone I rely on to steer me in the right direction. During this case, I have spoken with him more than 100 times. He has often come to my house to speak and counsel with me regarding the situation between me, my wife and the subject of this case, my poor girlfriend who has now tragically passed.

In the past years I found myself in a situation with the legal system were I was in the threat of spending many years of my life back in jail after having been free for a long time. The State wanted 5 years in prison, but thanks to Jonathan and his hard work, he kept me out of jail with a probation deal. Mr Schwartz is a good man: he is always seeking for justice for everyone, doing what other people think would be impossible to get his clients out of jail. He makes the impossible possible. He simply doesn't give up no matter what.

I pray to God I will never again be in a legal trouble but if for god's way that something happened I know that I can count on Jonathan skills as an attorney, and on his commitment and wisdom to help me resolve any issue and not just with the case. He has also become close with my wife and now, even later in life, he has taught me how to stay out of trouble and be a man.

As a person of color, I have witnessed Jonathan Schwartz fighting for all human beings to have an equal right, and for those who fear not getting justice and only have found despair in the system. I have seen a lot of people and he is one of the few that I feel really does not see color.

Any concern about this letter feel free to contact me

Arthur Brown

Jonathan has been my attorney for over 25 years and will be my attorney forever. He is very honest, professional, knowledgeable and down to earth. He is not only thorough but also easy to work with and always willing to take the time to discuss my concerns and respond to questions.

The staff is responsive, creative and a pleasure to deal with. The attention and service are personalized, and you are always made to feel like your business is important to them

Jonathan is like my family and I can ALWAYS count on him to do a GREAT job

Five stars and beyond

Rufus Dean

June 3, 2020

Recommendation Letter- Jonathan Schwartz

To Whom it May Concern:

Please accept this letter as a formal recommendation letter for Jonathan Schwartz. I have known Mr. Schwartz approximately three years when I hired him as my defense attorney and since then Mr. Schwartz became our family lawyer. During our interactions, Mr. Schwartz has proven to have the professional, hardworking and intellectual requisites to advance professionally in the criminal-justice field. As an attorney Mr. Schwartz has a lot overall commitment and provides the best legal advice. Provides excellent customer services and on his responsiveness via email or text. I proffer my support without reservation.

If you have any questions regarding the content of this letter, please feel free to contact me.

Kifah Mekled
Regards,
Kifah Mekled
786-260-8076

clarkwmarketing@gmail.com Wed, Feb 26, 9:06 PM (13 hours ago)

to me

To whom it may concern,

My name is Will Clark,
Jonathan Shwartz represented new in multiples cases over the years. He has been an indespensible asset in defense as well as friendly advice or consultation on various other matters.

He went above and beyond to perform his duties for me, both as a attorney and a friend. Sometimes it was easy and sometimes it wasn't, but I never heard him complain. I reccomend him to everybody I can.

He has my trust and that really is the best
I can say because it is so hard to trust people these days.

Thank you so much Jonathan, you changed my life.

Christopher Ian Burke
4226 S.W. 62nd Avenue
Miami, FL 33155

To Whom It May Concern,

I don't think I would be alive today, if it wren't for the help I've received, over the years, from Jonathan Schwartz. My history of mental illness was no deterrent for Jonathan. He has stuck by me no matter what my struggles. Thanks Jonathan for being true to me and so many others. You are appreciated and treasured.

Jonathan Schwartz is a gift.

If you have any questions, please feel free to contact me.

Thank You,

Christopher Ian Burke

Dear Johnathan Schwartz.
I can't even put into words how indebted I am to you. Two years ago you helped my son and you were there every step of the way and thankfully everything wound up with a very happy ending. In my heart, I know that was because of your diligence. Recently I needed your services and not only did you answer your cell phone on a Saturday you got my son out on a Sunday. You are not only a great attorney but a wonderful man with a giant heart. I explained that I adopted my son as a single mother and could only afford to make small payments and you were so gracious and accepted my offer. I would highly recommend you to anyone I know if they need a lawyer.
Thank you so much,

Michelle Sternberg

Electrolysis & Laser By Michelle.Has MOVED TO Angels Nails:
2305 East Hallandale Beach Blvd 33009
786-306-7987

Jonathan Patterson
jrpatterson94@gmail.com
305.399.4489

To whom it may concern,

My experiences with Jonathan Schwartz & Associates were stupendous through and through. All of my family's Traffic Tickets, Traffic violations, criminal & misdemeanor cases have been handled by Jonathan Schwartz with utmost care and professionalism. Available 24/7, when you need him most he is there. I can say my life has been re-directed by Schwartz & Associates, they definitely know their craft and walk the extra mile for you. I appreciated working with people that care for you on a personal level instead of just handling you as a "case". Highly recommend.

Thank you Jonathan! You bring peace to my life with every conversation!

Sincerely,

Jonathan Patterson

Mr. Jonathan Schwartz is dedicated to his clients. I was in need of his firm for 3 different legal battles and they went above and beyond my expectations. He, along with his firm, are well spoken individuals who'll patiently explain in detail what follows after every action taken with your case. Once Mr. Schwartz understands your situation, all you have to worry about is following his guidance. I never felt a moment of confusion, I felt reassured from beginning to end. Thank you to Mr. Schwartz and his firm for helping me out. 10/10 would recommend

- Anthony Fabian

Character reference letter

05/22/2020

To whom it may concern:

I Lazaro Acosta Dearmas am writing this letter to express my sincere gratitude and admiration towards Mr. Jonathan Schwarts. Mr. Schwarts is a very respectful and dedicated man in his line of work. He always strives to provide good service and is very reliable. In my past experiences with Mr.Schwarts, he's always made sure to answer any questions as soon as possible and if not at the moment. He has always been concerned with my court dates and always kept me up to date with up coming dates and procedures. He is friendly and very thorough with his work. I would definitely recommend him and trust him with my eyes closed.

Lazaro Acosta Dearmas
786-259-3199

From: **Rebeca Sinclair** <rsinclair080@outlook.com>
Date: Sat, Mar 21, 2020 at 8:35 PM
Subject: Jonathan Schwartz testimonial
To: mdepaz.sb.law@gmail.com <mdepaz.sb.law@gmail.com>

I was represented better than I could have ever imagined. My needs were put first. My opinions were valued and my doubts were always reassured. My nerves were calmed and the process was always explained. [My attorney] fought hard for me. He went above and beyond and did everything he could to ensure a great outcome. I couldn't have asked for a better attorney. A job well done!

Rebeca Sinclair

Hello I'm Maike Acosta, I'm Jonathan Schwarts client, he is my lawyer and he is very caring of his clients. Jonathan keeps in contact with me here and there to catch me up on my cases and to remind me of my court dates. He is a lawyer that cares about his client and he is very on top of his duties. He is a great lawyer and he has done an excellent job with being my lawyer. I am very satisfied with him and his work.

Lorna Burke Castellanos
4226 S.W. 62nd Avenue
Miami, FL 33155
(305) 804-2086
lanatj@yahoo.com

To Whom It May Concern,

My name is Lorna Burke Castellanos. I have known Jonathan Schwartz for over thirty years. During this time, he has remained true to friends, family, and clients. He is an exceptional person with a big heart.

Several years ago, I saw Jonathan at the Courthouse. On this particular occasion, I was with my bi-polar brother who was addressing one of many problems. Jonathan took one look at my face, turned and looked at my brother, and then said, " Do you need help?" He not only offered assistance, but has continued to render services, at no cost, over the years.

Jonathan is passionate about helping others. He is selfless and will never give up on you, even when the going gets tough.

Thanks for your time. If you have any questions, please feel free to call.

Grateful,

Lorna Burke Castellanos

Alfred Teger
2843 S. Bayshore Drive, Apt 6C
Coconut Grove, FL 33133

Phone: (732) 322-3139 E-mail: fteger@gmail.com

May 18, 2020

To Whom It May Concern:

Re: **Jonathan Stephen Schwartz**

I am writing this letter in support of Jonathan Stephen Schwartz, who I have personally known for over ten years. During this period of time, I have gotten to know Mr. Schwartz quite well.

I have found Mr. Schwartz extremely ethical and trustworthy, and entirely dedicated to his law practice and clients. His personal integrity is beyond question. He is very concerned with the well being of others, and often will go out of his way to assist people in need.

I would totally trust Mr. Schwartz with any legal and financial responsibilities given him, and would have no hesitation in dealing with him on any of these matters.

Thank you,

Alfred Teger

Alfred Teger

Jo Ann Mayer, PhD

2843 S Bayshore Drive, Unit 6C

Miami, FL 33133 USA

Cell: +1 732 763 8195 email: jamayer986@gmail.com

May 28, 2020

To Whom it May Concern:

RE: Character Reference for Jonathan Stephen Schwartz

I am writing this letter in support of Jonathan Stephen Schwartz. I met Jonathan through mutual friends when I moved to Miami in 2010. We have become good friends, and I enjoy his friendship and stimulating intellectual discussions. I admire his passion for honesty and truth.

Over the years, as we have shared more of our philosophies and professional careers, I have come to see how passionate and caring Jonathan is of his clients. Jonathan is dedicated to his client's case, frequently postponing his planned events to be there for his client. He often assists not only with legal needs but their personal needs as well. This level of concern and responsibility is often missing in today's professionals.

Jonathan holds himself to the highest ethical standards in the practice of law. He is honest and trustworthy. I highly recommend him for handling any legal and financial issues.

With regards,

Jo Ann Mayer, PhD
International Medical Strategy Consultant

Carmen Civieta Gaskell

10611 SW 77th. Terrace
Miami, FL 33173
cacivieta@gmail.com
305-297-4407

May 26th. 2020

To Whom It May Concern:

It has been an honor and a privilege to have known Jonathan Schwartz for the last 20 years or so. Throughout these years, his deep involvement with social issues and going the extra mile to defend and help the less fortunate, has become apparent. He regularly visits the jails to make sure the prisoners are being treated justly and know about their rights and responsibilities. He does this on a pro-bono basis.

Recently, when the COVID19 outbreak began, Jonathan was working day and night to help the prisoners, whom he knew had committed lesser degree crimes, appear before the judge, and possibly, facilitate their release in order to be sent home to spare them from being infected in the crowded environment of the jails.

Jonathan is a man of many talents. He is equally at ease and does not mind the extra effort of going and teaching Yoga to the inmates, knowing this will help them improve their self-esteem, or learning how to read music, so he can play one of his beautiful Spanish guitars. He does it all this without ever boasting about it, or mentioning it.

It is my pleasure -

Sometimes the phrase "Thank You" is said and repeated many times over. However, sometimes that phrase is just not enough. I cannot begin to express my sincere gratitude for the handling of my son's case. Mr. Schwartz in not only a brilliant and skillful attorney, he is a conscientious one as well. One of Miami's best, a rare breed indeed. He and his staff are always willing and able to offer guidance and help 24/7 and their level of care and concern is second to none!

Janet Palacio

Guest & Employee Legal Services
ROYAL CARIBBEAN CRUISES LTD.
Legal Department
305 539-6133
jpalacio@rccl.com

"Life is 10% what happens to us and 90% how we react to it."

CLASS DESCRIPTION

A typical 90-minute class can be divided into six areas of focus (our classes thus far, however, have been limited to 60 minutes)

Centering - the beginning 5-10 minutes of the class is devoted to establishing the foundation for mindful awareness by disengaging from preoccupations of the mind and initiating the conscious breath work that is integral for the class.

Opening - the experience of centering is enhanced by engaging in a series of static poses that are held for longer periods while maintaining focused awareness on the breath and sensations arising in the body.

Create - after the vital areas of the body are opened they are then 'flushed' through a vigorous set of continuous, moving postures that require concentrated breathing to facilitate the body through this energetic cleansing process.

Resiliency - this period involves building core physical, mental and emotional fortitude through a set of poses that require physical strength, balance and stamina.

Closing - this section of the class is dedicated to 'sealing' the benefits achieved through a set of seated or reclining postures intended to release any remaining blocked energy.

Integration - the final segment of class is devoted to surrendering into stillness, in both lying and seated positions, while being guided through a process of integrating the physical, mental and emotional benefits of practice

APPLICATION OF YOGA FOR REHABILITATION

The practical application of Yoga for developing self-discipline, emotional intelligence and impulse control is another important goal of Freedom Yoga, particularly as it applies to addiction recovery and violence prevention (numerous studies confirm the effectiveness of Yoga in supporting addiction recovery).

The most often reported benefits from students having taken classes are:

(1) Reduction of stress

(2) More able to focus on the positive rather than the negative

(3) Support in addiction recovery

(4) Greater mental clarity

(5) Pain relief

(6) Improved sleep

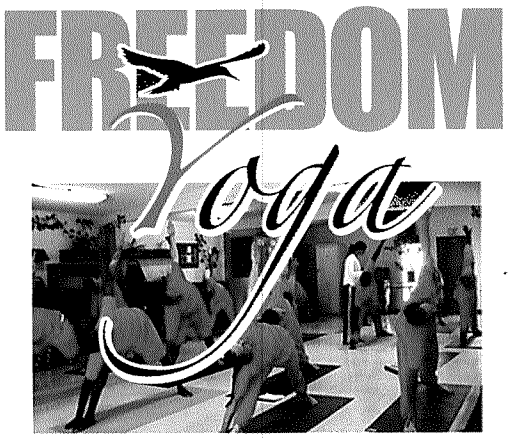
(7) Better able to deal with the mental and emotional strain of prison

(8) Greater access to inner peace

FREEDOM Yoga

200 S.E. 1ST ST., MIAMI, FL 33131

305-799-8106



FREEDOM YOGA MISSION STATEMENT

The Mission of the Freedom Yoga Prison Project is to expand the practice of Yoga and Mindfulness Meditation to prisons and rehabilitation facilities, and to provide training for Yoga instructors interested in teaching to at-risk populations in prisons, residential rehabilitation facilities, and community programs.

GOALS OF FREEDOM YOGA

The goal of the Freedom Yoga Prison Project is to help people to shift unconscious behavioral patterns of reacting into conscious ways of responding by teaching the skill of clearly witnessing their moment-to-moment experience. Learning this fundamental behavioral shift can make the difference between a person committing a crime or not.

DEVELOPING MINDFUL AWARENESS

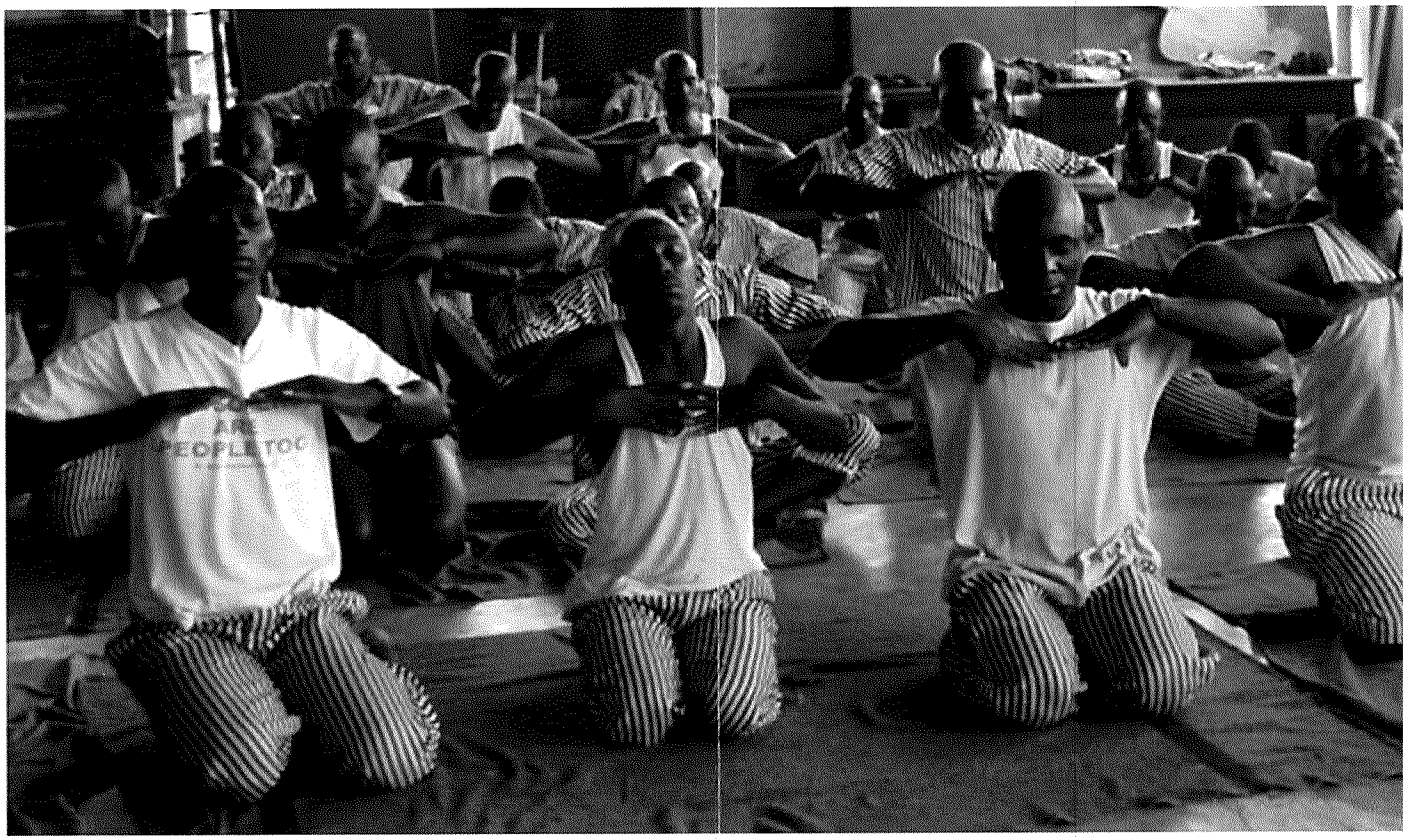
Mindful awareness, or Mindfulness, is at the core of the Freedom Yoga program. Mindful awareness can be practiced in seated meditation and while engaging in Yoga practice. It is designed to promote a general mind/body consciousness that can strengthen the capacity for self-reflection, self-acceptance and change.

WHY YOGA IN PRISON?

Prison is a breeding ground for mental, emotional and physical distress and a repository for those suffering from Post Traumatic Stress Disorder. Experiences of anxiety, depression, agitation, hopelessness, grief, fear and rage can be greatly increased under incarcerated conditions. Psychiatrists, psychologists and clinical social workers acknowledge that embodiment practices such as Yoga can greatly help people alleviate the symptoms that lead to both reactive behaviors and stress related disease. Learning a practice in prison for mindful awareness and embodiment is not only important for supporting behavioral rehabilitation but also critical for physical and emotional well-being.

Most men in prison have become disassociated from their feelings and bodies as a result of backgrounds of neglect or abuse, violent behavior, and/or the overuse of alcohol and drugs. Freedom Yoga helps students to reclaim a sensitivity to themselves through a practice of self-awareness and self-control that instills non-reactivity and self-acceptance.

The classes help to free the mind and body from confusion and distress allowing one to be at peace and receptive to learning new ways of thinking by engaging students in an appealing yet challenging practice of postures (asanas), conscious breathing (pranayama), and short periods of meditation. Discipline of the mind and body is emphasized as integral for developing positive behavioral habits and impulse control. The ethical code of conduct and behavior that defines a Yoga practitioner's way of life is underscored. The program also promotes non-competitiveness and intentionally fosters community building through cooperative group participation.



TESTIMONIALS FROM CURRENT AND FORMER PRISONERS IN PRISON YOGA PROJECTS

"Now that I'm out, I wanted to let you know that I am practicing Yoga every day. It really helps me to calm down and helps me to deal with my addiction issues." - A.B.

"I used drugs and alcohol for many years basically to kill the pain of my life. Yoga has helped clear my mind, deal with the pain, move into the present and just love myself and who I am." - J.B.

"I have a strengthened identity with self and a sense of something universal. It has given me the ability to affect my own well being and peace without dependency upon someone else or chemical substance." - T.W.

"In my opinion the teacher has thrown a pontoon to a bunch of swimmers who believe they are not going to make it because we can't see the shore. Yoga is remarkable." - M.S.

"I have experienced decreased anxiety and improved ability to deal with stress. I have also been able to relieve back pain and in general manage pain and injuries." - S.L.

"I came in contact with yoga before I came to prison but always thought it was for hippies or older folks. But now that I have taken yoga, I feel less physical pain, I sleep better and I'm more at peace with myself." - D. W.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	**Supreme Court Case No. SC17-1391**
Complainant,	**The Florida Bar File No. 2016-70,106 (11J)**
v.	
JONATHAN STEPHEN SCHWARTZ,	
Respondent.	

_____/

NOTICE OF FILING TRANSCRIPTS FROM ORIGINAL BAR GRIEVANCE TRIAL

Respondent Jonathan Schwartz submits the three (3) volumes of transcripts from the original Bar Grievance Trial before Circuit Judge Referee Celeste H. Muir held on April 4, 2018 (Volumes 1 and 2) and April 18, 2018 (Volume 3). Respondent requests that the Court read the complete transcripts as an essential ingredient of the pending sanctions proceeding.

Respectfully submitted,

KUEHNE DAVIS LAW, P.A.
Miami Tower, Suite 3105
100 S.E. 2 St.
Miami, FL 33131-2154
Tel: 305.789.5989
Fax: 305.789.5987
ben.kuehne@kuehnelaw.com

mdavis@kuehnelaw.com
efiling@kuehnelaw.com

By: S/ *Benedict P. Kuehne*
BENEDICT P. KUEHNE
Florida Bar No. 233293
MICHAEL T. DAVIS
Florida Bar No. 63374

CERTIFICATE OF SERVICE

I certify this document was efiled on September 1, 2020, to:

JENNIFER R. FALCONE
Florida Bar No. 624284
Bar Counsel
The Florida Bar – Miami Branch Office
444 Brickell Avenue, Suite M-100
Miami, FL 33131-2404
Tel: 305.377.4445
jfalcone@floridabar.org

PATRICIA ANN TORO SAVITZ
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RICHARD BARON
rb@richardbaronlaw.com

BARRY M. WAX
barry@barrywax.com

HON. LIZETT MARTINEZ, Referee
dmeneses@jud11.flcourts.org
lmartinez@jud11.flcourts.org
Attention: Mercedes Feliciano, Judicial Assistant
Richard E. Gerstein Justice Bldg.217
1351 N.W. 12th Street
Miami, FL 33125
Tel: (305) 548-5618
F002@jud11.flcourts.org

S/Benedict P. Kuehne
BENEDICT P. KUEHNE

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	**Supreme Court Case No. SC17-1391**
Complainant,	**The Florida Bar File No. 2016-70,106 (11J)**
v.	
JONATHAN STEPHEN SCHWARTZ,	**Supreme Court Case No. SC19-983**
Respondent.	**The Florida Bar File No. 2018-90,035 (2S)**
_____/	

NOTICE OF FILING TRANSCRIPTS FROM SANCTIONS HEARING ON AUGUST 21, 2020

Respondent Jonathan Schwartz submits the 2-volume transcripts from the sanctions hearing before Circuit Judge Referee Lizett Martinez held on August 21, 2020 (Volumes 1 and 2).

Respectfully submitted,

KUEHNE DAVIS LAW, P.A.
Miami Tower, Suite 3105
100 S.E. 2 St.
Miami, FL 33131-2154
Tel: 305.789.5989
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ben.kuehne@kuehnelaw.com
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By: S/ *Benedict P. Kuehne*

BENEDICT P. KUEHNE
Florida Bar No. 233293
MICHAEL T. DAVIS
Florida Bar No. 63374

CERTIFICATE OF SERVICE

I certify this document was efiled on September 1, 2020, to:

JENNIFER R. FALCONE
Florida Bar No. 624284
Bar Counsel
The Florida Bar – Miami Branch Office
444 Brickell Avenue, Suite M-100
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Miami, FL 33125
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S/Benedict P. Kuehne
BENEDICT P. KUEHNE

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, **Complainant,**	**Supreme Court Case No. SC17-1391**
v.	
JONATHAN STEPHEN SCHWARTZ, **Respondent.**	**The Florida Bar File No. 2016-70,106 (11J)**

_____/

RESPONDENT'S NOTICE OF FILING CASE LAW CITED IN PROPOSED REPORT OF REFEREE ON SANCTIONS

Respondent submits the case law cited in his proposed Report of Referee on Sanctions for the Referee's Consideration.

Respectfully submitted,

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The Florida Bar v. Poplack

599 So.2d 116

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599 So.2d 116 (Mem), 17 Fla. L. Weekly S565
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Ariel POPLACK, Respondent.

No. 76823.
April 30, 1992.

Referee recommended that attorney be suspended from practice of law for 30 days followed by 18–month probation, and the Florida Bar petitioned for review of recommended sanction. The Supreme Court held that the recommended sanction followed by probation is appropriate for lying to police officer.

Suspended.

Grimes, J., dissented and filed opinion in which Shaw, C.J., joined.

West Headnotes (3)

[1] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

In reviewing referee's recommendations for discipline of member of the bar, Supreme Court's scope of review is broader than the scope of review of findings of fact, as it is the responsibility of the Supreme Court to order the appropriate punishment, though referee's recommendation on discipline is afforded presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence.

6 Cases that cite this headnote

[2] **Attorneys and Legal Services** ⇐ Factors Considered

In bar disciplinary proceedings, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of qualified lawyer, the judgment must be fair to the respondent, being sufficient to punish breach of ethics and at the same time encourage reformation and rehabilitation, and the judgment must be severe enough to deter others who might prone or tempted to become involved in similar violations.

5 Cases that cite this headnote

[3] **Attorneys and Legal Services** ⇐ Definite Suspension

Attorneys and Legal Services ⇐ Probation in general

Thirty-day suspension followed by 18 months probation is appropriate for lying to police officer, where attorney has not been the subject of prior disciplinary action, and acts under the emotional distress of a broken marriage. West's F.S.A. Bar Rule 4–8.4.

3 Cases that cite this headnote

*116 John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and Randi Klayman Lazarus, Bar Counsel, Miami, for complainant.

Steven A. Fein, North Miami Beach, for respondent.

PER CURIAM.

The Florida Bar petitions for review of a referee's recommended sanction that the respondent, Ariel Poplack (Poplack), be suspended from the practice of law for thirty days followed by an eighteen-month probation during which Poplack will receive psychological counseling. The Florida Bar is seeking a suspension of ninety-one days followed by a period of probation. We have jurisdiction pursuant to article V, section 15 of the Florida Constitution.

The events giving rise to this disciplinary action occurred on May 14, 1989, in Coral Gables, Florida. Late in the evening, a

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police officer on patrol found Poplack and *117 another man near what appeared to be a disabled car. Poplack stood nearby in a disheveled condition while the other man attempted to attach the car to a tow truck. The police officer stopped to investigate because the scene looked suspicious. Upon an inquiry, Poplack lied to the police officer by telling the officer that the car belonged to a friend and that he had borrowed the car. He explained that the car had a flat tire and therefore needed to be towed. The police officer testified that he left the scene with some reservations because it looked peculiar.

After leaving the scene, the police officer received a stolen car report describing a car similar to the one he just saw with Poplack. The police officer returned to the scene and arrested Poplack and the other individual for stealing the car. At this time, Poplack changed his story to indicate that he was pulling a prank or a practical joke on a friend. However, we note that the owner of the car testified that he did not know either Poplack or the other individual charged with the theft.

The state attorney filed a third-degree felony charge of grand theft against Poplack. However, because Poplack did not have a prior criminal record and the owner of the stolen car did not object, the state attorney referred Poplack to a pretrial intervention program. After he successfully completed the pretrial program, the State nolle prossed the charges.

At the Bar disciplinary hearing, the owner of the car testified that Poplack made a complete restitution for any damages to the car. In addition, a number of witnesses testified that Poplack is a man of good character and professional competence. The witnesses portrayed him as an honest, hard-working young man who had suffered from the dissolution of his marriage. The witnesses held the general view that Poplack had overcome the adverse emotional effects of his marital dissolution. These witnesses also confirmed that Poplack often acted as a prankster. However, the record does not contain anything that suggests Poplack's actions were in the nature of a practical joke or prank.

The referee also heard testimony from a psychiatrist who had evaluated Poplack. The psychiatrist indicated that Poplack had some psychological problems, and that he would benefit from counseling. The psychiatrist opined that Poplack was truly remorseful and that his judgment was clouded at the time of the incident by alcohol and depression, which led to self-defeating behavior. Poplack did not testify at the hearing, nor did he personally express any remorse about his actions to the referee.

The referee found Poplack guilty of violating Rule Regulating The Florida Bar 4–8.4(c) (conduct involving misrepresentation, dishonesty in talking to the police officer); and recommended a thirty-day suspension, to be followed by an eighteen-month probation.

The Bar does not challenge the referee's factual findings, but claims that the referee erred in recommending a thirty-day suspension rather than a ninety-one-day suspension. The Bar asserts that a thirty-day suspension is too lenient for an attorney found guilty of lying; and in the past this Court has given longer suspensions for attorneys found guilty of lying. The Bar cites *The Florida Bar v. Lancaster,* 448 So.2d 1019 (Fla.1984), in which this Court suspended an attorney for two years for lying to a state attorney investigating stolen property. The Bar also cites *The Florida Bar v. Colclough,* 561 So.2d 1147 (Fla.1990), in which this Court suspended an attorney for six months because the attorney made misrepresentations to the court as well as opposing counsel in a lawsuit. The Bar argues that *Lancaster, Colclough* and the instant case are similar because in each instance the referee found the attorney guilty of lying. Thus, the Bar concludes that the Court should overturn the referee's recommendation and suspend Poplack for ninety-one days.

Poplack argues that a ninety-one-day suspension is not supported by case law, and thus, the referee's recommendation of a thirty-day suspension should be upheld. Poplack contends that both *Lancaster* and *Colclough* are distinguishable from the instant case. In *Lancaster,* this Court found *118 the disciplined attorney guilty of lying to the state attorney while under oath; whereas Poplack argues that his lie to a police officer did not occur under oath. Similarly, Poplack notes that in *Colclough* this Court found the disciplined attorney guilty of perpetrating a fraud on a trial court and opposing counsel, facts which are not present in Poplack's case. Thus, Poplack concludes that a ninety-one-day suspension is not warranted.

Poplack also argues that a ninety-one-day suspension would be disproportionate to the referee's findings. He asserts that cases where this Court has granted a ninety-one-day suspension have involved numerous instances of dishonesty. In contrast, Poplack argues that his case involves an isolated

instance of misjudgment. Poplack cites *The Florida Bar v. McKenzie,* 557 So.2d 31 (Fla.1990) (where this Court approved a ninety-one-day suspension, after two prior disciplinary actions had been initiated against an attorney and where the attorney had been found guilty of seven provisions of the former Code of Professional Responsibility); and *The Florida Bar v. Fischer,* 549 So.2d 1368 (Fla.1989) (where this Court imposed a ninety-one-day suspension after the attorney was found guilty of violating eight provisions of the Rules Regulating The Florida Bar, including engaging in conduct prejudicial to the administration of justice and concealing or knowingly failing to disclose that which he was required by law to reveal) to support his argument. Poplack concludes that a ninety-one-day suspension would be disproportionate punishment for the violation he committed.

Finally, Poplack contends that the referee's recommended sanction of a thirty-day suspension is appropriate because it will serve the goals of bar discipline proceedings of protecting the public from unethical conduct, encouraging reformation and rehabilitation, and deterring others who might be tempted to be involved in similar violations.

[1] In reviewing a referee's recommendations for discipline, our scope of review is broader than afforded to findings of facts because it is our responsibility to order the appropriate punishment. *The Fla. Bar v. Anderson,* 538 So.2d 852, 854 (Fla.1989). However, a referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. *The Fla. Bar v. Lipman,* 497 So.2d 1165, 1168 (Fla.1968). We find it troubling when a member of the Bar is guilty of misrepresentation or dishonesty, both of which are synonymous for lying. Honesty and candor in dealing with others is part of the foundation upon which respect for the profession is based. The theme of honest dealing and truthfulness runs throughout the Rules Regulating The Florida Bar and The Florida Bar's Ideals and Goals of Professionalism. *See* Rules Regulating The Florida Bar 4–3.3 (candor toward the tribunal), 4–3.4 (fairness of opposing party and counsel), 4–4.1 (truthfulness in statements to others), 4–8.4 (lawyer misconduct), and *Ideals and Goals of Professionalism,* Fla.B.J., Sept. 1991, at 138 (a lawyer's word should be his or her bond).

[2] If Poplack is to remain a part of the profession, as the Bar concedes he should, we must determine an appropriate discipline. We have held that bar disciplinary proceedings must serve three purposes: first, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer; second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and third, *the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Fla. Bar v. Lord,* 433 So.2d 983, 986 (Fla.1983) (emphasis in original).

[3] We find the cases that the Bar cites supporting a ninety-one-day suspension are factually different from the instant case. Unlike our decisions in *Lancaster* and *Colclough,* the instant case does not involve an attempt to perpetrate a fraud on the court or a false statement made while ***119** under oath. However, the fact remains that Poplack lied to a police officer investigating a suspicious scene. Only the police officer's timely intervention prevented Poplack and the other individual from successfully stealing the car. Even though his lie was not related to his practice of law, we hold that Poplack's conduct is still a violation of rule 4–8.4.

With respect to discipline, the gravity of Poplack's conduct cannot be disputed. However, he has not been the subject of prior disciplinary action, and there is mitigating evidence showing that he acted under the emotional distress of a broken marriage. Additionally, many witnesses offered their opinion that Poplack had begun a significant rehabilitation. Given these circumstances, we believe that a thirty-day suspension is appropriate to recognize the seriousness of the offense. We think that the referee's recommended period of probation with counseling will encourage and facilitate Poplack's continued rehabilitation. The probation is an appropriate means to ensure that Poplack's rehabilitation is genuine and continuing.

Accordingly, we suspend Ariel Poplack from the practice of law for thirty days, during which time he is enjoined and prohibited from the practice of law in Florida, with automatic reinstatement at the end of the period of suspension as provided by Rule Regulating The Florida Bar 3–5.1(e). The suspension shall take effect on June 1, 1992, thereby giving Poplack thirty days to close out his practice in an orderly fashion and to protect his client's interests, including

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providing the notice required by rule 3–5.1(h) of the Rules Regulating The Florida Bar. Additionally, we place Poplack on probation for a period of eighteen months as provided in rules 3–5.1(c) and 3–5.1(d). During this probation, the Poplack shall participate in psychological counseling, and the counselor shall submit reports to the Bar every six months indicating Poplack's compliance and progress. The costs of these proceedings are taxed against Poplack and judgment is entered in the amount of $2,240.93, for which sum let execution issue.

It is so ordered.

OVERTON, McDONALD, BARKETT, KOGAN and HARDING, JJ., concur.

GRIMES, J., dissents with an opinion, in which SHAW, C.J., concurs.

GRIMES, Justice, dissenting.

There is no suggestion that Poplack was under the influence of drugs or alcohol at the time of the incident. Under these circumstances, it is hard for me to believe that he could have stolen the automobile from a perfect stranger as a prank, and I note that he never testified that this was his motivation. If it truly was a prank, I question Mr. Poplack's judgment to practice law. I would suspend him for a minimum of ninety days.

SHAW, C.J., concurs.

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The Florida Bar v. Lord

Supreme Court of Florida. | June 9, 1983 | 433 So.2d 983

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West Headnotes (p.1)
Attorneys and Law Firms (p.2)
Opinion (p.2)
Concurring In Part / Dissenting In Part (p.4)
All Citations (p.5)

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433 So.2d 983
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
William A. LORD, Respondent.

No. 61649.
|
June 9, 1983.

Synopsis
Disciplinary proceeding was brought. The Supreme Court held that failure to file income tax returns for period of 22 years warrants six-month suspension.

Six-month suspension ordered.

Alderman, C.J., and McDonald, J., concurred in part, dissented in part, and filed opinions.

Ehrlich, J., concurred in part, dissented in part, and filed opinion with which McDonald, J., concurred.

West Headnotes (5)

[1] **Attorneys and Legal Services** ⇐ Definite Suspension

Where state bar recommended that attorney be suspended, at minimum, for three months and one day for misconduct, so as to preclude automatic reinstatement referee did not err in considering attorney's rehabilitation as one of ten factors in recommending appropriate discipline. West's F.S.A. Integration Rule, Art. 11, Rule 11.10(4).

2 Cases that cite this headnote

[2] **Attorneys and Legal Services** ⇐ Other factors

While personal difficulties should not be relied upon to excuse attorney's misconduct, referee should not be restrained from considering hardships in recommending discipline which would be fair to society and to attorney, in addition to being effective deterrent to others.

[3] **Attorneys and Legal Services** ⇐ Suspension

In determining appropriate discipline after attorney's misconduct, referee properly based his recommendation, in part, on attorney's personal difficulties by considering what effect attorney's misconduct had upon him as attorney, and what impact his further suspension would have upon his clients.

[4] **Attorneys and Legal Services** ⇐ Nature and purpose

Discipline for unethical conduct by member of bar must serve three purposes: first, judgment must be fair to society, both in terms of protecting public from unethical conduct and at same time not denying public services of qualified lawyer as result of undue harshness in imposing penalty; second, judgment must be fair to attorney, being sufficient to punish breach of ethics and at same time encourage reformation and rehabilitation; and third, judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

27 Cases that cite this headnote

[5] **Attorneys and Legal Services** ⇐ Criminal conduct

Failure to file income tax returns for period of 22 years warrants six-month suspension. West's F.S.A. Integration Rule, Art. 11, Rule 11.02(3)(a, b); West's F.S.A. Code of Prof.Resp., DR1–102(A)(3, 4, 6); 26 U.S.C.A. §§ 6012, 7203.

5 Cases that cite this headnote

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Attorneys and Law Firms

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William H. Pruitt of Pruitt & Pruitt, West Palm Beach, for respondent.

Opinion

PER CURIAM.

This attorney-discipline proceeding is before the Court on petition of The Florida Bar. Before us, we have the report of the referee and the petition of The Florida Bar for review thereof. We have jurisdiction. Art. V, § 15, Fla.Const.

From 1954 to 1976 respondent knowingly and willfully failed to file any income tax returns, although required to do so under Title 26, United States Code, section 6012 (1976). In 1980 respondent was charged with four misdemeanor counts of violating Title 26, United States Code, section 7203 (1976), by willfully failing to file income tax returns for the years of 1973 to and including 1976. He subsequently entered guilty pleas to all counts and was found to have failed to account for and pay taxes on approximately $545,000.00 in income during that period. The United States District Judge sentenced respondent to one-year imprisonment, to be suspended except for ninety days at a minimum security institution, and three years with the added obligation of performing four hundred hours of community service. He has completed his term of confinement and is presently continuing to perform his required period of community service.

The Florida Bar filed a formal complaint against respondent charging him with violations of article XI, Rule 11.02(3) (a) and (b), of the Integration Rule of The Florida Bar, and Disciplinary Rules 1–102(A)(3), (4), and (6) of the Code of Professional Responsibility of The Florida Bar. These charges all stem from respondent's failure to file federal income tax returns for the twenty-two year period from 1954 to 1976, inclusive. At the hearing held before the referee, respondent entered a guilty plea to the above charges. The findings and recommendations of the referee, as taken in pertinent part from the referee's report, provide as follows:

III. *Recommendations of the Referee as to Disciplinary Measures to be Applied:* I recommend that the Respondent be found guilty in accordance with his plea as set forth above and that he be suspended from the practice of law for the period of three months.

IV. *Findings and Basis for Recommendation of the Referee:*

In making the above recommendation, the Referee has concluded that the Respondent has been rehabilitated and that no further showing of rehabilitation is appropriate in this case inasmuch as the same would constitute a rerecitation of the evidence and testimony already received by the Referee.

In making the above recommendation, the Referee has further taken into consideration:

*985 A) The age of the Respondent, his years of service to his clients, his community, his Bar and his Country.

B) The testimony of leaders of the Palm Beach County Bar and members of the community with respect to the Respondent's rehabilitation.

C) That, notwithstanding the extreme seriousness of the charges, the plea was in fact to misdemeanors and that the Respondent has not pled to or been found guilty of a felony. Further, the United States Government, including the Honorable Susan H. Black, United States District Judge, were satisfied with a sentence of probation, including 81 days served in a minimum security facility.

D) The other personal hardships incurred by the Respondent, including his loss of standing as a leading member of the Palm Beach community, the loss of his position in an outstanding law firm, his loss of clients, his loss of professional esteem and the acute personal embarrassments and personal tragedies associated with the disclosures in this case.

E) The extent to which any further period of suspension would likely lead to the loss of all clients and law practice that might remain following the period of suspension, inasmuch as it is clear to this Referee that the Respondent would in any event be reinstated. In this respect the Referee has also taken into consideration that there will be money judgments obtained by the United States and that it will be

necessary for the Respondent to continue in the practice of law in order to satisfy the obligations of said judgments.

F) In making the above recommendation, the Court has also taken into consideration that there has been no argument presented to the Referee in support of the disbarment of the Respondent, so that the primary concern of this Referee, notwithstanding the fact that disbarment is an option available, is in fact the length of term of suspension.

G) That the aforesaid Honorable Susan H. Black stated in the record, at the time of sentencing, that the Court was of the opinion that the Respondent needs no further rehabilitation and that this was, and is, an isolated event in his life.

H) The Respondent's witnesses, all of whom were leaders and outstanding members of the Palm Beach area Bar, banking and business community, testified in support of the Respondent's good reputation in the community, notwithstanding the charges against him, as to his good character, and as to their belief that he has been rehabilitated.

I) That by the application of relative standards, the sentence recommended herein is adequate to address those interests of the Bar with respect to discipline unconnected with rehabilitation.

J) The unblemished record of the Respondent exclusive of these charges.

The Florida Bar challenges this referee report. Specifically, The Bar feels that the referee erred in basing his recommendations on the conclusion that respondent had been rehabilitated and on respondent's personal difficulties. Moreover, The Bar contends that the referee's proposed term of suspension is inappropriate considering the severity of the charges to which respondent has admitted guilt.

[1] First, we find that the referee did *not* err in considering Lord's rehabilitation in his report. The Bar erroneously contends that the referee's recommendation was based solely upon the belief that respondent had been rehabilitated. The referee's recommendation was, in fact, made after a thorough consideration of ten factors, among which rehabilitation was one.

In addition, rehabilitation became relevant to the proceeding when The Bar recommended, over Lord's objection, that respondent be suspended, at minimum, for three months and one day. Article XI, Rule 11.10(4), of the Integration Rule of The Florida Bar, provides in pertinent part:

> A suspension of three months or less shall not require proof of rehabilitation or satisfactory passage of The Florida Bar examination; *a suspension of more than three months shall require proof of rehabilitation;* no suspension shall be ordered ***986** for a specific period of time in excess of three years.

(Emphasis added). The significance of The Bar's recommended suspension of three months and one day is that respondent would be required to establish his rehabilitation before reinstatement. Conversely, if, as recommended by the referee, respondent is suspended for three months or less he would automatically be reinstated at the conclusion of his suspended term without further proof of rehabilitation. When The Bar's and referee's respective disciplinary proposals are juxtaposed, it is evident that rehabilitation is a major distinguishing factor for the referee to consider before recommending an appropriate discipline.

[2] **[3]** Equally without merit is The Bar's contention that the referee erred by basing, in part, his recommendation on respondent's personal difficulties. While personal difficulties should not be relied upon to excuse Lord's misconduct, the referee should not be restrained from considering hardships in recommending a discipline which would be fair to society and to respondent in addition to being an effective deterrent to others. *The Florida Bar v. Pahules,* 233 So.2d 130 (Fla.1970); *cf., The Florida Bar v. Weaver,* 356 So.2d 797 (Fla.1978); *The Florida Bar v. Thue,* 244 So.2d 424 (Fla.1971). Here the referee quite properly considered what effect Lord's misconduct had upon him as an attorney and what impact his further suspension would have upon society, namely respondent's clients.

Although the referee properly considered respondent's rehabilitation and personal difficulties in arriving at his

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recommendation, we cannot agree with his proposed three-month suspension. The complaint now brought against respondent reflects Lord's failure to file income tax returns for an extended period of twenty-two years. Respondent has pled guilty to violations of Florida Bar Integration Rule 11.02(3)(a) and (b) and Disciplinary Rules 1–102(A)(3), (4), and (6) of the Code of Professional Responsibility. The misconduct charged is not an isolated event, rather, it constitutes serious cumulative misconduct involving moral turpitude. *The Florida Bar v. Rubin,* 362 So.2d 12, 15 n. 11 (Fla.1978), *citing, State ex rel. The Florida Bar v. Murrell,* 74 So.2d 221 (Fla.1954); *The Florida Bar v. Baron,* 392 So.2d 1318 (Fla.1981); *The Florida Bar v. Vernell,* 374 So.2d 473 (Fla.1979). Moreover, the misconduct present here reflects a flagrant and deliberate disregard for the very laws which respondent took an oath to uphold.

[4] Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, *the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Thue,* 244 So.2d 424, 425 (Fla.1971), citing, *The Florida Bar v. Pahules,* 233 So.2d 130, 132 (Fla.1970). *See also, State ex rel. The Florida Bar v. Murrell,* 74 So.2d 221, 227 (Fla.1954) (emphasis added). We find that the recommended three-month suspension lacks the requisite severity to adequately deter others tempted to engage in similar violations.

[5] Accordingly, we find William A. Lord guilty in accordance with his plea and suspend him for a period of six months, the suspension effective July 11, 1983. We also assess the cost of this proceeding against respondent in the amount of $674.54.

It is so ordered.

ADKINS, BOYD, OVERTON and SHAW, JJ., concur.

ALDERMAN, C.J., and McDONALD, J., concur in part and dissent in part with opinions.

EHRLICH, J., concurs in part and dissents in part with an opinion with which McDONALD, J., concurs.

***987** ALDERMAN, Chief Justice, concurring in part, dissenting in part.

I agree with the majority that we approve the referee's recommendation that Lord be found guilty in accordance with his guilty plea. I also concur with its finding that the three-month suspension recommended by the referee lacks the requisite severity to adequately deter others tempted to engage in similar violations.

I do not concur, however, that a six-month suspension is sufficiently severe discipline for Lord's misconduct. Lord admitted that he failed to file income tax returns for more than twenty years. His misconduct does not consist of one isolated event, but rather, as the majority points out, consists of serious cumulative misconduct which involves moral turpitude and which reflects a flagrant and deliberate disregard for the laws which Lord took an oath to uphold.

Normally, this type of misconduct would warrant disbarment. But, in light of the many mitigating factors found by the referee, I would find that a three-year suspension is the appropriate discipline for Lord.

McDONALD, Justice, concurring in part and dissenting in part.

I concur with the opinion in everything except the punishment. Any lawyer who fails to file income tax returns for twenty years should be disbarred. From an ethical standpoint I see little difference in a lawyer converting a client's trust funds, for which we regularly disbar, from a lawyer converting the funds belonging to the United States in the form of a wilful failure to send them in when due. Lord's conduct was cumulative and gross and so far below what we expect of lawyers that he should forfeit the privilege of practicing law.

EHRLICH, Justice, concurring in part and dissenting in part.

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I concur with that portion of the opinion and decision relating to guilt, but I dissent as to the discipline imposed. I agree that the three-month suspension recommended by the referee is disproportionate to the gravity of the offense. I cannot agree that adding three more months cures that disproportion.

An attorney bears a special responsibility under the law. As expressed in the Preamble to the Code of Professional Responsibility:

> Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

Respondent knowingly and willfully failed to file income tax returns for more than two decades. He violated those very laws he has sworn to uphold and preserve. In so doing, he purloined from the United States government and ultimately all other United States citizens $412,220.82 in tax revenues over the twenty-two year period.

Our profession proscribes involvement in illegal conduct involving moral turpitude, dishonesty, fraud, deceit and misrepresentation. Fla.Bar Code Prof.Resp., D.R. 1–102. It ill behooves the legal profession to condone theft which takes the form of failure to pay a legal obligation to the government. By imposing a mere token sanction against such misconduct we fail to deter others who may be tempted to behave similarly; far worse, we diminish the credibility of the entire bar as a self-regulating profession, ever vigilant to insure strict compliance to the values embodied in the Code of Professional Responsibility.

The Florida Bar, the ever vigilant guardian of the Code of Professional Responsibility, recommends that respondent be suspended for a period of six months. I find it difficult to reconcile this recommendation with the position of the Bar in other matters involving the honesty of a lawyer. If respondent had taken or even "borrowed" from a trust account for a period of twenty-two years, I am certain that the Bar would be urging the ultimate in discipline, disbarment. To me this is symptomatic of an ***988** attitude that seemingly pervades our whole society. We as a people countenance and, at least tacitly, approve a double standard in our criminal justice system. If it be the Internal Revenue laws that are violated, our disapproval is muted and the punishment is token. I do not believe that this Court or the Bar can knowingly be a party to any such disparity in the enforcement of the Code of Professional Responsibility.

In light of the ongoing and flagrant disregard respondent has shown for the law, I would recommend he be disbarred from the practice of law.

McDONALD, J., concurs.

All Citations

433 So.2d 983

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State v. Kuntsman

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643 So.2d 1172, 19 Fla. L. Weekly D2161
District Court of Appeal of Florida,
Third District.

The STATE of Florida, Petitioner,

v.

Christopher KUNTSMAN, et al., Respondents.

No. 94-1269.
Oct. 12, 1994.

Order was entered by the Circuit Court of Dade County, Amy Steele Donner, J., compelling prosecution witnesses at deposition to view and respond to questions concerning photo array presented by the defense, and the state petitioned for writ of certiorari. The District Court of Appeal, Levy, J., held that the trial court was not authorized to compel the witnesses to view the photo array, absent strong or compelling reasons, which were not shown in the instant case.

Certiorari granted; order quashed.

West Headnotes (5)

[1] **Criminal Law** ⇐ Discretion in Ordering Disclosure

It is within sound discretion of trial judge to grant or limit criminal discovery. West's F.S.A. RCrP Rule 3.220.

3 Cases that cite this headnote

[2] **Criminal Law** ⇐ In General; Examination of Victim or Witness

Criminal discovery rule does not provide trial judge with authority to compel witness to submit to any type of involuntary physical examination. West's F.S.A. RCrP Rule 3.220.

4 Cases that cite this headnote

[3] **Criminal Law** ⇐ In General; Examination of Victim or Witness

Discovery rule did not authorize judge to compel prosecution witnesses to view photo array, containing photographs of four defendants and 34 other persons, absent showing by defendants that strong or compelling reason justified the order, and such strong or compelling reason was not provided by defendants' need to determine specific allegations made by the eyewitnesses against each of the defendants, who were similar in appearance, as that goal was achieved by the taking of the deposition itself. West's F.S.A. RCrP Rule 3.220.

10 Cases that cite this headnote

[4] **Criminal Law** ⇐ In General; Examination of Victim or Witness

Purpose of criminal discovery is to avail defense of evidence known to state so that convictions will not be obtained by suppression of evidence favorable to defendant, or by surprise tactics in courtroom, and criminal discovery rule is not intended to provide defendants with opportunity to build their cases during the discovery process by creating evidence, such as misidentifications. West's F.S.A. RCrP Rule 3.220.

3 Cases that cite this headnote

[5] **Constitutional Law** ⇐ Proceedings Concerning Disclosure

Defendant in criminal proceeding does not have due process right to take deposition of prosecution witnesses. U.S.C.A. Const.Amend. 14.

*1172 Robert A. Butterworth, Atty. Gen., and Joni Braunstein, Asst. Atty. Gen., for petitioner.

Scott Sakin; Max P. Engel; James H. Woodard, Miami, for respondents.

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Before SCHWARTZ, C.J., and NESBITT and LEVY, JJ.

LEVY, Judge.

We grant the State's Petition for Writ of Certiorari and quash the trial court's order compelling prosecution witnesses to view an array of photographs and then be questioned about those photographs during the course of criminal depositions.

The State filed an Information charging five defendants collectively, and as principals, with one count of armed robbery, two counts of burglary of a conveyance with assault, two counts of aggravated battery, and one count of criminal mischief. Attorneys for the defendants deposed one of the victims. Because four out of the five defendants had similar appearances, the victim distinguished them during the deposition based on their hair color and clothing. In an attempt to have the victim identify the criminal actions taken by each defendant, defense counsel requested the victim to view a photo array. This array consisted of thirty-eight black and ***1173** white photographs, and included only four photos of the defendants. The State objected to the use of the photo array, and the victim refused to view or answer questions concerning the array. Defense counsel then certified the question. Following a hearing, the trial judge entered an order requiring all of the prosecution witnesses to view and respond to questions concerning the photo array. The State now petitions this Court for a Writ of Certiorari to quash the trial court's order.

[1] **[2]** The criminal discovery process is governed by Florida Rule of Criminal Procedure 3.220. Furthermore, it is within the sound discretion of the trial judge to grant or limit criminal discovery. *Gray v. State,* 640 So.2d 186 (Fla. 1st DCA 1994); *Baker v. State,* 526 So.2d 202 (Fla. 4th DCA 1988). However, Rule 3.220 does not provide a trial judge with the authority to compel a witness to perform any type of involuntary physical examination. *State v. Smith,* 260 So.2d 489, 490 (Fla.1972) (quashing a trial court order compelling prosecution witnesses to submit to an optical examination to test their visual acuity). In *Smith,* the Supreme Court noted that only in "rare instance[s]" would a trial court have the authority to order an involuntary examination of a witness. *Smith,* 260 So.2d at 490 (finding the defendant's claim that the State's case primarily depended upon the identification of the defendants by eyewitnesses insufficient to warrant an involuntary eye examination). Subsequent to the Supreme Court's decision in *Smith,* the District Courts have recognized a trial court's authority to order an involuntary examination of a prosecution witness, but have limited the exercise of that authority to situations where strong and compelling reasons exist. *See State v. Camejo,* 641 So.2d 109 (Fla. 5th DCA 1994) (quashing the trial court's order compelling the victim of a sexual battery to undergo psychological evaluation by a psychiatrist), *question certified on reh'g,* 641 So.2d 109 (Fla. 5th DCA 1994); *Bartlett v. Hamwi,* 626 So.2d 1040 (Fla. 4th DCA 1993) (denying defendant's request for hair samples from a prosecution witness); *State v. LeBlanc,* 558 So.2d 507 (Fla. 3d DCA 1990) (holding that a trial court must not subject a victim to an involuntary psychological examination absent strong and compelling evidence of a victim's veracity, or mental or emotional instability); *State v. Diamond,* 553 So.2d 1185 (Fla. 1st DCA 1988) (quashing a trial court's order requiring a child witness to submit to a gynecological examination by the defendant's expert gynecologist); *State v. Coe,* 521 So.2d 373 (Fla. 2d DCA 1988) (holding that the trial court could not compel a victim to undergo a psychiatric examination based merely on the allegations that the victim could not appreciate the duty to tell the truth, might have suffered from psychological problems, or might have suffered from alcoholism).

[3] We recognize that the case before us, unlike many of the foregoing cases, does not involve the type of physical examination that implicates an individual's privacy right to be free from bodily intrusion. Nevertheless, the same rationale that applies to the involuntary physical examination cases has also been applied to cases where the trial court has ordered a victim to appear and participate at a live line-up. *See State v. Ray,* 604 So.2d 1249 (Fla. 4th DCA) (analogizing a trial court's order which requires the victim of an armed robbery to appear at a live line-up to cases involving involuntary physical examinations), *rev. denied,* 613 So.2d 8 (Fla.1992); *see also State v. Cobb,* 619 So.2d 1056 (Fla. 5th DCA 1993) (quashing a trial court's order compelling a prosecution eyewitness to attend a pre-trial line-up) (*citing Ray,* 604 So.2d at 1249). In *Ray,* the Fourth District reasoned that a criminal defendant's right to discovery and confrontation does not entitle the defendant to compel a prosecution witness to

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undergo an involuntary examination of any sort, absent a showing that strong or compelling reasons exist to warrant such a remedy. *Ray,* 604 So.2d at 1250. Consequently, we hold that the trial judge in the instant case was not authorized to compel the prosecution witnesses to view the photo array, absent a showing by the defendants that strong or compelling reasons justified the order.

The defendants herein did not demonstrate any strong or compelling circumstances which would justify the trial court's discovery order. The main reason asserted by the ***1174** defendants in support of the order was their need to determine the specific allegations made by the prosecution's eyewitnesses against each defendant. That goal is achieved, however, by the taking of the deposition itself. Therefore, because the defendants did not present the trial court with a strong or compelling reason, the trial judge erred in ordering the prosecution witnesses to view the photo array.

[4] The trial court's order also contravenes the purpose and intent of the criminal discovery rules. The purpose of criminal discovery is "to avail the defense of evidence known to the state so that convictions [will] not be obtained by the suppression of evidence favorable to a defendant, or by surprise tactics in the courtroom." *Cooper v. State,* 336 So.2d 1133, 1138 (Fla.1976), *cert. denied,* 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). *See also* *State v. Tascarella,* 580 So.2d 154, 156 (Fla.1991); *James v. State,* 453 So.2d 786, 789 (Fla.), *cert. denied,* 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984). Thus, Rule 3.220 is not intended to provide defendants with an opportunity to build their cases during the discovery process by "creating" evidence, i.e. misidentifications. If the defendants in the instant case were only seeking to discover the extent of each defendant's involvement in the criminal incident, they would have exclusively formulated their questions solely around photographs of the defendants. Instead, they compiled a photo array containing thirty-eight black and white photographs, and including only four photos of the defendants. Surely, the defendants could have discovered the information they sought by conducting a proper deposition under the rules.

[5] Finally, the defendants attempt to elevate their argument to one of constitutional proportions by asserting that their "due process rights" will be violated if the trial court's order is quashed. That argument clearly lacks merit. First, a defendant in a criminal proceeding has no constitutional right to take a deposition of any of the prosecution's witnesses. *Weatherford v. Bursey,* 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *United States v. LaRouche,* 896 F.2d 815, 825 (4th Cir.1990), *cert. denied,* 496 U.S. 927, 110 S.Ct. 2621, 110 L.Ed.2d 642 (1990); *Lindsey v. Smith,* 820 F.2d 1137, 1151 (11th Cir.1987), *cert. denied,* 489 U.S. 1059, 109 S.Ct. 1327, 103 L.Ed.2d 595 (1989); *United States v. Desantis,* 802 F.Supp. 794, 798 (E.D.N.Y.1992); *State v. Flood,* 257 S.C. 141, 184 S.E.2d 549, 551-52 (1971); *Bartlett,* 626 So.2d at 1042. Furthermore, unlike Florida and a very few other States, the vast majority of the States in this country, as well as the federal courts themselves, do not permit prosecution witnesses to be deposed by defendants. [1]

Consequently, for the foregoing reasons, we hold that the trial court departed from the essential requirements of the law by ordering the prosecution witnesses to view the photo array. We therefore grant the State's Petition for Certiorari and quash the trial court's order.

Certiorari granted; order quashed.

Footnotes

1 *See* John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?,* 16 Fla.St.U.L.Rev. 675, 675 (1988) (stating that the only states which provide for criminal depositions are: Florida, New Hampshire, North Dakota, Vermont, and Texas).

State v. Kuntsman, 643 So.2d 1172 (1994)

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State v. McWilliams

District Court of Appeal of Florida, Third District. | June 5, 2002 | 817 So.2d 1036 | 2002 WL 1174297

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West Headnotes (p.1)
Attorneys and Law Firms (p.1)
ON REHEARING DENIED (p.1)
All Citations (p.2)

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817 So.2d 1036
District Court of Appeal of Florida,
Third District.

The STATE of Florida, Petitioner,
v.
John R. McWILLIAMS and Darrell Even McWilliams, Respondents.

No. 3D02–150.
|
June 5, 2002.

Synopsis

Defendants filed a motion for an order permitting them to use the police photo line-ups in depositions of all state witnesses who made an out-of-court identifications of them. The Circuit Court, Miami-Dade County, Dennis J. Murphy, J., granted the motion. State appealed. The District Court of Appeal, Fletcher, J., held that order allowing defense counsel to use photo line-ups prepared by police when conducting depositions of the State's witnesses was not improper.

Rehearing denied.

Procedural Posture(s): On Appeal.

West Headnotes (1)

[1] Criminal Law ⇐ Depositions

Trial court's order, allowing defense counsel to use the photo line-ups prepared by police when conducting depositions of the State's witnesses, was not improper; the purpose of the use of the photo line-ups at the depositions was not to create evidence, but rather to question the identifying witnesses about the actual photo line-up procedure, and to inquire about the identifications that were made, and although defense counsel was free to question witnesses about the line-up they viewed, counsel was not free to conduct a new identification proceeding.

1 Cases that cite this headnote

Attorneys and Law Firms

***1036** Robert A. Butterworth, Attorney General, and Frank J. Ingrassia, Assistant Attorney General, for petitioner.

Kenneth White, Miami, for respondent, John R. McWilliams.

David Michael Tarlow, Miami, for respondent, Darrell Even McWilliams.

Before JORGENSON, GODERICH, and FLETCHER, JJ.

ON REHEARING DENIED

FLETCHER, Judge.

The State has moved for a rehearing of the order denying its petition for writ of certiorari. For the following reasons we deny the State's rehearing motion.

During the police investigation herein two separate photographic line-ups were created by the police. One line-up contained a photograph of defendant John McWilliams, the other line-up contained a photograph of defendant Darrell McWilliams. During the deposition of a state-listed witness, counsel for the defendants attempted to use these police photo line-ups in the questioning of the deponent. The State objected and refused to allow the deponent to answer. The defense moved the trial court for an order permitting them to use the police photo line-ups in depositions of all state witnesses who made an (alleged) out-of-court identification of the defendants. The trial court ruled that the defendants could use the police photo line-ups in the depositions of those state witnesses who identified either defendant from them.

It is this ruling that the State has sought to quash, taking the position that this court's decision in *State v. Kuntsman,* 643 So.2d 1172 (Fla. 3d DCA 1994) requires quashal of the trial court's ruling. *Kuntsman,* however, dealt with an entirely different situation wherein the defense put ***1037** together its own photo "line-up" which contained thirty-eight black and white photographs, four of which were of the *Kuntsman*

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defendants. At deposition the State objected to the use of the photo array and the deponent refused to view or answer questions regarding it. At the defense's request, the trial court ordered all prosecution witnesses to view and respond to questions concerning the private photo array. On review this court concluded that the trial judge "was not authorized to compel the prosecution witnesses to view the [defense-made] photo array, absent a showing by the defendants that strong or compelling reasons justified the order" (*Kuntsman* at 1173), and further concluded that no such showing had been made. Most important, this court determined that the trial court's order improperly allowed the defendants an opportunity to build their cases during the discovery process by "creating" evidence (misidentifications). Such is contrary to the purpose of the criminal discovery process which is to avail the defense of evidence known to the State so that convictions will not be obtained by the suppression of evidence favorable to the defense or by surprise tactics in the courtroom.

Unlike *Kuntsman,* the instant case involved the actual police photo line-ups, not photo arrays prepared by the defense. The purpose herein of the use of the photo line-ups at deposition is not to create evidence. Rather it is to question the identifying witnesses about the actual photo line-up procedure, and to inquire about the identifications that were made—all perfectly routine and all consistent with *Kuntsman.* [1]

Rehearing denied.

All Citations

817 So.2d 1036, 27 Fla. L. Weekly D1312

Footnotes

1 We note that although defense counsel is free to question witnesses about the photographic line-up they viewed, he is not free to present the witness with the photo line-up and conduct a new identification proceeding. Accordingly, if the witness is handed the photographic line-up and asked which photograph he or she selected, the witness is free to review the exhibit in its entirety, including the reverse side of the individual photographs, to determine which photograph he or she initially selected.

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The Florida Bar v. Rosenberg

Supreme Court of Florida. | May 28, 2015 | 169 So.3d 1155 | 2015 WL 2458013

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West Headnotes (p.1)
Attorneys and Law Firms (p.)
Opinion (p.)
All Citations (p.)

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169 So.3d 1155, 40 Fla. L. Weekly S306
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Erwin ROSENBERG, Respondent.

No. SC13–2067.
May 28, 2015.
Rehearing Denied July 7, 2015.

Background: State bar brought disciplinary proceedings against attorney. Referee granted summary judgment in favor of state bar and recommended 91-day suspension.

Holdings: The Supreme Court held that:

[1] attorney violated rules, and

[2] one-year suspension was warranted.

Suspension ordered.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (8)

[1] **Attorneys and Legal Services** ⇐ Conduct as to Courts and Administration of Justice in General

Attorneys and Legal Services ⇐ Competence and professional judgment in general

Attorney's conduct while representing defendants in civil action, failing for over a year to respond to plaintiffs' request for production, failing to comply with several court orders directing him and clients to produce requested documents, resulting in attorney being sanctioned for bad faith conduct and required to pay attorney fees, and subsequently failing to comply with sanctions order, violated rules requiring attorney to provide competent representation, prohibiting attorney from intentionally failing to comply with a discovery request, and prohibiting conduct that is prejudicial to administration of justice. West's F.S.A. Bar Rules 4–1.1, 4–3.4(d), 4–8.4(d).

1 Cases that cite this headnote

[2] **Attorneys and Legal Services** ⇐ On motion or summary proceeding

The referee in an attorney disciplinary case has authority to enter summary judgment on the same basis as in a civil case, when, as a matter of law, it is apparent from the pleadings and other evidence that there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law.

[3] **Attorneys and Legal Services** ⇐ De novo review in general

Attorneys and Legal Services ⇐ Presumptions and Burden of Showing Error

In an attorney discipline case, on review of a referee's report based on a summary judgment, the standard of review is de novo, with all facts and inferences viewed in favor of the party against whom the summary judgment has been entered.

1 Cases that cite this headnote

[4] **Attorneys and Legal Services** ⇐ Evidence, verdict, and findings

The party seeking review of a referee's report based on a summary judgment in an attorney discipline case must point to some disputed issue of fact material to the referee's conclusions.

[5] **Attorneys and Legal Services** ⇐ Definite Suspension

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One-year suspension was warranted sanction for attorney whose conduct while representing defendants in civil action, failing for over a year to respond to plaintiffs' request for production, failing to comply with several court orders directing him and clients to produce requested documents, resulting in attorney being sanctioned for bad faith conduct and required to pay attorney fees, and subsequently failing to comply with sanctions order, violated rules requiring attorney to provide competent representation, prohibiting attorney from intentionally failing to complying with a discovery request, and prohibiting conduct that is prejudicial to administration of justice. West's F.S.A. Bar Rules 4–1.1, 4–3.4, 4–8.4(d).

2 Cases that cite this headnote

[6] **Attorneys and Legal Services** ⇐ Power and discretion to determine sanction

Attorneys and Legal Services ⇐ Disposition and punishment; sanctions

In reviewing a referee's recommended discipline for attorney misconduct, the Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction.

6 Cases that cite this headnote

[7] **Attorneys and Legal Services** ⇐ Power and discretion to determine sanction

Attorneys and Legal Services ⇐ Disposition and punishment; sanctions

Generally speaking, the Supreme Court will not second-guess a referee's recommended discipline for attorney misconduct as long as it has a reasonable basis in existing case law and the standards for imposing lawyer sanctions.

5 Cases that cite this headnote

[8] **Attorneys and Legal Services** ⇐ Aggravating factors

Aggravating factors to be considered in determining sanction for attorney who failed to respond to discovery requests, failed to comply with court orders requiring production of documents, and failed to comply with resulting order sanctioning him for bad faith conduct, were that attorney engaged in multiple offenses and multiple instances of the same offense, refused to acknowledge the wrongful nature of his misconduct, had substantial experience in the practice of law and failed to pay any portion of the attorney fee award imposed against him.

3 Cases that cite this headnote

***1156** John F. Harkness, Jr., Executive Director and Adria E. Quintela, Staff Counsel, The Florida Bar, Tallahassee, FL, and Tonya LaShun Avery, Bar Counsel, The Florida Bar, Miami, FL, for Complainant.

Erwin Rosenberg, Miami Beach, FL, pro se.

PER CURIAM.

We have for review a referee's report recommending that Respondent Erwin Rosenberg be found guilty of professional misconduct in violation of the Rules Regulating the Florida Bar (Bar Rules), and suspended from the practice of law for ninety-one days. We have jurisdiction. *See* art. V, § 15, Fla. Const. As discussed in this opinion, we approve the referee's findings of fact and recommendations as to guilt. We disapprove the referee's recommended sanction, and conclude instead that a one-year suspension is appropriate.

FACTS

In October 2013, The Florida Bar (Bar) filed a complaint against Respondent Rosenberg, alleging that he engaged in misconduct in violation of the Bar Rules. A referee was appointed to consider the matter. In the proceedings before the referee, Rosenberg filed a Motion for Summary Judgment. The Bar filed a response in opposition to Rosenberg's motion, as well as a cross-motion for summary judgment. After considering these filings, the referee entered

an "Order Denying Respondent's Motion for Summary Judgment and Granting Complainant's Cross–Motion for Summary Judgment." In the order, the referee found that the facts as alleged by the Bar were undisputed, that Rosenberg failed to present any evidence to show material facts in dispute, and that Rosenberg's legal arguments were without merit. The referee has submitted his report for the Court's review (based on his order granting summary judgment), in which he made the following findings and recommendations.

In 2006, Rosenberg was hired to represent several businesses (the clients) that were being sued in the circuit court in Miami–Dade County for breach of contract; he entered appearances on behalf of the clients in March and April 2006. Prior to Rosenberg's appearance in the case, in December 2005, counsel for the plaintiffs had served on the clients a request for production, requesting that they produce a number of documents. When the clients did not comply, on March 1, 2006, the circuit court judge entered an order granting the plaintiffs' motion to compel production and ordering the clients to produce the requested documents within twenty days. The clients also did not comply with *1157 this order. The plaintiffs then filed a motion for contempt and sanctions. In April 2006, the circuit court judge granted the motion as to sanctions but denied the motion as to contempt, and ordered the clients to produce the documents within five days.

In September 2006, the case against the clients was transferred to the circuit court in Palm Beach County, before Judge Jonathan Gerber. At that time, the clients still had not complied with the plaintiffs' December 2005 request for production. In March 2007, the plaintiffs filed a motion to compel production, for contempt, and for sanctions. Judge Gerber held a hearing on the motion in April 2007. Rosenberg appeared at the hearing and objected to the plaintiffs' request for production on the grounds that the documents sought were not reasonably calculated to lead to admissible evidence. Judge Gerber overruled the objection, granted the plaintiffs' motion to compel, and ordered the clients to produce the requested documents within fifteen days. Thereafter, on May 2, 2007, Rosenberg filed a motion for rehearing, a motion for a protective order, a request for an in camera inspection, and a stay for appellate certiorari review. In these motions, Rosenberg asserted that the documents sought by the plaintiffs contained trade secrets or confidential business information, and that disclosure of the documents would harm his clients. On May 29, Judge Gerber held a hearing; the judge ultimately denied the motions and overruled Rosenberg's trade secrets and confidentiality objections. Judge Gerber held that, because Rosenberg had not raised these arguments in the more than one year that he represented the clients, the objections were waived.

In June 2007, the plaintiffs filed what was their fifth motion to compel production of documents, as well as a motion for contempt and sanctions. Judge Gerber held a hearing on this motion. At the hearing, Rosenberg maintained that he had produced some documents partially responsive to the plaintiffs' request, and that he had provided all of the documents given to him by the clients. In response, the plaintiffs argued that the documents were duplicates of ones already produced, that the documents were not provided in any particular order, and that Rosenberg had not served a written response to the request to produce, as required by Florida Rule of Civil Procedure 1.350. Judge Gerber granted the plaintiffs' motion and ordered Rosenberg and the clients to produce the requested documents within eight days; the judge also granted the plaintiffs' request for sanctions and warned Rosenberg and the clients that if they did not comply, he would consider striking their pleadings.

After the circuit court issued its order, Rosenberg filed a written response to the plaintiffs' request for production on June 28, 2007. In the response, Rosenberg again objected to production on the grounds that the plaintiffs' requests were overbroad and burdensome, and that the documents requested would violate his clients' trade secret and business confidentiality privileges. The plaintiffs then filed their sixth motion to compel, for contempt, and sanctions. On July 24, 2007, Judge Gerber held a hearing and granted the motion. The judge further ordered that an evidentiary hearing be held on an order to show cause why Rosenberg should not be sanctioned for bad faith conduct.

Rosenberg withdrew as counsel for the clients on July 30, 2007. On August 7, 2007, the circuit court entered an order setting a hearing on the show cause order for August 24. Rosenberg filed a motion to dismiss the order to show cause, alleging that the court failed to provide sufficient *1158 notice or opportunity to be heard; Judge Gerber denied this motion.

At the show cause hearing on August 24, 2007, Rosenberg declined to testify on his own behalf. He was, however, called

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as an adverse witness by counsel for the plaintiffs. Following the hearing, on September 14, 2007, Judge Gerber entered a written "Order Imposing Attorney's Fees for Bad Faith Conduct." In this order, Judge Gerber found that Rosenberg acted in bad faith:

> The most egregious bad faith action which Mr. Rosenberg committed was re-stating in his June 28 written response the same objections which this Court already had overruled, without Mr. Rosenberg taking any further action to comply with Plaintiffs' requests for production or with this Court's orders. Mr. Rosenberg's explanation that he interpreted rule 1.350 as saying that he merely should repeat the overruled objections "as a zealous advocate" ... simply defies common sense. Such flouting of this Court's orders is the very definition of bad faith conduct. This Court finds Mr. Rosenberg to be an intelligent person, and this Court does not believe that the gravity of his repeated misconduct can be accepted as merely an error in judgment or ignorance of the rules.

Accordingly, Judge Gerber held that the plaintiffs were entitled to recover from Rosenberg their attorney's fees relating to all motions to compel filed after Rosenberg entered his appearance in the case. The Fourth District Court of Appeal affirmed the circuit court's order in January 2009. *See Rosenberg v. Gaballa,* 1 So.3d 1149 (Fla. 4th DCA 2009). The referee in this case found that Rosenberg still has not paid any portion of the attorney's fee award.

Based on these facts, the referee recommends that Rosenberg be found in violation of the following Bar Rules: 4–1.1 (a lawyer shall provide competent representation to a client); 4–3.4(d) (a lawyer must not in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party); and 4–8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice).

The referee found four aggravating factors in this case: Rosenberg engaged in multiple offenses, and multiple instances of the same offense; he has refused to acknowledge the wrongful nature of his misconduct; he has substantial experience in the practice of law; and he has failed to pay any portion of the attorney's fee award imposed against him. The referee also considered two mitigating factors: Rosenberg has no prior disciplinary history; and he has already received a monetary sanction imposed by the circuit court for his bad faith conduct.

In making a recommendation as to the sanction, the referee noted:

> The Referee has strong doubts about the Respondent's fitness to practice law. It is obvious Respondent possesses above-average intelligence. It appears, however, that he lacks either the common sense or the intellectual honesty to distinguish appropriate and rational arguments from inappropriate and irrational arguments. The ability to read precedent, while a necessary condition for practicing law, is not sufficient. A lawyer must be able to apply legal principles correctly and honestly. There are times when a lawyer must yield to the facts, precedent, or court orders. Respondent appears incapable of discerning when to yield a legally unsupportable position.

Although the report indicates the referee believed a lengthier suspension was warranted, ***1159** based on the Florida Standards for Imposing Lawyer Sanctions and case law he recommends that Rosenberg be suspended from the practice of law for ninety-one days. Additionally, the referee recommends that Rosenberg not be reinstated to practice until

he can demonstrate rehabilitation by addressing "whatever underlying psychological or emotional issues may exist which appear to interfere with his ability to objectively evaluate facts, precedents, and court orders," and until he has paid the sanctions imposed in Judge Gerber's September 2007 order.

Before this Court, Rosenberg seeks review of the referee's order granting summary judgment in favor of the Bar, [1] as well as the referee's findings of fact and recommendations as to guilt. The Bar has filed a cross-notice of review, challenging the referee's recommended sanction. The Bar urges the Court to disapprove the referee's recommendation for a ninety-one day suspension and instead suspend Rosenberg from the practice of law for one year.

ANALYSIS

[1] [2] [3] [4] We first address Rosenberg's argument that the referee improperly granted the Bar's motion for summary judgment. The referee in a disciplinary case has authority to enter summary judgment on the same basis as in a civil case—when, as a matter of law, it is apparent from the pleadings and other evidence that there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law. *See Fla. Bar v. Greene,* 926 So.2d 1195, 1200 (Fla.2006); *Fla. Bar v. Daniel,* 626 So.2d 178, 182 (Fla.1993). On review of a referee's report based on a summary judgment, the standard of review is de novo, with all facts and inferences viewed in favor of the party against whom the summary judgment has been entered. *See Fla. Bar v. Cosnow,* 797 So.2d 1255, 1258 (Fla.2001). The party seeking review must point to some disputed issue of fact material to the referee's conclusions. *Id.*

In this case, the referee's order granting summary judgment, and the findings of fact contained in the Report of Referee, are largely based on Judge Gerber's September 2007 Order Imposing Attorney's Fees for Bad Faith Conduct. This Court has held that the referee in a disciplinary proceeding may consider judgments entered in other tribunals, and may properly rely on such judgments to support his or her findings of fact. *See Fla. Bar v. Gwynn,* 94 So.3d 425, 430 (Fla.2012). Here, the facts are essentially undisputed. Counsel for the plaintiffs filed a request for production in December 2005. In the more than a year that passed between Rosenberg's appearance in the case in March and April 2006, and when he withdrew as counsel for the clients in July 2007, Rosenberg did not fully comply with the plaintiffs' requests. He also did not comply with the several circuit court orders directing him (and the clients) to produce the documents requested. Ultimately, in September 2007, Judge Gerber entered an order sanctioning Rosenberg for bad faith conduct, and ordered him to pay the plaintiffs' attorney's fees. To date, Rosenberg has not complied with this order.

***1160** Rosenberg does not dispute that these events occurred. Rather, he contends that the referee erred in granting the Bar's motion for summary judgment because the referee failed to consider other material facts in dispute. He asserts that the orders to compel production entered in the circuit court in Miami–Dade County were non-final because the judge in that circuit never ruled on Rosenberg's motion for rehearing and, moreover, that those orders were unenforceable because Miami–Dade County was not the proper venue for the breach of contract action. Rosenberg also maintains that the clients produced some of the documents requested by the plaintiffs, and they timely objected to producing other documents on the grounds that the information sought was not reasonably calculated to lead to the discovery of admissible evidence; when Judge Gerber overruled these "scope of discovery" objections, Rosenberg argues that he then properly raised an objection based on trade secret and business confidentiality privileges. We note that Rosenberg has not cited any legal authority for his assertion that the Miami–Dade judge's orders to compel were unenforceable after the case was transferred to Palm Beach County.

But in any event, Rosenberg's arguments in this regard do not demonstrate that the referee erred in granting summary judgment. Rather, Rosenberg seeks to relitigate Judge Gerber's findings and conclusions as to his bad faith conduct in the civil litigation. Such arguments are not proper in this disciplinary case. The issue here is not whether Rosenberg properly raised certain objections to the plaintiffs' motions to compel production; however, he may not repeatedly continue to raise those same objections after they have already been considered and ruled upon, and he may not refuse to comply with the numerous orders to compel entered by the circuit courts in both Miami–Dade County and Palm Beach County.

Rosenberg also argues that the referee, in granting summary judgment, failed to consider that Judge Gerber was biased against him. Rosenberg suggests that Judge Gerber's bias is evidenced by the fact that, at the hearing on the order to show cause why Rosenberg should not be sanctioned, Rosenberg was denied a meaningful opportunity to refute the accusations of bad faith conduct, and in particular he was not permitted to cross-examine Judge Gerber. However, the undisputed facts show that Rosenberg was given notice of the show cause hearing, he was offered an opportunity to present evidence on his own behalf, and he chose not to testify.

Accordingly, we conclude that the referee fully considered the undisputed facts in this case, and we agree that Rosenberg failed to demonstrate material facts in dispute. We approve the referee's order granting summary judgment in favor the Bar, as well as the referee's findings of fact.

Turning to the referee's recommendations as to guilt, we conclude that the undisputed facts amply support the referee's recommendation that Rosenberg be found guilty of violating Bar Rules 4–1.1, 4–3.4(d), and 4–8.4(d). *See Fla. Bar v. Shoureas,* 913 So.2d 554, 557–58 (Fla.2005) (stating that "the referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt."). Indeed, given the undisputed facts, it is clear that Rosenberg failed to act competently on behalf of his clients, in violation of Bar Rule 4–1.1, when he failed to seek documents from his clients after multiple circuit court orders compelling production of the documents; when he testified at the show cause hearing before ***1161** Judge Gerber that he believed he had complied with the orders to compel production by simply providing the few documents his clients had given him, without reviewing those documents; when he did not timely file a written response to discovery, as required by the Rules of Civil Procedure; and when he continued to raise objections that the circuit court had already considered and overruled. We agree with the referee that Rosenberg's conduct displayed "a lack of knowledge, thoroughness, and preparation in his representation." Additionally, the facts as found by the referee demonstrate that Rosenberg repeatedly failed to comply with numerous circuit court orders compelling production, in violation of Bar Rule 4–3.4(d). And his failure to comply with these orders was detrimental to the administration of justice, in violation of Bar Rule 4–8.4(d).

Rosenberg urges the Court to disapprove the referee's recommendations as to guilt on the same grounds that he opposes the referee's order granting summary judgment. He also argues that Judge Gerber lacked authority to enter the Order Imposing Attorney's Fees for Bad Faith Conduct because this Court has exclusive jurisdiction to sanction lawyers for misconduct. Rosenberg's argument is unfounded. In *Moakley v. Smallwood,* 826 So.2d 221, 226–27 (Fla.2002), this Court held that the trial courts possess inherent authority to impose attorneys' fees against an attorney for "bad faith conduct." Finally, Rosenberg challenges the referee's recommendations as to guilt because he contends that Bar Rules 4–1.1, 4–3.4, and 4–8.4(d) are unconstitutionally vague in violation of due process. However, the Rules of Professional Conduct have consistently been upheld against vagueness and due process challenges. *See, e.g., Fla. Bar v. Von Zamft,* 814 So.2d 385, 388 n. 1 (Fla.2002) (stating with respect to the respondent's argument that Bar Rule 4–8.4(d) is unconstitutionally vague: "We reject this claim as being without merit.").

Because Rosenberg has failed to show that the referee's recommendations as to guilt are unsupported, we approve those recommendations and find Rosenberg guilty of violating Bar Rules 4–1.1, 4–3.4(d), and 4–8.4(d).

[5] **[6]** **[7]** Next, we address the referee's recommended discipline, a ninety-one day suspension. In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson,* 538 So.2d 852, 854 (Fla.1989); *see also* art. V, § 15, Fla. Const. However, generally speaking this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer,* 753 So.2d 555, 558 (Fla.1999).

The referee concluded that Rosenberg's actions warranted a suspension from the practice of law; we agree. *See* Fla. Stds. Imposing Law. Sancs. 4.52 ("Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence, and causes injury or potential injury to a client"); 6.22 ("Suspension is appropriate when a lawyer knowingly violates a court order or rule,

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and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding"); 7.2 ("Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system"). However, we find that Rosenberg's ***1162** repeated failures to comply with court orders and his bad faith conduct, together with the aggravating factors found by the referee, warrant a suspension longer than ninety-one days. We conclude that a one-year suspension is appropriate.

The referee relied on *Florida Bar v. Bloom,* 632 So.2d 1016 (Fla.1994), as the basis for his recommended discipline. In that case, Bloom was named as the defendant in a lawsuit, resulting from his neglect and mismanagement of a real estate matter. Bloom failed to timely answer interrogatories in the case, attend hearings, and pay costs imposed against him based on his failure to answer the interrogatories. *Id.* at 1017. When Bloom did not answer the trial court's order to show cause, the court entered an order imposing sanctions in the amount of $16,296. *Id.* Bloom then failed to answer interrogatories or attend depositions set in aid of execution of the judgment. Consequently, the trial court entered an order finding Bloom in indirect criminal contempt. On review, the Court found Bloom guilty of violating Bar Rules 4–3.4(d) and 4–8.4(d). *Id.* It held that Bloom's "flagrant disregard for the judicial process" warranted a ninety-one day suspension. *Id.*

In the present case, the referee stated he believed Rosenberg's actions warranted a lengthier suspension. Nonetheless, the referee felt constrained by *Bloom* to recommend that Rosenberg be suspended for only ninety-one days. Although Rosenberg's misconduct is similar to that in *Bloom,* the case is distinguishable. For more than a year, Rosenberg refused to comply with numerous circuit orders requiring him to produce documents. He also continued to raise objections to production that had already been considered and ruled on by the circuit court. Both Judge Gerber and the referee noted concerns as to Rosenberg's fitness to practice.

[8] We must also consider the referee's findings in aggravation. The referee found four aggravating factors: Rosenberg engaged in multiple offenses, and multiple instances of the same offense; he has refused to acknowledge the wrongful nature of his misconduct; he has substantial experience in the practice of law; and he has failed to pay any portion of the attorney's fee award imposed against him in 2007. It is particularly significant that Rosenberg has refused to accept the wrongful nature of his misconduct. Rather, he continues to attempt to relitigate Judge Gerber's order imposing sanctions. He has not paid any portion of the sanction entered against him, even though Judge Gerber's order was affirmed on appeal in 2009. Moreover, Rosenberg has continued his abusive litigation practices before both the referee and this Court; he has filed numerous motions, many of which are procedurally improper and without merit.

Finally, as the Bar has pointed out, since the decision in *Bloom,* the Court has moved toward imposing stronger sanctions for unethical and unprofessional conduct. *See Fla. Bar v. Adler,* 126 So.3d 244, 247 (Fla.2013) (noting that "this Court has moved towards stronger sanctions for attorney misconduct"); *Fla. Bar v. Rotstein,* 835 So.2d 241, 246 (Fla.2002) (noting that many of the cases cited by the respondent were inapplicable "because the cited cases are dated and do not reflect the evolving views of this Court" and that "[i]n recent years, this Court has moved towards stronger sanctions for attorney misconduct"). Thus, we conclude that the referee's recommendation for a ninety-one day suspension is not appropriate. We find instead that a one-year suspension is warranted.

CONCLUSION

Accordingly, Respondent Erwin Rosenberg is hereby suspended from the practice of law for one year. Additionally, he ***1163** shall not be reinstated to the practice of law until he complies with the terms and conditions set forth in the Report of Referee. The suspension will be effective thirty days from the date of this opinion so that Rosenberg can close out his practice and protect the interests of existing clients. If Rosenberg notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Rosenberg shall fully comply with Rule Regulating the Florida Bar 3–5.1(h). Further, Rosenberg shall accept no new business from the date this opinion is filed until he is reinstated.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399–2300, for recovery of costs

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from Erwin Rosenberg in the amount of $3,243.39, for which sum let execution issue.

It is so ordered.

LABARGA, C.J., and PARIENTE, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

LEWIS, J., concurs in result.

Footnotes

1 Rosenberg also challenges the referee's April 4, 2014, "Order Denying Respondent's Motion for Rehearing." In that order, the referee denied Rosenberg's motion for rehearing of an order denying his third motion for disqualification. We have fully considered Rosenberg's arguments as to this issue, and we approve the referee's order on rehearing without further discussion.

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The Florida Bar v. Fortunato

Supreme Court of Florida. | March 22, 2001 | 788 So.2d 201 | 2001 WL 278096

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West Headnotes (p.1)
Attorneys and Law Firms (p.1)
Opinion (p.1)
All Citations (p.3)

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KeyCite Yellow Flag - Negative Treatment
Distinguished by The Florida Bar v. Head, Fla., March 15, 2012

788 So.2d 201
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Melody Ridgley FORTUNATO, Respondent.

No. SC96979.
|
March 22, 2001.
|
Rehearing Denied June 14, 2001.

Synopsis

Attorney disciplinary proceedings were instituted. The Supreme Court held that failing to respond to two related appellate court orders, resulting in dismissal of client's appeal and in issuance of third appellate court order sanctioning attorney, to which order she also initially failed to respond, and providing false testimony at disciplinary hearing, warranted ninety-day suspension.

Suspension ordered.

West Headnotes (1)

[1] **Attorneys and Legal Services** ⇐ Definite Suspension

Failing to respond to two related appellate court orders, resulting in dismissal of client's appeal and in issuance of third appellate court order sanctioning attorney, to which order she also initially failed to respond, and providing false testimony at disciplinary hearing, warranted ninety-day suspension. West's F.S.A. Bar Rules 3–4.2, 3–4.3, 4–1.3, 4–3.4(c), 4–8.4(a).

4 Cases that cite this headnote

Attorneys and Law Firms

***201** John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Division Director, The Florida Bar, Tallahassee, FL; and Adria E. Quintela, Bar Counsel, Fort Lauderdale, FL, for Complainant.

Melody Ridgley Fortunato, Fort Lauderdale, FL, Respondent, pro se.

Opinion

PER CURIAM.

We have for review a referee's report recommending that attorney Melody Ridgley Fortunato be publicly reprimanded for violating several of the Rules Regulating The Florida Bar. We have jurisdiction. *See* art. V, § 15, Fla. Const.

I. FACTS

The Bar filed a complaint against Fortunato and, after a hearing, the referee recommended finding her guilty of several charged rule violations for failing to respond to two related appellate court orders, which failure resulted in not only the dismissal of her client's appeal but also in the issuance of a third appellate court order sanctioning Fortunato, to which order she also initially failed to respond. Specifically, the referee found Fortunato guilty as charged of violating rules 3–4.2 (violation of the Rules of Professional Conduct is cause for discipline); 3–4.3 (commission by a lawyer of any act that is unlawful or contrary to honesty and justice); 4–1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); 4–3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal); and 4–8.4(a) (lawyer shall not violate or attempt to violate the Rules of ***202** Professional Conduct). The referee also recommended finding Fortunato not guilty of a separate unrelated charge, which recommendation is neither challenged by the Bar nor of significance here.

What *is* significant here is that the referee found that Fortunato "gave no credible reason whatsoever for her failure to respond to the Orders in question or comply with their terms. On the contrary, her testimony was verifiably false, confusing, and deliberately misleading."

Upon considering the mitigating and aggravating factors at issue (including the fact that Fortunato had previously been publicly reprimanded), [1] the referee recommended that Fortunato be publicly reprimanded and ordered to pay the Bar's costs.

II. ANALYSIS

The Bar petitioned for review of the recommended discipline and in its initial brief urged that Fortunato should be suspended for ninety-one days because she purposefully provided false, misleading, and evasive testimony during the disciplinary proceeding, especially considering the misconduct at issue and the fact that Fortunato had previously been publicly reprimanded. Fortunato did not file an answer brief. [2] We agree with the Bar that a more severe sanction is in order here but, all things considered, find its suggestion of a ninety-one day suspension (which would require proof of rehabilitation) to be too harsh. We instead suspend Fortunato for ninety days.

Although not directly on all fours, we find *Florida Bar v. Arango,* 720 So.2d 248 (Fla.1998), to be instructive. In *Arango,* this Court rejected the referee's recommendation that Arango be admonished and instead suspended him for thirty days where, as with Fortunato in the present case, Arango had been found guilty of violating rule 4–1.3 and the misconduct at issue involved a pattern of neglect that caused injury or potential injury to a client. [3] The present case additionally involves several other rule violations and prior discipline-factors not present in *Arango.*

Most striking of all, however, is that, like the present case, *Arango* involved the submission of false evidence, although documentary in nature and of a much less culpable sort. Specifically, the referee in *Arango* found as an aggravating factor that Arango had submitted suspected false evidence and statements and engaged in other deceptive practices during the disciplinary process. 720 So.2d at 250. Arango challenged the finding of this aggravating ***203** factor, but this Court approved it on review, recognizing that "the record in the present case seems to support a finding that a member of Arango's staff was responsible for any false or fabricated evidence," *id.* at 253, and that

> although competent, substantial evidence supports the referee's finding regarding the falsity or fabrication of certain evidence submitted by Arango, there is no finding as to whether the submission of such evidence was negligent or intentional or whether Arango manufactured or directed the manufacture of such evidence. After reviewing the record, there does not appear to be sufficient evidence to support a finding that Arango manufactured or directed the manufacture of false or fabricated evidence, nor does there appear to be sufficient evidence to support a finding that Arango intentionally submitted such evidence in the proceedings below. It is clear from the record that each item of evidence in question was prepared by ... Arango's paralegal [i.e., not Arango himself]....

Id. at 251 n. 3.

In contrast, the referee in the present case specifically found that Fortunato herself provided "verifiably false, confusing, and deliberately misleading" testimony at the disciplinary hearing. Although not explicitly labeled as such by the referee, we consider this finding as a significant aggravating factor. *See* Fla. Stds. Imposing Law. Sancs. 9.22(f) ("Aggravating factors include ... submission of false evidence, false statements, or other deceptive practices during the disciplinary process.").

This Court has been most intolerant of attorneys who have been affirmatively charged with and found guilty of similar misconduct while appearing before a court of law or other tribunal. *See, e. g., Florida Bar v. Cibula,* 725 So.2d 360, 364 (Fla.1998) ("We have warned that such conduct [lying under oath] warrants severe discipline and have dealt harshly with those who commit this offense."); *Florida Bar v.*

Segal, 663 So.2d 618, 622 (Fla.1995) ("Making a knowing misrepresentation to a tribunal is a serious ethical breach."); *Florida Bar v. Williams,* 604 So.2d 447, 451 (Fla.1992) ("This Court has suspended attorneys found guilty of lying.... Dishonesty and lack of candor cannot be tolerated in a profession built upon trust and respect for the law."). This intolerance extends also to attorneys like Fortunato who have provided false testimony before a referee during a disciplinary proceeding. *See Arango,* 720 So.2d at 253 (in imposing suspension, considering among other things aggravating factor that Arango had submitted false or fabricated evidence during the disciplinary process); [3] *Florida Bar v. Weisser,* 721 So.2d 1142, 1146 (Fla.1998) (finding that aggravating factors, including subject attorney's untruthful testimony at the disciplinary proceeding, "further support the imposition of disbarment in this case").

III. CONCLUSION

We accordingly approve the referee's findings of fact and recommendations as to guilt. However, we reject as unsupported by existing caselaw the referee's recommendation as to discipline and, instead of publicly reprimanding Fortunato, we hereby suspend her from the practice of law for ninety days. We intentionally impose more than the thirty-day suspension imposed in *Arango* because we find the facts and circumstances of the present case to be more egregious, especially the referee's finding (which we consider as a significant aggravating factor) that Fortunato provided false testimony at the disciplinary hearing. Indeed, we note that, but for the appreciable mitigation present here, a ***204** more severe sanction may have been in order.

Accordingly, Melody Ridgley Fortunato is hereby suspended from the practice of law in Florida for ninety days. The suspension will be effective thirty days from the filing of this opinion so that Fortunato can close out her practice and protect the interests of existing clients. If Fortunato notifies this Court in writing that she is no longer practicing law and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Fortunato shall accept no new business from the date this opinion is filed until the suspension is completed. Judgment is entered for The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, for recovery of costs from Melody Ridgley Fortunato in the amount of $1,681.71, for which sum let execution issue.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

All Citations

788 So.2d 201, 26 Fla. L. Weekly S177

Footnotes

1 Specifically, the referee found in aggravation that Fortunato had previously been publicly reprimanded for neglect and charging an excessive fee. In mitigation, the referee found that Fortunato has a good character and reputation; that she is remorseful and gave assurances that she would avoid further disciplinary proceedings; that there was a lack of dishonesty or selfish motive in the offenses at issue; that there was no pattern of misconduct; that she acknowledged the wrongful nature of her conduct in disregarding the appellate orders; and that she had personal or emotional problems at the time of the misconduct at issue.

2 Neither party challenges the referee's findings of fact or recommendations as to guilt, which we approve without comment.

3 We recognize but reject as clearly erroneous the referee's finding in mitigation in the present case that "[t]he instant offense does not appear to be part of a pattern of misconduct by [Fortunato]." To the contrary, it is undisputed that Fortunato repeatedly failed to respond to appellate court orders, which failure resulted

in, among other things, the dismissal of her client's appeal. *See* Fla. Stds. Imposing Law Sancs. 4.42(b) (suspension generally appropriate when "a lawyer engages in a pattern of neglect and causes injury or potential injury to a client").

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The Florida Bar v. Adorno

Supreme Court of Florida. | April 21, 2011 | 60 So.3d 1016 | 2011 WL 1496478

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Opinion (p.)
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60 So.3d 1016, 36 Fla. L. Weekly S174
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,

v.

Henry Nissim ADORNO, Respondent.

No. SC09–1012.
April 21, 2011.

Background: Attorney disciplinary proceeding was brought.

[Holding:] The Supreme Court held that three-year suspension was warranted for attorney whose misconduct included negotiating a $7 million settlement on behalf of seven named plaintiffs while abandoning thousands of putative class members in action against city to recover for allegedly improper assessments, claiming a $2 million fee for attorney's law firm from the settlement amount, and obtaining nondisclosure agreement with named plaintiffs for which the only logical reason could be keeping facts of settlement secret from putative class members.

Ordered accordingly.

See also, *Masztal v. City of Miami*, 971 So.2d 803.

West Headnotes (18)

[1] **Attorneys and Legal Services** ⇐ On motion or summary proceeding

A referee has the authority in attorney disciplinary proceeding to grant summary relief when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

[2] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

Unlike a referee's factual findings, which are entitled to deference in attorney disciplinary proceeding, a referee's order granting summary relief in such a proceeding is reviewed de novo by the Supreme Court.

[3] **Attorneys and Legal Services** ⇐ Class actions

Attorney violated bar rule prohibiting a lawyer from representing a client if the representation of one client will be directly adverse to another client, where attorney negotiated to the detriment of putative class members a $7 million settlement on behalf of seven named plaintiffs in action against city to recover allegedly improper assessment fees, thus abandoning putative class in breach of fiduciary duty owed to them. West's F.S.A. Bar Rule 4–1.7(a).

[4] **Attorneys and Legal Services** ⇐ Class actions

Attorney violated bar rule prohibiting a lawyer from representing a client if there is a substantial risk that the representation of one or more clients will be materially limited by a personal interest of the lawyer, where attorney negotiated a $7 settlement on behalf of seven named plaintiffs that included a $2 million fee for attorney's law firm, while abandoning thousands of putative class members, in action against city to recover allegedly improper assessments. West's F.S.A. Bar Rule 4–1.7(a)(2).

[5] **Attorneys and Legal Services** ⇐ Class actions

Attorney violated bar rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation, where attorney negotiated a $7 million settlement on behalf of seven

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named plaintiffs in action against city to recover allegedly improper assessments, abandoned thereby thousands of putative class members, hid the terms of the settlement agreement from the class through a nondisclosure agreement, and stopped litigating on behalf of the class as a result of a standstill agreement. West's F.S.A. Bar Rule 4–8.4(c).

[6] **Attorneys and Legal Services** ⇐ Multiple clients; dual representation

Attorney violated bar rule prohibiting conduct in connection with the practice of law that is prejudicial to the administration of justice, where attorney abandoned thousands of putative class members by negotiating on behalf of seven named plaintiffs a $7 settlement in action against city to recover allegedly improper assessments. West's F.S.A. Bar Rule 4–8.4(d).

[7] **Attorneys and Legal Services** ⇐ Contingency fees and agreements

Attorney secured $2 million dollar fee from a $7 million settlement by means of unethical conduct, thereby violating bar rule relating to fees, where attorney obtained fee by abandoning putative class members and negotiating $7 million settlement on behalf of seven named plaintiffs whose claims totaled $84,000 in action against city to recover allegedly improper assessments, and original retainer agreement did not mention a contingency fee. West's F.S.A. Bar Rule 4–1.5.

[8] **Attorneys and Legal Services** ⇐ Amount in general

A attorney fee obtained by unethical means is a prohibited fee under bar rule relating to fees and costs for legal services. West's F.S.A. Bar Rule 4–1.5.

[9] **Attorneys and Legal Services** ⇐ Measure and Amount of Compensation in General

Costs ⇐ Class actions

The amounts of attorneys' fees in class actions are circumscribed by case law.

[10] **Attorneys and Legal Services** ⇐ Definite Suspension

Attorneys and Legal Services ⇐ Mishandling of trust account or client funds

Three-year suspension, as opposed to a public reprimand, was warranted for attorney who negotiated a $7 million settlement on behalf of seven named plaintiffs while abandoning thousands of putative class members in action against city to recover for allegedly improper assessments, claimed a $2 million fee for attorney's law firm from the settlement amount, obtained nondisclosure agreement with named plaintiffs for which the only logical reason could be keeping facts of settlement secret from putative class members, and ceased all activity on behalf of putative class members. West's F.S.A. Bar Rules 4–1.5, 4–1.7(a), 4–8.4(c, d).

3 Cases that cite this headnote

[11] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

In reviewing a referee's recommended discipline for attorney misconduct, the Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. West's F.S.A. Const. Art. 5, § 15.

[12] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

Generally speaking, the Supreme Court will not second-guess the referee's recommended

discipline for attorney misconduct as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

[13] **Attorneys and Legal Services** ⇐ Nature and purpose

When the Supreme Court reviews the recommended discipline for attorney misconduct, it does so mindful of its obligation to impose a sanction that is consistent with the purposes of lawyer discipline.

[14] **Attorneys and Legal Services** ⇐ Communications, representations, and disclosures

Attorneys and Legal Services ⇐ Class actions

Attorney's acts were deliberate and knowing, thus satisfying the intent element under bar rule prohibiting n attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, where case against city to recover allegedly improper assessments was already viewed as a class action when attorney's law firm took over the case, attorney filed amended complaint that identified case as class action, attorney negotiated a settlement for only the seven named plaintiffs, and attorney knowingly kept settlement agreement secret by having the named plaintiffs sign nondisclosure agreement, though city had stated that such agreements were prohibited. West's F.S.A. Bar Rule 4–8.4(c).

[15] **Attorneys and Legal Services** ⇐ Honesty in general; communications, representations, and disclosures in general

In order to satisfy the element of intent, under bar rule prohibiting an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, it must only be shown that the conduct was deliberate or knowing. West's F.S.A. Bar Rule 4–8.4(c).

1 Cases that cite this headnote

[16] **Attorneys and Legal Services** ⇐ Public Reprimand, Censure, or Admonition

Attorney's actions were intentional and not negligent, such that a public reprimand was not appropriate, in breaching his fiduciary obligations to thousands of putative class members by negotiating a $7 settlement that benefited only the attorney's law firm and the seven named plaintiffs in action against city to recover allegedly improper assessment; attorney did not inform trial court or putative class that he had abandoned the class action during the settlement negotiations, he did not inform trial court that he had negotiated $7 million solely for the handful of named plaintiffs, and there was no support for his claim that his firm was going to pursue class action at a later date. West's F.S.A. Bar Rules 4–1.5, 4–1.7(a), 4–8.4(c, d).

2 Cases that cite this headnote

[17] **Attorneys and Legal Services** ⇐ Nature and purpose

When considering lawyer discipline, the Supreme Court must impose a discipline that is severe enough to deter other attorneys who might be prone to engage in similar conduct.

[18] **Attorneys and Legal Services** ⇐ Other factors

An attorney cannot perform good works in order for such good deeds to be used as a credit against severe misconduct.

***1018** John F. Harkness, Jr., Executive Director and Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar,

Tallahassee, FL, and Kasey L. Prato, Bar Counsel, The Florida Bar, Miami, FL, for Complainant.

Bruce S. Rogow and Cynthia E. Gunther of Bruce S. Rogow, P.A., Fort Lauderdale, FL; and Andrew S. Berman of Young, Berman, et al., North Miami Beach, FL, for Respondent.

PER CURIAM.

Both Henry Nissim Adorno and The Florida Bar petition this Court for review of the referee's report finding Adorno guilty of ethical breaches and recommending a public reprimand. Adorno takes issue with the findings of guilt, and the Bar takes issue with the leniency of the punishment. [1] We have jurisdiction. *See* art. V, § 15, Fla. Const.

As the number of lawyers increases to an unprecedented level, the responsibility of ensuring that all lawyers conduct themselves within the ethical bounds required by the Rules Regulating the Florida Bar continues to be a top priority for this Court. This case involves one of the more experienced members of the Bar, Respondent Henry Nissim Adorno, who committed serious violations of the Rules Regulating the Florida Bar in connection with his representation of clients in a class action case against the City of Miami involving a challenge to the legality of an assessment.

Adorno settled the lawsuit for $7 million on behalf of seven class action plaintiffs, even though those plaintiffs had damages collectively of only $84,000, and thereafter abandoned his obligations to the thousands of individuals who would have been part of the class. The settlement of $7 million resulted in a fee to the law firm of $2 million.

In the words of the Third District Court of Appeal, which reviewed the propriety of the trial court's decision to set aside the ***1019** entire settlement after learning of these facts: "It defies any bounds of ethical decency to view class counsel's actions as anything but a flagrant breach of fiduciary duty." *Masztal v. City of Miami,* 971 So.2d 803, 809 (Fla. 3d DCA 2007). The referee who heard this case described the settlement with seven individuals "to the detriment of the underdetermined/putative class—under the facts of this case" as "prejudicial, illogical, and unexplainable."

We approve the referee's findings of fact and recommendations of guilt. For the reasons expressed herein, including the seriousness of the misconduct, we disapprove the referee's recommended sanction of a public reprimand and instead impose a three-year suspension—the most severe sanction short of disbarment.

FACTS

Henry Nissim Adorno was admitted to The Florida Bar in 1973 and at the time of the misconduct in this case was a named partner in the Miami firm of Adorno & Yoss. This disciplinary case arose from an underlying civil case seeking class certification for alleged improper emergency medical assessment fees imposed by the City of Miami on property owners.

The parties to the Bar proceedings did not contest the underlying facts, but disputed whether Adorno's conduct gave rise to any rule violations. The referee stated that a detailed description of the underlying events is set forth in *Masztal,* which is the appeal from the trial court's order setting aside the $7 million settlement. Again, Adorno does not contest the facts in *Masztal;* he challenges the referee's findings that his conduct violated the Florida Bar rules.

In *Masztal,* the Third District examined whether the trial court had properly set aside the underlying settlement after it was discovered that the $7 million settlement was only for the few named plaintiffs and not for the entire class. Because the facts presented in *Masztal* are an accurate summary of the background, and were relied on by the referee, we refer to that opinion:

> In early 1998, a group of citizens joined together to contest the proposed fire rescue assessment. They formed a Florida nonprofit corporation called Tenants and Taxpayers United for Fairness, Inc. Peter Clancy was the President, and nine others made up the original Board of Directors, including Judy Clark and Eva Nagymihaly. The corporation solicited donations from the public to fund their impending litigation. The funds helped defray the cost of hiring the firm of Atlas Pearlman Tropp & Borkson, P.A.
>
> The Atlas Pearlman retainer agreement stated that the case would proceed as a class action. Atlas Pearlman subsequently filed a class action complaint and amended complaint. Clancy created an informational pamphlet to distribute to the public and help secure donations.

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The pamphlet explained that the "named plaintiffs really represent every other private owner in the City" and why "a class action lawsuit [was] filed." In his testimony, Clark admitted that the purpose of the lawsuit was to end the fire rescue fee and obtain a refund for all who had paid the assessment.

Atlas Pearlman continued representation until the firm merged its practice with the firm of Adorno & Yoss, LLP in 2002. Assistant City Attorney Charles C. Mays represented the City.

Six years elapsed between the inception of the class action suit and settlement during which time extensive litigation and negotiations took place. Both Atlas Pearlman and Adorno & Yoss pursued class certification. The court deferred class certification pending trial or ***1020** cross-motions for summary judgment on the refund issue.

The original plaintiffs subsequently moved for summary judgment on the invalidity of Ordinance Number 11584 and the unconstitutionality of section 170.201. The trial court held the ordinance invalid to the extent that it authorized the City to impose a special assessment for emergency medical services, and it declared section 170.201 unconstitutional to the extent that it included the phrase emergency medical services. It also struck that portion of the statute.

The original plaintiffs also moved for summary judgment on the City's affirmative defenses. The trial court struck the City's affirmative defense that the plaintiffs paid the assessment voluntarily and without legal compulsion. The court further struck the City's statute of limitations affirmative defense, finding that the plaintiffs' claims were not time-barred. *The trial court set the trial of the refund issue for May 26, 2004.* At this time, the class had not yet been certified. *It is undisputed, and the trial court so found* in its March 17, 2006 Order, *that everyone treated the case as though the class had been certified.*

Masztal, 971 So.2d at 805–06 (footnote omitted) (emphasis added).

The sole issue set for trial on May 26, 2004, was the amount of money that would be refunded to the entire class. Although the trial court had not yet certified the class, the judge had repeatedly stated that class certification was certain because it was a "no-brainer" issue. Even an Adorno & Yoss memo prepared for trial stated that "the sole issue to be tried is the amount of the ... refund due to the property owners of Miami" and that class certification was a "no-brainer." In the memo, Adorno & Yoss asked for "$75,450,269.64, representing a refund of the illegally assessed portion" of the property assessment. Adorno himself admitted the issue of class certification was a "no-brainer." Before the trial, Adorno met with the named plaintiffs to discuss dollar amounts with them—they determined that an acceptable settlement for the entire class would be $35 million.

The class was an easily identified group because it was composed of people who had paid the City's property assessment, so it was not difficult to determine the amounts of the refunds that would be owed. Adorno decided to handle the settlement negotiations from this point forward. Following mediation, which was not successful, Adorno refused to speak with the City Attorneys. He wanted to speak only with the City Manager, Joe Arriola, whom Adorno knew. Adorno wanted to talk with the "businessman." Thus, Adorno sought out Arriola and would only speak with him.

On the evening of May 25, 2004, which was the night before the refund trial, Adorno called Arriola and discussed the City's liabilities, which Adorno stated were from $20 million to $75 million.[2] Meanwhile, the City had calculated damages for the entire class and determined its liability for refunds to the entire class was $23 million to $24 million. During the course of the phone conversation on the night before trial, Arriola stated that the City could not pay $35 million, but could offer $5 million. Adorno replied, "[T]here is no frigging way that Judge Lopez is going to approve $5 million."[3]

***1021** On the morning of May 26, 2004, just before the refund trial, Adorno met with Arriola at a cafe. The mayor of Miami was present for part of this meeting. Arriola asked Adorno, "[I]s there anything we can do to avoid court today?" Adorno then offered to settle the case for $7 million on behalf of the named plaintiffs. The City agreed to this amount. The record indicates that the named plaintiffs would receive $5 million and the firm would receive $2 million. There is no indication regarding how the firm's fee was determined.

After the meeting, that same day, Adorno went to court before Judge Lopez and stated, "The Plaintiffs and Defendant

have agreed to settle this case subject to City Commission approval." Adorno did not clarify that "plaintiffs" meant the handful of named plaintiffs, rather than the entire class. Adorno also told the court that the parties intended to "maintain the status quo" with respect to the refund aspect of the case—this vague statement apparently meant that there would be no further discovery or other activities until after a City Commission meeting in October. At no point during the refund hearing on May 26, 2004, did anyone make it clear to the judge that the settlement applied only to the named plaintiffs, rather than the entire class of citizens who had paid the assessment.

After that May 26, 2004, hearing, Adorno did not pursue litigation on behalf of the entire class. Although Adorno claimed that he did not intend to permanently abandon the remaining class members, the inaction was in accord with what Adorno referred to as the standstill agreement —a letter dated May 26, 2004, that Adorno's partner, Mitchell Bloomberg, sent Assistant City Attorney Mays, which actually called for a standstill of the litigation.

In addition to the standstill agreement, after the settlement, the firm also had the named plaintiffs sign a nondisclosure agreement. Adorno testified that he knew of the nondisclosure agreement and the plans to have the named plaintiffs sign the agreement and that he agreed with it. The named plaintiffs were to keep the settlement confidential until after the first City Commission meeting held after October 1, 2004. Although Assistant City Attorney Mays had informed the firm that public record laws prohibited the City from entering into nondisclosure agreements, the firm still pursued having the named plaintiffs sign the nondisclosure agreement. The named plaintiffs signed the agreement in June 2004 (about two weeks after Mays told the firm that the City could not enter into nondisclosure agreements). The agreement was never signed by a City or firm representative.

The City Commission did not address the settlement agreement until November 18, 2004. After the November 2004 City Commission meeting, the City issued its first installment payment of $3.5 million pursuant to the settlement agreement, in which the firm received $1 million and the named plaintiffs received the remaining $2.5 million to be apportioned. The named plaintiffs "admitted that they had received a significant windfall from the settlement amount, as compared to the refund amount which they would have been entitled to under a class settlement." *Masztal,* 971 So.2d at 807.

In January 2005, additional property owners, who were not among the original named plaintiffs, sought to intervene after learning of the settlement that excluded their interests. The trial court held a hearing on February 3, 2005, to consider the intervenors' motion. At that hearing, Judge Lopez was informed for the first time that the settlement was not for the entire class. The judge indicated that he thought the settlement had been for the ***1022** entire class, not merely the handful of named plaintiffs. The judge stated, "It was a pending class motion. I don't think you can pick off the plaintiffs at this stage without coming before me."

As explained by the Third District:

> Both the new plaintiffs and the City moved to vacate the settlement. The City argued that the settlement should be set aside on the grounds of unilateral mistake and public policy.
>
> At the evidentiary hearing on the City's motion to vacate, the City introduced the testimony of City Commissioners Johnny Winton and Jeffrey Allen. Both Commissioners testified that they believed that the settlement was class-wide. [City Attorney] Fernandez likewise testified that he believed that the settlement was for the entire class.
>
> The trial court granted the City's motion to vacate and set aside the agreement on the grounds of unilateral mistake. The trial court found that the City did not know that the settlement was for individual claims, the documents were allegedly conflicting as to the scope of the settlement, and the Commissioners did not exhibit inexcusable lack of due care when they voted to approve the settlement. The trial court further found that there was an implied class action requiring judicial approval of the individual settlement for fairness and reasonableness.
>
> The trial court also granted the Intervenors' motion to vacate on the grounds of breach of fiduciary duty and collusion. The trial court then ordered the plaintiffs and their counsel to disgorge and return the first installment paid of $3.5 million to be placed in an account to be administered by counsel under the court's supervision pending final resolution of the case. The trial court

appointed the Intervenors as the class representatives and certified the class.

[3] *Masztal,* 971 So.2d at 808.

In the order, the trial court stated that from the inception of the case, the parties had treated it as a class action. Further, the judge noted that he had made it clear, on several occasions, that he would certify the class. In addition, the trial court stated that the

> decision by plaintiffs' counsel to be less than forthright with the court about the type of settlement reached by the parties and the lack of clarification on the part of the defendant supports the finding that the parties were seeking to avoid the Court's duty to perform a fairness hearing under rule 1.220(e). All settlements, whether individual or class, should have been brought before this Court for a fairness hearing, or should have been held in conjunction with the refund trial.

Final Order on Defendant's Motion to Set Aside or Vacate the Settlement and Recover Monies Paid Toward Same at 3–4, *Masztal v. City of Miami,* No. 98–11208 CA01 (Fla. 11th Cir.Ct. Mar. 17, 2006). The trial court's order stated that the class action was "ultimately disregarded for personal gain" and the "amounts settled for by the individual plaintiffs bear no rational relation to the extent of their damages," since they "were refunded the full amount paid of the fire fee assessment plus a premium of approximately 800%." *Id.* The named plaintiffs appealed to the Third District, which affirmed the trial court. The district court held that (1) the original plaintiffs and their attorneys had an implied fiduciary relationship with the proposed class, and (2) the original plaintiffs and attorneys breached a fiduciary duty to the class when they settled their claims prior to the class being certified. [3] *Masztal,* 971 So.2d at 809–10.

***1023** In the disciplinary hearing before the referee, in which both Adorno and Mays were respondents, the referee found that Adorno's role in the events was substantially different from the role of Assistant City Attorney Mays. [4] Adorno was the attorney who announced the settlement in Judge Lopez's court in May 2004. Adorno led the negotiations at mediation with the City, and he negotiated the settlement with City of Miami officials.

The referee recommended that Adorno be found guilty of violating Rules Regulating the Florida Bar 4–1.7 (conflict of interest) and 4–1.5 (excessive or prohibited fee). The referee found that Adorno took an excessive fee when he settled with individual plaintiffs to the detriment of the putative class. In addition, the referee recommended that Adorno be found guilty of violating Rule Regulating the Florida Bar 4–8.4 (misconduct). The referee concluded that as a matter of law, Adorno breached a fiduciary duty owed to the putative class and prejudiced that class when he settled on behalf of individual plaintiffs to the detriment of the putative class. The referee recommended that Adorno be found not guilty of violating Rule Regulating the Florida Bar 4–3.3 (candor toward the tribunal). The referee stated that he could not say "without hesitation, under a clear and convincing standard of proof that Respondent Adorno violated this rule." [5]

As the disciplinary sanction, the referee recommended that Adorno receive a public reprimand. The referee awarded costs to the Bar in the amount of $8,901.65. With regard to aggravating factors, the referee found three aggravators: (1) a prior disciplinary offense (a private reprimand for minor misconduct in 2003); (2) multiple offenses (violations of rules 4–1.5, 4–1.7, and 4–8.4); and (3) substantial experience in the practice of law. The referee also found that Adorno caused potential or actual injury to the putative class and left "thousands of potential plaintiffs unable to effectively pursue their claims against the City of Miami," in addition to "causing unnecessary delay and expense to the parties."

In mitigation, the referee found five mitigators: (1) Adorno provided full and free disclosure to the disciplinary board and had a cooperative attitude toward the proceedings; (2) although experienced as an attorney, Adorno was not experienced in handling class actions; (3) Adorno had a good reputation in the legal community and had made substantial contributions to his community and the legal profession; (4) Adorno's prior disciplinary offense was remote; and (5) Adorno "exemplifie[d] a dedication to pro bono work

together with substantial contributions to those less fortunate in the Miami Dade community."

The Florida Bar petitioned this Court for review of the recommended sanction, seeking more substantial discipline. Adorno filed a cross-petition for review, challenging the recommendations of guilt.

ANALYSIS

[1] [2] Adorno challenges the referee's recommendation that he be found guilty of violating the Rules Regulating the Florida *1024 Bar. In this case, the findings of fact are based upon an order of summary judgment. As this Court has held, a referee has the authority to grant summary relief "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. However, unlike a referee's factual findings, which are entitled to deference, a referee's order granting summary relief is reviewed de novo by this Court." *Fla. Bar v. Gold,* 937 So.2d 652, 655 (Fla.2006) (citations omitted).

[3] [4] ***Conflict of Interest—rule 4–1.7.*** The referee recommended that Respondent be found guilty of violating rule 4–1.7, which prohibits representation where the actions of the attorney constitute a conflict of interest. *See* R. Regulating Fla. Bar 4–1.7(a)(1) (a lawyer shall not represent a client if the representation of one client will be directly adverse to another client); 4–1.7(a)(2) (a lawyer shall not represent a client if there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer). Adorno asserts that he did not create a conflict of interest when he settled the claims for only a handful of plaintiffs for $7 million, even though he failed to advise the members of the class and he abandoned any further pursuit of a class action lawsuit. Adorno's position is based on the argument that he did not have a duty to the rest of the members of the class because the class had not yet been certified.

The facts and the law directly refute Adorno's position. This case does not involve a technical conflict of interest. The facts show that Adorno negotiated to the detriment of the other class members when he settled for the named plaintiffs for an amount grossly disproportionate to the value of their individual claims. In doing so, he received a $2 million fee for the firm, while he ignored or abandoned the putative class members. The seven named plaintiffs had a total of $84,000 in claims, yet Adorno's meeting with City representative Arriola resulted in a settlement of $7 million. In comparison, the City had estimated its exposure for the entire class was approximately $23 or $24 million. The amount the original plaintiffs settled for bears no relation to the extent of any damages they incurred in the form of assessments they paid during prior years. In fact, the $7 million settlement is more than eighty-three times larger than the $84,000 value of the named plaintiffs' claims.

By abandoning the class for the few named plaintiffs and the substantial fee for his firm, Adorno compromised the class claims. The named plaintiffs were disproportionately enriched, while Adorno's actions in reaching the "inequitable settlement" left thousands of potential class plaintiffs unable to effectively pursue their claims against the City and placed them in a financially disadvantageous situation—the payment of $7 million substantially reduced the amount that the thousands of other class action members would be able to receive in any settlement. Thus, even if the putative class attempted to negotiate with the City, close to 30% of the City's identified refund liability ($23 to $24 million) had been given to seven plaintiffs, leaving thousands of class members to seek refunds through settlement from the substantially reduced amount of calculated funds—an amount that had been determined based on the assessments paid by the easily identified pool of citizens. Further, at trial it is likely that the City would have argued that (a) it had settled with the class, and (b) it had a right to a setoff for all amounts paid out.

*1025 In addition, there is another troubling aspect to this case: whether Adorno and his firm, by agreeing to a stay or standstill of the litigation and having their clients sign a nondisclosure agreement so that no other class members would be notified of the settlement, provided the City with ammunition to pursue a statute of limitations defense as to the remainder of the class. As explained by the Third District:

> The concept of the statute of limitations became the subject during settlement negotiations. The City's representative, Deputy Fire Chief

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> Maurice Kemp, testified that the expiration of the statute of limitations period within which the class could bring additional taxpayer claims against the City was part of the overall agreement at mediation. Mays likewise admitted that the legal strategy with regard to the settlement was that he would recommend a settlement of the individual claims and present the settlement to the Commission at a time during which the expiration of the statute of limitations period would bar the other taxpayers' remaining claims. Both former City Manager Joe Arriola and former City Attorney Alex Vilarello were aware of the statute of limitations issue. Adorno Yoss denied having considered the statute of limitations issue in connection with the settlement.

Masztal, 971 So.2d at 806–07. Whether or not Adorno's actual intent in entering into the standstill agreement and having his clients sign a nondisclosure agreement was to cut off the claims of the remaining class members, there is no question that the collective import of Adorno's actions regarding the disproportionate settlement amount, as well as the terms of the settlement, created a conflict of interest that prejudiced the remaining class members.

Before this Court, Adorno asserts that he did not have an attorney-client relationship with the putative class and, thus, he did not have any responsibilities to that class. Adorno's argument misses the point. As the Third District Court noted in *Masztal,* the crucial issue is whether Adorno had a *fiduciary* duty to the putative class, not whether he had an attorney-client relationship with those members. It is the breach of the fiduciary duty that violated rule 4–1.7.

Further, we reject Adorno's arguments that he had no duty to the class members. Contrary to Adorno's arguments before this Court, the record demonstrates that the underlying case was viewed as a class action and that Adorno knew he had a fiduciary duty to the class. The claim was filed as a class action, and on the very day the settlement was announced, the refund trial was going to be held to determine the amount of refund to the entire class. The trial court judge had previously stated that certification of the class was a "no-brainer," and the record shows that Adorno was fully aware of the judge's statement. When the trial court subsequently held a hearing to determine whether to set aside the settlement, Adorno testified:

> COUNSEL: But you're well aware from reading the transcripts of the May 4th, 2004, hearing that the judge and Mr. Bloomberg [another attorney at Adorno and Yoss] indicated that certification was a no-brainer?
>
> ADORNO: And you can add me to that group.
>
> COUNSEL: And yourself—
>
> ADORNO: Yeah.
>
> COUNSEL:—to the group, indicating that certification of the class was a no-brainer?
>
> ADORNO: Absolutely.

In addition, as demonstrated by Adorno's admissions in the record, he was aware of the putative class and knew he had a duty to it. With regard to a May 24, ***1026** 2004, meeting with the named plaintiffs before mediation, Adorno testified in his deposition as follows:

> COUNSEL: Okay. And in the meeting with the clients, what do you recall being discussed?
>
> ADORNO: *I pretty much ran that meeting,* explained in general terms why we were there, and they had—it was necessary for us based upon the judge's requirement of mediation that we have a number to be able to settle. So most of the conversation was my telling them what I thought that number should be. And I needed to get their permission, even though I explained to them that notwithstanding us agreeing to a number, this would have to go back to Judge Lopez for approval, but I wasn't authorized just to go in there and do it without some acquiescence from the class representatives.
>
> COUNSEL: Right. And the approval by Judge Lopez would be if it were a settlement of the *class claims,* correct?

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ADORNO: That's—at that time, *that was the only conversation that we had.*

COUNSEL: Okay. So the numbers you were discussing with your clients had to do with, at that initial meeting, had to do with the numbers that they would approve for settling the *class claims?*

ADORNO: *Yes, sir.*

COUNSEL: Okay. And what did the clients give you authority to give a number to Mr. Mays?

ADORNO: *35 million.*

(Emphasis added.)

Further, during the course of the underlying proceedings, the judge and the attorneys repeatedly spoke about the class —including how simple it would be to identify the actual members once the issue of the refund was resolved. All that was needed was to examine the City's list of property owners who had paid the assessment. Thus, for the sake of judicial economy, the judge and parties had decided to address other issues before certifying the class. At a February 17, 2004, hearing before Judge Lopez, at which Adorno was present, the transcript reflects the following discussion regarding the plaintiffs' motion for class certification:

COURT: We have to address the refund issue first. Because to me, anybody that is a property owner within the operative time frame that was assessed a fee, if it's found to be refundable, this is a no-brainer, that's a class certification.

....

COURT: Why don't I need to address—as I've said, the numbers are there. The class certification is not a big issue to me.

MAYS [Assistant City Attorney]: And....

COURT: Stop.

Certifying the class at this moment doesn't help anything other than spend more money. If I rule against you on the refund issue, this case is over, right?

CAMPBELL [of Adorno & Yoss]: That is correct, your Honor.

COURT: Why are we wasting time with the certification today when we should be addressing whether or not, as I said, I'll make a finding, whether that's affirmed or not is always an issue. Once that is done, this case is ripe for certification, why do we need to address that today?

....

COURT: You're misreading me. I plan to do it all at one time.

If I find you're entitled to a refund, and I've gone through all those hoops, the issue of class certification is a no-brainer. Every homeowner is entitled ***1027** *to a refund, period, they've paid it on their Ad Valorem tax.*

....

COURT: *Whoever got assessed from the tax rolls, that's an easy number of persons to determine.*

The key questions remains, are they entitled to a refund. That's not set for today, we're not here to rule on that. I don't want to put the cart before the ... horse. I am not going to spend all this time today unnecessarily, even though I think I know what the issues and the numbers are, but why am I going to put you through advertising, sending all the notices, doing all those issues when we may never get to that if I determine that you're not due a refund?

CAMPBELL [of Adorno & Yoss]: That's fine, your Honor.

COURT: We're in agreement with that.

(Emphasis added.) When Adorno testified before the trial court about the intervenors' case, he stated that he was representing the entire class at the mediation:

COUNSEL: ... *On May 24th, the date of the mediation, was the Adorno firm representing itself as the attorneys for the class?*

ADORNO: *Yes, Sir.*

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COUNSEL: *On May 26th, at the time the settlement was announced to Judge Lopez, was the Adorno firm holding itself out as attorneys for the class, non-certified?*

ADORNO: *The answer is no and yes. We didn't announce the settlement to Judge Lopez. The transcript speaks for itself. That wasn't the purpose of that hearing.*

And yes, we were still class counsel.

COUNSEL: On June 8th, when the letter was sent to the manager, was the Adorno firm still representing itself as class counsel?

ADORNO: Yes, Sir.

(Emphasis added.)

As demonstrated above, from the outset, people other than the named plaintiffs were viewed as members of the putative class, and it was treated as a class action. Further, Tenants and Taxpayers United for Fairness, Inc., the corporation created to challenge the assessment, solicited donations from the public to fund their impending litigation. A pamphlet was developed stating why there should be a class action suit. The record indicates that the funds gathered from the public helped defray the cost of hiring legal counsel. The retainer agreement for Atlas Pearlman stated that "after the law firm has been reimbursed for its full hourly fees (not including the retainers and cost payments), the retainer amounts and cost payments will be returned to the individuals or entities that advanced the funds." Nevertheless, as the Third District noted in *Masztal,* "None of the contributors to the non-profit corporation were reimbursed a penny out of the $7 million settlement." *Masztal,* 971 So.2d at 806 n. 1.

Adorno attempts to overcome this issue by asserting that *Masztal* created new law regarding fiduciary duty and he should not be sanctioned for violating a duty that did not exist when he engaged in the conduct. Adorno's argument is disingenuous. This Court has long held that the term "fiduciary relation" is a broad term, embracing both technical fiduciary relations and informal relations. *Quinn v. Phipps,* 93 Fla. 805, 113 So. 419, 421 (1927). This Court has refrained from defining particular instances of fiduciary relation "in such a manner that other and perhaps new cases might be excluded." *Id.* (quoting *Beach v. Wilton,* 244 Ill. 413, 91 N.E. 492, 495 (1910)). Rather, we have stressed that the "overwhelming weight of authority" established that the principle of fiduciary duty ***1028** "extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other." *Id.* (quoting *Beach,* 91 N.E. at 495); *see also Maxwell v. First United Bank,* 782 So.2d 931, 933–34 (Fla. 4th DCA 2001) ("A fiduciary relationship may be either express or implied.... A fiduciary relationship which is implied in law is based on the circumstances surrounding the transaction and the relationship of the parties."). In *Masztal,* the Third District relied on these prior decisions, which clearly set forth these principles. *Masztal,* 971 So.2d at 808–09 (discussing *Quinn,* 113 So. at 421; *Maxwell,* 782 So.2d at 933–34; *Allied Minority Contractors Ass'n v. Broward Cnty.,* 738 So.2d 525, 527 (Fla. 4th DCA 1999); *Shelton v. Pargo, Inc.,* 582 F.2d 1298, 1305 (4th Cir.1978)). Under Adorno's argument, an implied fiduciary duty would extend only to those situations where a Florida court expressly recognized the exact duty previously—a result that is inconsistent with well-established precedent.

Adorno also argues that he should not be found guilty of violating the Bar rules because (1) he relied on the advice of others; (2) the mediator suggested that the parties consider a settlement that did not include the entire class; and (3) the named plaintiffs wanted to settle their $84,000 in claims for a net of almost $5 million. His argument is contrary to the Bar rules and case law. Rule Regulating the Florida Bar 4–5.2(a) plainly states that a "lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." Further, in *Florida Bar v. St. Louis,* 967 So.2d 108, 118 (Fla.2007), the Court held that "advice of counsel" is not a defense available to respondents in Florida Bar discipline cases, unless specifically provided for in a rule or considered as a matter in mitigation. We noted as follows in *St. Louis:*

[O]ther jurisdictions have held that the defense is not available in bar discipline proceedings. In *People v. Katz,* 58 P.3d 1176, 1187(Colo.P.D.J.2002), that court said: "It is the individual attorney's duty and obligation to comply

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with the Rules of Professional Conduct. The attorney may not delegate that duty or responsibility to another under the umbrella of advice of counsel and thereby create a defense to a violation of those Rules."

St. Louis, 967 So.2d at 118 n. 3.

In the end, Adorno argues that he is not guilty of misconduct by attempting to shift blame to others, but he is ultimately responsible for his own misconduct. He had the obligation to act to the benefit of the entire class and could not compromise the class action claim to the substantial detriment of the class members and to the substantial benefit of the named plaintiffs. Adorno is the person who brokered the settlement with City Manager Arriola and then abandoned the putative class members.

By focusing on the interests of the named plaintiffs during settlement discussions and abandoning the putative class in order to achieve the $7 million settlement for the named plaintiffs, Adorno violated rule 4–1.7(a)(1) (a lawyer shall not represent a client if the representation of one client will be directly adverse to another client). In addition, because Adorno negotiated the settlement in a manner that resulted in a large fee for his firm and abandoned the putative class, Adorno violated rule 4–1.7(a)(2) (a lawyer shall not represent a client if there is a substantial risk that the representation of one or more clients will be materially limited by a personal interest of the lawyer). *See* *Fla. Bar v. Rodriguez*, 959 So.2d 150 (Fla.2007) ***1029** (holding that respondent violated rule 4–1.7(a) by entering into a secret engagement agreement with an opposing party and receiving a significant sum from the opposing party, while respondent was still representing his clients against that party).

Accordingly, competent, substantial evidence supports the referee's recommendation that Adorno violated rule 4–1.7.

Violation of rule 4–8.4. Adorno was also charged with violating rules 4–8.4(a), 4–8.4(c), and 4–8.4(d), and those rules were argued before the referee. The referee recommended finding Adorno guilty of violating rule 4–8.4, but did not identify the specific subdivisions. For the reasons that follow, we find that Adorno has violated each of the charged rules.

First, by violating rule 4–1.7, as addressed above, Adorno has violated rule 4–8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct). A respondent violates rule 4–8.4(a) whenever he or she violates any other Rule of Professional Conduct.

[5] Next, rule 4–8.4(c) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The facts indicate that Adorno abandoned the putative class via his settlement negotiations, hid the terms of the settlement agreement from the class through a nondisclosure agreement, and stopped litigating on behalf of the class as a result of the standstill agreement. Although the standstill agreement was allegedly a part of the settlement terms with the City, the nondisclosure agreement was not requested by the City. In fact, the City affirmatively advised the firm that such agreements were prohibited by the City under its public records law.

Although testimony in the record indicates that Adorno's partner drafted the nondisclosure agreement, Adorno admitted knowing about the plan to have the named plaintiffs sign the nondisclosure agreement and did not oppose that plan. Before the referee, Adorno testified that the City wanted the nondisclosure agreement; however, evidence in the record shows that Assistant City Attorney Mays refused to sign a letter from the firm that provided the named plaintiffs would sign a nondisclosure agreement. Mays stated that public records laws prohibited the City from entering into such agreements, and no City representative signed the agreement. Nevertheless, about two weeks after Mays told the firm that the City would not sign the nondisclosure agreement, the firm still had the named plaintiffs sign the agreement. We conclude that competent, substantial evidence in the record supports finding a violation of rule 4–8.4(c). *See also* *Fla. Bar v. Herman*, 8 So.3d 1100, 1106 (Fla.2009) (failure to inform client of the conflict and obtain the client's consent was dishonest and deceitful in violation of rule 4–8.4(c)).

[6] Finally, the referee found that Adorno breached a fiduciary duty owed to a putative class and prejudiced that class when he settled for the named plaintiffs to the detriment of the putative class. Rule 4–8.4(d) states that a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice. Based on competent, substantial evidence in the record, Adorno

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prejudiced the rights of the putative class by abandoning them, reaching a settlement with the City that only benefited the handful of named plaintiffs, and then failing to move forward with the class action case. The record supports the referee's recommendation that Adorno violated rule 4–8.4(d).

[7] [8] ***Violation of rule 4–1.5.*** The Bar asserts that Adorno's conduct also violated rule 4–1.5. As to this rule, the referee found that the Bar carried its burden of ***1030** proof and that Adorno took an "excessive attorney fee when he settled with individual plaintiffs to the detriment of the putative/undetermined class." Further, the referee stated as it relates to this rule violation:

> Settling with seven individual plaintiffs to the detriment of the undetermined/putative class—under the facts of this case was prejudicial, illogical, and unexplainable.
>
> As a result of Respondent's prejudice to the class, it follows Respondent took an excessive and indefensible attorney fee.

As the referee found, the fee was obtained by abandoning the putative members of the class action, whom Adorno had a fiduciary duty to represent. The trial court vacated the $7 million settlement due to the breach of fiduciary duty and collusion and ordered Adorno & Yoss to disgorge its fee. *Masztal,* 971 So.2d at 805, 808. A fee obtained by unethical means is a prohibited fee. *See Rodriguez,* 959 So.2d at 161–62 (respondent ordered to disgorge the fee he collected because it was prohibited under the Bar rules); *St. Louis,* 967 So.2d at 123–24 (same). As such, the fee at issue here was a prohibited fee.

[9] Adorno asserts that the $2 million fee was not excessive because it was less than 30% of the $7 million settlement. In this case, however, it is not the percentage of the settlement that renders the fee a violation of the Bar rules. Rather, it is that the fee was a prohibited fee as it was obtained through unethical means. Moreover, this case was not a contingent fee case. The original retainer agreement with Atlas Pearlman is the only contract between the named plaintiffs and the firm. Because Atlas Pearlman merged with Adorno & Yoss subsequent to the signing of the retainer agreement, Adorno & Yoss was subject to that agreement. The agreement did not mention a contingency fee; rather, it clearly stated that the firm would be paid nonrefundable retainer fees of $20,000 for trial and $30,000 for an appeal, with a $5000 cost payment at both court levels. The retainer agreement states: "In the event that a class action is certified and the litigation is successful, then *our law firm will apply to the court for attorneys' fees.* ... The law firm will be entitled to retain all excess fees including fees generated by a multiplier applied by the court." At the final hearing before the referee, Bloomberg, an attorney at Adorno and Yoss, was asked whether the engagement letter contemplated a contingency fee agreement. He answered, "It does not contemplate an individual settlement, and it does not contemplate a contingency fee...." In light of the above, it is unclear how the firm sought $2 million in fees, since the retainer agreement was not a contingency fee agreement. [6]

Accordingly, as competent, substantial evidence in the record demonstrates that Adorno secured the fee by means of unethical conduct (abandoning his obligations to the remainder of the class and settling for a grossly disproportionate amount on behalf of only the named plaintiffs), we conclude that the facts support the referee's recommendation of guilt for violating rule 4–1.5.

DISCIPLINE

[10] [11] [12] [13] In reviewing a referee's recommended discipline, this Court's scope of ***1031** review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson,* 538 So.2d 852, 854 (Fla.1989); *see also* art. V, § 15, Fla. Const. However, generally speaking, this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer,* 753 So.2d 555, 558 (Fla.1999). Further, when this Court reviews the recommended discipline, it does so mindful of its obligation to impose a sanction that is consistent with the purposes of lawyer discipline.

In *Florida Bar v. Pahules,* 233 So.2d 130, 132 (Fla.1970), the Court first stated that three precepts should be applied in determining discipline. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and, at the same time, not depriving the public of the services of a qualified attorney due to undue harshness

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in imposing a penalty. *Id.* Second, the judgment must be fair to the respondent—sufficient to sanction a breach of ethics and, at the same time, encourage rehabilitation. *Id.* Third, the judgment must be severe enough to deter others who might be prone to become involved in like violations. *Id.* This Court has continued to be mindful of these considerations. *See, e.g., Fla. Bar v. Liberman,* 43 So.3d 36, 39 (Fla.2010); *St. Louis,* 967 So.2d at 124; *Fla. Bar v. Stein,* 916 So.2d 774, 777 (Fla.2005).

[14] Adorno argues that he did not intend to engage in misconduct because he did not know he had a duty to the putative class and did not know he was violating any disciplinary rules by his misconduct and, thus, he should not be subject to a disciplinary sanction. As we have discussed, members of The Florida Bar are responsible for knowing the Rules Regulating the Florida Bar. *See* R. Regulating Fla. Bar 3–4.1 (every member of The Florida Bar is charged with notice and held to know the standards of ethical and professional conduct prescribed by this Court); *see also Fla. Bar v. Dubow,* 636 So.2d 1287, 1288 (Fla.1994) (recognizing that it is well established that ignorance of the law, especially by lawyers in disciplinary proceedings, is no excuse).

[15] With regard to whether he "knew" he was violating a duty to the putative class, or had intent to violate the rules, the preface to the Florida Standards for Imposing Lawyer Sanctions defines "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." This same standard holds true in case law, which recognizes that a violation of rule 4–8.4(c) requires intent. It is well established that "in order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing." *Fla. Bar v. Fredericks,* 731 So.2d 1249, 1252 (Fla.1999) (stating that the motive behind the respondent's action was not the determinative factor; rather, the issue was whether the respondent deliberately or knowingly engaged in the activity in question).

Here, the record clearly establishes that Adorno knowingly engaged in the activity in question. When Adorno & Yoss took over the case (after Atlas Pearlman merged with Adorno & Yoss), the case was already viewed as a class action. Adorno's firm filed an amended complaint that identified the case as a class action. Further, Adorno was present when the trial court referred to class certification as a "no brainer." Adorno testified before the disciplinary referee and the civil trial court, repeatedly acknowledging that he had a duty to the entire class whom he admittedly ***1032** undertook to represent. In the civil proceeding, he testified as follows:

> COUNSEL: Are you aware—you're not aware, Sir, that a representative party in a class action must adequately protect the interests of those he purports to represent?
>
> ADORNO: No, I would agree with that.
>
> COUNSEL: Okay, would you agree, Sir, that that requirement applies both to the named plaintiffs and to class counsel?
>
> ADORNO: Yes.
>
> COUNSEL: And would you agree, Sir, that because all members of the class are bound by the res-judicata effect of a judgment, a principal factor in determining the appropriateness of a class certification is the forthrightness and vigor with which the representative party can be expected to assert and defend the interest of the members of the class?
>
> ADORNO: I agree with that too.
>
> COUNSEL: And would you agree that, when dealing with class certification, the analysis encompasses two separate inquiries: whether any substantial conflicts of interest exist between the representatives and the class, and whether the representatives will adequately prosecute the action?
>
> You would agree with that?
>
> ADORNO: I think I would agree with that too.

Thus, when Adorno decided to meet with City representative Arriola and negotiate a settlement only for the named plaintiffs (and the resulting fee for his firm), Adorno was fully aware that he had moved away from representing the putative class members. After reaching the settlement agreement, which benefited only the handful of named plaintiffs and his firm, Adorno and the firm abandoned the putative class members. Adorno then knowingly kept the settlement secret by having the named plaintiffs sign nondisclosure agreements, even though the City had stated that such agreements were prohibited.

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Approximately eight months after the settlement was reached for the named plaintiffs, on February 3, 2005, a hearing was held to consider a motion to permit the intervention of new class representatives, an action that was opposed by Adorno's firm. When Adorno engaged in these acts of misconduct, the case law was well established that he owed a duty to the putative class.

[16] Although Adorno asserts that he did not have an intent to engage in misconduct, his actions satisfy the element of intent because such acts were deliberate and knowing. Thus, we must review the appropriate Florida Standards for Imposing Lawyer Sanctions that involve knowing misconduct, which are Standards 4.32, 7.1, and 7.2.[7]

Standard 4.32 states: "Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client." Adorno did not inform the putative class or the trial court that he had abandoned the class action during the settlement negotiations. On May 26, 2004, when Adorno advised the trial court that the parties had reached a settlement, ***1033** Adorno, as attorney for the entire class, did not advise the trial court that he had negotiated a $7 million settlement solely for the handful of named plaintiffs. He failed to inform the trial judge that he had decided not to negotiate on behalf of the entire class. Further, he did not proceed with the refund hearing.

Standard 7.2 states: "Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system." Standard 7.1 states that disbarment is appropriate "when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." The referee specifically found that Adorno caused potential or actual injury when he settled on behalf of the individual plaintiffs for $7 million to the detriment of the putative class. Based on the terms of the settlement agreement that Adorno negotiated, the putative class members could have been harmed significantly, since the payment of $7 million to the named plaintiffs substantially reduced (by approximately 30%) the funds from which the thousands of other class members could be paid in any future settlement with the City and had a potential effect on the amount the class could recover at trial if the City attempted to set off the money already paid. Eventually, members of the putative class took action and intervened on their own. They were able to vacate the settlement and continue the class action, which occurred solely due to the actions of the putative class members and was met with active opposition by Adorno and his firm.

Adorno claims that the firm was going to pursue the class action at a later date. The referee did not make any findings that support Adorno's claim. Further, as previously discussed, after reaching the settlement agreement, the firm did not pursue any action on behalf of the putative class, and the standstill agreement actually called for a stay of the litigation, which was effective in stopping the case for numerous months. While we do not know if the intent was to allow the City to raise the statute of limitations against the remaining class members at a later date, it is clear that Adorno took no further action on behalf of the class after he negotiated the settlement for the named plaintiffs. There is absolutely no support for Adorno's claim that his firm was going to pursue a class action at a later date.

Accordingly, for all these reasons, we conclude that Adorno's actions in breaching the essential obligation to his clients were intentional and not negligent. Thus, a public reprimand is inappropriate. The Standards indicate that either a suspension or disbarment is the appropriate sanction in this case.

In asserting that this Court should impose a rehabilitative suspension, the Bar points out some of the similarities between the instant case and *Florida Bar v. Rodriguez*. In that case, the respondent and his firm entered into a secret engagement agreement with the company DuPont, while the firm was actively representing clients against DuPont. *Rodriguez*, 959 So.2d at 154–55. The firm received $6,445,000 from DuPont in exchange for the engagement agreement. *Id.* at 155. In the agreement, the firm stated that it would not pursue future actions against DuPont and would be retained by DuPont on an hourly basis for any future DuPont work. The firm did not disclose this agreement or the conflict of interest to clients the firm was representing in settlement negotiations against DuPont. Thus, Rodriguez

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"became an agent for DuPont ***1034** while still representing his Benlate clients against DuPont. In fact, due to the [clients'] funds that were held in escrow to prevent any breach of confidentiality, the firm represented the Benlate plaintiffs as a fiduciary (the escrow agent) for two years after signing the engagement agreement." *Id.* at 160. Accordingly, "Rodriguez was representing adverse interests because he was on retainer to DuPont during that two-year period." *Id.*

Rodriguez, like Adorno, violated rules 4–1.5 (excessive or prohibited fees), 4–1.7 (conflict of interest), and 4–8.4(a) (violation of the rules of professional conduct). For deliberately engaging in an ongoing conflict of interest that exposed his clients to harm, the Court disapproved the referee's recommendation of a public reprimand and suspended Rodriguez for two years. *Rodriguez,* 959 So.2d at 160. The Court noted that Rodriguez's actions rose above negligence, and applied Standards 4.32 and 7.2, which are the same Standards that apply to Adorno's knowing misconduct. The Court stated that Rodriguez "was a knowing party to the engagement agreement, he did not disclose the conflict of interest to his clients, and his interests were clearly divided. He protected his interest in the engagement agreement by engaging in actions that were contrary to the interests of his own clients." *Rodriguez,* 959 So.2d at 160. Adorno's misconduct is extremely similar to Rodriguez's misdeeds. Both attorneys had a definite conflict of interest, acted in their own self-interest, and exposed their clients to harm.

Although the Bar posits that Adorno's misconduct is less egregious than Rodriguez's misconduct, we disagree. In fact, Adorno's behavior could be more aptly compared to that of Rodriguez's partner in the misconduct, St. Louis, upon whom we imposed the sanction of disbarment after disapproving the referee's recommendation of a sixty-day suspension. *See St. Louis,* 967 So.2d at 122. In explaining the reason for disbarment, we stated:

> Disbarment is appropriate "when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." Fla. Stds. Imposing Law. Sancs. 7.1. At the time St. Louis made the misrepresentations to Judge Wilson and the Bar representatives, he knew his statements were false. Also, he knowingly failed to inform his Benlate clients about the engagement agreement and the conflict of interest. He intentionally engaged in these misrepresentations, violating the duties he owed as a professional, in order to preserve his portion of the $6,445,000 engagement agreement. These acts of deceit were detrimental to the legal system, negatively impacting the proceedings before Judge Wilson and St. Louis's representation of his Benlate clients.

Id. at 123. In Adorno's case, except for the fact that the referee did not find clear and convincing evidence of a false representation to the trial court, disbarment would be the appropriate sanction.

Our holding in *Florida Bar v. Herman,* 8 So.3d 1100 (Fla.2009), also provides guidance in reviewing a case where the attorney engaged in an ongoing and concealed conflict of interest. Respondent Herman failed to inform his client that he was also representing his own company, which was a competitor of his client. *Id.* at 1103. "Herman represented Aero Controls [the client] at the same time he represented Nation Aviation, his own company. Both companies performed the same services [selling used airplane parts] and functions and had the same pools of potential customers and potential suppliers." ***1035** *Id.* at 1104–05. Based on this misconduct, Herman was found guilty of violating rules 4–1.7 and 4–8.4(c) and received an eighteen-month suspension. *Id.* at 1105–06. However, we must also consider the consequences of Adorno's violation, coupled with the fact that additional violations were found in this case.

[17] When considering lawyer discipline, we must impose a discipline that is severe enough to deter other attorneys who might be prone to engage in similar conduct. Prevailing plaintiffs' attorneys have the potential to earn substantial fees in class-action litigation, but with that potential comes the responsibility to represent the interests of the entire class. With this precept in mind, the opinion in *Moody v. Sears Roebuck & Co.,* 191 N.C.App. 256, 664 S.E.2d 569 (2008), is relevant. With regard to a precertification class-action complaint, the North Carolina court recognized that parties may try to abuse the class-action mechanism in various ways, including:

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> [D]efendants faced with a class action may be encouraged to try to avoid class resolution of claims by buying off individual named plaintiffs. These defendants could settle with strong class plaintiffs, and proceed with a class action when faced with weak or ineffectual named plaintiffs.... The other side of the coin is that plaintiffs with small claims may try to use class allegations to coerce unusually generous individual settlements from defendants.

Moody, 664 S.E.2d at 578 (quoting 5 *Moore's Federal Practice* § 23.64[2] [a] (3d. ed. 2008)).

Here, as the referee found, Adorno misused the class-action mechanism to leverage the City into the $7 million settlement for the benefit of a handful of named plaintiffs and his firm. He was proceeding with a class-action, but abandoned the putative class when it was convenient for him to settle the case at a windfall for the named plaintiffs and his firm.

> COUNSEL: Sir, you would agree with me, because you were in such an advantageous position with the City on May 26th of 2004 with regard to how this case had been litigated, you were able to get the City to pay $7 million to [seven] people with claims worth about $83,000?
>
> ADORNO: Yeah, I would agree with that.

This is precisely the type of abuse lawyers representing a putative class must avoid. As the referee found, by settling with only the named plaintiffs to the detriment of the putative class, Adorno "left thousands of potential plaintiffs unable to effectively pursue their claims against the City of Miami. Further, the settlement ultimately was appealed, set aside and the litigation renewed causing unnecessary delay and expense to the parties." Moreover, as the referee stated:

> [I]t is the totality of the circumstances one must examine in determining Respondent Adorno's conduct. Settling with seven individual plaintiffs to the detriment of the undetermined/putative class—under the facts of this case was prejudicial, illogical, and unexplainable.
>
> As a result of Respondent's prejudice to the class, it follows Respondent took an excessive and indefensible attorney fee.

[18] We recognize that Adorno has developed a reputation in the community for outstanding service. Testifying on Adorno's behalf were numerous civic leaders and managing partners of leading law firms, as well as one of our former colleagues who previously practiced law with Adorno. The referee found that Adorno's life work exemplified a "dedication to pro bono work together with substantial contributions to those less fortunate" and ***1036** that he "should be commended and recognized for his substantial life time dedication to pro bono work, charities, and the betterment of his community." However, this Court has clearly stated that "[p]rior commendable acts cannot exonerate an attorney from the discipline that must be imposed for intentional, egregious ethics violations." *Fla. Bar v. Korones,* 752 So.2d 586, 591 (Fla.2000).

> [N]either praise of past glory and good deeds, nor mere disappointment with the frailties of humanity can substitute for our duty to properly protect the citizens of Florida. There is certainly a lesson for all lawyers to learn from these most unfortunate of circumstances: Always honor and never betray the oath that grants one the privilege to be a Florida lawyer, no matter how much or how little money may entice.

Id. at 592; *see also* *Fla. Bar v. Travis,* 765 So.2d 689, 691 (Fla.2000) (holding that respondent's prior good works do not overcome intentional misconduct); *Fla. Bar v. Aaron,* 606 So.2d 623, 624 (Fla.1992). An attorney cannot perform good works in order for such good deeds to be used as a credit against severe misconduct. *Travis,* 765 So.2d at 691.

We also recognize that the misconduct represented here was nothing short of an egregious violation of Adorno's professional obligations as an attorney. Although the referee found that Adorno had substantial experience in the practice of law, he also found that Adorno was not experienced in class action lawsuits. Nevertheless, we do not regard what occurred here as a technical violation borne out of inexperience in the practice of class-action certification.

Adorno knew he represented the entire class and that he had an obligation to the entire class. He knew that an acceptable settlement for the entire class would have been $35 million and that the claims of the named plaintiffs were worth only $84,000. He knew that as of the evening before the refund hearing, the City Manager told him that the City would not pay $35 million but could offer $5 million to settle the class action. Adorno replied, "[T]here is no frigging way that [the trial judge] is going to approve $5 million" to settle the class action. Yet, the next morning, Adorno offered to settle for $7 million for only the seven named plaintiffs, which the City accepted even though the day before the City had offered $5 million to settle the *entire* class action. Although Adorno claimed that the settlement was only for the named plaintiffs, it defies logic that the City would have agreed to pay eighty-three times the amount of the individual claims unless it was to gain an advantage in reducing or eliminating its liability for the class action (such as avoiding any further payments to the remainder of the class). The only logical reason for the nondisclosure agreement, which the City did not seek, would be to keep the fact of the settlement secret from the other putative class members. Further, it is undisputable that after consummating the settlement and claiming a $2 million fee, Adorno ceased any activity on behalf of the putative members of the class, even though he and the firm were scheduled for a hearing on the amount of the refund on the day of the settlement. We regard the ethical breaches to the entire class, which inured to the benefit of a handful of plaintiffs, prejudiced the remaining members of the class, and resulted in a $2 million fee for the firm, to be knowing and intentional violations of the Bar rules.

Under all the circumstances, we find that the referee's recommendation of a public reprimand is unsupported. After considering the factual findings, the totality of the misconduct, the rules violated, the Standards, and case law, we conclude ***1037** that a three-year suspension is the appropriate sanction.

CONCLUSION

In conclusion, we approve the referee's findings of fact, recommendations of guilt, and award of costs. We disapprove the referee's recommendation of a public reprimand. Henry Nissim Adorno is hereby suspended from the practice of law for three years, effective, nunc pro tunc, October 28, 2010. As Respondent is currently suspended, it is unnecessary to provide him with thirty days to close out his practice to protect the interests of existing clients. Henry Nissim Adorno shall fully comply with Rule Regulating the Florida Bar 3–5.1(g).

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399–2300, for recovery of costs from Henry Nissim Adorno in the amount of $8,901.65, for which sum let execution issue.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

Footnotes

1 After reviewing the record and the briefs of the parties, the Court unanimously concluded that an immediate suspension of Adorno was required due to the seriousness of the misconduct and allowed supplemental briefing on whether more severe sanctions should be imposed, including disbarment. *See Fla. Bar v. Adorno,* 48 So.3d 837 (Fla.2010).

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2 The record indicates that Adorno had previously worked with a firm employee in developing a damages model that established an amount for the class settlement, which included all class members. The Adorno & Yoss model estimated a refund amount from $23 million to over $70 million.

3 Judge Peter Lopez was the judge presiding in the class action case.

4 Charles Mays represented the City of Miami in the underlying civil litigation. His conduct was the subject of *Florida Bar v. Mays,* No. SC09–1011 (Fla. Apr.21, 2011). The referee submitted a report finding that Mays did not engage in any misconduct and, therefore, did not recommend imposing a sanction on Mays. The Bar did not seek review of that referee's report, and we have approved the uncontested report. *Fla. Bar v. Mays,* No. SC09–1011 (Fla. Apr. 21, 2011) (unpublished order).

5 This allegation was based on Adorno telling the trial court that the plaintiffs had reached a settlement agreement with the City, but failing to clarify that "plaintiffs" meant only the few named plaintiffs—not the whole class.

6 In addition, the amounts of attorneys' fees in class actions are also circumscribed by case law. *See, e.g., Kuhnlein v. Dep't of Revenue,* 662 So.2d 309 (Fla.1995) (holding that in class actions that result in the creation of a common fund, the interest of class counsel in obtaining fees is adverse to interests of the class so the court must determine reasonable attorney fees by applying the lodestar approach).

7 In recommending a public reprimand, the referee applied Standards 4.33 and 7.3, which are for negligent conduct. *See* Standard 4.33 (stating that a public reprimand is appropriate when a lawyer is negligent in determining whether representation of a client may adversely affect another client and causes injury or potential injury); Standard 7.3 (stating that a public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury).

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The Florida Bar v. Hmielewski

Supreme Court of Florida. | November 26, 1997 | 702 So.2d 218 | 1997 WL 730711

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West Headnotes (p.1)
Attorneys and Law Firms (p.)
Opinion (p.)
All Citations (p.)

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Herrera v. 7R Charter Limited, S.D.Fla., September 29, 2017

702 So.2d 218, 22 Fla. L. Weekly S736
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Timothy J. HMIELEWSKI, Respondent.

No. 88526.
Nov. 26, 1997.

In attorney discipline proceeding, the Supreme Court held that: (1) making deliberate misrepresentations in medical malpractice action regarding location of patient's medical records violated professional discipline rules about dishonesty and access to evidence, and (2) misconduct warranted three-year suspension rather than disbarment in light of mitigating factors.

Suspension ordered.

West Headnotes (4)

[1] **Attorneys and Legal Services** ⇐ Candor in general; communications, representations, and disclosures in general

Making deliberate misrepresentations in medical malpractice action regarding location of patient's medical records violated rules prohibiting unlawful or dishonest conduct, knowingly making false statements to tribunal, failing to disclose material fact to tribunal, unlawful obstruction of another party's access to evidence, unlawful concealment of relevant material, intentional failure to comply with discovery requests, false statements to third persons while representing client, obtaining evidence by methods that violate rights of third persons, and conduct involving dishonesty, fraud, deceit, or misrepresentation. West's F.S.A. Bar Rules 3–4.3, 4–3.3(a)(1, 2), 4–3.4(a, d), 4–4.1(a), 4–4.4, 4–8.4(c).

5 Cases that cite this headnote

[2] **Reference** ⇐ Hearing and determination

Referee's findings of fact carry presumption of correctness that should be upheld unless clearly erroneous or without support in record.

[3] **Attorneys and Legal Services** ⇐ Evidence, verdict, and findings

Attorneys and Legal Services ⇐ Disposition and punishment; sanctions

Supreme Court has broader discretion when reviewing referee's recommended disciplinary measures than when reviewing finding of fact because responsibility to order appropriate sanction ultimately rests with that Court.

2 Cases that cite this headnote

[4] **Attorneys and Legal Services** ⇐ Definite Suspension

Making deliberate misrepresentations in medical malpractice action regarding location of patient's medical records warranted imposition of three-year suspension rather than disbarment, considering absence of selfish motive, extremely strong character evidence, and relatively unblemished record. West's F.S.A. Bar Rules 3–4.3, 4–3.3(a)(1, 2), 4–3.4(a, d), 4–4.1(a), 4–4.4, 4–8.4(c).

5 Cases that cite this headnote

*219 John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and David M. Barnovitz, Bar Counsel and Adria E. Quintela, Kevin P. Tynan and Rose Ann DiGangi–Schneider, Co–Bar Counsel, Fort Lauderdale, for Complainant.

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J. David Bogenschutz of Bogenschutz and Dutko, P.A., Fort Lauderdale, for Respondent.

PER CURIAM.

We have for review the complaint of The Florida Bar and the referee's report regarding alleged ethical breaches by attorney Timothy J. Hmielewski. We have jurisdiction. Art. V, § 15, Fla. Const.

Hmielewski agreed to represent Scott Schubot in a Minnesota lawsuit against Mayo Clinic alleging claims of wrongful death and medical malpractice arising from the death of Schubot's father. Sometime between the commencement of his representation of Schubot and the filing of the lawsuit, Schubot confided in Hmielewski that he had purloined some of his father's medical records from the Mayo Clinic, and then showed the records to Hmielewski. Schubot told Hmielewski that he believed that the records belonged to him and his father since they had paid for the medical services involved. Schubot had become concerned that Mayo Clinic was trying to cover up what had really happened. He took the records after Mayo Clinic tried to persuade him that his father's injuries occurred because his father was suicidal.

Because the medical records had been taken, Mayo Clinic was unable to find or produce these critically important records when called upon by Hmielewski in pretrial discovery to produce the documents. In response to various interrogatories propounded upon Schubot by Mayo Clinic, which requested production of any of his father's medical records that he had in his possession, Hmielewski falsely stated that all records in Schubot's possession had already been provided to Mayo Clinic, even though Hmielewski knew that the records his client had taken had never been revealed or sent to the hospital. Hmielewski made a number of other false ***220** representations to Mayo Clinic regarding the medical records and also misrepresented in a report to the trial court that one of the material factual issues in the case was why Mayo Clinic had failed to maintain critical patient records during the time frame when Schubot's father suffered his ultimately fatal injuries. Hmielewski also submitted an expert report on behalf of his client that opined that Mayo Clinic had tampered with the medical records, although he knew that the expert's opinion was based on the expert's belief that Mayo Clinic had failed to produce the medical records. In a settlement letter to Mayo Clinic demanding $400,000, Hmielewski deliberately misrepresented that Mayo Clinic had lost the medical records. As a result of Hmielewski's untrue and misleading representations, Mayo Clinic was put to substantial trouble and expense in attempting to locate and ascertain the medical information contained in the purloined medical records.

All of this came to light when Schubot's deposition was taken in the discovery phase of the Minnesota lawsuit. Hmielewski testified at the disciplinary hearing that he told Schubot that he would be asked about the records during his deposition and that he must truthfully answer the question. Hmielewski did not attend the deposition, but told his young associate who did attend in his place that Schubot must not be permitted to lie. At the associate's urging at the deposition, Schubot admitted that he had the records. Hmielewski was sanctioned by the Minnesota trial court for his fraudulent conduct and he and his client were fined $105,159. Hmielewski agreed to hold Schubot harmless for the payment of the fine. The matter was then referred to The Florida Bar.

[1] The referee found that Hmielewski deliberately made the misrepresentations set forth above when all along he knew that the records were not lost but had been taken by his client. The referee recommended that Hmielewski be found guilty of violating the following Rules Regulating The Florida Bar: (1) rule 3–4.3, which proscribes conduct that is unlawful or contrary to honesty or justice; (2) rule 4–3.3(a)(1), which prohibits knowingly making false statements of material fact or law to a tribunal; (3) rule 4–3.3(a)(2), which prohibits failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (4) rule 4–3.4(a), which prohibits both the unlawful obstruction of another party's access to evidence and the unlawful altering, destruction or concealment of a document or other material that the lawyer knows or reasonably should know is relevant to a pending or reasonably foreseeable proceeding, or counseling or assisting another person to do such an act; (5) rule 4–3.4(d), which prohibits the intentional failure to comply with legally proper discovery requests; (6) rule 4–4.1(a), which mandates that lawyers not make false statements of material fact or law to third persons while representing a client; (7) rule 4–4.4, which prohibits the use of methods of obtaining evidence that violate the rights of third persons; and (8) rule 4–8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation.

The referee recommended that Hmielewski be suspended from the practice of law for one year followed by two years of probation, noting that the character and reputation testimony presented on Hmielewski's behalf was the primary mitigating factor that saved Hmielewski from disbarment.

[2] "A referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record." *Florida Bar v. Berman,* 659 So.2d 1049, 1050 (Fla.1995). We find support in the record for the referee's factual findings. These findings establish that Hmielewski improperly allowed what he perceived as his duty to his client to overshadow his duty to the justice system when he made deliberate misrepresentations of material fact to the Mayo Clinic and the Minnesota trial court. Hmielewski's violations made a mockery of the justice system and flew in the face of Hmielewski's ethical responsibilities as a member of The Florida Bar.

[3] [4] However, we reject the referee's disciplinary recommendation that Hmielewski be given only a one-year suspension. This Court has broader discretion when reviewing *221 a referee's recommended disciplinary measures because the responsibility to order an appropriate sanction ultimately rests with this Court. In recommending only a one-year suspension, the referee appeared to be influenced by his belief that Hmielewski's actions were not the result of selfish motives. Thus, the referee's report states:

> B. *Absence of selfish motive.* As strange as it may seem in light of the actions of the respondent, this referee is convinced that the respondent did not act out of selfishness. There was no motive of personal gain behind the respondent's actions. If anything, the respondent was overzealous in his efforts to promote his client's interests. The respondent appeared to adopt his client's belief that the Mayo Clinic would falsify or fabricate medical records regarding his client's father's demise. He anticipated that at that moment he would be able to produce the actual medical records thereby catching the hospital in its lie. Instead, the respondent got caught up in his own lie and allowed it to perpetuate in violation of his duty to the Court and to opposing counsel.

If it were not for this finding, the extremely strong character evidence, and Hmielewski's relatively unblemished record (one admonishment for minor misconduct in twenty-one years of practice), this Court would have no hesitation in imposing disbarment. Under the circumstances, we have determined that Hmielewski's misconduct warrants imposition of a three-year suspension. As a condition of reinstatement, Hmielewski shall pay to Mayo Clinic the sum of $26,189, which was determined to be the additional cost of defense caused by Hmielewski's actions.

Hmielewski is hereby suspended from the practice of law for a period of three years. The suspension will be effective thirty days from the filing of this opinion so that Hmielewski can close out his practice and protect the interests of existing clients. If Hmielewski notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Hmielewski shall accept no new business from the date this opinion is filed until the suspension is completed.

Hmielewski is ordered to pay costs to The Florida Bar in the amount of $2,164.04, for which sum let execution issue.

It is so ordered.

KOGAN, C.J., OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., and GRIMES, Senior Justice, concur.

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The Florida Bar v. Cox

Supreme Court of Florida. | May 17, 2001 | 794 So.2d 1278 | 2001 WL 521314

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Attorneys and Law Firms (p.2)
Opinion (p.2)
Dissenting Opinion (p.8)
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794 So.2d 1278
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Karen Schmid COX, Respondent.

No. SC96217.
|
May 17, 2001.

Synopsis

Prosecuting attorney was charged with violating ethical rules for concealing identity of confidential informant. After referee recommended public reprimand, the Bar sought review of referee's recommendation. The Supreme Court held that: (1) disbarment was presumptive penalty, but (2) mitigating factors warranted imposition of only one year suspension.

Ordered accordingly.

Lewis, J., dissented and filed opinion.

West Headnotes (9)

[1] **Attorneys and Legal Services** ⇐ Presumptive, baseline, or preliminary potential sanction

Disbarment was presumptive penalty for prosecuting attorney whose withholding of confidential informant's true name in solicitation of a minor prosecution resulted in mistrial, where attorney acted intentionally either for her own benefit to ensure availability of reluctant witness, or for benefit of witness to conceal her involvement in case, and resulting dismissal with prejudice of criminal case constituted serious injury to legal system.

1 Cases that cite this headnote

[2] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

Although, in an attorney discipline matter, a referee's findings of fact are given deference, the Supreme Court's review of a referee's recommended discipline is more extensive, because the Court has the ultimate responsibility to determine the appropriateness of a recommended sanction.

2 Cases that cite this headnote

[3] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

In an attorney discipline matter, the Supreme Court typically will not disapprove a referee's recommended discipline so long as the referee's recommendation has a reasonable basis in existing caselaw.

3 Cases that cite this headnote

[4] **Attorneys and Legal Services** ⇐ Duties as to false evidence in general

Knowingly presenting false evidence is a violation of an attorney's professional duty.

[5] **Attorneys and Legal Services** ⇐ Presumptive, baseline, or preliminary potential sanction

Absent any mitigating or aggravating factors, disbarment is the presumptive sanction for an attorney knowingly presenting false testimony in a judicial proceeding.

1 Cases that cite this headnote

[6] **Attorneys and Legal Services** ⇐ Definite Suspension

One-year suspension was appropriate sanction for prosecuting attorney who withheld true identity of confidential informant, who testified at trial, even though disbarment was

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presumptive penalty, where evidence showed that attorney's conduct was aberration in otherwise unblemished career, attorney had no prior disciplinary record, and was sincerely remorseful.

1 Cases that cite this headnote

[7] **District and Prosecuting Attorneys** ⇐ Duties

A prosecutor has a duty not only to fairly present the evidence and permit the jury to come to a fair and impartial verdict, but also properly functions in a quasi-judicial capacity with reference to the accused to see that the accused is accorded a fair and impartial trial.

[8] **District and Prosecuting Attorneys** ⇐ Duties

By the nature of their position, prosecutors direct the power of the government against an accused person, and thus, prosecutors must be ever mindful of their awesome power and concomitant responsibility to reflect a scrupulous adherence to the highest standards of professional conduct.

[9] **Attorneys and Legal Services** ⇐ Purpose of proceedings in general

The purpose of lawyer discipline is threefold: lawyer discipline must protect the public from unethical conduct but at the same time not deny the public the services of a qualified attorney, the discipline must be fair to the attorney, with the object of correcting the wayward tendency in the accused lawyer while offering to the lawyer a fair and reasonable opportunity for rehabilitation, and lawyer discipline must operate as an effective deterrent to other lawyers who might be prone or tempted to become involved in like violations.

5 Cases that cite this headnote

Attorneys and Law Firms

*1279 John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Division Director, Tallahassee, FL; and Debra Joyce Davis, Assistant Staff Counsel, Tampa, FL, for Complainant.

David A. Maney of Maney, Damsker & Jones, P.A., Tampa, FL, for Respondent.

Opinion

PER CURIAM.

We have for review a referee's report recommending that attorney Karen Schmid Cox be publicly reprimanded for violating several Rules Regulating the Florida Bar. We have jurisdiction. *See* art. V, § 15, Fla. Const. For the reasons expressed below, we disapprove the referee's recommended discipline and impose a one-year suspension.

The Bar charged Cox with violating four Rules Regulating the Florida Bar while acting in her capacity as an Assistant United States Attorney in a criminal prosecution. Following hearings on both guilt and discipline, the appointed referee made the following factual findings. [1]

FACTS

Cox was assigned to prosecute a case against James R. Sterba on an indictment charging a violation of 18 U.S.C. § 2422(b) (solicitation of a minor to engage in prostitution or any sexual act). The United States Customs Service ("Customs") investigated the case and employed a confidential informant, Adria Jackson, to pose as a 13 year old girl on the Internet to assist Customs in its investigation of child pornography and pedophiles. Customs gave Jackson the fictitious name of "Gracie Greggs." Prior to trial, the magistrate in the case ordered Cox to provide Jackson's name to the defense. Cox knew Jackson's true name prior to trial. However, Cox listed Jackson on the government's witness list as Gracie Greggs, and informed defense counsel, the court, and the venire that Jackson's name was Gracie Greggs. On direct examination of Jackson, Cox deliberately introduced the witness to the court

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and the jury by asking, "Are you Gracie Greggs?" instead of the customary question, "What is your name?" Jackson was a crucial witness for the government's case against Sterba, and Cox learned after ***1280** trial that Jackson had a previous criminal history.

Jackson's true identity was revealed mid-trial and the United States District Court granted Sterba's motion for a mistrial. *See United States v. Sterba,* 22 F.Supp.2d 1333 (M.D.Fla.1998). Sterba then moved to dismiss the indictment against him on double jeopardy grounds and the federal district court agreed that Sterba had been "goaded" into requesting a mistrial:

> Specifically, I have found that the intent of the prosecutor in this case was to succeed in palming off Adria Jackson and her biographical baggage as Gracie Greggs, an operative of law enforcement....
>
> As a result of the prosecutorial plan in this case, the United States required the defense to present its case, forced the defendant to make his constitutional election whether to testify, secured the right to cross-examine the defendant under oath, and otherwise leveraged the defendant into the position of revealing his strategy, his theories, his evidence, and his cross-examination. All the while, the prosecutor [Cox] harbored a secret. Viewed one way, the secret was that she had withheld so-called *Giglio* and other information that, if ever known to the defense, might discredit her featured witness. Viewed differently, the secret was that the prosecutor at any time could prompt a defense motion for a mistrial (and thereby accrue another chance at conviction) by revealing to the defense the truth about "Gracie Greggs." In either event, the trial was not conducted on equal footing because the prosecutor had a lie at her disposal.
>
> ....
>
> By a course of intentional misconduct, discovered serendipitously by the defense during trial, the prosecution goaded the defense into moving for a mistrial. The defendant's fifth amendment immunity from double jeopardy precludes another trial and, therefore, requires the dismissal of the indictment.

Id. at 1341–43. Although the referee in this case disagreed with the district court's determination that Cox planned to deprive Sterba of his constitutional rights, the referee did conclude that Cox "was a seasoned prosecutor and fully aware of the requirements of candid disclosure to the court and defense counsel and the reasons in justice for that candor."

Based on his factual findings, the referee recommended that Cox be found guilty of violating the following Rules Regulating the Florida Bar: 4–3.3(a)(1) (lawyer shall not knowingly make false statement of material fact or law to a tribunal); 4–3.3(a)(4) (lawyer shall not knowingly permit any witness to offer testimony that the lawyer knows to be false); 4–3.4(a) (lawyer shall not unlawfully obstruct another party's access to evidence or otherwise conceal other material that the lawyer knows or should know is relevant to pending proceeding, nor assist another person to do such an act); and 4–3.4(b) (lawyer shall not fabricate evidence, or counsel or assist a witness to testify falsely).

As to discipline, the referee initially concluded that the presumptively appropriate sanction was suspension under Florida Standard for Imposing Lawyer Sanctions 6.12, which provides:

> Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action.

The referee found that Standard 6.11, which provides for the presumption of disbarment, was not the proper starting point ***1281** for the analysis of this case because "the evidence indicates that [Cox] did not intend to deceive the United States District Court before which she was practicing on any matter of substantial justice." The referee found that Cox believed Jackson had a clean criminal record and that the use of an assumed name for the witness would not be any impediment to justice in the case.

The referee found only one aggravating circumstance-that Cox had substantial experience in the practice of law. *See* Fla. Stds. Imposing Law. Sancs. 9.22(i). In mitigation, the referee found that Cox had no prior disciplinary record, lacked a

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selfish or dishonest motive, and made full and free disclosure during the proceedings. *See* Fla. Stds. Imposing Law. Sancs. 9.32(a), (b), (e). The referee also found that Cox would be subject to additional penalties as a result of her misconduct, *see* Fla. Stds. Imposing Law. Sancs. 9.32(g), because "[s]he has been investigated by the Office of Professional Regulation for this conduct and anticipates receiving a penalty of two weeks without pay." The referee found that Cox's reputation was "excellent" and "unsullied except for this instance." *See* Fla. Stds. Imposing Law. Sancs. 9.32(g). The referee relied on Cox's "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," and the testimony of several of these witnesses that the instant conduct "was a mistake and an aberration." The referee also found that Cox was sincerely remorseful, *see* Fla. Stds. Imposing Law. Sancs. 9.32(*l*), and that Cox "comprehends or fully grasps the serious import of her conduct and truly regrets her actions." The referee observed: "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."

The referee concluded that the many mitigating circumstances, when weighed qualitatively against the one aggravating circumstance, "seem to call for a reduction of the discipline" from the presumption of suspension, and recommended that Cox receive a public reprimand and be placed on probation. Although the referee did not specifically rely on any one case in making this recommendation, the referee explained that such a sanction "seem[ed] to be proportional with other similar disciplinary cases," and noted that several cases involving false testimony lacked the substantial mitigation found in the instant case. The referee commented that "[p]rosecutors as a class are accustomed to demanding punishment of others ... [and] to assuming an attitude of righteous indignation on behalf of society," and therefore concluded that Cox "is one of those lawyers whose sense of justice is sufficient that she will truly suffer as a result of a public reprimand."

THE BAR'S PETITION FOR REVIEW

[1] [2] [3] The Bar seeks review of the referee's recommended sanction, arguing that a public reprimand is inappropriate under the facts of this case and that a three-year suspension is in order. Although a referee's findings of fact are given deference, our review of a referee's recommended discipline is more extensive, because this Court has the ultimate responsibility to determine the appropriateness of a recommended sanction. *See Florida Bar v. Niles,* 644 So.2d 504 (Fla.1994). However, we typically will not disapprove a referee's recommended discipline so long as the referee's recommendation has a reasonable ***1282** basis in existing caselaw. *See Florida Bar v. Lecznar,* 690 So.2d 1284, 1288 (Fla.1997). In this case, we conclude that in light of the duty violated and the injury caused by the misconduct, the referee's recommended discipline of a public reprimand does not have a reasonable basis in existing caselaw, and we therefore disapprove the recommended discipline.

Cox argues that the referee's recommended sanction is supported by many cases involving misrepresentations in which public reprimands were imposed.[2] Having reviewed the cases cited by Cox, we find that these cases are distinguishable because the misrepresentations at issue in these cases either did not have a dramatic effect on the proceedings,[3] were less severe or less culpable than the instant case,[4] arose in uncontested disciplinary cases,[5] or were mitigated by unusual circumstances.[6]

Cox also relies on our recent case of *Florida Bar v. Feinberg,* 760 So.2d 933 (Fla.2000), in which we publicly reprimanded an Assistant State Attorney for making false statements to defense counsel and for having direct contact with a defendant who was represented. We find that case distinguishable ***1283** because *Feinberg* involved misrepresentations induced when "a somewhat clever defendant indicated to Feinberg that he had discharged (or would be discharging) his attorney," and the defendant "requested that Feinberg not reveal these conversations to his counsel based upon an alleged fear for the defendant's safety (due to the attorney's alleged contacts with the 'drug community')." *Id.* at 939. Although *Feinberg* involved misrepresentations to opposing counsel, that case notably did not involve misrepresentations to the court or the knowing presentation of false testimony to a jury. *Feinberg* and the other cases cited by Cox do not support a public reprimand.

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The Florida Standards for Imposing Lawyer Sanctions provide a starting point for determining, in the absence of mitigating or aggravating circumstances, an appropriate discipline based on the duty violated and the potential or actual injury caused by the violation. As discussed above, the referee in this case initially determined that suspension was the presumed discipline under Standard 6.12; however, the Bar argues that Standards 6.11 and 7.1, which presume disbarment, apply in this case. Standard 6.11 provides:

> Disbarment is appropriate when a lawyer: (a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or (b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

The Bar concedes that subsection (a) was not presumptively appropriate because the referee found that Cox "did not intend to deceive the United States District Court on any matter of substantial justice." The Bar instead argues that the referee did not give sufficient weight to subsection (b) of this standard and that Cox's improper withholding of material information posed a potentially serious injury to the defendant in the case. Furthermore, the Bar maintains that, the actual result, dismissal with prejudice, was a significant adverse effect on the legal proceeding.

The Bar additionally contends that Standard 7.1 constitutes a proper starting point, insofar as it provides that

> [d]isbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

The Bar argues that Cox either acted for her own benefit to ensure the availability of a reluctant witness, or for the benefit of Jackson to ensure Jackson's anonymity and conceal her involvement in the case from her former husband. The Bar contends that the dismissal with prejudice of the criminal case constitutes a serious injury to the legal system. We agree that Standards 6.11 and 7.1 apply in this case and that, accordingly, disbarment and not suspension was the presumptive sanction.

The referee found that, although Cox knew Jackson's real name, she introduced her to the court, jury, and defense counsel as Gracie Greggs; assisted the witness in concealing her true name from the court, jury and defense counsel; and assisted Jackson to testify falsely. These findings indicate that Cox "improperly with[held] material information" as described in Standard 6.11. Further, the indictment against Sterba was dismissed with prejudice and no appeal was taken. We can think of no greater "significant ... adverse effect on the legal proceeding" than a dismissal with prejudice of a criminal indictment due to a prosecutor's misconduct. Equally important, Cox's misconduct ***1284** involved "potentially serious injury to a party," namely the criminal defendant, Sterba, whose rights to a fair trial, confrontation, and due process would have been denied had Cox's misconduct not been revealed. As the United States District Court observed in dismissing the indictment, Cox

> either manufactured or accepted a plan to employ a fictitious name for Jackson and deploy that name in the service of the prosecution both before and during trial to further the prosecutorial goal of a conviction. The expectation was to proceed with the plan without the knowledge of the defense and without the knowledge or consent of the court. By that means, the AUSA [Cox] could secure for the prosecution the presumed benefit of a conviction of Sterba, while avoiding any presumably unnecessary and bothersome little entanglements with whatever lingering facts might impinge the credibility of her featured witness.
>
> *... [T]his plan was hatched with the notion that it would succeed, undetected and unimpaired. In this instance, success means jail for Sterba and a readily*

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repeatable template for renewal in future occasions. The conception and implementation of this plan was intentional and calculated to deprive the defense of its right of confrontation. It almost succeeded.

Sterba, 22 F.Supp.2d at 1340.

[4] We also deem application of Standard 7.1 appropriate under the facts as found by the referee. The referee found that Jackson was reluctant to return to Florida for trial because of a custody dispute with her former husband, and that Customs had assured Jackson that she would not have to testify at trial. The referee found that Cox "listed the name Gracie Greggs for the confidential informant because of concerns for the witness," and "acted (albeit without reflection) in what she thought was the best interest of her witness." Knowingly presenting false evidence is a violation of an attorney's professional duty,[7] and Cox's intent in doing so was "to obtain a benefit for ... another," namely the witness, Jackson. As discussed, such conduct caused serious injury to the legal system and potentially serious injury to the defendant, Sterba. Thus, under the Standards, we view disbarment as the presumptive penalty in this case.

[5] Likewise, we also find disbarment to be the presumptive sanction under this Court's caselaw. Of all the cases cited by the parties, *Florida Bar v. Agar,* 394 So.2d 405 (Fla.1980), is the most instructive on the conduct at issue here. In *Agar,* the attorney knowingly elicited and presented false testimony as to the identity of a witness during a court proceeding. Although the witness in *Agar* was the wife in an uncontested divorce proceeding and the substance of her testimony was to prove an apparently uncontested and minor issue in those proceedings, this Court disapproved the referee's recommended suspension of four months and disbarred Agar, stating that

> [n]o breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty.

Agar, 394 So.2d at 406 (quoting *Dodd v. Florida Bar,* 118 So.2d 17, 19 (Fla.1960)). ***1285** Because there is no discussion in *Agar* of any aggravating or mitigating circumstances, we conclude that *Agar* stands for the proposition that absent any mitigating or aggravating factors, disbarment is the presumptive sanction for an attorney knowingly presenting false testimony in a judicial proceeding.

[6] Although disbarment is the presumptive penalty, we are mindful of the substantial mitigation found by the referee. However, in support of its argument for a three-year suspension, the Bar recommends that we consider Cox's role as a prosecutor in aggravation, arguing that the list of aggravating factors in Standard 9.22 is not all-inclusive. Although we decline to formally characterize Cox's role as a prosecutor as an aggravating factor, we find that Cox's failure to abide by a prosecutor's duty to ensure the fairness of a criminal proceeding is essential to evaluating the gravity of the duty violated in this case.

[7] **[8]** The tenor of the caselaw discussing the role of prosecutors makes clear that prosecutors are held to the highest standard because of their unique powers and responsibilities. The United States Supreme Court observed over sixty years ago that a prosecutor has responsibilities beyond that of an advocate, and has a higher duty to assure that justice is served:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.... He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is

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> not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Thus, a prosecutor has a duty not only "to fairly present the evidence and permit the jury to come to a fair and impartial verdict," *Pendarvis v. State,* 752 So.2d 75, 77 (Fla. 2d DCA 2000), but also "properly functions in a quasi-judicial capacity with reference to the accused ... to see that the accused is accorded a fair and impartial trial." *Gonzalez v. State,* 97 So.2d 127, 128 (Fla. 2d DCA 1957). By the nature of their position, prosecutors direct the power of the government against an accused person. *See Ruiz v. State,* 743 So.2d 1, 8–9 (Fla.1999) (reversing conviction and vacating death sentence in part due to prosecutors' attempt "to tilt the playing field ... by invoking the immense power, prestige, and resources of the State"). Therefore, prosecutors must "be ever mindful of their awesome power and concomitant responsibility ... [to] reflect a scrupulous adherence to the highest standards of professional conduct." *Martin v. State,* 411 So.2d 987, 990 (Fla. 4th DCA 1982); *see also DeFreitas v. State,* 701 So.2d 593, 600 (Fla. 4th DCA 1997) (prosecutor must seek justice "with the circumspection and dignity the occasion calls for"). A criminal prosecution "is not a game where the prosecution can declare, 'It's for me to know and for you to find out,' " *Craig v. State,* 685 So.2d 1224, 1229 (Fla.1996), and a prosecutor is duty-bound to remember that "obtaining a conviction at the expense of a fair trial is not justice." *Briggs v. State,* 455 So.2d 519, 521 (Fla. 1st DCA 1984).

A prosecutor's heightened duties are likewise reflected in the ***1286** Rules Regulating the Florida Bar. Rule 4–3.8 is entitled "Special responsibilities of a prosecutor." Although the Bar did not charge a violation of this rule, the commentary to the rule provides that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." *See* R. Regulating Fla. Bar 4–3.8, cmt. Additionally, Standard 5.2 specifically provides a special set of standards for attorney conduct where the attorney is in an "official or government position," Fla. Stds. Imposing Law. Sancs. 5.2, which clearly encompasses prosecutors on both state and federal levels. We considered these high standards in the recent *Feinberg* case, discussed above, by observing that "[t]ruth is critical in the operation of our judicial system and we find such affirmative misrepresentations by any attorney, but especially one who represents the State of Florida, to be disturbing." *Feinberg,* 760 So.2d at 939. When a prosecutor fails in these duties and violates an individual's constitutional rights, a prosecutor "not only may be admonished by the trial court, but should expect to be subject to disciplinary proceedings by The Florida Bar." *Boatwright v. State,* 452 So.2d 666, 668 (Fla. 4th DCA 1984) (Glickstein, J., concurring specially).

[9] The purpose of lawyer discipline is threefold. First, lawyer discipline must protect the public from unethical conduct but at the same time not deny the public the services of a qualified attorney. *See Florida Bar v. Pahules,* 233 So.2d 130, 132 (Fla.1970). In this case, the referee found, based on the testimony of many distinguished jurists, attorneys, and others that Cox is a hardworking prosecutor who is dedicated to justice and serving the public, and that the conduct in the instant case is an aberration in an otherwise unblemished career. However, Cox failed to heed her duty to represent the public fairly and justly in her role as a prosecutor, and damaged the public by undermining the confidence in the very core of the judicial process—the search for truth. The public clearly deserves protection from a prosecutor who determines on her own when and how to follow the rules. The United States District Court described this breach thus:

> In short, [Cox] arrogated to herself the legal and moral authority to decide what truth became public and, thereby, what fate awaited Sterba. [Cox] substituted herself for the judge, jury, and defense, in effect, making away with the fact-finding machinery.

Sterba, 22 F.Supp.2d at 1340. The public expects and deserves fairness and candor from attorneys, especially from a prosecutor who has the power and responsibility derived

from representing the government. If we are to preserve the credibility of our self-regulated profession, we must address breaches of that trust in a manner that is commensurate with the severity of the breach.

Second, the discipline must be fair to the attorney, with the object of correcting "the wayward tendency in the accused lawyer while offering to [the lawyer] a fair and reasonable opportunity for rehabilitation." *State ex rel. Florida Bar v. Ruskin,* 126 So.2d 142, 144 (Fla.1961). Cox's previously unsullied reputation and this apparently isolated lack of judgment support the conclusion that Cox must be given the opportunity to rehabilitate herself.

Finally, lawyer discipline must operate as an effective deterrent to other lawyers who might be prone or tempted to become involved in like violations. *See Florida Bar v. Lord,* 433 So.2d 983, 986 (Fla.1983). The only effective deterrent to the conduct at issue in this case is a suspension with the requirement that rehabilitation be proven prior to reinstatement. Were we ***1287** to impose a suspension with automatic reinstatement, we would fail in our duty to deter others, because "[a] mere suspension for a fixed period of time, with the assurance of automatic reinstatement at the end of the prescribed period, does not impose upon the lawyer the responsibility of taking affirmative action during the period of suspension in order to gain readmittance at the end of the period." *Ruskin,* 126 So.2d at 144. We warn that we will not hesitate to deal harshly with such misconduct in the future, and trust that our decision here will have the desired effect of deterring this type of disregard for the rules of our profession that directly impact the administration of justice.

CONCLUSION

Karen Schmid Cox is hereby suspended from the practice of law for a period of one year. The suspension will be effective thirty days from the filing of this opinion so that Cox can withdraw from representation accordingly. If Cox notifies this Court in writing that she is no longer practicing or that she does not require thirty days, this Court will enter an order making the suspension effective immediately. Cox shall not undertake any new cases from the date this opinion is filed until she is reinstated. If, following this one-year suspension, Cox is able to demonstrate rehabilitation and is reinstated pursuant to rule 3–7.10 of the Rules Regulating the Florida Bar, Cox will be on probation for a period of one year and be required to complete fifteen hours of continuing legal education in ethics.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, and PARIENTE, JJ., concur.

LEWIS, J., dissents with an opinion.

QUINCE, J., recused.

LEWIS, J., dissenting.

While I agree with the majority that the discipline it imposes today is within a permissible range, I must respectfully dissent. Had the local referee recommended the discipline selected today by this Court I could concur. This Court has generally recognized that the recommendation of a referee as to discipline is persuasive, but we do not afford the same deference to discipline recommendations as is afforded considerations of guilt. However, historically this Court has been firmly committed to the concept that, as a general principle, we do not and should not second-guess a referee's recommendation of discipline if the discipline has a reasonable basis in existing law. In my view, the majority today disregards very important factors involved in our system of lawyer discipline of having referees in local communities make determinations based upon the evidence presented. In the past, we have very clearly articulated:

> As to discipline, we note that the referee in a Bar proceeding again occupies a favored vantage point for assessing key considerations —such as a respondent's degree of culpability and his or her cooperation, forthrightness, remorse, and rehabilitation (or potential for rehabilitation). Accordingly, we will not second-guess a referee's recommended discipline as long that

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discipline has a reasonable basis in existing caselaw.

Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla.1997).

I am concerned that this Court has recently fallen into a pattern of rejecting recommended discipline and merely substituting this Court's view for that of a referee. The standard, as I understand it to be applicable, is not whether we would have recommended the same discipline but, on ***1288** the contrary, whether that which has been recommended has a reasonable basis in existing law. In my view, based upon the evidence presented to this local referee, I cannot conclude that there is no reasonable basis in existing law. While one may find the implementation of more severe discipline in circumstances containing elements similar to those presented in the instant case, one also finds reasonable authority upon which the referee, in our system of discipline, was permitted to rely.

This record demonstrates that the referee conducted two days of hearings directed to the issue of the recommendation as to guilt and an additional day concerning the appropriate discipline. The referee here had the advantage of personal participation in evaluating all of the key considerations involved in this dispute. No fewer than nineteen witnesses were presented by Ms. Cox during the portion of the hearing directed to discipline. The witnesses were most impressive, including nine who were either state or federal court judges. It was the Bar's position below that the appropriate discipline would be suspension for a period ranging from ninety-one days to two years. However, the Bar now asserts in this Court that a three-year suspension should be required.

The record underlying this disciplinary dispute demonstrates that a criminal defendant had allegedly engaged in an Internet transmission with an informant of the United States Customs Service (Customs) which resulted in an indictment charging violations of federal law. Customs had come into contact with the informant, Adria Jackson, in connection with an investigation of child pornography on the Internet. Although having no evidence to suggest that Jackson was involved in criminal activity, following an interview with her, Customs requested that she act as an informant and provide assistance in connection with the investigation of child pornography. The evidence indicates that Customs checked Jackson's background on several occasions, and these investigations revealed no criminal history and there is no evidence to indicate that Jackson ever provided information that would cause concern that she had prior criminal problems, nor is there any evidence that Customs ever had any reason to believe that Jackson had a prior criminal record.

For purposes of identity protection, Jackson was to utilize the name "Gracie Greggs" and she utilized such name in connection with all dealings with Customs, including the signing of documents regarding her employment, the agreement which controlled the conditions of her status, and receipts for payments. This name was utilized in all communications with Customs and internally.

The Internet transmissions between the defendant and the informant with which the underlying proceedings were concerned had been printed, saved, and delivered to Customs. The informant was living in a different state at the time trial was approaching, and she was emotionally distraught that she might be required to return and make a personal appearance to testify, even if it was only limited to matters pertaining to the identification of electronic correspondence. The informant had expressed that it was her clear understanding that she would remain completely anonymous with respect to the particular investigation and she did not want her identity and real name exposed. The record suggests that the informant's concerns were driven by her fear that this matter would have a negative impact upon her personal domestic litigation problems.

Although clearly imprudent and misdirected, Cox sympathized with the informant's dilemma, and, in attempting to ***1289** accommodate the informant's desire for anonymity and to avoid aggravating the domestic situation in which the informant was involved, Cox made the decision which has brought her to this day that all lawyers must seek to avoid. Based upon misplaced sympathies and a cloudy perception as to the role of the informant in the proceedings, Cox permitted the case to flow and be conducted inappropriately.

The majority notes that the decisions upon which Cox has relied as reasonably supporting the determination of the referee can be distinguished, but the cases upon which the majority relies to reject the referee's recommendation can also be clearly distinguished in numerous significant ways. Here,

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the referee, having the benefit of personal participation in the proceedings, found that six very substantial mitigating factors should be applied in connection with the consideration of the discipline to be imposed. Further, the substantial evidence from multiple judicial officers based upon Cox's professional behavior cannot be so lightly disregarded. It must be recognized that cases involving the type of behavior for which Cox must respond here have generated discipline covering the entire range of sanctions from public reprimands to disbarments. There can be no doubt that the violation of the duty of candor undermines the system; however, with the previously approved discipline having such a broad range based upon the decisions from this Court, a rejection of the determination by the referee here is, in my view, merely substituting the personal views of those here for those of the referee, a result which the decisions of this Court counsel against. As very clearly noted in *Florida Bar v. Niles*, 644 So.2d 504, 506–07 (Fla.1994):

> [A] referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. *See* *The Florida Bar v. Lipman*, 497 So.2d 1165, 1168 (Fla.1986); *The Florida Bar v. Poplack*, 599 So.2d 116 (Fla.1992).

In my view, the result here does not afford proper respect to the determination of the referee and the evidence presented.

While one may agree or disagree with the determination in *Florida Bar v. Anderson*, 538 So.2d 852 (Fla.1989), in that case, a public reprimand was imposed in connection with conduct intended to mislead and deceive an appellate court. Forgery was found to exist in connection with legal proceedings in *Florida Bar v. Fatolitis*, 546 So.2d 1054 (Fla.1989), which resulted in a public reprimand. Lack of candor during the discovery process produced a public reprimand in *Florida Bar v. Wright*, 520 So.2d 269 (Fla.1988), and a public reprimand was imposed for false statements made by an attorney who had been subject to prior disciplinary action in *Florida Bar v. McLawhorn*, 535 So.2d 602 (Fla.1988).

False testimony produced a public reprimand in *Florida Bar v. Batman*, 511 So.2d 558 (Fla.1987), as was the result in connection with the filing of a false affidavit in *Florida Bar v. Hagglund*, 372 So.2d 76 (Fla.1979). *See also* *Florida Bar v. Pearce*, 356 So.2d 317 (Fla.1978); *Florida Bar re Brooks*, 336 So.2d 359 (Fla.1976); *Florida Bar v. King*, 174 So.2d 398 (Fla.1965).

It is interesting to note that this Court recently approved the issuance of a public reprimand in connection with the actions of a judicial officer who had both initiated a proceeding and then provided false and misleading testimony in that proceeding, which compromised the integrity of the legal system, in *In re Frank*, 753 So.2d 1228 (Fla.2000). I agree that *Florida Bar* ***1290** *v. Feinberg*, 760 So.2d 933 (Fla.2000), may certainly have some distinguishing features, but the underlying principle which applies here is that a public reprimand recommended by a local referee was recently considered by this Court to be within the range of appropriate discipline where a governmental attorney engaged in conduct involving a lack of candor in connection with a legal proceeding and had undermined the fundamental attorney-client relationship in the criminal context.

In a similar manner, the range of approved discipline in connection with these types of cases falls far below that directed to be imposed today. The mitigation was far less significant in *Florida Bar v. Corbin*, 701 So.2d 334 (Fla.1997), but a ninety-day suspension was imposed for deliberately misrepresenting material facts to a court, knowingly submitting false affidavits, and deliberately attempting to mislead the Bar where the individual involved also had prior disciplinary offenses and possessed a dishonest motive. *See also Florida Bar v. Story*, 529 So.2d 1114 (Fla.1988); *Florida Bar v. Morrison*, 496 So.2d 820 (Fla.1986); *Florida Bar v. Shapiro*, 456 So.2d 452 (Fla.1984).

While I do not condone that which occurred in this case and find it both troubling and aggravating due to the nature of the circumstances, I would not second-guess the referee, merely

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substitute my view for his, and reject his recommendation, which was reached only after careful consideration of the ethical violation, the purposes of discipline, the wide range of sanctions previously approved in decisions from this Court, the aggravating and mitigating circumstances, and, most importantly, the nature, scope, and extent of the evidentiary proceedings upon which the referee relied in making the recommendation of discipline. I must, therefore, respectfully dissent.

All Citations

794 So.2d 1278, 26 Fla. L. Weekly S331

Footnotes

1 Neither the Bar nor Cox challenges the referee's factual findings or recommendations of guilt, which we approve without discussion.

2 The referee did not rely on any one case in support of the recommended public reprimand and probation, and instead distinguished several cases in which rehabilitative suspensions were imposed. The referee distinguished *Florida Bar v. Broida,* 574 So.2d 83 (Fla.1991), in which we imposed a one-year suspension, because the attorney was found to have engaged in many violations, including "continuously misrepresenting facts to the court," and "personally attacking the integrity of multiple lawyers and judges" with whom the attorney had contact. The referee also found *Florida Bar v. Cibula,* 725 So.2d 360 (Fla.1998), inapposite, noting that the attorney "lied to the court about his annual income fully intending to thwart the administration of justice and personally benefit therefrom," and despite the lack of mitigating facts, the attorney was suspended for 91 days. Likewise, the referee distinguished *Florida Bar v. Kravitz,* 694 So.2d 725 (Fla.1997), in which the attorney "lied to the court and tried to extort money from his client," and was suspended for 30 days.

3 *See Florida Bar v. McLawhorn,* 535 So.2d 602 (Fla.1988) (lawyer publicly reprimanded for, among other things, misstating true owner of certain real property in traverse in post-dissolution proceedings where opposing counsel was told of misstatement prior to hearing and the court was informed at hearing).

4 *See Florida Bar v. Fatolitis,* 546 So.2d 1054 (Fla.1989) (attorney publicly reprimanded for signing his wife's name as witness to a will where wife was present at will signing but was physically unable to sign due to having burned her hand); *Florida Bar v. Anderson,* 538 So.2d 852 (Fla.1989) (two attorneys disciplined for making factual misrepresentations in appellate brief, with less culpable attorney receiving public reprimand and lead counsel being suspended for 30 days); *Florida Bar v. Hagglund,* 372 So.2d 76 (Fla.1979) (public reprimand imposed where attorney filed affidavit that attorney "knew or should have known" was false in lawsuit against former client and owner of business in which attorney had invested).

5 *See Florida Bar v. Sax,* 530 So.2d 284 (Fla.1988) (attorney publicly reprimanded following uncontested referee's report for submitting a notarized pleading containing a statement attorney "knew or should have known" was not true); *Florida Bar v. Pearce,* 356 So.2d 317 (Fla.1978) (attorney publicly reprimanded following uncontested referee's report for participating in plans for witnesses to testify falsely); *Florida Bar v. re Brooks,* 336 So.2d 359 (Fla.1976) (attorney publicly reprimanded following conditional guilty plea for testifying falsely in inquest).

6 *See Florida Bar v. King,* 174 So.2d 398 (Fla.1965) (public reprimand imposed in lieu of disbarment on attorney who testified falsely and failed to dissuade other witnesses from testifying falsely before grand

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jury investigating bribery in attorney's senatorial campaign where delay of nine years in the proceeding, subsequent exemplary conduct, and other unique circumstances of the case mitigated against disbarment).

7 The Oath of Admission to the Florida Bar provides in part that an attorney "will never seek to mislead the judge or jury by any artifice or false statement of fact or law."

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The Florida Bar v. Dupee

160 So.3d 838

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160 So.3d 838
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Zana Holley DUPEE, Respondent.

No. SC13–921.
|
March 26, 2015.

Synopsis

Background: Florida Bar filed complaint against attorney, alleging multiple counts of professional misconduct. Referee issued report finding violations of rules of professional conduct and recommending suspension from practice of law for 90 days. Attorney and Bar filed petitions for review.

Holdings: The Supreme Court held that:

[1] evidence supported referee's findings that attorney violated rules of professional conduct, and

[2] one-year suspension was appropriate sanction for attorney's misconduct.

Suspension ordered.

West Headnotes (13)

[1] **Attorneys and Legal Services** ⇐ Scope, Standard, and Extent of Review

Attorneys and Legal Services ⇐ Evidence, verdict, and findings

Supreme Court's review of attorney disciplinary matters is limited, and if a referee's findings of fact are supported by competent, substantial evidence in the record, the Supreme Court will not reweigh the evidence and substitute its judgment for that of the referee.

[2] **Attorneys and Legal Services** ⇐ Honesty in general; communications, representations, and disclosures in general

Proof of the element of intent, as is required for finding that an attorney has engaged in dishonesty, fraud, deceit, or misrepresentation, is satisfied by showing that the attorney engaged in the conduct deliberately or knowingly.

[3] **Attorneys and Legal Services** ⇐ Candor in general; communications, representations, and disclosures in general

Attorneys and Legal Services ⇐ Making or Submitting False Documents

Attorneys and Legal Services ⇐ Money; Funds

Evidence supported finding that attorney knowingly filed dissolution client's inaccurate financial affidavit and failed to disclose existence of cashier's check belonging to client, in violation of rules of professional conduct prohibiting unlawful and dishonest acts, making of a false statement or failure to disclose a material fact to the tribunal, and conduct involving dishonesty, fraud, deceit, or misrepresentation; even if attorney initially believed client's financial affidavit was accurate because she had given away money from cashier's check to charity, as the dissolution proceedings continued, neither attorney nor client could have believed that check would be used for charitable purposes. West's F.S.A. Bar Rules 3–4.3, 4–3.3(a), 4–3.4(b), 4–4.1, 4–8.4(a, c).

[4] **Attorneys and Legal Services** ⇐ Questions of law or fact

In attorney disciplinary proceedings, responsibility for finding facts and resolving conflicts in the evidence is placed with the referee.

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[5] **Attorneys and Legal Services** ⇐ Questions of law or fact

The referee in attorney disciplinary proceedings is in the best position to judge the credibility of witnesses.

[6] **Attorneys and Legal Services** ⇐ Evidence, verdict, and findings

A party seeking to show that a referee's findings of fact in attorney disciplinary proceedings are not supported by competent, substantial evidence cannot do so simply by pointing to contradictory evidence in the record.

[7] **Attorneys and Legal Services** ⇐ Conduct as to Adverse Parties and Counsel

Evidence supported finding that attorney deliberately withheld wife's financial documents requested by opposing counsel in dissolution proceedings, in violation of rules of professional conduct prohibiting concealing or obstructing the opposing party's access to evidence, disobeying the rules of the tribunal, and failing to produce records or documents in response to discovery; husband's requests for production specified that production should be made at his counsel's office, attorney did not object to place of production or seek protective order, and attorney's failure to comply with discovery rules was not justified by fact that records were in a box of documents that opposing counsel could have inspected at attorney's office or fact that all documents were disclosed before trial. West's F.S.A. RCP Rules 1.280(c), 1.350(b); West's F.S.A. Bar Rule 4–3.4(a, c, d); West's F.S.A. Family Law Rules of Proc., Rule 12.285(*l*).

[8] **Attorneys and Legal Services** ⇐ Duties as to false evidence in general

Evidence supported finding that attorney knowingly allowed false evidence to be presented in dissolution proceedings, by wife's inaccurate deposition testimony about withdrawal and redeposit of funds from credit union account, without taking any remedial action, in violation of rules of professional conduct governing candor to a tribunal and prohibiting attorney from fabricating evidence; attorney did not interrupt deposition to counsel wife, and although attorney asserted that she waited until a break and informed opposing counsel that accurate information about amount of money in account could be obtained by reference to certain documents, the transcript did not reflect such a clarification, and counsel for husband did not recall one being made. West's F.S.A. Bar Rules 3–3.3(a, b), 4–3.4(b).

[9] **Attorneys and Legal Services** ⇐ Conduct as to Adverse Parties and Counsel

Evidence supported finding that attorney, who received coin collection from wife in dissolution proceedings, failed to timely notify opposing counsel that she had custody of coins, in violation of rule of professional conduct requiring attorney receiving property in trust to provide notice to parties claiming an interest in the property; although attorney asserted that she had no knowledge of husband's claim to coins, fact that wife wanted attorney to have coins so that husband could not take them was enough to alert attorney that there might be ownership dispute, attorney became aware of dispute when husband visited home while she was there and could not find coins, and attorney did not notify opposing counsel that she had custody of coins until postjudgment contempt proceeding. West's F.S.A. Bar Rule 5–1.1(e, f).

[10] **Attorneys and Legal Services** ⇐ Definite Suspension

Suspension of one year was appropriate sanction for attorney's conduct in dissolution proceedings in knowingly filing wife's inaccurate financial statement, deliberately withholding financial

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documents during discovery, knowingly allowing wife to present false testimony during deposition without taking any remedial action, and failing to notify husband's counsel that she had possession of coin collection that was disputed, in violation of rules of professional conduct prohibiting the making of false statement or failure to disclose material fact to the tribunal, conduct involving dishonesty, fraud, deceit, or misrepresentation, concealing access to evidence, and requiring attorney receiving trust property to provide notice to parties claiming an interest. West's F.S.A. Bar Rules 3–4.3, 4–3.3, 4–3.4, 4–4.1, 4–8.4(a, c), 5–1.1(e, f).

[11] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

In reviewing a referee's recommended discipline, the Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Supreme Court's responsibility to order the appropriate sanction; however, generally speaking, the Supreme Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. West's F.S.A. Const. Art. 5, § 15.

[12] **Attorneys and Legal Services** ⇐ Nature and purpose

Purposes of attorney discipline are: (1) to protect the public from unethical conduct without undue harshness towards the attorney; (2) to punish misconduct while encouraging reformation and rehabilitation; and (3) to deter other lawyers from engaging in similar misconduct.

[13] **Attorneys and Legal Services** ⇐ Comparable dispositions; proportionality

Because the Florida Standards for Imposing Lawyer Sanctions do not distinguish among suspensions of differing length, they are helpful only as a starting point in determining appropriate sanction for attorney misconduct; the Supreme Court also looks to the caselaw and compares the facts and circumstances of the case under review with previous disciplinary cases in which similar misconduct occurred under comparable circumstances.

Attorneys and Law Firms

***840** John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, FL; Adria E. Quintela, Staff Counsel, The Florida Bar, Sunrise, FL; and James N. Watson, Jr., Bar Counsel, The Florida Bar, Tallahassee, FL, for Complainant.

David Robert Ristoff of Williams, Ristoff & Proper, P.L.C., New Port Richey, FL, for Respondent.

Opinion

***841** PER CURIAM.

We have for review a referee's report recommending that Respondent Zana Holley Dupee be found guilty of professional misconduct and be suspended from the practice of law for ninety days followed by two years' probation. We have jurisdiction. *See* art. V, § 15, Fla. Const. Due to the serious nature of the misconduct, we find that more severe discipline is required and suspend Respondent from the practice of law for one year.

FACTS

The Florida Bar filed a complaint against Respondent alleging multiple counts of professional misconduct. The Court referred the complaint to a referee, who conducted disciplinary proceedings including an evidentiary hearing and submitted a report including findings of fact, recommendations as to guilt, and recommendations as to discipline.

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The Referee's Findings of Fact

The referee made the following findings of fact. Respondent represented the wife in a dissolution of marriage action filed by the client's husband in July 2010. Respondent's client had a credit union account in her name only with over $480,000 in it. After the dissolution action was filed and after meeting with Respondent to discuss representation, the client withdrew the money in the account, closed the account, and had the credit union issue a cashier's check in the amount of $482,980.46, payable to "Parenting Education Charitable Trust." Respondent had suggested the name to use on the check, became aware of the existence of the check shortly after its issuance, and knew that no charitable trust by that name existed. This check was never negotiated and remained in the client's possession for the next eleven months, until she redeposited it into a new account at the same credit union and then moved it to an already existing account at a bank. Because the named payee was fictitious and the check was never negotiated, the money represented by the cashier's check remained the property of Respondent's client. *See* § 673.4041(2), Fla. Stat. (2014).

In late August and early September 2010, respectively, the husband's attorney served on Respondent a request for production and standard family law interrogatories. Respondent did not provide timely responses to these discovery requests. The husband's counsel filed a motion to compel, which the trial court granted. In December 2010, Respondent served answers to the standard family law interrogatories and a written response to the husband's request for production. She also filed a family law financial affidavit signed by the wife. The only cash asset listed in the financial affidavit as being in the wife's name only was a checking account containing $16,285.40. The affidavit did not mention the cashier's check then in the wife's possession. The affidavit was therefore false and Respondent submitted it to the court knowing that it was false.

In the wife's answers to the standard family law interrogatories, under the category "assets," subcategory "intangible personal property" (item 4c), the answer stated, "No items other than the financial account listed in the Wife's Financial Affidavit." By stating that the wife's only intangible personal property was the account listed in the affidavit, the answer Respondent served on behalf of the wife was false and Respondent knew it was false. Item 4e called for disclosure of "financial accounts," and the answer read, "These are listed in the Wife's Financial Affidavit. Copies of statements are also included in the documents being produced in response to Husband's Request to Produce." Item 4f called for "closed financial ***842** accounts." The answer read, "Copies of statements are included in the documents being produced in response to Husband's Request to Produce." The answers to items 4e and 4f were incomplete and misleading. Florida Rule of Civil Procedure 1.340, Interrogatories to Parties, provides that interrogatory answers that refer to other records must be "in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party interrogated, the records from which the answer may be derived or ascertained." Respondent knowingly failed to provide truthful and complete disclosure of material information sought in discovery.

The request to produce, in item 6, asked for banking information for the previous four years in three categories, "accounts," "records," and "checks and money orders." The request specified the husband's attorney's office as the place of production. The response served by Respondent on behalf of the wife stated, "The following disclosures and documents as set out below are available for inspection and copying at the office of the undersigned." The responses to items 6a and 6b, which requested bank account information and records, stated that bank account records, including those for the previously mentioned credit union account, were "available for inspection and copying at the office of the undersigned." No response was provided for item 6c, which requested "all cashier's checks, money orders, or certified checks, in your possession or under your control."

Although the husband's request to produce specified the husband's counsel's office as the place of production and the husband's motion to compel compliance had been granted in December 2010, Respondent did not produce the requested items until September and October of 2011. Respondent did not object to the specified place of production or seek a protective order. Under Florida Family Law Rule of Procedure 12.285, Mandatory Disclosure, Respondent was required to produce the requested documents, including the cashier's check. She knowingly failed or refused to produce documents in response to the request for production.

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While the dissolution proceeding was pending, Respondent submitted to counsel for the husband a proposed settlement agreement. The proposal included dispositions of various items and categories of the parties' assets and provided that the wife would receive all funds in accounts held solely in her name. This proposal was delivered at a time when Respondent's client still held the undisclosed cashier's check in an amount exceeding $480,000.

On September 9, 2011, the husband's attorney took the wife's deposition. Respondent was present. Knowing that some years earlier, the husband had transferred $100,000 to the wife as a conciliation following some marital discord, the husband's attorney asked her if she still had that money. The questioning brought out testimony that the wife had withdrawn the money from the account where she had it, along with other money in the account, and had a check issued "for charity," after which she changed her mind about donating the money to charity and redeposited it in a new account. When the husband's attorney asked her how much money she had in the account, she said she could not recall. When he asked her whether it was less than $200,000, she said she could not recall. This was about one month after she had redeposited the proceeds of the cashier's check to an account at the credit union, shortly after which she moved it to an existing account at a bank.

When her client testified in deposition, in Respondent's presence, that she did not know whether the cashier's check was ***843** written for an amount that was less than $200,000, the testimony was false, and Respondent knew it was false. The wife's testimony that the funds had been withdrawn from the account for the purpose of making a donation to a charity was also false because, as Respondent knew, her client had never intended to use the money to fund a trust or make a charitable donation. The referee found that Respondent failed to take any action to correct her client's false testimony so as to prevent the possibility of committing a fraud on the court.

After the deposition testimony in which the wife disclosed that she had withdrawn an unspecified amount of money, but at least $100,000, from her credit union account and had a check issued "for charity," which she later redeposited, the husband's attorney scheduled a hearing on his then pending motions to compel discovery. On the eve of the scheduled hearing date, September 20, 2011, Respondent delivered to the husband's counsel a box of documents which she said contained items responsive to his original request for production filed more than a year earlier. Then, in October, the wife signed and Respondent served a corrected financial affidavit, which disclosed that the wife's checking account balance was $437,422.04. This money was derived from the proceeds of the redeposited cashier's check, some of the money having been spent in the interim. Before he had seen the corrected financial affidavit, the husband's attorney called Respondent to ask if she could tell him the source of the interest income the wife had reported on her 2010 tax return. That same day, Respondent delivered copies of additional records, including those showing the existence of the former credit union account and the issuance of the cashier's check.

After the final judgment was entered in the dissolution case, the court allowed the former husband to visit the former marital home for the purpose of retrieving personal items that had been awarded to him as nonmarital property but not yet given to him. One item on his list of personal items was described as a "coin collection from childhood in fireproof safe in study." When he went to the home to get the item, he could not find it. The former wife, who disputed his ownership of any coins, had removed some coins from the home and given them to Respondent so the former husband would not be able to take them. Respondent did not disclose that she had the coins until she was ordered to produce them in a postjudgment contempt proceeding. When she received the coins from her client, Respondent knew that the husband had asserted or might assert a claim to the coins or at least some of them.

Referee's Recommendations as to Guilt

The referee recommends that Respondent be found guilty of the following rule violations: Rule Regulating the Florida Bar 3–4.3 ("The commission by a lawyer of any act that is unlawful or contrary to honesty and justice ... may constitute a cause for discipline."); rule 4–3.3(a)(1) (a lawyer shall not knowingly make a false statement to a tribunal or fail to correct a false statement made to a tribunal) and 4–3.3(b) (a lawyer representing a client in a proceeding who knows that a person is engaging or has engaged in fraudulent conduct shall take reasonable remedial measures); rule 4–3.4(a)–(d) (a lawyer must not obstruct a party's access to evidence, conceal material that is relevant to a proceeding or counsel or assist

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another to do so, fabricate evidence or counsel or assist a witness to testify falsely, disobey an obligation under the rules of a tribunal, or fail to comply with a proper discovery request); rule 4–4.1 (in representing a client a lawyer shall not make a false *844 statement to a third person or fail to disclose facts to a third person when necessary to avoid assisting in a criminal or fraudulent act); rule 4–8.4(a) ("A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."); rule 4–8.4(c) ("A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation...."); and rule 5–1.1(e)–(f) (upon receipt of property in which another person has or claims an interest, a lawyer shall treat the property as trust property and notify the claimant of receipt of the property).

Referee's Recommendation as to Discipline

The referee recommends that Respondent be suspended from the practice of law for ninety days and that upon reinstatement she be placed on probation for two years with the conditions that she be required to attend Ethics School and a professionalism workshop. The referee also recommends that the cost of the Bar's investigation and prosecution of this matter be charged to Respondent.

Petitions for Review

Respondent seeks review of the referee's report, challenging the referee's findings of fact, the referee's recommendations as to guilt, and the recommended discipline. Respondent argues that she should not be disciplined or, in the alternative, that the record supports only a finding of negligent misconduct justifying disciplinary measures less severe than those recommended by the referee.

The Bar has also filed a petition for review and argues that the proven misconduct calls for more severe discipline than that recommended by the referee. The Bar argues that because Respondent is guilty of misconduct involving deceit, dishonesty, or fraud that was committed knowingly, the appropriate measure of discipline is suspension from the practice of law for one year.

ANALYSIS

[1] The Court's standard of review for evaluating a referee's factual findings is as follows: This Court's review of such matters is limited, and if a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *See* *Fla. Bar v. Frederick*, 756 So.2d 79, 86 (Fla.2000); *Fla. Bar v. Jordan*, 705 So.2d 1387, 1390 (Fla.1998). The Court has repeatedly stated that the referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt. *See Fla. Bar v. Shoureas*, 913 So.2d 554, 557–58 (Fla.2005).

[2] Respondent argues that the referee's findings of fact are not supported by competent, substantial evidence. With respect to the referee's findings that Respondent committed acts involving dishonesty or fraud, Respondent argues that the findings are not supported by the evidence because proof of guilt of such misconduct requires proof of wrongful intent, and the evidence failed to establish intent on her part. This Court has recognized that finding that an attorney has engaged in dishonesty, fraud, deceit, or misrepresentation requires proof of intent as a necessary element. *See, e.g., Fla. Bar v. Barley*, 831 So.2d 163, 169 (Fla.2002); *Fla. Bar v. Fredericks*, 731 So.2d 1249, 1252 (Fla.1999). Proof of the element of intent is satisfied by showing that the attorney engaged in the conduct deliberately or knowingly. *See, e.g., Fla. Bar v. Johnson*, 132 So.3d 32, 36 (Fla.2013); *Fla. Bar v. Brown*, 905 So.2d 76, 81 (Fla.2005). As we explain below, we find the evidence is sufficient *845 to support the referee's findings that Respondent engaged in dishonest conduct knowingly.

Respondent claims there was insufficient evidence to prove that she knew her client had not established a charitable trust with the money she withdrew from her credit union account. Lacking such knowledge, Respondent argues, she did not knowingly submit a false financial affidavit or give false answers in discovery responses on behalf of her client. Respondent argues that the record shows she did not fail to disclose the existence of the former credit union account and the cashier's check, because she referred to records pertaining to the account in her written response to the request to produce, and the records were made available to the husband's attorney. Respondent argues that the record

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shows that when she discovered that her client still had the check, Respondent took reasonable action to provide corrected information by filing an updated financial affidavit. Respondent also states that the evidence shows she took steps to correct the inaccurate information her client provided in her deposition. Respondent also argues that the record fails to show she knew the husband had a claim to the coins she accepted from her client.

The Financial Affidavit and the Interrogatory Answers

[3] About six months before the dissolution of marriage action was filed, Respondent had provided legal advice to the wife concerning her will. The wife told Respondent about her credit union account containing over $480,000. The wife thought of the account as her separate property and told Respondent she did not want her husband to receive any part of her estate. Respondent testified that she advised the wife that by law a spouse is entitled to a share of a deceased person's estate, so she would not be able to completely bar her husband from receiving any part of her estate upon her death. Respondent testified that the wife initially wanted to make her sister the beneficiary of her estate, and Respondent advised her she needed an alternate beneficiary also because if her sister predeceased her, her estate would go to her husband. They discussed various charities the wife might designate as alternate beneficiary. Respondent told the wife about a friend of hers who owned a company that published books that were used in classes intended to teach parents effective child-rearing methods. The company that published the books was a for-profit enterprise, but Respondent suggested the owner might be interested in establishing a nonprofit organization to support the cause of promoting training in effective parenting techniques for the prevention of child abuse.

Respondent testified that when the wife consulted her about the dissolution of marriage action, Respondent advised her that the money she had in her credit union account, or most of it, would probably be deemed a marital asset subject to equitable distribution. According to Respondent's testimony, when the wife insisted that she did not want her husband to receive any of the money, Respondent advised her that if she donated the money to charity, the transaction would have to be disclosed and would be deemed a dissipation of assets, resulting in a setoff in the final distribution of marital assets. Nevertheless, the wife said she wanted to donate the money to the parenting education group Respondent had told her about previously.

When Respondent advised the wife about her will, Respondent did not know whether her friend's company had an affiliated nonprofit support organization. However, by the time Respondent was retained to represent the wife in the dissolution proceeding, she had learned not only that ***846** there was no such nonprofit organization in existence, but also that due to a decline in the business, her friend had decided to seek other employment and was not interested in forming a nonprofit organization related to improving parenting or preventing child abuse. On questioning by her own counsel in the referee proceeding, Respondent testified as follows:

> Q. Okay. Now, this Parenting Education Charitable Trust, which is the payee on this $480,000 check, did you provide that name to her, that entity?
>
> A. When I told her, [my friend] didn't have any sort of charitable arm set up and something would have to be set up. [My friend] would prefer it to be a charitable trust because she didn't want the ongoing administrative expenses that were associated with a 501(c)(3) corporation. [The wife] asked me, well, how would a donation check be made out? I said, it would be made out to the name of the trust. And she asked me, well, how would the trust be named? I said, whatever you want to name it. You're creating it, so it's up to you what you want to name it. And I think she asked me if the name Parenting Education Charitable Trust would be okay, and I said yes.

Respondent testified that she told the wife that she, Respondent, was not qualified to advise her on setting up a charitable trust and she would need to consult other counsel to provide her that service.

The former wife's testimony differed from Respondent's. The former wife testified that Respondent told her the name of the payee to whom she should have the cashier's check written. The former wife testified that she believed Parenting Education Charitable Trust was an entity that had been or was in the process of being established, that Respondent was going to research the issues as necessary, and that other lawyers in her law firm would be able to perform the necessary legal work to establish the charitable entity.

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When asked why the cashier's check was not reported as an asset in the wife's initial family law financial affidavit, Respondent testified that when the wife gave her a worksheet she had prepared for the affidavit, and the money represented by the cashier's check was not listed, Respondent "thought the reason was because she gave it to the charity that she'd set up." The former wife, on the other hand, testified that she assumed Respondent or other lawyers in the law firm were working on setting up the trust. Respondent testified that she did not become aware that the wife had not funded a trust until the following August. Respondent claims that when she found out the wife still had the cashier's check, she advised her to redeposit it in a bank account so that the funds could be disclosed by means of an updated financial affidavit, which was filed in October 2011, before the case went to trial. The trial of the dissolution case was held October 24–26, 2011. Thus Respondent claims she corrected the faulty financial information within a reasonable time after learning of the inaccuracy.

Respondent's denial of the allegations of misconduct in connection with her disclosures to the court and in discovery on behalf of the wife depends on her claim that she assumed the wife had established a charitable trust and transferred the check in the amount of $482,980.46 to the trust. However, Respondent never heard any report back from anyone that a charitable trust had been established and funded with her client's money. From the day the check was issued until the day it was redeposited—a period of nearly a year—so far as the record shows Respondent and her client never discussed the progress being made toward the establishment of a ***847** trust. In order to know that the disclosures and discovery responses submitted on behalf of the wife were accurate, Respondent would have had to confirm that the wife had actually divested herself of the money. According to Respondent, she did not confirm it; she assumed it.

Even if Respondent initially believed the wife's financial affidavit was accurate because she had given away the money, the evidence supports the referee's conclusion: "As the dissolution proceedings continued, neither Respondent nor [the former wife] could have believed that the check would be used for charitable purposes." Although Respondent testified that she did not become aware that her client still had the check until August 2011, the referee implicitly concluded from the evidence that this knowledge must have come much earlier. If Respondent was not aware of the inaccuracy of her discovery responses when they were served, under Family Law Rule of Procedure 12.280, General Provisions Governing Discovery, she was obligated to amend the responses when she became aware that the responses were incorrect or had become incorrect in light of new information. The referee found Respondent never did this and that the failure to do so clearly shows intentional misconduct.

[4] **[5]** **[6]** Although there were conflicts in the evidence, the referee heard the testimony and resolved the conflicts. The responsibility for finding facts and resolving conflicts in the evidence is placed with the referee. *See Fla. Bar v. Hooper,* 509 So.2d 289, 290 (Fla.1987). The referee is in the best position to judge the credibility of witnesses. *See Fla. Bar v. Forrester,* 916 So.2d 647, 652 (Fla.2005); *Fredericks,* 731 So.2d at 1251. A party seeking to show that a referee's findings of fact are not supported by competent, substantial evidence cannot do so simply by pointing to contradictory evidence in the record. *See Fla. Bar v. Committe,* 916 So.2d 741, 746 (Fla.2005). We find that competent, substantial evidence in the record supports the referee's factual findings with respect to Respondent's knowledge of the cashier's check, the falsity of the financial affidavit filed with the court, and the incomplete, false, or misleading interrogatory answers provided to opposing counsel.

Based on her conduct with respect to the wife's financial affidavit and the discovery answers, the referee recommended that Respondent be found guilty of the following rule violations: (1) rule 3–4.3 (unlawful and dishonest acts are a cause for discipline), based on the filing of the inaccurate financial affidavit and not disclosing the existence of the cashier's check; (2) rule 4–3.3(a) (making or failing to correct a false statement of material fact made to a tribunal), based on the filing of the false financial affidavit; (3) rule 4–3.4(b) (a lawyer must not fabricate evidence), based on the submission of the false financial affidavit; (4) rule 4–4.1 (making a false statement or failing to disclose a material fact), based on the false financial affidavit and nondisclosure of the cashier's check; and (5) rule 4–8.4(a) and (c) (a lawyer shall not violate the Rules of Professional Conduct or do so through the acts of another and shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), based on the filing of the affidavit and the nondisclosure discussed in connection with the other violations. As stated above, the factual findings must

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support the recommendations as to guilt. We find that the referee's findings of fact support these recommendations as to guilt.

Response to Husband's Request for Production

[7] Respondent argues that there was no failure to disclose the cashier's check as *848 a financial asset because her written response to the husband's request to produce made reference to the credit union account from which the cashier's check was issued and stated that the records were "available for inspection and copying at the office of the undersigned." Respondent argues that the husband's attorney did not inspect the documents because of his own lack of diligence. However, the request to produce filed by the husband's attorney specified that production of documents should be made at his office. The referee found that Respondent did not object or seek a protective order with respect to the terms of the discovery.

Although the husband's request to produce specified the husband's attorney's office as the place of production, Respondent testified that her paralegal "tried to find out how they could coordinate the discovery but she wasn't getting any answers from [opposing counsel] or his office." The husband's attorney testified that from December 2010, when his first motion to compel was granted, until September 2011, Respondent delayed the production of the documents he sought by his request to produce. He testified that he offered numerous times to pick up the documents, scan them at his office, and bring them back the same day, but his offers were refused. The husband's attorney wanted to examine the documents at his office so he could decide which ones he needed to copy or scan and he preferred to scan the needed items at his office so he would have them in digital format.

Respondent testified that her law firm had a policy of not providing documents in discovery without payment of copying costs by opposing counsel. A paralegal who worked with Respondent testified that the documents were not produced because the husband's attorney refused to pay the copying costs. She said that she offered to send the documents to a copy service to have the documents copied or scanned at his expense, but the husband's attorney refused the offer. Attempting to explain why her firm would not allow the records to be delivered to the husband's attorney for him to inspect, copy, or scan selected items as he chose and then bring them back, the paralegal testified as follows:

> So, it went back and forth several times, but he wanted somebody to deliver them to his office and sit at the office and let him go through and pick out what he wanted and copy them. Because we weren't gonna drop the box of documents off because those were all our original documents and we had not scanned them in or catalogued them or Bates stamped them, you know, to know what—everything that's in there, so we weren't just gonna drop the box of documents off and let him go through and copy them.

This testimony does not justify the failure to produce the documents.

Florida Rule of Civil Procedure 1.350 governs "Production of Documents and Things" and provides that a party may request another party "to produce and permit the party making the request ... to inspect and copy any designated documents." Rule 1.350(b) provides that a request to produce "shall specify a reasonable time, place, and manner of making the inspection" and requires the party to whom the request is directed to respond either stating that the inspection will be permitted as requested or stating an objection. *See also* Fla. Fam. L.R.P. 12.285(*l*) ("Unless otherwise agreed by the parties or ordered by the court, all production required by this rule shall take place ... in the office of the attorney for the party receiving production."). The referee found that Respondent never objected to the husband's request to produce. The *849 husband's request for production did not require Respondent to incur any copying costs. There was no testimony that Respondent had any reason to believe the husband's attorney could not be trusted to inspect the original documents and return them in proper order. While the paralegal described her reluctance to turn over documents without knowing, in the paralegal's words, "everything that's in there," the obvious

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solution would be to catalogue the documents and to know what they are before producing them for inspection. A party's objections to the time, place, or manner of production should be made to the court. *See* Fla. R. Civ. Pro. 1.280(c) (General Provisions Governing Discovery; Protective Orders). The referee found that the dispute about paying for copies "may have resulted in some delay but certainly this was not the major reason for the delay in responding to [the husband's attorney's] requests."

Respondent also argues that if she violated the rules of discovery, the violation was inconsequential because ultimately all the wife's financial information was disclosed before the trial. However, concealing a document even temporarily, and even when the information may be available to opposing counsel by other means or from other sources, has been held to be misconduct. *See* *Fla. Bar v. Forrester,* 818 So.2d 477, 481–82 (Fla.2002). Respondent's claim that there was no concealment of financial information because the bank records were in a box of documents which opposing counsel could have inspected at her office does not justify her failure to comply with the rules of discovery. We find that competent, substantial evidence in the record supports the factual finding of the referee that Respondent deliberately withheld documents requested in the husband's request to produce. This factual finding supports the referee's recommended finding as to Respondent's guilt of violating rule 4–3.4(a) (concealing or obstructing the opposing party's access to evidence) and rule 4–3.4(c)–(d) (disobeying the rules of the tribunal and failure to produce records or documents in response to discovery).

The Wife's Deposition Testimony

[8] Respondent argues that the referee erred in finding that she knowingly allowed false evidence to be presented by way of the wife's deposition testimony about the withdrawal and redeposit of the funds in the credit union account without taking any remedial action. The referee found that the wife's September 2011 deposition testimony that she had the cashier's check issued to make a donation to charity, did not know the amount of the cashier's check, and did not know whether the balance in the account from which she withdrew the money was more or less than $200,000 was false. The wife's testimony was that after she withdrew the money in the form of a cashier's check, it was not her money since it was going to charity; therefore she did not need to include it in her financial affidavit. When she later changed her mind about donating the money to charity, it meant merely that her financial affidavit needed to be "updated." The referee concluded that Respondent knew the wife's deposition testimony was false but took no remedial action.

The referee's recommended findings of misconduct for violating rule 4–3.3, Candor Toward the Tribunal, subdivision (a)(1) and (b), are based partly on Respondent's failure to correct the inaccurate financial affidavit as discussed above and partly on her failure to correct "the false evasive testimony" of the wife at her deposition. Rule 4–3.3(a)(1) provides: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law ***850** previously made to the tribunal by the lawyer." Rule 4–3.3(b) provides:

> A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Furthermore, rule 4–3.3 "applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." R. Regulating Fla. Bar 4–3.3 cmt. [1]

The comment to rule 4–3.3 recognizes that in certain circumstances the rule may put the attorney in the difficult position of betraying the confidence of his or her client:

> 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. Such a disclosure can

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> result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process that the adversary system is designed to implement.

The comment also illustrates the rule's requirement of "reasonable remedial measures" as follows: "If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client if circumstances permit. In any case, the advocate should ensure disclosure is made to the court."

Respondent suggests that the wife was not deliberately lying but was confused due to badgering by the husband's attorney. Respondent also argues that she took reasonable steps to remedy the effect of the wife's inaccurate deposition testimony. Respondent argues that if she had interrupted the wife in the middle of the deposition to counsel her about her testimony, she would have been accused of coaching the witness, so she waited until a break in the deposition to inform the husband's attorney that accurate information about the amount of money in the account could be obtained by examining the records she had referred to in her response to his request to produce—records which she had "made available" to him but had not yet actually provided to him.

Respondent's assumption that any interruption would have been objected to is speculative. We do not know what opposing counsel would have done if Respondent had asked for a suspension of questioning so she could counsel her client because, as far as the transcript shows, she never asked. The referee found that the husband's attorney did not remember Respondent acknowledging the inaccuracy of the wife's testimony and telling him where he could find the correct figures as Respondent claimed. The transcript of the deposition does not show any such correction or clarification on the record. Thus there ***851** was a conflict between Respondent's testimony and that of the husband's attorney. Resolving conflicts in the evidence is the responsibility of the referee. *See Hooper*, 509 So.2d at 290. The referee resolved this factual issue by finding that Respondent failed to take reasonable remedial steps to rectify the effect of false deposition testimony, knowing of its falsity. On review of the record we conclude that the referee's findings that the wife's deposition testimony was false and that Respondent knew it was false and took no reasonable remedial action are supported by competent, substantial evidence.

Respondent argues that the opposing party and the court had accurate financial information by the time of the trial and that the record shows no intent to mislead or deceive the court. In the aftermath of the September 2011 deposition, the requested documents were finally produced and accurate financial information was provided. The circuit court proceeded to render a final judgment and distribute the parties' assets. The Bar responds that Respondent should not be credited for her delayed compliance with her disclosure obligations, because after the deposition of the wife, it was inevitable that the deception would be uncovered, and Respondent had no choice but to provide accurate financial information. Regardless of the lack of effect on the ultimate outcome, the referee found that Respondent knowingly withheld accurate information from opposing counsel and the court by failing to take action to correct the inaccurate testimony at the deposition. This finding is supported by competent, substantial evidence. The referee's finding, in turn, supports the recommendations as to Respondent's guilt of violating rule 4–3.3(a)(1) and (b) (failing to take remedial action to correct the false deposition testimony) and rule 4–3.4(b) (assisting in the giving of false testimony).

Respondent's Receipt of the Coins

[9] Respondent challenges the referee's findings of fact and recommended finding as to misconduct in connection with her taking possession of the coins given to her by the wife. Respondent claims there is insufficient evidence to support the conclusion that she violated rule 5–1.1(e)–(f) by receiving property in trust without notice to a party claiming an interest in the property. Respondent claims she believed the coins the wife gave her were her client's property and she had no reason to believe the husband had a claim to those coins.

There was conflicting evidence concerning the coins. An exhibit admitted into evidence by the referee, which had

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also been an exhibit admitted into evidence in the circuit court dissolution case, was the "List of Husband's Personal Property." Item 9 on the list was "coin collection from childhood in fireproof safe in study." The final judgment in the dissolution case awarded both parties their claimed personal property as submitted to the court in their respective lists. The former husband testified that he had about a dozen old silver dollars and that when he was allowed by court order to visit the former marital home to collect the personal property that had been awarded to him but which he had not yet received, he could not find the coins. He asked the former wife where they were and, according to his testimony, she replied, "I have them in safekeeping." Respondent was present during this visit, heard the conversation, and said nothing.

The former wife testified that during the dissolution trial she gave some coins to Respondent for safekeeping because she was afraid her former husband might try to take them. She said she inherited the coins from her mother and she had claimed them as her separate property in ***852** the dissolution case. She testified that her former husband did not own any coins and the coins that were present in the marital home were hers.

In her testimony before the referee, Respondent admitted that during the dissolution trial she received some coins from her client because the wife was afraid the husband would try to take them. Respondent testified that she believed the coins she received were the separate property of the wife. Respondent testified that to the extent of her knowledge, the former husband did not have a coin collection and that she did not disclose her possession of the coins because she did not know the husband had asserted a claim to the coins she had taken possession of. The dissolution court ultimately divided the coins between the parties.

Respondent acknowledged that the reason the wife wanted her to take the coins was that the husband might try to take them. That fact alone was enough to alert Respondent that there might be a dispute as to the ownership of the coins, whether the husband's claim was meritorious or not. But even if, at the time she received them, Respondent was not aware that the husband claimed ownership of the coins the wife entrusted to her for safekeeping, she certainly became aware that there was a dispute as to the ownership of the coins when the former husband visited the home, looked for some coins, and could not find them. At that point, if not earlier, Respondent had a duty to disclose her custody of the coins. Therefore, even though ownership was disputed by her client, Respondent had a clear duty to notify opposing counsel that she had received and had custody of the coins. She did not do so until she was ordered to in connection with a postjudgment contempt proceeding. The referee's findings of fact represent a resolution of conflicting evidence. The mere showing that there is conflicting evidence in the record is not sufficient to overcome the presumption of correctness that applies to the referee's findings of fact. *See Committe,* 916 So.2d at 746; *Fla. Bar v. Barrett,* 897 So.2d 1269, 1275 (Fla.2005). The findings of fact are supported by competent, substantial evidence in the record. Moreover, the findings of fact support the recommendation of guilt of misconduct for violation of rule 5–1.1(e)–(f) (failure to give notice of receipt of property held in trust).

DISCIPLINE

[10] The referee recommended that Respondent be suspended from the practice of law for ninety days and be placed on probation for two years. The referee observed that a more severe discipline might be deemed appropriate to the nature of the misconduct, but found as mitigating factors that Respondent had an unblemished record and a good professional reputation. Respondent seeks review of the referee's recommendation on discipline. She argues that the discipline is too severe because her only misconduct, if any, was that she failed to respond quickly or thoroughly enough to rectify the situation when she discovered that the wife's financial disclosures were not accurate. She argues that since her misconduct was negligent and not intentional, she should not be suspended but only reprimanded. We have already rejected Respondent's claim that the evidence was insufficient to prove intent under the applicable standard for finding that element. We therefore reject Respondent's argument on the question of discipline.

[11] The Bar argues that the referee's recommended discipline is inadequate in light of the proven misconduct. In reviewing a referee's recommended discipline, this Court's scope of review is broader ***853** than that afforded to the referee's findings of fact because, ultimately, it is our responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson,* 538 So.2d 852, 854 (Fla.1989); *see also* art.

V, § 15, Fla. Const. However, generally speaking, this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer,* 753 So.2d 555, 558 (Fla.1999).

[12] The purposes of attorney discipline are: (1) to protect the public from unethical conduct without undue harshness towards the attorney; (2) to punish misconduct while encouraging reformation and rehabilitation; and (3) to deter other lawyers from engaging in similar misconduct. *See Fla. Bar v. Maynard,* 672 So.2d 530, 540 (Fla.1996); *Fla. Bar v. Neu,* 597 So.2d 266, 269 (Fla.1992); *Fla. Bar v. Lord,* 433 So.2d 983, 986 (Fla.1983).

Florida Standard for Imposing Lawyer Sanctions 6.1, False Statements, Fraud, and Misrepresentation, and Standard 6.2, Abuse of the Legal Process, provide guidance for determining the sanction in this case. Standard 6.1 applies to "conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court." Under standard 6.1, specific standard 6.12 provides: "Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action." Standard 6.2 applies to "failure to obey any obligation under the rules of a tribunal." Under standard 6.2, specific standard 6.22 provides: "Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding." Under these standards, a suspension is appropriate.

[13] Because the standards do not distinguish among suspensions of differing length, they are helpful only as a starting point. *See Fla. Bar v. Walton,* 952 So.2d 510, 514 (Fla.2006); *Brown,* 905 So.2d at 83–84. We also look to the caselaw and compare the facts and circumstances of the case under review with previous disciplinary cases in which similar misconduct occurred under comparable circumstances. *See, e.g., Fla. Bar v. Erlenbach,* 138 So.3d 369, 373–74 (Fla.2014); *Fla. Bar v. Breed,* 378 So.2d 783, 785 (Fla.1979).

In *Florida Bar v. Miller,* 863 So.2d 231, 233–34 (Fla.2003), the respondent was found to have concealed his awareness of a document, submitted false statements as to his awareness of the document, and permitted witnesses to testify in ways that created false impressions as to their awareness of the document. The Court imposed a one-year suspension. *Id.* at 236. In *Florida Bar v. Cox,* 794 So.2d 1278, 1279–80 (Fla.2001), a prosecuting attorney was found to have knowingly concealed information from the court and from the defendant which would have been important information for the defendant to have in preparation for trial. The Court observed that based on the applicable precedents, any attempt to withhold the truth or present false information in a court proceeding would normally merit disbarment. *Id.* at 1284–85. However, based on mitigating factors found by the referee, including the respondent's lack of a prior disciplinary record, the Court imposed a suspension of one year. *Id.* at 1286–87. Other cases show that intentional misrepresentation to a court is regarded as serious misconduct which usually results at minimum in a suspension requiring proof of rehabilitation for reinstatement. *See,* ***854** *e.g., Fla. Bar v. Head,* 84 So.3d 292, 303 (Fla.2012); *Fla. Bar v. Head,* 27 So.3d 1, 9–10 (Fla.2010); *Fla. Bar v. Hmielewski,* 702 So.2d 218, 219–21 (Fla.1997); *Fla. Bar v. Jasperson,* 625 So.2d 459, 463 (Fla.1993).

Based on the referee's findings of fact and recommendations as to guilt, considered in light of the lawyer sanction standards and disciplinary caselaw discussed above, we find that the appropriate measure of discipline in this case is suspension from the practice of law for one year.

CONCLUSION

Accordingly, Respondent is hereby suspended from the practice of law for one year. The suspension will be effective thirty days from the date of this opinion so that Respondent can close out her practice and protect the interests of existing clients. If Respondent notifies this Court in writing that she is no longer practicing and does not need thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Respondent shall accept no new business from the date this opinion is filed until such time

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as she is reinstated to the practice of law by order of this Court. Respondent is required to comply with Rule Regulating the Florida Bar 3–5.1(h).

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399–2300, for recovery of costs from Zana Holley Dupee in the amount of $9,009.33, for which sum let execution issue.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

All Citations

160 So.3d 838, 40 Fla. L. Weekly S171

Footnotes

1 The comment to rule 4–3.3 also includes the following statement: "The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." This comment does not apply here because, as the referee found, Respondent knew the testimony was false. We are also not concerned here with issues that sometimes arise in criminal cases in circumstances where a lawyer's duty of candor to the tribunal must be "balanced with competing obligations." *United States v. Stewart,* 931 F.Supp.2d 1199, 1215 (S.D.Fla.2013).

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The Florida Bar v. Whitney

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132 So.3d 1095, 38 Fla. L. Weekly S878
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Max Ricardo WHITNEY, Respondent.

No. SC11–1135.
Dec. 5, 2013.

Background: In attorney disciplinary proceedings, the referee found misconduct and recommended a ninety-day suspension from the practice of law.

Holdings: The Supreme Court held that:

[1] attorney engaged in misconduct in his handling of client's immigration matters and by his conduct during discovery in client's subsequent legal malpractice proceedings;

[2] one-year suspension was appropriate sanction; and

[3] referee abused his discretion by completely disallowing award for Florida Bar's investigative costs and certain costs for expert fees.

Suspension ordered.

West Headnotes (19)

[1] **Attorneys and Legal Services** ⇐ Evidence, verdict, and findings

Attorneys and Legal Services ⇐ Presumptions and Burden of Showing Error

An attorney contesting referee's findings in attorney disciplinary proceedings cannot meet his burden in the Supreme Court by simply pointing to contradictory evidence when there is also competent, substantial evidence in the record to support the referee's findings.

[2] **Attorneys and Legal Services** ⇐ Evidence, verdict, and findings

Referee's judgment regarding credibility in attorney disciplinary proceedings should not be overturned by the Supreme Court absent clear and convincing evidence that his judgment is incorrect.

[3] **Attorneys and Legal Services** ⇐ Diligence and promptness

Attorney violated rule of professional conduct requiring a lawyer to act with reasonable diligence and promptness in representing a client, where client and his cohabitating girlfriend hired attorney to provide them with legal advice with respect to girlfriend's illegal immigration status, attorney did not seek information regarding girlfriend's prohibited status, and beyond two trips to girlfriend's native country of Brazil, one of which was for a purpose other than his client's case, attorney took no further meaningful action with respect to the immigration matter. West's F.S.A. Bar Rule 4–1.3.

[4] **Attorneys and Legal Services** ⇐ Communications, representations, and disclosures

Doctor who hired attorney to provide him and his cohabitating girlfriend with legal advice with respect to girlfriend's illegal immigration status was attorney's client for purposes of rule of professional conduct governing communication with a client; attorney had two meetings with doctor and his girlfriend, as well as five or six telephone conversations with doctor, and retainer agreement identified doctor as the client. West's F.S.A. Bar Rule 4–1.4.

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[5] **Attorneys and Legal Services** ⇐ Communications, representations, and disclosures

Attorney violated rule of professional conduct requiring a lawyer to inform client of status of representation, where client and his cohabitating girlfriend hired attorney to provide them with legal advice with respect to girlfriend's illegal immigration status, and client did not receive any communication from attorney after hiring him until he contacted attorney nearly a year later to inquire as to the status of attorney's progress on the immigration matter. West's F.S.A. Bar Rule 4–1.4(a).

[6] **Attorneys and Legal Services** ⇐ Communications, representations, and disclosures

Attorney violated rule of professional conduct requiring a lawyer to explain matters to client, where client and his cohabitating girlfriend hired attorney to provide them with legal advice with respect to girlfriend's illegal immigration status, attorney did not explain what procedures would need to be followed to resolve the immigration matter, attorney informed girlfriend that she should remain in the United States and attorney took possession of her document, and it was not until client contacted attorney nearly a year later that attorney finally informed client that the only way he and his girlfriend could legally marry was to travel to her native country of Brazil. West's F.S.A. Bar Rule 4–1.4(b).

[7] **Attorneys and Legal Services** ⇐ Refunds

Attorney violated rule of professional conduct requiring a lawyer to protect client interests upon termination of representation initiated when client and his cohabitating girlfriend hired attorney to provide them with legal advice with respect to girlfriend's illegal immigration status; client paid attorney a total of $19,365 for fees and costs, which attorney deposited into his personal checking account and used to pay personal bills, attorney traveled to girlfriend's native country of Brazil on two occasions to allegedly conduct research that he could have accomplished without leaving the country, attorney did not report to client upon completion of trip, attorney maintained no records relating to client's legal matter, and attorney failed to refund unearned fees or expenses. West's F.S.A. Bar Rule 4–1.16(d).

[8] **Attorneys and Legal Services** ⇐ Candor in general; communications, representations, and disclosures in general

Attorney, who represented himself in legal malpractice action initiated by former client who had retained attorney to provide legal advice with respect to client's girlfriend's illegal immigration status, violated rule of professional conduct prohibiting a lawyer from making a misrepresentation to a tribunal, where attorney falsely represented to trial court that he could not attend duly noticed deposition because he was very ill, when in fact he merely had a rash. West's F.S.A. Bar Rule 4–3.3(a) (2005).

[9] **Attorneys and Legal Services** ⇐ Conduct as to Adverse Parties and Counsel

Attorneys and Legal Services ⇐ Making or Submitting False Documents

Attorneys and Legal Services ⇐ Giving false testimony

Attorney, who represented himself in legal malpractice action initiated by former client who had retained attorney to provide legal advice with respect to client's girlfriend's illegal immigration status, violated rule of professional conduct prohibiting a lawyer from obstructing another party's access to evidence, where attorney delayed production of requested documents in discovery and failed to produce all requested documents, attorney produced redacted documents without

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asserting an objection or indicating that a redaction had been made, attorney provided false testimony, attorney asserted frivolous objections to discovery requests on the basis of attorney-client privilege and withheld public records, and attorney failed to provide a privilege log or otherwise comply with discovery rules. West's F.S.A. Bar Rule 4–3.4(a).

[10] **Attorneys and Legal Services** ⇐ Making or Submitting False Documents

Attorney, who represented himself in legal malpractice action initiated by former client who had retained attorney to provide legal advice with respect to client's girlfriend's illegal immigration status, violated rule of professional conduct prohibiting a lawyer from fabricating evidence, where attorney produced documents that were redacted without asserting an objection or otherwise indicating that a redaction had been made, and attorney had no adequate explanation and failed to identify any privilege that applied to the redactions. West's F.S.A. Bar Rule 4–3.4(b).

[11] **Attorneys and Legal Services** ⇐ Obedience to court rules, orders, and rulings

Attorney, who represented himself in legal malpractice action initiated by former client who had retained attorney to provide legal advice with respect to client's girlfriend's illegal immigration status, violated rule of professional conduct prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal, where attorney failed and refused to participate in pretrial discovery, provided falsified documents, and failed to appear at his noticed deposition without contacting opposing counsel to make other arrangements. West's F.S.A. Bar Rule 4–3.4(c).

1 Cases that cite this headnote

[12] **Attorneys and Legal Services** ⇐ Conduct as to Adverse Parties and Counsel

Attorney, who represented himself in legal malpractice action initiated by former client who had retained attorney to provide legal advice with respect to client's girlfriend's illegal immigration status, violated rule of professional conduct prohibiting a lawyer from failing to comply with a legally proper discovery request; attorney failed to timely respond to the first request for production of documents, and then failed to provide certain documents to opposing counsel, and attorney was evasive regarding identity and address of his accountant. West's F.S.A. Bar Rule 4–3.4(d).

[13] **Attorneys and Legal Services** ⇐ Conduct as to Adverse Parties and Counsel

Attorney, who represented himself in legal malpractice action initiated by former client who had retained attorney to provide legal advice with respect to client's girlfriend's illegal immigration status, violated rule of professional conduct prohibiting a lawyer from engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice, where attorney engaged in a course of conduct aimed at delaying and defeating former client's lawful attempts to obtain evidence, and trial court's intervention was required on at least two occasions to compel the production of documents and appearance for deposition. West's F.S.A. Bar Rule 4–8.4(d).

[14] **Attorneys and Legal Services** ⇐ Definite Suspension

One-year suspension, rather than the ninety-day suspension recommended by the referee, was appropriate sanction for attorney engaged in misconduct in his handling of client's immigration matters and by his conduct during discovery in client's subsequent legal malpractice proceedings; misconduct

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encompassed numerous instances pertaining to both client representation and discovery-related violations, attorney accepted a substantial fee but did no notable work in furtherance of that representation, attorney misused client funds by twice traveling to Brazil unnecessarily, and attorney continued to refer to his conduct as merely negligent.

[15] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

In reviewing a referee's recommended discipline, the Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. West's F.S.A. Const. Art. 5, § 15.

[16] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

The Supreme Court will generally not second-guess the referee's recommended discipline in attorney disciplinary proceedings, as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

[17] **Attorneys and Legal Services** ⇐ Costs and Fees

Referee abused his discretion in attorney disciplinary proceedings by completely disallowing award for Florida Bar's investigative costs and certain costs for expert fees, where there was no showing that the costs were unnecessary, excessive or improperly authenticated. West's F.S.A. Bar Rule 3–7.6(q).

[18] **Attorneys and Legal Services** ⇐ Costs and Fees

Completely disallowing investigative costs in attorney disciplinary proceedings is an abuse of discretion. West's F.S.A. Bar Rule 3–7.6(q).

[19] **Attorneys and Legal Services** ⇐ Costs and Fees

It is not unreasonable in attorney disciplinary proceedings to allow costs for the time that the expert waited to give testimony or for an expert's report. West's F.S.A. Bar Rule 3–7.6(q).

***1098** John F. Harkness, Jr., Executive Director, and Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, Tallahassee, FL, and Frances R. Brown–Lewis, Bar Counsel, The Florida Bar, Orlando, FL, for Complainant.

Kevin P. Tynan of Richardson & Tynan, P.L.C., Tamarac, FL, for Respondent.

PER CURIAM.

We have for review a referee's report recommending that Respondent Max Ricardo Whitney be found guilty of professional misconduct in violation of the Rules Regulating the Florida Bar (Bar Rules) and suspended from the practice of law for ninety days. The Florida Bar has filed a "Notice of Intent to Seek Review of Report of Referee" and Respondent has cross-petitioned, contesting the referee's recommendation of guilt or, alternatively, requesting that the sanction be disapproved. We have jurisdiction. *See* art. V, § 15, Fla. Const. We approve the findings of fact and recommendations of guilt, and disapprove the referee's recommended sanction of a ninety-day suspension. We conclude that Mr. Whitney's misconduct warrants a one-year suspension from the practice of law in Florida. We also conclude that the referee abused his discretion in denying a portion of the costs sought by the Bar.

FACTS

The Florida Bar filed a Complaint against Respondent based upon misconduct arising from Respondent's representation of Dr. Michael G. Hill and Ms. Leila Mesquita de Oliveira, and Respondent's conduct in response to a lawsuit filed by Dr. Hill against Respondent. The Bar alleged that Respondent violated

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the following Bar Rules, as they existed at the time of the complaint: 3–4.3 (the commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise may constitute cause for discipline); 4–1.1 (competence); 4–1.3 (diligence); 4–1.4(a) (keeping client reasonably informed and promptly comply with requests for information); 4–1.4(b) (explaining a matter to client to extent reasonably necessary to permit informed decision); 4–1.16(d) (failing to take steps to the extent reasonably practicable to protect a client's interest upon termination of representation); 4–3.3(a) ("A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures."); 4–3.4(a) (a lawyer shall not unlawfully obstruct another ***1099** party's access to evidence); 4–3.4(b) (a lawyer shall not fabricate evidence); 4–3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); 4–3.4(d) (a lawyer shall not make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request); 4–8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 4–8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice).

A referee was appointed to hold hearings and provide a report to the Court. The referee made the following findings of fact and recommendations.

On January 19, 2004, Dr. Hill hired Respondent to provide immigration and legal advice. At their initial meeting, Respondent was advised that Ms. de Oliveira, who was present at the meeting, was a native of Brazil and was in the United States illegally for the third time. Respondent was informed that she had received a letter from the United States Department of Justice banning her from the country for twenty years because of her two previous illegal entries into the United States. Respondent was further advised that Dr. Hill intended to marry Ms. de Oliveira, but that they were not engaged and Dr. Hill had only known her since November 2003 when she moved into his house.

Based upon their meeting, a fee agreement was executed, which provided for a flat fee of $15,000, plus a $5,000 deposit for costs. In the agreement, Dr. Hill was referred to as the client. The fee contract provided that Respondent would represent Ms. de Oliveira "in regard to all matters pertaining to her immigration status" and that Respondent's obligations under the contract would terminate "upon decision of the Office of the Attorney General granting or denying permission for Leila Mesquita de Oliveira to reenter the United States." Dr. Hill provided Respondent with two checks, one dated January 26, 2004, in the amount of $10,000, and one dated February 6, 2004, in the amount of $9,365. Dr. Hill also paid directly for an airline ticket for Respondent to travel to Brazil. Respondent deposited the checks into his personal checking account, and used Dr. Hill's funds "to pay his personal bills because respondent was experiencing financial problems at the time."

In early 2004, Respondent twice traveled to Brazil to allegedly research the requirements for Dr. Hill and Ms. de Oliveira to marry in Brazil. The referee found that this information was easily obtained without leaving the country. Respondent also claimed that one of the trips to Brazil was to obtain information on rental properties for Ms. de Oliveira and to verify her Brazilian documents. Because the location in which Respondent indicated that he found a residence for Ms. de Oliveira was in an area other than where she lived in Brazil, the referee concluded that that trip was for a purpose other than for his client's case. In September 2004, Respondent took possession of Ms. de Oliveira's Brazilian passport, which she advised him was a falsified document, as well as other original Brazilian documents. The referee found that Respondent "took no further meaningful action with respect to Ms. de Oliveira's immigration matter."

Dr. Hill contacted Respondent in late 2004 or early 2005 after failing to receive any communication from Respondent since hiring him in January 2004. Respondent advised Dr. Hill that he had not initiated the process to have Ms. de Oliveira remain in the United States or to reenter legally so that they could be married in the United States. Respondent advised Dr. Hill that

Ms. de Oliveira needed to marry Dr. *1100 Hill in Brazil, and that he would only proceed further after Dr. Hill paid an additional fee of between $40,000 and $60,000. Dr. Hill terminated Respondent's services and demanded a full refund of his fee and costs, as well as the return of Ms. de Oliveira's documents. Respondent denied Dr. Hill's request, stating that he had earned the fees and costs paid. Respondent failed to provide an accounting to Dr. Hill, and failed to timely return Ms. de Oliveira's documents. Ms. de Oliveira executed a letter dated February 22, 2005, demanding return of her original documents. Respondent did comply with the written request from Ms. de Oliveira, who returned to Brazil in or around April 2005.

In July 2005, Dr. Hill filed a civil lawsuit against Respondent alleging breach of contract, legal malpractice, and unjust enrichment. (*Hill v. Whitney*, Case No. 05–CA–5999). Dr. Hill was represented by attorney Bonnie Jackson and Respondent was pro se. The referee found that "[R]espondent engaged in a course of conduct where he was uncooperative in coordinating the scheduling of hearings."

In an order entered on December 12, 2005, the trial court directed Respondent to produce responsive documents on or before December 19, 2005. Respondent failed to comply with that order and failed to appear for his duly noticed deposition on December 21, 2005. At no time did Respondent contact opposing counsel or file a notice of unavailability for his deposition. Not until January 4, 2006, did Respondent produce the documents sought by the request for production dated September 20, 2005, and which were ordered to be produced by December 19, 2005. Respondent did not produce all of the documents sought. On January 18, 2006, a hearing was held on Ms. Jackson's second motion to compel. Respondent was admonished by the court and advised to fully cooperate with discovery. At Respondent's deposition on January 27, 2006, Ms. Jackson learned of the outstanding documents when Respondent arrived with a client file containing documents that he had not previously produced pursuant to the request for production. Further, Respondent produced documents that were redacted without asserting an objection or otherwise indicating that a redaction had been made.

Respondent failed to produce Visa credit card statements or receipts that were responsive to Dr. Hill's first set of interrogatories and that the circuit court had ordered him to produce. Ms. Jackson sought such records to document the expenditures Respondent made in Brazil that had been allocated to Dr. Hill's cost deposit. In answering Dr. Hill's request for production, Respondent stated that he did not advertise, when, in fact, he had a website which was discovered by Ms. Jackson.

The referee found that Respondent testified falsely and deceptively at his deposition. While he testified that the name of his law firm was "Max R. Whitney, P.A.," Respondent failed to disclose that his website used the name "Max Whitney & Willie Jones Advogados Associados." Moreover, the business card provided to Dr. Hill reflected the name "Carvalhosa & Whitney Direito Internacional," while the Florida Secretary of State, Division of Corporations, reflects the firm registered under the name "The Law Offices of Max R. Whitney, P.A." and includes an address different than the one Respondent testified to during his deposition. In addition, Respondent testified falsely that the only pending litigation in which he was involved was a suit against him by U.B. Vehicle Leasing, Inc., relating to a dispute as to the mileage of a car. However, a mortgage foreclosure action had been filed against Respondent on November 1, 2004, *1101 and was pending at the time of the deposition. Respondent falsely testified that the mortgage on his home had not been in foreclosure. The referee found Respondent's failure to reveal the existence of the foreclosure action "particularly relevant to Dr. Hill's lawsuit given respondent's sworn deposition testimony on January 27, 2006, that he deposited the fees and costs Dr. Hill paid him into his personal checking account and used the funds to pay, among other things, the mortgage on his home."

Ms. Jackson served a motion for sanctions and motion for entry of default judgment against Respondent on March 31, 2006. The circuit court entered an order on May 30, 2006, granting the motion for sanctions and entry of default judgment, striking Respondent's defenses and awarding reasonable attorney's fees and costs to Dr. Hill. The circuit court found that "[R]espondent had 'willfully failed and refused to comply with previous order [sic] of this Court, failed and refused to participate in pretrial discovery and provided falsified documents' in the case."

On October 4, 2007, the circuit court entered a final judgment against Respondent in favor of Dr. Hill, including $20,000 on principal, which Respondent has remitted to Dr. Hill through

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Ms. Jackson. Respondent appealed to the Fifth District Court of Appeal, which upheld the final judgment but remanded for a determination of the correct amount of attorney's fees. *See Whitney v. Hill,* 1 So.3d 1157 (Fla. 5th DCA 2009). A Second Amended Final Judgment was entered on June 15, 2011. Respondent has not paid any of the additional $24,246 in attorney's fees, expert fees, and taxable costs awarded to Dr. Hill.

The referee recommended that Respondent be found guilty of violating Bar Rules: 4–1.3 (diligence); 4–1.4(a) (keeping a client reasonably informed and promptly comply with requests for information); 4–1.4(b) (explaining a matter to the client to the extent reasonably necessary to permit informed decision); 4–1.16(d) (upon termination of representation, a lawyer shall take steps to protect a client's interest); 4–3.3(a) (a lawyer shall not knowingly (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (4) permit any witness to offer testimony or other evidence that the lawyer knows to be false); 4–3.4(a) (a lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or reasonably foreseeable proceeding); 4–3.4(b) (a lawyer shall not fabricate evidence); 4–3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); 4–3.4(d) (a lawyer shall not make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party); and 4–8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice).

Although not expressly addressed in the referee's report, the referee did not recommend that Respondent be found guilty of violating the following Bar Rules alleged in the complaint: 3–4.3 (the commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise may constitute a cause for discipline); 4–1.1 (competence); 4–3.3(a) (a lawyer shall not knowingly: (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be ***1102** directly adverse to the position of the client and not disclosed by opposing counsel); and 4–8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

With respect to Respondent's representation of Dr. Hill, the referee found the testimony of the Bar's expert witness pertaining to immigration law to be helpful. In addition, the referee found Ms. Jackson's testimony to be "forthright" and credible. The referee found Respondent's testimony "to be self-serving and, at times, contrary to previous testimony and/or statements." In addition, the referee found Respondent's testimony regarding the immigration matter to lack credibility.

ANALYSIS

(A) Rule Violations

[1] **[2]** Respondent claims that the referee's findings of fact and recommendations of guilt as to each of the rule violations are erroneous. This Court has stated:

> A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. The party contending that the referee's findings of fact and conclusions as to guilt are erroneous 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. Nowacki, 697 So.2d 828, 832 (Fla.1997) (citations omitted). "An attorney cannot meet his burden by simply pointing to contradictory evidence when there is also competent, substantial evidence in the record to support the referee's findings." *Florida Bar v. Glueck,*

985 So.2d 1052, 1056 (Fla.2008). The Court has repeatedly stated that the referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt. *See Florida Bar v. Shoureas,* 913 So.2d 554, 557–58 (Fla.2005). Moreover, "[t]he referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." *Florida Bar v. Tobkin,* 944 So.2d 219, 224 (Fla.2006) (*citing Florida Bar v. Thomas,* 582 So.2d 1177, 1178 (Fla.1991)).

[3] **Rule 4–1.3.** Rule 4–1.3 provides that "A lawyer shall act with reasonable diligence and promptness in representing a client." Respondent's position is that Dr. Hill was not the client and thus Respondent could not have violated rule 4–1.3 with respect to Dr. Hill. The referee expressly found that Dr. Hill and Ms. de Oliveira hired Respondent to provide them with immigration and legal advice. The retainer agreement identifies Dr. Hill as the client, and the referee found Dr. Hill to be credible. Next, with regard to the issue of diligence, the referee found in pertinent part as follows: "I do find the failure of the Respondent in not seeking information from the Justice Department relative to Ms. de Oliveira's prohibition from being in this country was a failure to diligently represent his client(s),...." Before the referee and again before this Court, Respondent asserts that he did not take that action because he was concerned that a records request would jeopardize Ms. de Oliveira, who was in the United States illegally. Moreover, the referee found that "[b]eyond the two trips to Brazil, [one of which was for a purpose other than his client's case,] respondent took no ***1103** further meaningful action with respect to Ms. de Oliveira's immigration matter." We conclude that the referee's findings of fact are supported by competent, substantial evidence, which are sufficient to support the finding of guilt.

Rules 4–1.4(a) and (b). Rules 4–1.4(a) and 4–1.4(b), as applicable during the time of Respondent's representation in this case, provided in pertinent part as follows:

> **Rule 4–1.4. Communication**
>
> **(a) Informing Client of Status of Representation.** A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> **(b) Duty to Explain Matters to Client.** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

R. Regulating Fla. Bar 4–1.4 (2005).

[4] Once again, Respondent's position is that Dr. Hill was not the client and thus Respondent could not have violated rule 4–1.4 with respect to Dr. Hill. However, Respondent admits that he had two meetings with Dr. Hill and Ms. de Oliveira, as well as five or six telephone conversations with Dr. Hill. Also, the retainer agreement identified Dr. Hill as the client, so Respondent's argument that Dr. Hill was not the client is without merit.

[5] Next, the record shows that Dr. Hill did not receive any communication from Respondent since hiring him in January 2004, until Dr. Hill contacted Respondent in late 2004 or early 2005 to inquire as to the status of Respondent's progress on the immigration matter. Thus, the record supports the referee's recommendation of guilt for rule 4.1.4(a).

[6] Next, the record indicates that Respondent failed to sufficiently explain matters to permit the clients to make informed decisions regarding the representation. Dr. Hill testified that Respondent did not explain what procedures would need to be followed to resolve the immigration matter. In addition, Dr. Hill testified that Respondent informed Ms. de Oliveira that she should remain in the United States and Respondent took possession of her documents. It was not until Dr. Hill contacted Respondent in late 2004 or early 2005 that Respondent finally informed Dr. Hill that the only way Dr. Hill and Ms. de Oliveira could legally marry was to travel to Brazil. Accordingly, the referee's recommendation of guilt as to a violation of rule 4.14(b) is supported.

[7] **Rule 4–1.16(d).** At the time of his representation of Dr. Hill, Rule 4–1.16(d) provided in pertinent part as follows:

> **(d) Protection of Client's Interest.** Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any

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advance payment of fee or expense that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

R. Regulating Fla. Bar 4–1.16(d) (2005).

Respondent argues that the referee found no rule violation, based upon Respondent's return of Ms. de Oliveira's original documents. Respondent is misguided in his argument. Here, the rule violation is Respondent's failure to refund the unearned fees or expenses that he took from Dr. Hill. Respondent's failure to protect the funds is shown by clear and convincing evidence. Dr. Hill paid Respondent a total ***1104** of $19,365 for fees and costs, which Respondent deposited into his personal checking account and used to pay personal bills. Also, Respondent traveled to Brazil on two occasions to allegedly research issues related to the potential marriage of Dr. Hill and Ms. de Oliveira, but as found by the referee, Respondent could have easily obtained this same information without leaving the country and spending Dr. Hill's funds on those trips. Further, one of Respondent's trips, to purportedly obtain information for Ms. de Oliveira about rental properties and English schools, as well as to verify her Brazilian documents, was to a location other than where she lived in Brazil and gave rise to the referee's conclusion that the trip was for a purpose other than his client's case. This is especially noteworthy because Respondent did not report to Dr. Hill after he completed the trip. We also note that Respondent maintained no records relevant to his handling of Dr. Hill's and Ms. de Oliveria's legal matter. Accordingly, the referee's findings of fact are supported by competent, substantial evidence, and these findings support the recommendation that Respondent is guilty of violating rule 4–1.16(d).

[8] Rule 4–3.3(a). Respondent challenged the referee's recommendation that he is guilty of violation rule 4–3.3(a). The rule, in pertinent part, provided as follows:

Rule 4–3.3 Candor Toward the Tribunal

(a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

....

(4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

R. Regulating Fla. Bar 4–3.3(a) (2005).

The alleged misrepresentation to the tribunal underlying the referee's recommendation of guilt regarding this rule pertains to Respondent's representation of himself during the malpractice suit brought by Dr. Hill. Respondent had represented to the circuit court that he could not attend the duly noticed deposition on December 21, 2005, because, when he returned from Brazil, he was very ill; however, the medical records reflect that Respondent did not go to a medical clinic until December 23, 2005—two days after the deposition—and that he merely had a rash. In addition, the records custodian for Respondent's physician testified in a deposition that Respondent was treated solely for a skin rash. Further, the referee expressly found that "Respondent failed to comply with the court's December 12, 2005 order and failed to appear for his duly noticed deposition on December 21, 2005. At no time did respondent file a notice of unavailability for his deposition nor did he contact opposing counsel."

We find that there is competent, substantial evidence in the record to support the referee's finding that Respondent made false representations to the tribunal in response to Ms. Jackson's motion to compel Respondent's appearance for deposition, and that the referee's factual findings are sufficient to support the recommendation that Respondent be found guilty of violating rule 4–3.3(a).

***1105 [9] Rule 4–3.4(a).** Rule 4–3.4, Fairness to Opposing Party and Counsel, provides in pertinent part that a lawyer shall not "unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or

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reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act." R. Regulating Fla. Bar 4–3.4(a).

Respondent contends that he was merely tardy in replying to the First Request for Production, and that he ultimately responded and provided various documents on three separate occasions to Dr. Hill's counsel. The referee's findings, which are supported by competent, substantial evidence, are to the contrary.

Respondent did not produce the required documents sought by the request for production dated September 20, 2005, until January 4, 2006, despite the fact that the production originally was required by October 20, 2005, and the court had thereafter ordered Respondent to comply with the production request on or before December 19, 2005. Further, Respondent failed to produce all the requested documents, a fact that Ms. Jackson discovered during Respondent's deposition on January 27, 2006, when Respondent arrived with a client file containing documents that he had not previously produced pursuant to the request for production. Also, Respondent produced documents that were redacted without asserting an objection or otherwise indicating that a redaction had been made. In addition, Respondent failed to produce his Visa credit card account statements or receipts that the court had ordered him to produce that were responsive to the plaintiff's first set of interrogatories. Additionally, Respondent testified at his deposition that the name of his law firm was "Max R. Whitney, P.A.," but failed to disclose that his website used the name "Max Whitney & Willie Jones Advogados Associados." The business card Respondent provided to Dr. Hill and Ms. de Oliveira reflected another law firm name of "Carvalhosa & Whitney Direito Internacional." The Florida Secretary of State, Division of Corporations, indicated that respondent's law firm was registered with yet another name, "The Law Offices of Max R. Whitney, P.A.," and cited a different address than the one Respondent testified to during his deposition. Next, Respondent falsely testified at his deposition that the only pending litigation in which he was involved was a suit against him by U.B. Vehicle Leasing, Inc., relating to a dispute as to the mileage of a car. Also, Respondent falsely testified that the mortgage on his home had not been in foreclosure. Respondent asserted frivolous objections to discovery requests on the basis of attorney-client privilege and withheld documents despite the fact the documents had originated from Dr. Hill and were public records. He also failed to provide a privilege log or otherwise comply with the discovery rules. There is no dispute that the circuit court struck Respondent's defenses and entered a default judgment against him based upon his failure to comply with the discovery rules. Accordingly, there is competent, substantial evidence in the record to support the referee's factual findings and those findings are sufficient to support the referee's recommendation that Respondent violated rule 4–3.4(a).

[10] Rule 4–3.4(b). Rule 4–3.4, Fairness to Opposing Party and Counsel, provides in pertinent part that a lawyer shall not "fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses ***1106** incurred by the witness in attending or testifying at proceedings." R. Regulating Fla. Bar 4–3.4(b).

Respondent challenges the referee's recommendation of guilt regarding this rule. The record shows that Respondent produced documents that were redacted without asserting an objection or otherwise indicating that a redaction had been made. Specifically, in response to the request for production, Respondent produced to Ms. Jackson a United States Citizenship and Immigration Services Checklist that contained no substantive information. During his deposition, while Respondent was paging through his client file, Ms. Jackson saw a document nearly identical to the one Respondent had produced on January 4, 2006, but this one contained substantive information. Respondent had no adequate explanation for his having redacted this document or for his failure to disclose the redaction to Ms. Jackson in his response to the request for production. Also, he failed to identify any privilege that applied to the redaction. Respondent redacted another document that he produced, also failing to disclose the redaction or identify any particular privilege that would apply to such redaction. This document purported to be a letter dated July 1, 2005, from Respondent to the Department of Homeland Security. Accordingly, there is competent, substantial evidence in the record to support the referee's findings that Respondent, without explanation, produced documents purportedly pertaining to Dr. Hill and Ms. de Oliveira's case that he had altered by removing information. These facts are sufficient to support the referee's recommendation that Respondent fabricated evidence in violation of rule 4–3.4(b).

[11] **Rule 4–3.4(c).** Respondent challenges the referee's recommendation that he is guilty of violating rule 4–3.4(c). The rule provides in pertinent part that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." R. Regulating Fla. Bar 4–3.4(c).

In granting Dr. Hill's motion for sanctions, the circuit court expressly found "that Defendant has willfully failed and refused to comply with previous order [sic] of this Court, failed and refused to participate in pretrial discovery and provided falsified documents in the above-entitled action...." Although Respondent apparently was out of the country on the day that he was to comply with the circuit court's December 12, 2005, order to compel, the record shows that Respondent did not make an appearance at his noticed deposition on December 21, 2005, or contact opposing counsel to make other arrangements. In fact, he did not produce documents until January 4, 2006. Accordingly, there exists competent, substantial evidence to support the referee's finding that Respondent failed to comply with the circuit court's order to compel, and such finding is sufficient to support the referee's recommendation that Respondent violated rule 4–3.4(c).

[12] **Rule 4–3.4(d).** Respondent asserts that the referee is unsupported in recommending that he violated rule 4–3.4(d). The rule provides in pertinent part that a lawyer shall not "in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party." R. Regulating Fla. Bar 4–3.4(d).

The referee found that Respondent failed to timely respond to the first request for production of documents, and then failed to provide certain documents to opposing counsel. The record shows that, in response to interrogatories, Respondent refused to answer questions citing "attorney client privilege" though the lawsuit ***1107** was brought by Dr. Hill regarding Respondent's representation of Dr. Hill. In connection with his failure to turn over receipts related to his representation of Dr. Hill and Ms. de Oliveira, Respondent testified at his deposition that he gave all of his receipts to his accountant, who he identified at the time as Mr. Guerra. However, Respondent could not provide an address for his accountant, even though Respondent was allegedly at the accountant's office one hour before the deposition. More than a month after his deposition, Respondent identified his accountant as Mr. Lemus. Considering the circuit court findings, there exists competent, substantial evidence to support the referee's findings pertaining to Respondent's discovery violations and the evidence is sufficient to support the recommendation as to guilt for a violation of rule 4–3.4(d).

[13] **Rule 4–8.4(d).** Respondent asserts that "[n]ormally this rule is reserved for misconduct that occurs at the courthouse or in a court proceeding." According to Respondent, because he is not guilty of the other rule violations, he is not guilty of violating this rule.

Rule 4–8.4(d) provides in pertinent part that a lawyer "shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice." R. Regulating Fla. Bar 4–8.4(d).

Respondent's conduct during discovery in the civil suit was prejudicial to the administration of justice because he engaged in a course of conduct aimed at delaying and defeating Dr. Hill's lawful attempts to obtain evidence. Respondent's conduct was not isolated and required the intervention of the trial court on at least two occasions to compel the production of documents and appearance for deposition. Accordingly, there is competent, substantial evidence in the record to support the referee's findings of fact and the evidence is sufficient to support the recommendation that Respondent is guilty of violating rule 4–8.4(d).

(B) Discipline

[14] Based upon the rule violations found by the referee, the Bar argues that a one-year suspension is appropriate, rather than the ninety-day suspension recommended by the referee. [1]

The referee found the following aggravating factors under Standard 9.22: (b) dishonest or selfish motive; (c) pattern of misconduct; (d) multiple offenses; (h) vulnerability of the victim(s); and (i) substantial experience in the practice of law. The referee found the following mitigating factors under Standard 9.32: (a) absence of prior disciplinary record; (g) character or reputation; and (k) imposition of other penalties and sanctions. In addition, the referee found as mitigating factors the length of time elapsing between the civil

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proceeding and Respondent's ability to avoid disciplinary action.

The referee recommended a suspension after considering the following Standards for Imposing Lawyer Sanctions were applicable: ***1108** Standards 4.43 (Lack of Diligence [public reprimand]); 4.62 (Lack of Candor [suspension]); 6.12 (False Statements, Fraud, and Misrepresentation [suspension]); 6.22 (Abuse of the Legal Process [suspension]); and 7.2 (Other Duties Owed as a Professional [suspension]).

[15] **[16]** In reviewing a referee's recommended discipline, the Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See* *Florida Bar v. Anderson,* 538 So.2d 852, 854 (Fla.1989); *see also* art. V, § 15, Fla. Const. At the same time, the Court will generally not second-guess the referee's recommended discipline, as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Florida Bar v. Temmer,* 753 So.2d 555, 558 (Fla.1999). We agree that a suspension is warranted, but find that the existing case law, in light of the aggravating and mitigating factors, indicates that the appropriate sanction is a one-year suspension.

Respondent's misconduct encompasses numerous instances pertaining to both client representation and discovery-related violations, as compared to those cases where lesser sanctions were imposed for rule violations solely related to conduct pertaining to client representation or limited to discovery-related ethical violations. In *Florida Bar v. Maier,* 784 So.2d 411 (Fla.2001), the respondent received a sixty-day suspension for failure to act with diligence in pursuing a client's application for alien labor certification, failure to keep the client reasonably informed, and failure to timely respond to Bar inquiries. Similarly, a sixty-day suspension was imposed in *Florida Bar v. Forrester,* 818 So.2d 477 (Fla.2002), where the attorney attempted to conceal evidence during a deposition. In *Maier* and *Forrester,* the number of rule violations was significantly less than is present in the instant case.

In addition, the Court has dealt seriously with attorneys who have demonstrated an egregious disregard for the judicial process. In *Florida Bar v. Bloom,* 632 So.2d 1016 (Fla.1994), the Court imposed a ninety-one-day suspension on a respondent who engaged in discovery violations in a lawsuit where he was named the defendant. The Court found that "Bloom's flagrant disregard for the judicial process, as reflected by the facts of this case, warrants a suspension requiring proof of rehabilitation." *Id.* at 1017. In *Florida Bar v. Batista,* 846 So.2d 479 (Fla.2003), a ninety-one-day suspension was also imposed where the respondent failed to represent his clients and improperly attempted to have his former clients sign false affidavits in exchange for return of their attorney fees.

The Court has imposed one-year suspensions in cases when respondents have essentially taken no action on behalf of their clients, resulting in the finding of numerous ethical violations. In *Florida Bar v. Centurion,* 801 So.2d 858 (Fla.2000), the respondent failed to take several actions with respect to many clients, resulting in dismissal in a number of cases and prejudice to the attorney's clients. In *Florida Bar v. Rotstein,* 835 So.2d 241 (Fla.2002), the appropriate sanction was a one-year suspension. The respondent failed to act on the client's claim before the statute of limitations had run, and then fraudulently created a letter to the client indicating that he had timely withdrawn and advised the client of the statute of limitations. *Id.* at 242. The respondent maintained the fraud before the Bar. *Id.* And in *Florida Bar v. Shoureas,* 892 So.2d 1002 (Fla.2004), the Court suspended the respondent for three years, where counsel accepted representation ***1109** in two cases, collected a fee, and then took little or no action on behalf of his clients. The respondent also failed to keep his clients apprised of the status of their cases or to communicate with his clients. *Id.* at 1003.

Here, Respondent accepted a substantial fee from his client but did not perform notable work in furtherance of that representation. He also misused his client's funds by twice traveling to Brazil, once for no apparent case-related reason and once as unnecessary to obtaining the information sought. While the immigration issue may have been complicated, Respondent did not communicate that issue to Dr. Hill and Ms. de Oliveira. Next, with respect to the malpractice action, Respondent failed to produce documents, did not appear for

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his first noticed deposition, and offered frivolous responses to the interrogatories. Respondent has not paid the portion of the judgment awarding attorney's fees and costs in the malpractice action, and continues to refer to his conduct as negligent.

Based upon the facts in this case and established case law, we find the referee's recommended sanction of a ninety-day suspension unsupported and instead impose a one-year suspension.

(C) Bar Costs

[17] The referee awarded the Bar costs in the amount of $14,887.62, disallowing $3,170.80 of its costs after Respondent filed a motion objecting to some of the Bar's costs. The referee's report does not fully discuss his decision regarding costs, but the report indicates that no investigative costs ($609.14 sought) and certain costs for expert fees ($2560) were not awarded to the Bar.

Rule 3–7.6(q)(1) sets out allowable taxable costs. Pertinent to the instant case are rules 3–7.6(q)(1)(A) (investigative costs, including travel and out-of-pocket expenses) and 3–7.6(q)(1)(F) (witness expenses, including travel and out-of-pocket expenses). Pursuant to rule 3–7.6(q)(3) (Assessment of Bar Costs), "[w]hen the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated." Under the rule, "[t]he referee shall have discretion to award costs and, absent an abuse of discretion, the referee's award shall not be reversed." R. Regulating Fla. Bar 3–7.6(q)(2). Here, there has not been a showing that the Bar's costs were unnecessary, excessive, or improperly authenticated. Thus, the issue is whether the referee abused his discretion in completely disallowing investigative fees and in disallowing the expert fees in the amount of $2560.

[18] **[19]** Significantly, all of the costs listed on the Bar's affidavit are permitted as taxable costs. Respondent has made no showing that the costs were excessive. Completely disallowing investigative costs is an abuse of discretion. Moreover, it is not unreasonable to allow costs for the time that the expert waited to give testimony or for an expert's report. The Court has stated that " '[w]here the choice is between imposing costs on a bar member who has misbehaved and imposing them on the rest of the members who have not misbehaved, it is only fair to tax the costs against the misbehaving member.' " *Florida Bar v. Head,* 27 So.3d 1, 10 (Fla.2010) (*quoting Florida Bar v. Kassier,* 730 So.2d 1273, 1276 (Fla.1998)). Accordingly, we disapprove the referee's award of costs and award the Bar costs in the amount of $18,056.76, the amount requested in its Second Amended Request for Costs. *Cf. Florida Bar v. Rousso,* 117 So.3d 756, 769 (Fla.2013) (concluding that the referee abused his discretion in reducing the Bar's costs based upon an "equitable adjustment"); *see also* ***1110** *Florida Bar v. Dove,* 985 So.2d 1001, 1011 (Fla.2008) (rejecting lawyer's argument for a percentage system for costs in Bar disciplinary cases).

CONCLUSION

Accordingly, we approve the referee's findings of fact and recommendations of guilt. Further, we disapprove the referee's recommendation of a ninety-day suspension and award of costs. Max Ricardo Whitney is hereby suspended from the practice of law in Florida for one year. The suspension will be effective thirty days from the date of this opinion so that Respondent can close out his practice and protect the interests of existing clients. If Mr. Whitney notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Mr. Whitney shall fully comply with Rule Regulating the Florida Bar 3–5.1(h). Further, Mr. Whitney shall accept no new business from the date this opinion is issued until he is reinstated by an order of this Court.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399–2300, for recovery of costs from Max Ricardo Whitney in the amount of $18,056.76, for which sum let execution issue.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

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Footnotes

1 Respondent seeks to invoke the defense of laches to the instant case. We reject Respondent's argument, as the facts remain that the Bar deferred proceeding on Dr. Hill's complaint until completion of the civil litigation between Respondent and Dr. Hill, and much of the delay in that litigation is attributable to Respondent, either as the result of his discovery misconduct or in seeking to appeal the final judgments entered in the case. In addition, Respondent sought additional time for the referee to file his report in this action to permit Respondent additional time to locate a witness in Brazil. Thus, Respondent is the source of the delays. Further, Respondent offers no argument that he was prejudiced by the Bar's decision to defer proceeding on this matter until the civil suit was resolved, or by the delay of the filing of the official complaint.

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The Florida Bar v. Schwed

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The Florida Bar
v.
Lloyd R. Schwed

NO. 88,759
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Opinion

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Outline

Synopsis (p.)
West Headnotes (p.1)
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400

Supreme Court of Florida.

THE FLORIDA BAR, Complainant,

v.

Kelley Andrea BOSECKER, Respondent.

No. SC16-1387
September 27, 2018

Background: State Bar instituted attorney disciplinary proceedings. Referee made findings of fact and recommended conclusions of law.

Holdings: The Supreme Court held that:

[1] attorney violated Bar Rule governing suspension;

[2] attorney violated Bar Rule governing notice to clients;

[3] attorney violated Bar Rule governing conduct involving dishonesty, fraud, deceit, or misrepresentation; and

[4] disbarment was appropriate sanction for attorney's misconduct.

Attorney disbarred.

Procedural Posture(s): Proceeding on Attorney Discipline.

West Headnotes (19)

[1] **Attorneys and Legal Services** ⇐ Evidence, verdict, and findings

The Supreme Court's review of a referee's findings of fact as to each rule violation at an attorney disciplinary proceeding is limited, and if a referee's findings of fact are supported by competent, substantial evidence in the record, the Supreme Court will not reweigh the evidence and substitute its judgment for that of the referee.

[2] **Attorneys and Legal Services** ⇐ Evidence, verdict, and findings

At an attorney disciplinary proceeding, the referee is in a unique position to assess the credibility of witnesses, and his or her judgment regarding credibility should not be overturned absent clear and convincing evidence that his or her judgment is incorrect.

[3] **Attorneys and Legal Services** ⇐ Communications, representations, and disclosures

Attorney violated Bar Rule governing suspension by advising clients that she would monitor their cases and by having discussions with opposing counsel and court personnel during period of her suspension from practice of law without advising such individuals that she was under suspension. Fla. Bar Rule 3-5.1(e).

[4] **Attorneys and Legal Services** ⇐ Candor in general; communications, representations, and disclosures in general

Attorneys and Legal Services ⇐ Communications, representations, and disclosures

Attorney violated Bar Rule governing notice to clients by failing, for over two weeks after she was suspended from practice of law, to furnish copies of her suspension to clients, opposing counsel, and courts and then falsely representing to court, when seeking extension to file affidavit pertaining to suspension notices, that all notices had been provided. Fla. Bar Rule 3-5.1(h).

[5] **Attorneys and Legal Services** ⇐ Engaging or aiding in unauthorized practice of law

Attorney violated Bar Rule governing prohibited conduct by having direct contact with clients while employed by attorneys during period of

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suspension from practice of law. Fla. Bar Rule 3-6.1(d)(1).

[6] **Attorneys and Legal Services** ⇐ Candor in general; communications, representations, and disclosures in general

Attorneys and Legal Services ⇐ Communications, representations, and disclosures

Attorneys and Legal Services ⇐ Conduct as to Adverse Parties and Counsel

Attorney violated Bar Rule governing conduct involving dishonesty, fraud, deceit, or misrepresentation by falsely advising court that she had notified all of her clients, opposing counsel, and the courts of her suspension from practice of law, and by failing to promptly notify clients, opposing counsel, and courts of her suspension. Fla. Bar Rule 4-8.4(c).

[7] **Attorneys and Legal Services** ⇐ Admissibility in general

With regard to the admissibility of evidence in a Bar proceeding, a referee has wide latitude to admit or exclude evidence.

[8] **Attorneys and Legal Services** ⇐ Evidence

Because Bar disciplinary proceedings are neither civil nor criminal, but are quasi-judicial, the rules of evidence are not binding upon the referee.

[9] **Attorneys and Legal Services** ⇐ Admissibility in general

A referee may consider any evidence that is deemed relevant in determining a factual question at an attorney disciplinary proceeding.

[10] **Attorneys and Legal Services** ⇐ Evidence, verdict, and findings

A referee's decision regarding the admissibility of evidence at an attorney disciplinary proceeding will only be disturbed on review upon an abuse of discretion.

[11] **Attorneys and Legal Services** ⇐ Admissibility in general

Testimony and evidence relating to attorney's uncharged conduct with respect to a particular client's case was admissible as relevant to proving Bar's claims of contempt and request for disbarment based upon attorney's misconduct in practicing law while under suspension, given that case at issue was one more instance of such misconduct.

[12] **Attorneys and Legal Services** ⇐ Admissibility in general

Referee presiding over attorney disciplinary proceeding did not abuse her discretion by denying attorney's motion to reopen evidence to admit additional client letters as mitigating evidence; attorney received the mitigation letters after final hearing, but parties had been put on notice of date by which evidence or witnesses had to be disclosed, attorney did not comply with case management order, and attorney did not seek to introduce mitigation letters before close of evidence.

[13] **Attorneys and Legal Services** ⇐ Aggravating factors

Attorneys and Legal Services ⇐ Disbarment; Revocation of License

Disbarment was appropriate sanction for attorney's misconduct arising from her practicing of law while under suspension, in violation of Bar Rules governing suspension, notice to clients, prohibited conduct, and conduct involving dishonesty, fraud, deceit, or misrepresentation; attorney had prior

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disciplinary record and dishonest or selfish motive, refused to acknowledge wrongful nature of her conduct, and had substantial experience in practice of law. Fla. Bar Rules 3-5.1(e), 3-5.1(h), 3-6.1(d)(1), 4-8.4(c).

[14] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

In reviewing a referee's recommended discipline in an attorney disciplinary case, the Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Supreme Court's responsibility to order the appropriate sanction. Fla. Const. art. 5, § 15.

[15] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

Generally speaking, the Supreme Court will not second-guess the referee's recommended discipline in an attorney disciplinary case as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

[16] **Attorneys and Legal Services** ⇐ Aggravating factors

At an attorney disciplinary proceeding, the Supreme Court views cumulative misconduct more seriously than an isolated instance of misconduct, and cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct.

[17] **Attorneys and Legal Services** ⇐ Evidence, verdict, and findings

Attorneys and Legal Services ⇐ Presumptions and Burden of Showing Error

At an attorney disciplinary proceeding, a referee's findings in aggravation carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record.

[18] **Attorneys and Legal Services** ⇐ Particular Subjects of Review

Attorneys and Legal Services ⇐ Presumptions and Burden of Showing Error

A referee's decision not to find that a mitigating or aggravating factor applies when determining the appropriate sanction at an attorney disciplinary proceeding carries a presumption of correctness and will not be disturbed unless clearly erroneous or without support in the record.

[19] **Attorneys and Legal Services** ⇐ Mitigating factors

The fact that there is some evidence in the record to support a finding that a mitigating factor might apply when determining the appropriate sanction at an attorney disciplinary proceeding does not mean that the referee should have necessarily found it applicable.

***691** Original Proceeding – The Florida Bar

Joshua E. Doyle, Executive Director, Tallahassee, Florida, Chardean Mavis Hill and Katrina S. Brown, Bar Counsel, Tampa, Florida, and Adria E. Quintela, Staff Counsel, The Florida Bar, Sunrise, Florida, for Complainant

Kelley Andrea Bosecker, pro se, St. Petersburg, Florida, for Respondent

PER CURIAM.

We have for review a referee's report recommending that Respondent, Kelley Andrea Bosecker, be found guilty of professional misconduct in violation of the Rules Regulating the Florida Bar (Bar Rules) and disbarred. We have jurisdiction. *See* art. V, § 15, Fla. Const. Bosecker has

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sought review of the referee's report. For the reasons that follow, we approve in part the referee's factual findings and recommendations as to guilt, and approve the recommended disciplinary sanction of disbarment.

FACTS

Previously, in case number SC15-1592, Bosecker was the subject of a Florida Bar (Bar) disciplinary proceeding in which the Court approved the uncontested report of the referee and found her guilty of violating Bar Rules 4-3.1 (Meritorious Claims and Contentions) and 4-8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice), and imposed a forty-five day suspension. *Fla. Bar v. Bosecker*, No. SC15-1592, 2016 WL 2595926 (Fla. May 5, 2016).

Nearly three months later, on August 1, 2016, the Bar filed a "Petition for Contempt and Order to Show Cause" against Bosecker, alleging that she was in contempt of the suspension order in case number SC15-1592, effective May 27, 2016. Specifically, Bosecker failed to comply with Bar Rule 3-5.1(h), the notification requirement, and had also continued to engage in the practice of law during her suspension by having direct contact with her clients, engaging in discussions with opposing counsel, and contacting court personnel pertaining to the following cases in which she was counsel of record: *U.S. Bank, N.A. v. Rucker*, case number 2013-CA-002913, in the Fifth Judicial Circuit (Lake County, Florida); *Bank of New York Mellon v. Hodge*, case number 14-006510-CI, in the Sixth Judicial Circuit (Pinellas County, Florida); *JP Morgan Chase Bank, N.A. v. Investor Trustee Services, LLC*, case number 2013-CA-000689, in the Fifth Judicial Circuit (Lake County, Florida); *DeParedes v. Green Tree Servicing, LLC*, case number 5D15-3412, in the Fifth District Court of Appeal; and *Investor Trustee Services, LLC v. PNC Bank N.A.*, case number 2D15-4549, in the Second District Court of Appeal.

As a result of her alleged improper conduct, the Bar sought disbarment.

On August 3, 2016, the Court issued its order to show cause, directing Bosecker to show cause why she should not be held in contempt or otherwise disciplined. Bosecker filed her response on September 7, 2016, stating:

> [At] no time during the suspension period did she hold herself out to be an attorney, represent to anyone that she was an attorney, send any correspondence or email representing that she was an attorney; nor did Respondent ***692** take any action that violated the terms of her suspension from the Bar.

Based upon her responses to the Bar's allegations, the case was referred to a referee.

Following a final hearing, the Report of Referee was filed with the Court on May 25, 2017. The referee recommended that Bosecker be held in contempt of the order in case number SC15-1592, and recommended that she had violated Bar Rules 3-5.1(e) (Suspension), 3-5.1(h) (Notice to Clients), 3-6.1(c) (Notice of Employment Required),[1] and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). The referee further recommended that Bosecker be disbarred. Bosecker filed her "Notice of Intent to Seek Review of Report of Referee," and briefs have been filed by the parties.

The Referee's Findings of Fact and Recommendations as to Guilt.

Based upon the testimony presented and the evidence admitted at the hearing, the referee made the following findings and recommendations of guilt.

First, the referee found that Bosecker violated Bar Rule 3-5.1(h), as follows.

> The Supreme Court of Florida issued an order dated May 5, 2016, in *The Florida Bar v. Kelley Andrea Bosecker*, Case No. SC15-1592, suspending Respondent from the practice of law for forty-five (45) days (the" [sic] Suspension Order'). The Suspension Order was to be effective thirty (30) days so that Respondent could protect the interests of her existing clients, unless she notified the court that the 30 days was not needed to protect her clients' interests. Respondent was ordered to accept no

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new business from the date of the Suspension Order until reinstated, and ordered to fully comply with Rule 3-5.1(h), Rules Regulating The Florida Bar. TFB Exh. 1.

On June 1, 2016, Respondent filed an "Amended Notice by Respondent of Commencement of Suspension," indicating that she ceased practicing law as of midnight on May 26, 2016, and elected to commence her suspension on May 27, 2016. TFB Exh. 3. On June 1, 2016, the Court entered an order making Respondent's suspension effective May 27, 2016, as requested in Respondent's notice. TFB Exh. 4. Thus, Respondent was suspended from May 27, 2016, to July 11, 2016.

From June 3, 2016, through June 13, 2016, Respondent requested extensions of time to submit her required sworn affidavit pursuant to Rule 3-5.1(h) to the Bar. The Bar granted Respondent's first request for an extension, allowing her to submit the affidavit by June 13, 2016. TFB Exh. 5. On the day the affidavit was due, Respondent again asked for additional time from the Bar, which was denied. She then filed a "Motion for Extension of Time to File Affidavit of Providing Suspension Notice" with the Court seeking an extension solely for her affidavit by June 17, 2016. TFB Exh. 6. In her motion, Respondent stated she "has sent out the required suspension notices but needs additional time to finish the list of names and addresses required to be attached to the Affidavit before the Affidavit is submitted to the Bar." The Court entered an order on June 17, 2016, allowing Respondent until June 17, 2016, to provide the affidavit to ***693** the Bar. TFB Exh. 9. Respondent submitted her Rule 3-5.1 affidavit to the Bar on June 16, 2016. TFB Exh. 8. Respondent neither requested nor was given an extension to submit the Suspension Order to the necessary persons or entities. TFB Exhs. 5, 6, 9.

The evidence showed, and Respondent admitted, that she was still furnishing a copy of her Suspension Order to clients, opposing counsel, and courts in mid-June 2016, and as late as June 16, 2016. TFB Exhs. 7, 12d, 13f, 16d, 20e. Additionally, Respondent failed to provide a copy of the Suspension Order to at least one client, Daniel and Jill Baez. TFB Exhs. 8, 19 a-b. The Court heard from the following witnesses who each testified about Respondent's violation of Rule 3-5.1(h): Melissa Mara; Respondent; Alicia Raina Whiting-Bozich, Esq.; Julie Anthousis, Esq.; Chanelle L. Gardner; Judge Thomas H. Minkoff; Linda Holm; Joanne P. Simmons; Judge Vincent G. Torpy, Jr.; and, Kimberly Nolen Hopkins, Esq.

....

The Bar's petition, and the evidence presented at the final hearing, gave examples of Respondent's cases in which Respondent did not provide her clients with notice of her suspension until her suspension had already begun. Respondent did not give those clients an opportunity to take action to protect their interests. Additionally, opposing counsels, Ms. Whiting-Bozich, Ms. Anthousis, and Ms. Hopkins, testified that as of the dates Respondent contacted them regarding her clients' cases, the attorneys had neither received notice from Respondent that she was suspended nor provided a copy of the Suspension Order. The purpose of Rule 3-5.1(h) was entirely thwarted in this case, as Respondent was still furnishing a copy of her Suspension Order to clients, opposing counsel, and courts several weeks after she elected to start her suspension on May 27, 2016.

The referee next found facts pertaining to her recommendations that Bosecker was guilty of violating Bar Rules 3-5.1(e) and 3-6.1 [2]:

The evidence presented at the hearing established clearly and convincingly that Respondent violated Rule 3-5.1(e) by continuing to practice law while suspended, and Rule 3-6.1(c) [sic] by having direct client contact while suspended. Respondent improperly engaged in direct contact with her clients during her period of suspension, and improperly continued to assist her clients during her suspension. Respondent engaged in improper and prohibited discussions with opposing counsel during her suspension. Respondent engaged in improper discussions with court personnel during her suspension. Respondent held herself out to the courts and opposing counsel as an attorney eligible to practice law. Respondent was also allegedly employed during the period of suspension without complying with the requirements of Rule 3-6.1.

The Referee heard from the following witnesses who testified about Respondent continuing to practice law while suspended, and her direct client contact while suspended: Respondent; Alicia Raina Whiting-Bozich, Esq.; Julie Anthousis, Esq.; Chanelle L. Gardner; Judge Thomas H.

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Minkoff; Linda Holm; Grace Ann Fagan, Esq.; Kimberly Nolen Hopkins, Esq.; and, Erica DeParedes.

At the final hearing, evidence was presented to support this Rule violation. *694 Respondent stated in the May 27, 2016, letter that she sent to her clients, opposing counsel, and the courts that she would monitor the clients' cases during the suspension period and that the clients should as well. TFB Exh. 2. Respondent's letter advised the clients that if they needed legal assistance during the suspension period, she would be happy to refer them to an appropriate attorney, and to feel free to contact her if they had any questions or needed additional information. Respondent also sent a letter dated June 1, 2016, on her "attorney at law" letterhead addressed to the District Court of Appeal Clerks in appellate cases she had asking that the District Court of Appeal Clerks provide a copy of her May 27, 2016, letter to the Judges assigned to her cases. TFB Exh. 16b.

Respondent's letters are concerning and speak volumes regarding her intent to violate the Rules. Respondent should not have been monitoring her clients' cases during her suspension period. Respondent received copies of pleadings and orders filed in her clients' cases throughout her suspension because she was still attorney of record in the cases, and did not promptly notify the courts or opposing counsel of her suspension. TFB Exhs. 14c, 16c. Additionally, Respondent's letter dated May 27, 2016, was not provided to her clients until mid-June. To give her clients an opportunity to protect their interests, Respondent should have notified them of her suspension and provided them with an attorney referral prior to the effective date of suspension. Respondent should not have welcomed her clients to contact her during her suspension, as she was prohibited from having direct contact with them. Each of these actions violates the Rules and supports a finding of contempt.

The Bar then presented several cases in which Respondent's participation violated the Suspension Order. In each case, the evidence and testimony demonstrated misconduct in the form of prohibited client contact, lack of employer supervision, and practicing law during the suspension period. A running theme in all of these cases was Respondent's assertion and testimony that other attorneys supervised her, namely Ann Pellegrino and Andrea Roebuck. However, prior to and during Respondent's suspension, the Bar did not receive any notice from Ms. Pellegrino or Ms. Roebuck pursuant to Rule 3-6.1(c) indicating that Respondent was employed by either of them during the period of her suspension. TFB Exhs. 10, 11. In fact, no such notice was received until after the Bar filed its Petition for Contempt and Order to Show Cause in this case. Respondent, Ms. Pellegrino, and Ms. Roebuck each testified that none of them had read Rule 3-6.1 regarding employment of suspended lawyers until about September of 2016, although the Bar sent Respondent a letter dated May 9, 2016, advising her to review Rule 3-6.1 if she intended to be employed while suspended. Respondent testified that she received the Bar's May 9, 2016, letter.

....

In each of these cases, Respondent's suspension prohibited her from providing legal services and legal advice.... The evidence and testimony presented clearly and convincingly shows that Respondent counselled and assisted her clients throughout her suspension, which is the unauthorized practice of law in violation of her suspension order.[3]

*696 Lastly, the referee found facts pertaining to her recommendation that Bosecker was guilty of violating Bar Rule 4-8.4(c), as follows:

> Respondent admitted that on June 13, 2016, Respondent filed a Motion for Extension of Time to File Affidavit of Providing Suspension Notice, stating that Respondent had sent out the required suspension notices but needed additional time to finalize the list of names and addresses required to be attached to the Affidavit, and requesting an extension until June 17, 2016, to furnish her Rule 3-5.1 sworn affidavit to The Florida Bar. TFB Exh. 6. However, on June 14, 2016, and June 16, 2016, Respondent sent out the required suspension notice to her clients, opposing counsel, and the court in at least two (2)

> cases. TFB Exhs. 7, 20e. Respondent misrepresented in her motion filed on June 13, 2016, that she had sent out the required suspension notices. Respondent knowingly made a misrepresentation and never corrected her misstatement to the Court. Furthermore, Respondent engaged in deception and dishonesty by failing to timely inform her clients, opposing counsel, and the courts of her suspension. Although Respondent elected to start her suspension early, she waited for weeks before sending out the required notices. In several of the cases addressed at the final hearing, Respondent's clients were not given prior notice of suspension in order to protect their own interests. Moreover, Respondent continued to communicate with opposing counsel and the courts in her cases without notifying them that she was suspended.

The Referee's Recommended Sanction. In determining the appropriate sanction to recommend, the referee first considered the following Florida Standards for Imposing Lawyer Sanctions: 3.0 (Generally); 4.61 ("Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the client."); 6.11 ("Disbarment is appropriate when a lawyer: (a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or (b) improperly withholds material information, and causes serious or potentially serious injury to a party or causes a significant or potentially significant adverse effect on the legal proceeding."); 7.1 ("Disbarment ***697** is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."); and 8.1 ("Disbarment is appropriate when a lawyer: (a) intentionally violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system, or the profession; or (b) has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct.").

Additionally, the referee found five aggravating factors under Florida Standard for Imposing Lawyer Sanctions 9.22, including the following: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (d) multiple offenses; (g) refusal to acknowledge wrongful nature of conduct; and (i) substantial experience in the practice of law. The referee found that the mitigating circumstances under Florida Standard for Imposing Lawyer Sanctions 9.32, that Bosecker argued for, did not exist.

ANALYSIS

Rule Violations

[1] **[2]** The Court's review of the referee's findings of fact as to each rule violation is limited, and if a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Frederick*, 756 So.2d 79, 86 (Fla. 2000); *see* *Fla. Bar v. Jordan*, 705 So.2d 1387, 1390 (Fla. 1998). Moreover, "[t]he referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." *Fla. Bar v. Tobkin*, 944 So.2d 219, 224 (Fla. 2006) (quoting *Fla. Bar v. Thomas*, 582 So.2d 1177, 1178 (Fla. 1991)). As to the recommendations of guilt, the Court has stated that the referee's factual findings must be sufficient under the applicable rules to support the recommendations. *See Fla. Bar v. Shoureas*, 913 So.2d 554, 557-58 (Fla. 2005). Here, the referee found Bosecker guilty of violating Bar Rules 3-5.1(e), 3-5.1(h), 3-6.1(c), and 4-8.4(c), which are discussed below in turn.

[3] ***Bar Rule 3-5.1(e) (Suspension).*** With regard to Bar Rule 3-5.1(e), the referee found that the Bar established that Bosecker had engaged in the practice of law throughout the period of her suspension. The record evidence established, with respect to specific cases, that Bosecker continued to assist her clients during her suspension, based upon such conduct as advising her clients that she would monitor their cases and having had discussions with opposing counsel and

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court personnel during her suspension without advising them that she was under suspension. Bosecker also received copies of pleadings and orders filed in her clients' cases throughout her suspension because she was still attorney of record in the cases, and did not promptly notify the courts or opposing counsel of her suspension.

[4] ***Bar Rule 3-5.1(h) (Notice to Clients).*** The evidence showed, and Bosecker admitted at the hearing before the referee, that, while the suspension was effective May 27, 2016, she was still furnishing copies of her suspension order to clients, opposing counsel, and courts in mid-June 2016. In addition, in seeking an extension from this Court on June 13, 2016, to file her affidavit pertaining to the suspension notices, Bosecker represented to the Court that all notices had been provided. This was a misrepresentation of fact.

*698 [5] ***Bar Rules 3-6.1(c) (Notice of Employment Required) and 3-6.1(d)(1) (Prohibited Conduct; Direct Client Conduct).*** Bosecker testified that she was working for attorneys Pellegrino and Roebuck at the time that she was suspended. While Bar Rule 3-6.1 allows for attorneys under suspension or disbarment to perform services that may be ethically performed by nonlawyers, notice is required pursuant to Bar Rule 3-6.1(c). Specifically, Bar Rule 3-6.1(c) requires that "[b]efore employment commences, the entity must provide The Florida Bar with a notice of employment and a detailed description of the intended services to be provided by the individual subject to this rule." While Bosecker admitted that no such notice was provided to the Bar, it appears that the hiring entity is responsible for providing the notice and therefore, Bosecker is not in violation Bar Rule 3-6.1(c) under these circumstances.

However, Bar Rule 3-6.1(d)(1) prohibits suspended or former lawyers employed by attorneys from having direct contact with any client. In this case, the referee found numerous instances in which Bosecker had violated that rule.

[6] ***Bar Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).*** As previously indicated, Bosecker engaged in misrepresentation when she advised the Court on June 13, 2016, that she had notified all of her clients, opposing counsel, and the courts of her suspension. Bosecker was also dishonest in failing to promptly notify her clients, opposing counsel, and the courts of her suspension. Although Bosecker argues that she was merely mistaken and did not have the intent to deceive, her actions demonstrate otherwise.

Based upon the foregoing, we approve the referee's findings of fact and recommendations as to guilt pertaining to the violations of Bar Rules 3-5.1(e), 3-5.1(h), 3-6.1(d)(1), and 4-8.4(c). However, we disapprove the referee's recommendation that Bosecker violated Bar Rule 3-6.1(c).

Admissibility of Evidence

[7] [8] [9] [10] With regard to the admissibility of evidence in a Bar proceeding, "a referee has wide latitude to admit or exclude evidence." *Tobkin*, 944 So.2d at 224. Because Bar disciplinary proceedings are neither civil nor criminal, but are quasi-judicial, the rules of evidence are not binding upon the referee. *Fla. Bar v. Shankman*, 41 So.3d 166, 169 (Fla. 2010). Furthermore, a referee may consider any evidence that is deemed relevant in determining a factual question. *Fla. Bar v. Fredericks*, 731 So.2d 1249, 1251 (Fla. 1999). In addition, a referee's decision regarding the admissibility of evidence will only be disturbed on review upon an abuse of discretion. *Fla. Bar v. D'Ambrosio*, 25 So.3d 1209, 1215 (Fla. 2009).

[11] Bosecker argues that before the referee, the Bar improperly presented evidence and testimony from attorney Julie Anthousis pertaining to "the Mealy and Betty Reed loan modification," and that the referee should not have heard or considered the claim because it was not included in the Bar's petition. Bosecker further contends that the referee should have granted her request to submit evidence in response to the Bar's allegations.

In response, the Bar argues that the referee properly considered "uncharged conduct ... that was within the scope of the specific allegations in the Bar's Petition." The Bar explains that it filed its Final Witness List disclosing Ms. Anthousis as a witness in the case, and filed its Final Exhibit List showing several documents related to *Wells Fargo Bank v. Reed* as exhibits. Counsel for Bosecker objected to the introduction of the exhibit as outside the scope of the pleadings. The referee overruled Bosecker's objection, following argument by the Bar that the evidence *699 was relevant to the guilt phase and was within the scope of the Bar's allegations of misconduct.

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Here, the referee did not abuse her discretion in admitting the testimony and evidence relating to Bosecker's actions with regard to the *Reed* case. Rather, the evidence was relevant because the Bar was seeking contempt and disbarment based upon Bosecker's misconduct in practicing law while under suspension, and the *Reed* case was one more instance of such misconduct. Moreover, the referee properly excluded Bosecker's evidence in response, on the basis that she sought to submit evidence at the end of the hearing that had not previously been disclosed to the Bar.

[12] Bosecker also argues that the referee erred in denying her motion to reopen evidence to admit additional client letters. Without further argument or proof, Bosecker contends that the referee was biased against her. The facts underlying this claim are as follows. The Case Management Order in this case, entered on January 3, 2017, indicated that April 7, 2017, was the deadline for the disclosure of witnesses and exhibits. Bosecker received the additional mitigation letters after the April 27-28, 2017, final hearing. Because the parties had been put on notice of the date by which evidence or witnesses had to be disclosed, Bosecker did not comply with the Case Management Order, and she did not seek to introduce the two mitigation letters before the close of the evidence, we conclude that the referee did not abuse her discretion in not admitting the additional mitigating evidence.

Discipline

[13] **[14]** **[15]** **[16]** In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See* *Fla. Bar v. Anderson*, 538 So.2d 852, 854 (Fla. 1989); *see also* art. V, § 15, Fla. Const. However, generally speaking this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer*, 753 So.2d 555, 558 (Fla. 1999). In addition, the Court views cumulative misconduct more seriously than an isolated instance of misconduct, and cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct. *Fla. Bar v. Walkden*, 950 So.2d 407, 410 (Fla. 2007). Moreover, in imposing a sanction, the Court considers the following factors: "a) the duty violated; b) the lawyer's mental state; c) the potential or actual injury caused by the lawyer's misconduct; and d) the existence of aggravating and mitigating factors." Fla. Stds. Imposing Law. Sancs. 3.0.

Here, the referee found the following Standards applied: 3.0 (Generally); 4.61 ("Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the client."); 6.11 ("Disbarment is appropriate when a lawyer: (a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or, (b) improperly withholds material information, and causes serious or potentially serious injury to a party or causes a significant or potentially significant adverse effect on the legal proceeding."); 7.1 ("Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."); and 8.1 ("Disbarment is appropriate when a lawyer: (a) intentionally ***700** violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system, or the profession; or (b) has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct."). While Bosecker argues that these standards should not apply, her argument is based solely upon her own interpretation of the facts from her own testimony, and contrary to the referee's findings.

[17] **[18]** **[19]** Next, the referee found under Standard 9.22 the following factors in aggravation: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (d) multiple offenses; (g) refusal to acknowledge wrongful nature of conduct; and (i) substantial experience in the practice of law. "A referee's findings in aggravation carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record." *Fla. Bar v. Ticktin*, 14 So.3d 928, 937 (Fla. 2009). Bosecker has not made this showing. Instead, she argues her position with regard to the aggravating factors, and ignores the facts as found by the referee. "Because the referee is in the best position to judge the credibility of the witnesses, we defer to the referee's assessment." *Fla. Bar v. Forrester*, 916 So.2d 647, 652 (Fla. 2005). The evidence before the referee readily supports

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her findings in aggravation. In addition, the referee found that the mitigating circumstances under Standard 9.32 that Bosecker argued for did not exist. "A referee's decision not to find that a mitigating or aggravating factor applies also carries a presumption of correctness and will not be disturbed unless clearly erroneous or without support in the record." *Fla. Bar v. Varner*, 992 So.2d 224, 230 (Fla. 2008). Here, Bosecker argues that the referee erroneously failed to find Standards 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings), 9.32(g) (character or reputation) and 9.32(l) (remorse). However, "[t]he fact that there is some evidence in the record to support a finding that a mitigating factor might apply does not mean that the referee should have necessarily found it applicable." *Fla. Bar v. Herman*, 8 So.3d 1100, 1106 (Fla. 2009).

Finally, the referee cited and discussed numerous cases in support of her recommendation of disbarment. For example, the referee cited *Florida Bar v. Brown*, 635 So.2d 13, 13-14 (Fla. 1994), for the proposition that the presumptive penalty for a violation of a prior disciplinary order is disbarment, absent strong extenuating circumstances. In addition, *Florida Bar v. Bern*, 425 So.2d 526, 528 (Fla. 1982), provides in pertinent part that "[i]n rendering discipline, this Court considers the respondent's previous disciplinary history and increases the discipline where appropriate." Here, Bosecker was found to have practiced law while under suspension. Cases relied upon and supporting disbarment for such misconduct include *Florida Bar v. Norkin*, 183 So.3d 1018 (Fla. 2015); *Florida Bar v. Lobasz*, 64 So.3d 1167, 1173 (Fla. 2011); *D'Ambrosio*, 25 So.3d at 1220; and *Florida Bar v. Greene*, 589 So.2d 281, 282-83 (Fla. 1991). Additional cases supporting disbarment for continuing to practice law while under suspension include *Forrester*, 916 So.2d at 654–55, and *The Florida Bar v. Rood*, 678 So.2d 1277, 1278 (Fla. 1996).

Lastly, Bosecker argues that "[t]he rules treat suspended attorneys that are working as a legal assistant differently than individuals who are not lawyers and working as legal assistants," and that as a result, her equal protection rights were violated. The Bar disagrees, pointing out that Bosecker is not a nonlawyer, and as such, is subject to the Bar Rules. One such prohibition is that a suspended attorney shall not engage in direct client contact with clients. Bosecker violated that prohibition. ***701** Contrary to Bosecker's belief, there is no constitutional right to practice law; rather, it is a privilege to which the Court has exclusive jurisdiction under the Florida Constitution to oversee. Based upon this Court's exclusive jurisdiction, we have "the inherent power and duty to prescribe standards of conduct for lawyers, to determine what constitutes grounds for discipline of lawyers, to discipline for cause attorneys admitted to practice law in Florida, and to revoke the license of every lawyer whose unfitness to practice law has been duly established." R. Regulating the Fla. Bar 3-1.2. Having violated the Bar Rules 3-5.1(e), 3-5.1(h), and 4-8.4(c)—i.e, having failed to provide notice to her clients and the courts where she had cases pending that she was under suspension, being in direct contact with clients and judicial staff on behalf of her clients pertaining to those cases, holding herself out to be authorized to practice law, and then continuing to act on behalf of her clients without acknowledging that she was no longer so authorized to act—Bosecker can hardly claim that she acted only as any paralegal or legal assistant would do. Based upon the foregoing, we approve of the referee's report in part on the issue of guilt and approve the referee's report on the issue of discipline.

CONCLUSION

Accordingly, Kelley Andrea Bosecker is hereby disbarred from the practice of law in the State of Florida. Because Bosecker is currently under suspension, the disbarment is effective immediately. Bosecker shall fully comply with Rule Regulating the Florida Bar 3-5.1(h).

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Kelley Andrea Bosecker, in the amount of $3,841.03, for which sum let execution issue.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

Footnotes

1 While the Report of Referee makes reference to Bar Rule 3-6.1(c) and to the fact that Bosecker was employed during her suspension without complying with the requirements of Bar Rule 3-6.1, the referee also concluded that Bosecker violated the rule "by having direct client contact while suspended." Accordingly, it appears that the referee also intended to reference Bar Rule 3-6.1(d)(1) (Prohibited Conduct; Direct Client Conduct).

2 As observed previously, the referee's findings of guilt as to Bar Rule 3-6.1 appear to pertain to both subdivisions (c) and (d)(1).

3 The cases discussed by the referee include the following misconduct (record citations omitted):

[1] In *U.S. Bank v. Rucker*, where Respondent represented Emanuel Rucker. Respondent admitted that on June 30, 2016, she sent an email to opposing counsel, Ms. Whiting-Bozich and Mr. Flicker, stating that Respondent had been in contact with Mr. Rucker and that they were compiling information in the case. In the same email, Respondent asked if opposing counsel would be agreeable to extending a discovery deadline and in granting an extension for filing a counterclaim. Respondent copied her client, Mr. Rucker, on the email. The testimony and evidence showed that Respondent was not supervised by an attorney on this case and another attorney did not direct her to email opposing counsel....

[2] In *Bank of New York Mellon v. Hodge*, Respondent represented Lloyd and Karin Hodge. Respondent testified that she may have drafted and provided the Emergency Motion to Stay Application for Writ of Possession in the client's Second District Court of Appeal case to her clients prior to her suspension. The clients filed the motion *pro se* on June 1, 2016. By order dated June 2, 2016, the Second D.C.A. denied the motion. The order stated that, "[t]he appellants should be aware...that any future pro se filings in this court will be subject to being stricken without further notice to the extent that the appellants remained represented by counsel." Respondent was served with the court's June 2, 2016, order as she was still counsel of record, and she failed to timely notify the court of her suspension....

Respondent admitted that on June 7, 2016, she sent an email to Chanelle L. Gardner, Judicial Assistant to the Honorable Thomas H. Minkoff, stating that Mr. and Mrs. Hodge were requesting that the judge consider the motion for stay of the writ entered by the judge on June 1, 2016, and requesting information regarding what the clients needed to do to get the judge to make a determination on the motion the clients filed *pro se*. Respondent copied her clients and opposing counsel on the email. Respondent did not indicate in the email that she was suspended from the practice of law, or that she was not emailing the court as an attorney. By sending an email to the judicial assistant requesting information in the client's case, Respondent provided a service to her client during her suspension. By copying her clients on the email, Respondent had prohibited contact with her clients during her suspension.

... Furthermore, and glaringly significant, Respondent's email failed to indicate she was contacting the court on behalf of another attorney....

[3] In *JP Morgan Chase Bank v. Investor Trustee Services*, Respondent represented Investor Trustee Services. Respondent admitted that on or about the morning of June 14, 2016, Respondent left a voicemail message and sent an email to Linda Holm, Judicial Assistant to the Honorable Sandra Champ, indicating that the defendant would be filing a motion to cancel a foreclosure sale set for June 22, 2016, based on a pending motion for rehearing, and also requesting information and hearing times in the matter....

....

[4] In *DeParedes v. Green Tree Servicing*, Respondent represented Erika and Eduardo DeParedes. Respondent admitted that she engaged in two instances of direct contact with her client, Erica DeParedes, during the suspension period. On or about June 9, 2016, Respondent was served with the Appellee's Answer Brief as Respondent was counsel of record in the case, and failed to timely inform opposing counsel, Kimberly Hopkins, or the court of Respondent's suspension. Respondent admitted that she

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contacted Ms. DeParedes on or about June 9, 2016, to advise that she had received service of the Appellee's Answer Brief, that a Reply Brief needed to be filed, and was due in 20 days....
On June 16, 2016, Respondent emailed opposing counsel, Ms. Hopkins, and asked if she would consent to an extension until July 28 for the filing of a reply brief in the case. Respondent copied her client, Ms. DeParedes, on the email....

....

[5] In *Investor Trustee Services, LLC v. PNC Bank Nat'l Ass'n,* Respondent admitted that on June 23, 2016, during the period of Respondent's suspension, she sent an email to opposing counsel, Kimberly Hopkins, stating that Respondent was contacting Ms. Hopkins on behalf of attorney Andrea Roebuck who was retained and would be filing a notice of appearance in the case. Respondent's June 23, 2016, email asked Ms. Hopkins if she would agree to Ms. Roebuck filing a motion for reinstatement of the case. The docket shows that Ms. Roebuck filed a notice of appearance and motion for reinstatement on June 23, 2016, which was denied on July 7, 2016. In fact, the docket shows that nothing further happened in the appeal until Respondent filed a notice of appearance on July 21, 2016, which only provides service to opposing counsel. Ms. Roebuck's appearance and filing of the motion for reinstatement were merely placeholders until Respondent's suspension ended.

[6] In *Wells Fargo Bank v. Reed*, Respondent represented Mealy and Betty Jo Reed. In this case, Respondent inappropriately contacted opposing counsel, Ms. Anthousis, and engaged in the practice of law during the period of her suspension by providing legal services to her clients including representing the clients' interests in getting a loan modification, and providing legal advice regarding what the clients needed to do to finalize their loan modification. On June 2, 2016, Respondent sent an email to opposing counsel regarding Mr. Reed providing proof of delivery of his April payment to Wells Fargo, but that the payment had not been cashed. Respondent copied her client on the June 2, 2016, email. On June 13, 2016, Respondent sent an email to opposing counsel stating that the Reeds were never provided a permanent modification agreement by the lender to sign, and that Respondent and the client had been requesting the agreement for some time. Respondent copied her client on the June 13, 2016, email. On June 15, 2016, opposing counsel's assistant sent Respondent loan modification documents for the borrower to sign. Respondent thanked opposing counsel's assistant by email also on June 15, 2016. The client was copied on both emails. Ms. Anthousis testified that she believed Respondent was representing the Reeds during this time.

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Florida Bar v. Kinsella

Supreme Court of Florida. | December 20, 2018 | 260 So.3d 1046 | 2018 WL 6711456

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Outline

Synopsis (p.1)
West Headnotes (p.1)
Attorneys and Law Firms (p.2)
Opinion (p.2)
Dissenting Opinion (p.5)
All Citations (p.9)

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McKenna, Patrick 9/30/2020
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260 So.3d 1046
Supreme Court of Florida.

The FLORIDA BAR, Complainant,
v.
Jacqueline Marie KINSELLA, Respondent.

No. SC17-55
|
December 20, 2018

Synopsis

Background: Attorney disciplinary proceedings were commenced after attorney entered a no contest plea to first-degree misdemeanor charge of petit theft in connection with stealing money from cash registers at a store where she worked.

[Holding:] The Supreme Court held that three-year suspension, rather than disbarment, was appropriate sanction for attorney misconduct.

Ordered accordingly.

Canady, C.J., dissented and filed opinion in which Lewis, J., concurred.

Pariente, J., dissented and filed opinion.

Lewis, J., dissented and filed opinion.

Procedural Posture(s): Proceeding on Attorney Discipline.

West Headnotes (3)

[1] **Attorneys and Legal Services** ⇐ Mitigating factors

Attorneys and Legal Services ⇐ Criminal conduct

Attorneys and Legal Services ⇐ Criminal Conduct

Three-year suspension, rather than disbarment, was appropriate sanction for attorney misconduct in connection with attorney's entry of no contest plea to first-degree misdemeanor petit theft with adjudication withheld after stealing money from cash registers at a store where she worked, in violation of professional conduct rules governing misconduct, criminal misconduct, criminal conduct, and conduct involving dishonesty; total amount of thefts was less than $1,000, attorney fully and freely disclosed misconduct to State Bar and took steps of her own accord to address her financial situation, attorney's theft did not involve client funds and was unrelated to the practice of law, and attorney cooperated with authorities in aftermath of her crime. Fla. Bar Rules 3-4.3, 3-4.4, 4-8.4(b), 4-8.4(c); Fl. St. Lwyr. Sanctions, Standard 5.12.

[2] **Attorneys and Legal Services** ⇐ Court of last resort; Supreme Court

Attorneys and Legal Services ⇐ Disposition and punishment; sanctions

In reviewing a referee's recommended attorney discipline, the Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. Fla. Const. art. 5, § 15.

[3] **Attorneys and Legal Services** ⇐ Disposition and punishment; sanctions

In general, the Supreme Court will not second-guess the referee's recommended attorney discipline as long as it has a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. Fl. St. Lwyr. Sanctions, Standard 1.1 et seq.

Original Proceeding – The Florida Bar

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Florida Bar v. Kinsella, 260 So.3d 1046 (2018)
44 Fla. L. Weekly S14

Attorneys and Law Firms

Joshua E. Doyle, Executive Director, Tallahassee, Florida, Kenneth H. P. Bryk, Bar Counsel, Orlando, Florida, and Adria E. Quintela, Staff Counsel, The Florida Bar, Sunrise, Florida, for Complainant

Jacqueline Marie Kinsella, pro se, Goldenrod, Florida, for Respondent

Opinion

PER CURIAM.

***1047** This case is before us on the review of a referee's report recommending that Respondent, Jacqueline Marie Kinsella, be found guilty of various violations of the Rules of Professional Conduct arising from her theft of money from Kohl's Department Store, where she worked as an employee. After finding numerous mitigating factors, the referee recommended that Kinsella be suspended from the practice of law for ten days. Neither party contested the findings of guilt, but The Florida Bar sought review of the ten-day suspension, arguing in favor of a rehabilitative suspension of ninety-one days. After reviewing the referee's report, we suspended Kinsella immediately and issued an order to show cause why she should not receive a more severe sanction up to and including disbarment. Having considered the record, the responses to the order to show cause, and our prior case law, we conclude that a more severe sanction than a ninety-one day suspension is required and hereby suspend Kinsella from the practice of law for three years.

FACTS

Kinsella was admitted to The Florida Bar in February 2016. [1] On three separate occasions between April 21, 2016, and May 6, 2016, Kinsella stole money from three different cash registers at the Kohl's Department Store where she worked. She stole $140 on April 21, 2016, $100 on April 25, 2016, and $520 on May 6, 2016.

In May 2016, she was arrested and charged with grand theft of $300 or more but less than $5,000. On September 1, 2016, Kinsella entered a no contest plea to the first-degree misdemeanor charge of petit theft, and the remaining charges were dismissed by the State. Adjudication of guilt was withheld and she was placed on probation under the supervision of the Department of Corrections for a period of twelve months. Kinsella was further ordered to pay court costs and restitution to Kohl's, perform fifty hours of community service, complete a Vital Life Skills Class, and not to enter or go upon the premises of any Kohl's store.

On January 11, 2017, The Florida Bar filed its formal complaint against Kinsella in these proceedings. On January 31, 2017, Kinsella filed her Answer wherein she admitted the alleged facts and rule violations. On April 27, 2017, a sanction hearing was held before a referee to determine the appropriate disciplinary sanction. Because Kinsella admitted all allegations contained in the Bar's formal complaint, no evidentiary testimony was presented to establish findings of fact or guilt.

The referee found that Kinsella fully cooperated with law enforcement and the Bar, her misconduct was not related to alcohol or drug abuse or a gambling addiction, and none of the stolen funds were related to the practice of law. Kinsella testified during a sworn statement and at the sanction hearing that she voluntarily entered into a treatment contract with Florida Lawyers Assistance, Inc. (FLA) and has made progress in addressing the issues that led her to engage in these acts of misconduct. She reported that her treatment ***1048** involves debt management and financial counseling. Kinsella admitted that she took the funds from Kohl's because she had unresolved debt. The referee found that Kinsella's financial problems existed at the time she applied for membership to The Florida Bar and continue to persist today. Lastly, the referee found that Kinsella demonstrated significant remorse during her testimony at the sanction hearing.

The referee's report found Kinsella guilty of violating multiple Rules Regulating the Florida Bar including: Rules 3-4.3 (Misconduct and Minor Misconduct); 3-4.4 (Criminal Misconduct); 4-8.4(b) (Misconduct–Criminal Conduct that Reflects Adversely on Honesty, Trustworthiness, or Fitness as a Lawyer); and 4-8.4(c) (Misconduct–Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation).

Based on his findings of fact, recommendations as to guilt, the aggravating and mitigating factors, the Florida Standards for Imposing Lawyer Sanctions, and case law, the referee

recommended that Kinsella be suspended from the practice of law for ten days, followed by a one-year period of probation with additional conditions, and that she be ordered to pay the Bar's costs of $1,616.60. On February 15, 2018, this Court issued an order suspending Kinsella from the practice of law and commanding her to show cause why the referee's recommended sanction should not be disapproved and a more severe sanction, up to and including disbarment, be imposed.

ANALYSIS

Neither Kinsella nor the Bar contest the appropriateness of the referee's findings of fact or recommendations as to guilt. Accordingly, we approve the referee's findings of fact and recommendations as to guilt.

[1] As for the appropriateness of the recommended sanction, Kinsella contends that this Court should approve the referee's recommended discipline. The Bar, conversely, contends that this Court should disapprove the referee's recommended sanction and instead impose a suspension of at least ninety-one days. We conclude, based on the extensive mitigation presented in this case, Kinsella's remorse, and the referee's finding that Kinsella voluntarily sought out, consented to, and is making progress in treatment with FLA, that a three-year suspension, rather than disbarment, is the appropriate sanction.

[2] [3] The standard of review for a referee's recommendation as to discipline is as follows:

> In reviewing a referee's recommended discipline, the Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See* *Fla. Bar v. Anderson*, 538 So.2d 852, 854 (Fla. 1989); *see also* art. V, § 15, Fla. Const. However, generally speaking, this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the [Florida] Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer*, 753 So.2d 555, 558 (Fla. 1999).

Fla. Bar v. Ratiner, 46 So.3d 35, 39 (Fla. 2010).

In determining the appropriate sanction in this case, the referee considered several Standards for Imposing Lawyer Sanctions. Standard 5.1 provides that disbarment is appropriate when a lawyer engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law. Standard 5.12 provides that suspension is appropriate when a lawyer knowingly engages in conduct not included in the standard for disbarment and that seriously adversely reflects ***1049** on the lawyer's fitness to practice law. Lastly, Standard 5.13 provides that a public reprimand is appropriate when a lawyer knowingly engages in any other conduct involving dishonesty, fraud, deceit, or misrepresentation that adversely reflects on the lawyer's fitness to practice law.

We conclude that Standard 5.12 is the most appropriate standard for this case. The critical distinction between Standard 5.12, which calls for suspension, and Standard 5.1, which provides for disbarment, is whether the conduct "seriously adversely reflects on the lawyer's fitness to practice law." Fla. Stds. Imposing Law. Sancs. 5.1. In this case, both the State Attorney and the referee found that Kinsella's conduct warranted mercy. Although Kinsella was originally charged with grand larceny, a felony, she was allowed to enter a plea to petit theft, a misdemeanor, and received probation with adjudication withheld. Additionally, despite Kinsella's three acts of theft, the referee concluded that only a ten-day suspension was appropriate in this case. While we disagree with the length of suspension recommended by the referee, we agree that suspension, rather than disbarment, is appropriate.

The referee found three aggravating factors—(1) Kinsella acted with a dishonest or selfish motive; (2) she engaged in a pattern of misconduct; and (3) she committed multiple offenses—and seven mitigating factors: (1) Kinsella did not have a prior disciplinary record; (2) she suffered personal or emotional problems not related to alcohol or drug abuse; (3) she made a timely good faith effort to make restitution

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or rectify the consequences of her misconduct; (4) she made a full and free disclosure to the Bar or had a cooperative attitude toward the proceedings; (5) she is inexperienced in the practice of law; (6) other penalties or sanctions have been imposed for the same conduct; and (7) she showed remorse.

This Court has stated: "Like other factual findings, a referee's findings of mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record. A referee's failure to find that an aggravating factor or mitigating factor applies is due the same deference." *Fla. Bar v. Germain*, 957 So.2d 613, 621 (Fla. 2007) (citation omitted). Kinsella did not challenge the aggravating factors and in fact admitted that she understood that what she was doing was illegal; however, the referee also found that Kinsella fully and freely disclosed her misconduct to the Bar and took steps on her own accord, including entering into a contract with FLA, to address her financial situation.

The case law also supports imposing a lengthy suspension rather than disbarment in this case. *Florida Bar v. Anderson*, 594 So.2d 302 (Fla. 1992), and *Florida Bar v. Del Pino*, 955 So.2d 556 (Fla. 2007), are instructive. In *Anderson*, like this case, the attorney misappropriated funds from her employer for personal use. 594 So.2d at 303. Anderson pled no contest to three third-degree felonies; adjudication of guilt was withheld and she was placed on probation for three years. *Id.* The referee recommended a three-year suspension; however, the Court found that disbarment was warranted. *Id.* at 304. Like Kinsella, Anderson misappropriated her employer's funds, and her crimes were not committed in her capacity as an attorney. Unlike Kinsella, however, Anderson was ultimately convicted of three counts of felony theft, while Kinsella pled no contest to one count of misdemeanor theft, with adjudication withheld. Again, it is significant that the State chose not to pursue the more severe sanction of grand larceny against Kinsella.

***1050** In *Del Pino*, the attorney was suspended for three years after she participated in the fraudulent transfer of a condominium, which resulted in a conviction for mail fraud and tax evasion. 955 So.2d at 558-59. Del Pino pled guilty to both charges and was sentenced to three years of probation with conditions. *Id.* at 559. In imposing a three-year suspension, the Court noted several mitigating factors significant to its analysis including evidence of an emotionally and physically abusive romantic relationship. *Id.* at 562. Unlike *Del Pino*, this case involves less severe crimes; however, similar to *Del Pino*, the referee found multiple, compelling mitigating factors and decreased Kinsella's recommended sanction accordingly.

Florida Bar v. De la Torre, 994 So.2d 1032 (Fla. 2008), is also helpful. In *De la Torre*, the Court held that engaging in felonious conduct warrants suspension from the practice of law, even where adjudication of guilt is withheld. 994 So.2d at 1034. The attorney in that case entered no contest pleas to five criminal offenses (possession of cocaine, battery on a law enforcement officer, resisting an officer without violence, unlawful possession of cannabis, and possession of drug paraphernalia), two of which were felonies; adjudication of guilt was withheld. *Id.* Like this case, none of the criminal actions in *De la Torre* were related to the practice of law. Finding substantial mitigation, the referee recommended that De la Torre be suspended from the practice of law for ninety-one days followed by three years of probation. *Id.* The Court found De la Torre's evidence in mitigation significant but ultimately imposed an eighteen-month suspension from the practice of law. *Id.* at 1037-38.

Although this Court has begun to impose harsher sanctions for attorney misconduct, even this Court's most recent cases do not justify disbarring Kinsella. *See Fla. Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2002). For example, this Court disbarred attorney Randall Lawrence Gilbert for negligently supervising an employee who stole millions of dollars from Gilbert's trust account. *Fla. Bar v. Gilbert*, 246 So. 3d 196 (Fla. 2018). In concluding that disbarment was the appropriate sanction in *Gilbert*, this Court held, "As an attorney, he owed a duty to the public and to his clients to safeguard their money. Instead, he flouted the system by lying to a federal probation officer and allowing a

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nonattorney to hold himself out as a law school graduate and a certified public accountant (CPA)." *Id.* at 197. While her misconduct was inexcusable, Kinsella's theft did not involve client funds and was unrelated to the practice of law. Moreover, Kinsella cooperated with authorities in the aftermath of her crime.

The Court has stated that it expects "members of The Florida Bar to conduct their personal business affairs with honesty and in accordance with the law." *Fla. Bar v. Baker*, 810 So.2d 876, 882 (Fla. 2002); *see also Fla. Bar v. Hosner*, 520 So.2d 567, 568 (Fla. 1988) ("[L]awyers are necessarily held to a higher standard of conduct in business dealings than are nonlawyers."). Here, Kinsella's flagrant abuse of the law merits a severe sanction. *See, e.g.*, *Fla. Bar v. Hall*, 49 So.3d 1254, 1261 (Fla. 2010).

However, on the whole, the referee also found substantial mitigation. First, though Kinsella stole a total of three times, the total amount of her thefts was less than $1,000. Kinsella pleaded no contest to one count of misdemeanor petit theft, and the State dismissed the felony grand theft charge and the other misdemeanor petit theft charge. Additionally, Kinsella successfully completed her one year of probation in this case and completed all of the other tasks assigned by the court, including ***1051** payment of costs, payment of restitution to Kohl's Department Store, performance of fifty hours of community service, completion of a Vital Life Skills Class, and not entering any Kohl's location. Not even The Florida Bar suggested that disbarment is the appropriate sanction, arguing in its brief in this Court that a 91-day suspension is the appropriate sanction. Accordingly, given all of these circumstances, we conclude that the disciplinary sanction of a three-year suspension, rather than disbarment, is warranted and appropriately serves the three-pronged purpose of attorney discipline: (1) it is fair to society; (2) it is fair to the Respondent; and (3) it is severe enough to deter other attorneys from similar misconduct. *See Fla. Bar v. Lawless*, 640 So.2d 1098, 1100 (Fla. 1994).

CONCLUSION

Accordingly, Kinsella is hereby suspended from the practice of law for a period of three years. Because Kinsella is currently suspended, the suspension is effective immediately. Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Jacqueline Marie Kinsella in the amount of $1,616.60, for which sum let execution issue.

It is so ordered.

ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED ON OR BEFORE DECEMBER 27, 2018. A RESPONSE TO THE MOTION FOR REHEARING/ CLARIFICATION MAY BE FILED ON OR BEFORE JANUARY 2, 2019. THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS SUSPENSION.

QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

CANADY, C.J., dissents with an opinion, in which LEWIS, J., concurs.

PARIENTE, J., dissents with an opinion.

LEWIS, J., dissents with an opinion.

CANADY, C.J., dissenting.

I agree with Justice Lewis that Kinsella's misconduct requires disbarment. There is no reason to believe that a lawyer who has betrayed her employer by stealing from the employer will not betray her clients by stealing from them. There should be no place for thieves in The Florida Bar. As explained by Justice Lewis, Kinsella's misconduct falls squarely under Standard 5.11, which provides that disbarment is the appropriate sanction. We should follow that standard; Kinsella should be disbarred for her multiple acts of theft from her employer.

I dissent from the imposition of a sanction less than disbarment.

LEWIS, J., concurs.

PARIENTE, J., dissenting.

I begin with the acknowledgment that the conduct of Ms. Kinsella, freshly out of law school and having passed the Florida Bar Exam, cannot be excused when she stole $140, $100, and $520 from Kohl's Department store where she was working over a two-week period. But, as Kinsella does not attempt to justify her actions, has shown extreme remorse, and never contested the charges filed by The Florida Bar, the only question in this case is the appropriate sanction: Should Kinsella be given a ten-day suspension, as recommended by the referee who observed Ms. Kinsella, a ninety-one day suspension as requested by The Florida Bar, a three-year suspension as held by the majority of this Court, or disbarred as urged by the dissent?

***1052** I agree with the per curiam opinion that any act of theft requires a sanction more severe than a short nonrehabilitative suspension. In fact, Ms. Kinsella has already been suspended by order of this Court.[2] However, the circumstances of this case do not compare to other theft cases where this Court has imposed three-year suspensions or disbarment. A three-year suspension is simply disproportionate to the conduct in this case and I would impose the sanction sought by The Florida Bar—a ninety-one day suspension.

While certainly not dispositive, the prosecutor in Kinsella's criminal case determined that Kinsella should be able to enter a no contest plea to only the first-degree misdemeanor charge of petit theft. Additionally, the prosecutor requested that adjudication be withheld and the court impose probation with specific conditions—all of with which Kinsella complied.[3] Additionally, the referee found multiple mitigating factors, which the per curiam opinion acknowledges stating, "In this case, both the State Attorney and the referee found that Kinsella's conduct warranted mercy." Per curiam op. at 1049. However, the per curiam opinion uses this and other mitigating factors to justify the imposition of a three-year suspension rather than disbarment. I, conversely, would conclude that the extensive mitigation in this case warrants the imposition of a rehabilitative suspension of one year, which is far closer to the Bar's request for a ninety-one day suspension.

While neither the referee's recommendations nor The Florida Bar's requested sanctions are binding on this Court, in my view, they should not be ignored. I know this Court has become increasingly tough on attorneys who violate the Rules Regulating the Florida Bar, but we must keep in mind the facts and circumstances of each individual case and the purposes of Florida Bar discipline.

A Three-Year Suspension Is Not Warranted

As noted by the per curiam opinion, the referee found seven mitigating factors, including that Kinsella showed remorse, made a timely good faith effort to make restitution, made a full and free disclosure to the Bar, and had a cooperative attitude toward the proceedings. In addition, she has taken substantial steps to avoid problems in the future. All of these factors paint Kinsella as a young attorney who exercised extremely poor judgment and has taken full responsibility for her actions. Additionally, though the referee found three aggravating factors, two of those factors—a pattern of misconduct and multiple acts of misconduct—arise from the same underlying conduct.

Moreover, in her response, Kinsella indicated that she had spent the majority of her brief legal career before her suspension volunteering for the Legal Aid Foundation, "providing legal advice through a helpline to those who cannot afford a private attorney." Resp. to Order to Show Cause at 4. Indeed, Kinsella "hopes to continue work as a legal aid or non-profit attorney when the Court deems [her] ***1053** able." *Id.* Kinsella "believes this is the best way for her to serve the public." *Id.*

Our case law also supports this conclusion. The cases cited by the per curiam opinion are distinguishable and consequently unhelpful in this case. First, the misconduct in all three cases is significantly more egregious than the misconduct in this case. For example, the attorney in *Florida Bar v. Anderson*, 594 So.2d 302 (Fla. 1992), pleaded no contest to three third-degree felony charges, for which adjudication was withheld, while the attorney in *Florida Bar v. De la Torre*, 994 So.2d 1032, 1033-34 (Fla. 2008), entered no contest pleas to five criminal offenses, two of which were felonies, and adjudication was withheld. *Anderson*, 594 So.2d at 303; *De la Torre*, 994 So.2d at 1033-34. Conversely, in this case, Kinsella pled no contest to one misdemeanor charge of petit theft and adjudication of guilt was withheld.

Additionally, the attorney in *Florida Bar v. Del Pino*, 955 So.2d 556 (Fla. 2007), was suspended for three years following a conviction for mail fraud and tax evasion. *Id.* at 558. Certainly Kinsella stealing less than $1,000 from her employer, while serious, is not the same kind or degree of misconduct as that of Del Pino.

Indeed, there does not appear to be a case from this Court that is directly on point. However, examining the conduct in the following cases illustrates that Kinsella's misconduct does not rise to that of attorneys who have historically been suspended from the practice of law for three years. Kinsella's misconduct is considerably less severe than that of other attorneys who have received equal or even lesser sanctions.

For example, in *Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003), this Court held that an attorney's theft of funds from his law firm employer warranted a three-year suspension, followed by a three-year probationary period. Specifically, while Arcia was employed as an associate at the law firm of Zarco and Pardo, P.A., he formed his own one-man law firm, which was in direct competition with Zarco and Pardo, P.A. *Id.* at 297. Arcia solicited clients from Zarco and Pardo for his own benefit by intercepting telephone calls directed to the firm. Additionally, on several occasions he deposited fees he had obtained representing Zarco and Pardo's clients or prospective clients into his solo-firm's bank account. *Id.* Arcia admitted "to depriving the firm of about $62,000 in legal fees. During the 1½ to 2-year span of Arcia's misconduct, the firm paid him bonuses." *Id.*

Likewise, in *Florida Bar v. Winters*, 104 So.3d 299 (Fla. 2012), two attorneys participated in the following misconduct:

> Winters and Yonker made secret plans to leave the Mulholland Firm and begin practicing together, and that in the process, Winters and Yonker: (1) themselves and through a former paralegal for the Mulholland Firm, solicited Mulholland Firm clients to terminate representation by the Mulholland Firm and be represented by Winters' and Yonker's new firm; (2) made misrepresentations to the Mulholland Firm and to Mulholland Firm clients; (3) made copies of and took possession of Mulholland Firm client files without authorization; and (4) improperly used a third attorney's name, who never actually joined the new firm, in their new firm name on documents.

Id. at 300. Ultimately, the Court imposed a ninety-one day suspension for Winters and a sixty-day nonrehabilitative suspension for Yonker. *Id.* at 303.

Most recently, this Court imposed a one-year suspension for an attorney who converted $500 in client funds for his own use. *See Fla. Bar v. Wynn*, 210 So.3d 1271, 1272 (Fla. 2017). In doing so, we noted that "misuse or misappropriation of client funds ***1054** is one of the most serious offenses a lawyer can commit." *Id.* at 1274.

Likewise, just this year, we approved an eighteen-month suspension for an attorney who knowingly signed and provided to a lender a real estate closing statement containing incorrect statements about closing funds. *Fla. Bar v. Perez*, No. SC16-111, 2018 WL 2731612, at *1 (Fla. Jun. 7, 2018). In that case, Perez prepared a closing statement reflecting that approximately $3 million in cash would be brought to the closing by the buyer, when, in fact, the total of the buyer's contribution consisted of $1.5 million in cash and a promissory note in favor of the seller of approximately $1.5 million. Order at 1, *Fla. Bar v. Perez*, No. SC16-111 (Fla. Oct. 20, 2017) (disapproving referee's report and remanding back to the referee for additional proceedings). Perez acknowledged that he purposely reflected the down payment inaccurately, but did not see a problem with doing so because he was directed to do so by the loan officer. *Id.* Certainly, Kinsella's acts of dishonesty are not so much more egregious than Perez's to warrant double the length of suspension. Additionally, there is far more mitigation in this case than was present in *Perez*.

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Disbarment Is Not Warranted

I also disagree with the dissenting views that disbarment is warranted in this case and take particular issue with the assertion of Justice Lewis that "[t]he imposition of a three-year suspension, rather than disbarment, is a black eye on this Court's attorney misconduct jurisprudence." Dissenting op. at 1055 (Lewis, J.); *see also* dissenting op. at 1051 (Canady, C.J.). For obvious reasons, the facts in this case are far from analogous to cases where we have disbarred lawyers for trust account violations. Indeed, the majority of the cases upon which Justice Lewis relies involve just that—trust account violations, misappropriation of client funds, or other kinds of theft related to the practice of law. *See* dissenting op. at 1055–56 (Lewis, J.).[4] While Kinsella's conduct cannot and should not go unpunished, this case of a young woman who made a serious mistake unrelated to the practice of law, has made full restitution, and has exhibited extreme remorse is not comparable to cases involving misuse of client or law firm funds where this Court has disbarred attorneys.

In fact, the three-year suspension that the Court imposes is the longest rehabilitative suspension before disbarment, which is a five-year period and then requires the attorney to retake The Florida Bar examination and demonstrate rehabilitation. This harsh sanction requires that Kinsella would have to apply to The Florida Bar for reinstatement following the suspension and prove significant rehabilitation. *See* R. Regulating Fla. Bar 3-5.1(e). There is no guarantee that Kinsella would be reinstated, especially where there were acts of dishonesty. *See* R. Regulating Fla. Bar 3-7.10(f)(1) ("A record manifesting a deficiency in the honesty, trustworthiness, diligence, or reliability of ***1055** a petitioner may constitute a basis for denial of reinstatement."). Finally, Kinsella would not be reinstated absent positive action showing rehabilitation and "personal assurances, supported by corroborating evidence, of a desire and intention to conduct [herself] in an exemplary fashion in the future." *See* R. Regulating Fla. Bar 3-7.10(f)(3)(E).

CONCLUSION

The Court's imposition of a three-year suspension is simply not supported by this Court's precedent. Moreover, I cannot agree that the harsh sanction imposed in this case serves the three-pronged purpose of attorney discipline: (1) it is fair to society; (2) it is fair to the respondent; and (3) it is severe enough to deter other attorneys from similar misconduct. *See Fla. Bar v. Lawless*, 640 So.2d 1098, 1100 (Fla. 1994).

Kinsella was punished in a criminal court of law and has paid her debt to society. Both the State Attorney and the referee concluded that Kinsella's misconduct did not warrant a severe sanction. Even the Bar has not advocated for a suspension greater than ninety-one days in this case. In light of all of these findings, it is clear that the Court's imposition of a three-year suspension is unnecessary and overly harsh. And, certainly, the findings do not justify the dissents' view that disbarment is warranted. Thus, I would follow the Bar's recommendation and impose a suspension ranging anywhere from ninety-one days to one year.

Accordingly, I dissent.

LEWIS, J., dissenting.

I dissent to this Court's imposition of a mere three-year suspension. In my view, Kinsella's unethical conduct warrants disbarment. Attorneys who commit the egregious act of theft or misappropriating monies are appropriately disbarred. *See, e.g.*, *Fla. Bar v. Anderson*, 594 So.2d 302 (Fla. 1992). The majority attempts to minimize Kinsella's conduct as somehow soluble given her student loan debt. I find such flimsy mollifications to be unavailing. The "extensive" mitigation cited by the majority does not and cannot overcome the serious nature of the offenses that Kinsella committed. *See* majority op. at 1048.[5] The imposition of a three-year suspension, rather than disbarment, is a black eye on this Court's attorney misconduct jurisprudence. The overwhelming majority of cases involving theft have resulted in disbarment. *See, e.g.*, *Fla. Bar v. Spear*, 887 So.2d 1242 (Fla. 2004); *Fla. Bar v. Shanzer*, 572 So.2d 1382 (Fla. 1991). The majority's sanction of suspension is not authorized under the Florida Standards for Imposing Lawyer Sanctions ("the Standards") and does not have a reasonable basis in existing case law.

Kinsella was employed at Kohl's Department Store and was entrusted with handling the store's cash register. The fact that

none of the stolen funds were related to the practice of law is irrelevant; Kinsella stole from those who entrusted her to handle money. *See* *Fla. Bar v. Arcia*, 848 So.2d 296, 300 (Fla. 2003) ("[F]or purposes of attorney discipline, theft of firm funds is serious enough to warrant disbarment under most circumstances."). Further, Kinsella was entrusted with handling Kohl's money in the same way that she would be entrusted to handle client funds; and, where conversion of client funds is concerned, the standards are clear:

> 4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts ***1056** client property regardless of injury or potential injury.

Fla. Stds. Imposing Law. Sancs. 4.1; *see also Fla. Bar v. Bloom*, 972 So.2d 172, 178 (Fla. 2007) (holding disbarment was the appropriate sanction for misconduct that included misappropriation of funds and criminal charges of theft).

Likewise, Standard 5.1 provides that disbarment is appropriate when a lawyer engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law. Fla. Stds. Imposing Law. Sancs. 5.11 ("Disbarment is appropriate when ... a lawyer engages in ... theft."). This Court has repeatedly held that misuse of funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment. *Shanzer*, 572 So.2d at 1383 (citing *Fla. Bar v. Farbstein*, 570 So.2d 933 (Fla. 1990); *Fla. Bar v. Newman*, 513 So.2d 656 (Fla. 1987)); *see also Fla. Bar v. Spears*, 786 So.2d 516 (Fla. 2001) (disbarment was warranted sanction for attorney who misappropriated client funds while under investigation for other similar misconduct); *Fla. Bar v. Travis*, 765 So.2d 689, 691 (Fla. 2000) (disbarment was warranted for deliberately misappropriating clients' funds over a substantial period of time and noting that "[t]he presumption of disbarment is exceptionally weighty when the attorney's misuse is intentional"); *Fla. Bar v. Fitzgerald*, 541 So.2d 602, 606 (Fla. 1989) (disbarment ordered where attorney misappropriated trust funds despite unrebutted evidence of attorney's rehabilitation). Here, Kinsella stole money from Kohl's cash registers on three separate occasions. She was later arrested and charged with felony grand larceny. Thus, the presumptive sanction under the Standards is disbarment, not suspension.

Again, the fact that Kinsella's theft from her employer was not related to the practice of law is irrelevant. In my view, Justice Pariente's attempt to draw distinctions between where criminal conduct occurs and different levels of criminal sophistication is fanciful at best. An individual physically removing money from a cash register and an individual conducting an electronic credit card scam are both thieves. Further, the notion that Kinsella's conduct is not comparable to other cases involving misuse of client or law firm funds is severely misguided. Attempts to distinguish thefts related or unrelated to the practice of law ignore the common denominator at issue—theft. A thief is a thief. Kinsella's conduct was dishonest and unlawful and hollow explanations pointing to an individual's circumstances cannot diminish the fact that such a deceitful act occurred on three separate occasions.

Let it be clear, debt can be no excuse for such egregious conduct—many recent law school graduates have unresolved debt. Negative public sentiment toward the legal profession would surely increase if those who make the perilous mistake of engaging in this type of behavior are not rightly punished. An individual cannot be both a lawyer and a thief.

This Court has a responsibility to protect the public's trust and confidence in the legal profession. Those who are guilty of theft tarnish all of us. To impose anything other than disbarment is a disservice to Florida's court system and democracy. Kinsella's three-year suspension undermines professionalism and creates fertile ground for public distrust.

Kinsella should be disbarred. For these reasons, I dissent.

All Citations

260 So.3d 1046, 44 Fla. L. Weekly S14

Footnotes

1 Prior to becoming an attorney, Kinsella had two misdemeanor traffic cases brought against her, which were the subject of inquiry by the Florida Board of Bar Examiners.

2 Order to Show Cause (Fla. Feb. 15, 2018) ("[T]he Court has determined that Respondent should receive at least a 91-day rehabilitative suspension.... [T]he Court hereby commands Jacqueline Marie Kinsella to show cause on or before March 19, 2018, why the referee's recommended sanction should not be disapproved and a more severe sanction, up to and including disbarment, be imposed.").

3 In order for the trial court to agree to adjudication being withheld, there would have been a finding that "the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law." § 948.01(2), Fla. Stat. (2018).

4 The dissenting opinion of Justice Lewis relies on *Anderson*, because the theft there was not related to the practice of law. 594 So.2d at 303. Indeed, *Anderson* involved an attorney who "converted publicly owned funds to pay off her personal credit-card debt" while working as an executive assistant with the Tampa Housing Authority. *Id.* However, in that case, The Florida Bar specifically requested disbarment and the referee recommended a three-year suspension. *Id.* at 302. Additionally, and significantly, this Court held that it was the theft of public funds that made it analogous to the theft of trust account funds. *Id.* at 303. In addition, the illegal conduct in that case was far more sophisticated as the attorney "forged a signature on two checks and submitted three Housing Authority money orders in payment for debts [she] owed" her credit card company. *Id.* The total amount involved in that case was $4,500 in public money. *Id.*

5 To this point, the majority's characterization of Kinsella's post-arrest conduct as constituting "substantial" mitigation is misguided. An individual's completion of probation should not be characterized as "substantial" mitigation.

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The Florida Bar v. Fortunato

Supreme Court of Florida. | March 22, 2001 | 788 So.2d 201 | 2001 WL 278096

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Outline

West Headnotes (p.1)
Attorneys and Law Firms (p.1)
Opinion (p.1)
All Citations (p.3)

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KeyCite Yellow Flag - Negative Treatment
Distinguished by The Florida Bar v. Head, Fla., March 15, 2012

788 So.2d 201
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Melody Ridgley FORTUNATO, Respondent.

No. SC96979.
|
March 22, 2001.
|
Rehearing Denied June 14, 2001.

Synopsis

Attorney disciplinary proceedings were instituted. The Supreme Court held that failing to respond to two related appellate court orders, resulting in dismissal of client's appeal and in issuance of third appellate court order sanctioning attorney, to which order she also initially failed to respond, and providing false testimony at disciplinary hearing, warranted ninety-day suspension.

Suspension ordered.

West Headnotes (1)

[1] **Attorneys and Legal Services** Definite Suspension

Failing to respond to two related appellate court orders, resulting in dismissal of client's appeal and in issuance of third appellate court order sanctioning attorney, to which order she also initially failed to respond, and providing false testimony at disciplinary hearing, warranted ninety-day suspension. West's F.S.A. Bar Rules 3–4.2, 3–4.3, 4–1.3, 4–3.4(c), 4–8.4(a).

4 Cases that cite this headnote

Attorneys and Law Firms

***201** John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Division Director, The Florida Bar, Tallahassee, FL; and Adria E. Quintela, Bar Counsel, Fort Lauderdale, FL, for Complainant.

Melody Ridgley Fortunato, Fort Lauderdale, FL, Respondent, pro se.

Opinion

PER CURIAM.

We have for review a referee's report recommending that attorney Melody Ridgley Fortunato be publicly reprimanded for violating several of the Rules Regulating The Florida Bar. We have jurisdiction. *See* art. V, § 15, Fla. Const.

I. FACTS

The Bar filed a complaint against Fortunato and, after a hearing, the referee recommended finding her guilty of several charged rule violations for failing to respond to two related appellate court orders, which failure resulted in not only the dismissal of her client's appeal but also in the issuance of a third appellate court order sanctioning Fortunato, to which order she also initially failed to respond. Specifically, the referee found Fortunato guilty as charged of violating rules 3–4.2 (violation of the Rules of Professional Conduct is cause for discipline); 3–4.3 (commission by a lawyer of any act that is unlawful or contrary to honesty and justice); 4–1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); 4–3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal); and 4–8.4(a) (lawyer shall not violate or attempt to violate the Rules of ***202** Professional Conduct). The referee also recommended finding Fortunato not guilty of a separate unrelated charge, which recommendation is neither challenged by the Bar nor of significance here.

What *is* significant here is that the referee found that Fortunato "gave no credible reason whatsoever for her failure to respond to the Orders in question or comply with their terms. On the contrary, her testimony was verifiably false, confusing, and deliberately misleading."

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Upon considering the mitigating and aggravating factors at issue (including the fact that Fortunato had previously been publicly reprimanded), [1] the referee recommended that Fortunato be publicly reprimanded and ordered to pay the Bar's costs.

II. ANALYSIS

The Bar petitioned for review of the recommended discipline and in its initial brief urged that Fortunato should be suspended for ninety-one days because she purposefully provided false, misleading, and evasive testimony during the disciplinary proceeding, especially considering the misconduct at issue and the fact that Fortunato had previously been publicly reprimanded. Fortunato did not file an answer brief. [2] We agree with the Bar that a more severe sanction is in order here but, all things considered, find its suggestion of a ninety-one day suspension (which would require proof of rehabilitation) to be too harsh. We instead suspend Fortunato for ninety days.

Although not directly on all fours, we find *Florida Bar v. Arango,* 720 So.2d 248 (Fla.1998), to be instructive. In *Arango,* this Court rejected the referee's recommendation that Arango be admonished and instead suspended him for thirty days where, as with Fortunato in the present case, Arango had been found guilty of violating rule 4–1.3 and the misconduct at issue involved a pattern of neglect that caused injury or potential injury to a client. [3] The present case additionally involves several other rule violations and prior discipline-factors not present in *Arango.*

Most striking of all, however, is that, like the present case, *Arango* involved the submission of false evidence, although documentary in nature and of a much less culpable sort. Specifically, the referee in *Arango* found as an aggravating factor that Arango had submitted suspected false evidence and statements and engaged in other deceptive practices during the disciplinary process. 720 So.2d at 250. Arango challenged the finding of this aggravating ***203** factor, but this Court approved it on review, recognizing that "the record in the present case seems to support a finding that a member of Arango's staff was responsible for any false or fabricated evidence," *id.* at 253, and that

> although competent, substantial evidence supports the referee's finding regarding the falsity or fabrication of certain evidence submitted by Arango, there is no finding as to whether the submission of such evidence was negligent or intentional or whether Arango manufactured or directed the manufacture of such evidence. After reviewing the record, there does not appear to be sufficient evidence to support a finding that Arango manufactured or directed the manufacture of false or fabricated evidence, nor does there appear to be sufficient evidence to support a finding that Arango intentionally submitted such evidence in the proceedings below. It is clear from the record that each item of evidence in question was prepared by ... Arango's paralegal [i.e., not Arango himself]....

Id. at 251 n. 3.

In contrast, the referee in the present case specifically found that Fortunato herself provided "verifiably false, confusing, and deliberately misleading" testimony at the disciplinary hearing. Although not explicitly labeled as such by the referee, we consider this finding as a significant aggravating factor. *See* Fla. Stds. Imposing Law. Sancs. 9.22(f) ("Aggravating factors include ... submission of false evidence, false statements, or other deceptive practices during the disciplinary process.").

This Court has been most intolerant of attorneys who have been affirmatively charged with and found guilty of similar misconduct while appearing before a court of law or other tribunal. *See, e. g., Florida Bar v. Cibula,* 725 So.2d 360, 364 (Fla.1998) ("We have warned that such conduct [lying under oath] warrants severe discipline and have dealt harshly with those who commit this offense."); *Florida Bar v.*

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Segal, 663 So.2d 618, 622 (Fla.1995) ("Making a knowing misrepresentation to a tribunal is a serious ethical breach."); *Florida Bar v. Williams,* 604 So.2d 447, 451 (Fla.1992) ("This Court has suspended attorneys found guilty of lying.... Dishonesty and lack of candor cannot be tolerated in a profession built upon trust and respect for the law."). This intolerance extends also to attorneys like Fortunato who have provided false testimony before a referee during a disciplinary proceeding. *See Arango,* 720 So.2d at 253 (in imposing suspension, considering among other things aggravating factor that Arango had submitted false or fabricated evidence during the disciplinary process); *Florida Bar v. Weisser,* 721 So.2d 1142, 1146 (Fla.1998) (finding that aggravating factors, including subject attorney's untruthful testimony at the disciplinary proceeding, "further support the imposition of disbarment in this case").

III. CONCLUSION

We accordingly approve the referee's findings of fact and recommendations as to guilt. However, we reject as unsupported by existing caselaw the referee's recommendation as to discipline and, instead of publicly reprimanding Fortunato, we hereby suspend her from the practice of law for ninety days. We intentionally impose more than the thirty-day suspension imposed in *Arango* because we find the facts and circumstances of the present case to be more egregious, especially the referee's finding (which we consider as a significant aggravating factor) that Fortunato provided false testimony at the disciplinary hearing. Indeed, we note that, but for the appreciable mitigation present here, a ***204** more severe sanction may have been in order.

Accordingly, Melody Ridgley Fortunato is hereby suspended from the practice of law in Florida for ninety days. The suspension will be effective thirty days from the filing of this opinion so that Fortunato can close out her practice and protect the interests of existing clients. If Fortunato notifies this Court in writing that she is no longer practicing law and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Fortunato shall accept no new business from the date this opinion is filed until the suspension is completed. Judgment is entered for The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, for recovery of costs from Melody Ridgley Fortunato in the amount of $1,681.71, for which sum let execution issue.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

All Citations

788 So.2d 201, 26 Fla. L. Weekly S177

Footnotes

1 Specifically, the referee found in aggravation that Fortunato had previously been publicly reprimanded for neglect and charging an excessive fee. In mitigation, the referee found that Fortunato has a good character and reputation; that she is remorseful and gave assurances that she would avoid further disciplinary proceedings; that there was a lack of dishonesty or selfish motive in the offenses at issue; that there was no pattern of misconduct; that she acknowledged the wrongful nature of her conduct in disregarding the appellate orders; and that she had personal or emotional problems at the time of the misconduct at issue.

2 Neither party challenges the referee's findings of fact or recommendations as to guilt, which we approve without comment.

3 We recognize but reject as clearly erroneous the referee's finding in mitigation in the present case that "[t]he instant offense does not appear to be part of a pattern of misconduct by [Fortunato]." To the contrary, it is undisputed that Fortunato repeatedly failed to respond to appellate court orders, which failure resulted

in, among other things, the dismissal of her client's appeal. *See* Fla. Stds. Imposing Law Sancs. 4.42(b) (suspension generally appropriate when "a lawyer engages in a pattern of neglect and causes injury or potential injury to a client").

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Florida Bar v. Dunne

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11

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Supreme Court of Florida.

The FLORIDA BAR, Complainant(s)
v.
Colleen Marie DUNNE, Respondent(s)

CASE NO.: SC18-1880
JANUARY 16, 2020

Lower Tribunal No(s).: 2017-70,102(16A)

***1** The uncontested report of the referee is approved and respondent is suspended from the practice of law for one year, effective thirty days from the date of this order so that respondent can close out her practice and protect the interests of existing clients. If respondent notifies this Court in writing that she is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(h). In addition, respondent shall accept no new business from the date this order is filed until she is reinstated. Respondent is further directed to comply with all other terms and conditions of the report and consent judgment.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Colleen Marie Dunne in the amount of $1,250.00, for which sum let execution issue.

The filing of a motion for rehearing shall not alter the effective date of this suspension.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

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43 So.3d 36
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Noah Daniel LIBERMAN, Respondent.

No. SC06–1874.
|
Aug. 26, 2010.

Synopsis

Background: Attorney disciplinary proceeding was commenced against attorney convicted of one felony count of trafficking in the drug known as Ecstasy. Referee recommended that the Supreme Court accept attorney's unconditional guilty plea and consent judgment for discipline suspending attorney for three years.

[Holding:] The Supreme Court held that disbarment was appropriate sanction.

Disbarment ordered.

Pariente, J., concurred in part, dissented in part, and filed opinion in which Quince, J., concurred.

West Headnotes (3)

[1] **Attorneys and Legal Services** Criminal Conduct

Disbarment effective, nunc pro tunc, to the date attorney was automatically suspended was appropriate sanction for attorney convicted of one felony count of illegal drug trafficking; disbarment served best to encourage rehabilitation and to protect the public, and only disbarment could measure up to the gravity of conviction and serve as a sufficient deterrent for others who might be tempted to engage in similar illegal activity.

[2] **Attorneys and Legal Services** Presumptive, baseline, or preliminary potential sanction

After an attorney has been convicted of a felony, the burden is on the attorney to overcome the presumption of disbarment in disciplinary proceedings.

[3] **Attorneys and Legal Services** Other factors

In attorney disciplinary proceeding, the sanction must be (1) fair to the disciplined attorney, being sufficient to punish while at the same time encouraging rehabilitation; (2) fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the service of a qualified lawyer as a result of undue harshness; and (3) severe enough to deter others who might be tempted to engage in like violations.

2 Cases that cite this headnote

Attorneys and Law Firms

*37 John F. Harkness, Jr., Executive Director, Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, Tallahassee, FL, and William Mulligan, Bar Counsel, The Florida Bar, Miami, FL, for Complainant.

Richard Baron of Richard Baron and Associates, Miami, FL, for Respondent.

Opinion

PER CURIAM.

We have for review a referee's report recommending that the Court accept respondent's unconditional guilty plea and consent judgment for discipline, suspending respondent from The Florida Bar for three years. We have jurisdiction. *See* art. V, § 15, Fla. Const. As more fully explained below,

after consideration of the referee's report, the guilty plea and consent judgment, and the parties' joint response to the Court's order to show cause why respondent should not be disbarred, we disapprove the proposed sanction of a three-year suspension and disbar respondent effective, *nunc pro tunc,* July 3, 2006.

On March 30, 2006, respondent Noah Daniel Liberman pleaded guilty and was adjudicated guilty of one first-degree felony count of trafficking in the drug known as "Ecstasy" (ten grams or more but less than 200 grams). Due to this felony conviction, he was, on July 3, 2006, automatically suspended from The Florida Bar pursuant to Rule Regulating the Florida Bar 3–7.2(e), in case number SC06–977. He has remained suspended since that time.

After the automatic felony suspension was imposed, The Florida Bar filed a complaint against respondent, alleging that based on his felony conviction he violated Rules Regulating the Florida Bar 3–4.3, providing that the "commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline," and 4–8.4(b), providing that a lawyer shall not "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." As noted, the respondent and the Bar have submitted and the referee has recommended that the Court accept an unconditional guilty plea and consent judgment for discipline suspending respondent for three years effective, *nunc pro tunc,* July 3, 2006. The referee's report recites the following facts stipulated in the guilty plea and consent judgment:

> Respondent, Noah Daniel Liberman, was a young attorney who was primarily, if not exclusively, involved in civil litigation. He also had an illness; he was a drug addict and was severely addicted to the drugs methamphetamine and M.D.M.A. (ecstasy). For years prior to his arrest, drugs controlled his life.
>
> The use of the drugs led to he and his friends pooling their funds to purchase the drugs in greater quantity for a volume discount and then the drugs being distributed among his friends. During this time period one of his friends, a fellow addict, was arrested for a drug offense and began working undercover ***38** for Coral Gables Police Department in conjunction with the Miami Beach Police [D]epartment and the Drug Enforcement Administration (DEA) unbeknownst to Respondent.
>
> For a period of approximately six weeks in 2004, this "confidential source" purchased small quantities of either methamphetamine or M.D.M.A. from Respondent on four (4) occasions as follows:
>
> (1) On February 16, 2004, 1 gram of methamphetamine.
>
> (2) On February 24, 2004, 2 grams of methamphetamine and 2 M.D.M.A. Ecstasy pills.
>
> (3) On March 9, 2004, 1 gram of Methamphetamine
>
> (4) On April 5, 2004, 2 grams of Methamphetamine.
>
> The "confidential source" then requested that Respondent obtain an amount of the drug M.D.M.A. that far exceeded that which was usual or customary for Respondent to have in his possession. Once the "confidential source" was confident that Respondent had the requested drugs in his possession, the police were notified and raided Respondent's home finding a trafficking amount of the drug M.D.M.A.
>
> Subsequently, Respondent entered into a plea agreement with the Office of the State Attorney and pled guilty. On or about March 30, 2006, Respondent was adjudicated guilty of one felony count of Phenethylamine/Ecstasy/Trafficking of 10 Grams or more but less than 200 Grams.... Since that time he has cooperated with authorities, served a short sentence in county jail over weekends only, served six months on community control, and successfully completed his probation.

The referee also found and considered the following mitigating factors: (1) respondent did not have a prior disciplinary record; (2) he lacked a dishonest or selfish motive; (3) he made a timely good-faith effort to rectify the consequences of his misconduct; (4) he made a full and free disclosure to the disciplinary board and had a cooperative attitude toward the proceeding; (5) he was inexperienced in the practice of law; (6) he otherwise had a good reputation and character; (7) he had a physical or mental disability or impairment; (8) he participated in an interim rehabilitation

Asturias, Jose 9/30/2020
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program; (9) other penalties or sanctions were imposed on him; (10) he showed remorse for his actions; and (11) he was involved in ongoing supervised rehabilitation under Florida Lawyer's Assistance, Inc. The referee considered one aggravating factor—respondent's pattern of misconduct.

[1] On January 8, 2010, after considering the referee's report, we directed the parties to show cause why the recommended sanction should not be disapproved and why harsher sanctions, including disbarment, should not be imposed. The Bar and respondent filed a joint response to the order to show cause, contending that in light of the mitigating circumstances in this case, a three-year suspension is appropriate. We disagree.

[2] As acknowledged by the parties, under Standard for Imposing Lawyer Sanctions 5.11, the presumptive discipline for an attorney convicted of a felony is disbarment. The burden is on the attorney to overcome this presumption. *Fla. Bar v. McKeever*, 766 So.2d 992, 993 (Fla.2000). Here, despite the presence of substantial mitigation, we conclude that a lesser sanction is not justified.

The Bar and respondent point to multiple cases where we have imposed lengthy suspensions in cases involving felony convictions ***39** where substantial mitigation, including drug and alcohol addiction, was shown. *See, e.g., Fla. Bar v. Del Pino*, 955 So.2d 556 (Fla.2007) (recognizing cases where a respondent's drug addiction caused or contributed to the felonious conduct and resulted in suspension instead of disbarment); *Fla. Bar v. Hochman*, 815 So.2d 624 (Fla.2002) (suspending attorney for three years where attorney pled no contest to felony grand theft and mitigating evidence included drug and alcohol addiction); *Fla. Bar v. Marcus*, 616 So.2d 975 (Fla.1993) (suspending attorney for three years after conviction of felony for misappropriating client funds where cocaine addiction was directly and causally linked to misconduct); *Fla. Bar v. Corbin*, 540 So.2d 105 (Fla.1989) (suspending attorney for three years after conviction of attempted sexual battery on a child where substantial mitigation included voluntarily entering and completing residential alcohol treatment program); *Fla. Bar v. Jahn*, 509 So.2d 285 (Fla.1987) (suspending attorney for three years after conviction for delivery of cocaine to a minor and possession of cocaine where drug addiction was one of several mitigating factors); *Fla. Bar v. Rosen*, 495 So.2d 180, 181 (Fla.1986) (suspending attorney for three years after conviction for possession of cocaine with intent to distribute, where addiction was found to be the "prime force behind his felony conviction").

Of these cases, only *Rosen* involved drug trafficking. In *Rosen*, the attorney had become increasingly addicted to free-base cocaine, so much so that he voluntarily closed his law practice because he could no longer serve his clients. *Rosen*, 495 So.2d at 181. Subsequently, he "continued to withdraw into the nightmarish netherworld of cocaine addiction until he finally became involved in drug trafficking." *Id.* In contrast, here there was no showing that respondent was essentially incapacitated by his addiction. We have not hesitated in the past to disbar Florida attorneys with felony convictions involving drug trafficking. *See Fla. Bar v. Hecker*, 475 So.2d 1240 (Fla.1985) (disbarring attorney who pled guilty to criminal conspiracy to traffic in 1000 pounds of cannabis); *Fla. Bar v. Wilson*, 425 So.2d 2 (Fla.1983) (disbarring attorney convicted of solicitation to traffic in cocaine and attempted trafficking in cocaine).

[3] Given the gravity of respondent's offense, we conclude that disbarment effective, *nunc pro tunc*, July 3, 2006, is the appropriate sanction in light of the criteria previously enunciated by this Court in *Florida Bar v. Pahules*, 233 So.2d 130, 132 (Fla.1970): the sanction must be (1) fair to the disciplined attorney, being sufficient to punish while at the same time encouraging rehabilitation; (2) fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the service of a qualified lawyer as a result of undue harshness; and (3) severe enough to deter others who might be tempted to engage in like violations. *See also Fla. Bar v. St. Louis*, 967 So.2d 108, 124 (Fla.2007) (discussing *Pahules* criteria). Disbarment of an attorney convicted of a serious felony offense cannot be interpreted as unfair to him. Illegal behavior involving moral turpitude demonstrates intentional disregard for the very laws an attorney is bound to uphold. Disbarment under these circumstances also serves best to encourage rehabilitation and to protect the public in that it ensures respondent may be readmitted only upon full compliance with the rules and regulations governing admissions to the Bar. Finally, we

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conclude that only disbarment can measure up to the gravity of a conviction for illegal drug trafficking and serve as a sufficient deterrent for others who might be tempted to engage in similar ***40** illegal activity. Although we do not find that the mitigating circumstances present in this case are sufficient to overcome the presumption of disbarment for a felony conviction, we do find that such mitigation is sufficient to justify making the order of disbarment effective, *nunc pro tunc,* to the date respondent was automatically suspended due to the felony conviction.

Accordingly, Noah Daniel Liberman is hereby disbarred effective, *nunc pro tunc,* July 3, 2006. Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399–2300, for recovery of costs from Noah Daniel Liberman in the amount of $1,858.22, for which sum let execution issue.

It is so ordered.

CANADY, C.J., and LEWIS, POLSTON, LABARGA, and PERRY, JJ., concur.

PARIENTE, J., concurs in part and dissents in part with an opinion, in which QUINCE, J., concurs.

PARIENTE, J., concurring in part and dissenting in part.
I would approve the referee's recommendation of a three-year suspension, as urged by The Florida Bar and agreed to by the respondent. Since respondent's drug crimes, which occurred over six years ago, he has led a drug-free and exemplary existence. Although respondent pled guilty to the serious offense of drug trafficking, the overwhelming evidence in this case demonstrates that his misconduct stemmed from a severe addiction to drugs, did not arise from the practice of law, and resulted in no client harm.

There are other strong mitigating factors in this case that, when coupled with respondent's addiction, weigh heavily in favor of a three-year suspension rather than disbarment. For example, when charged with this crime, respondent immediately assumed responsibility for his actions. This factor was critical to the determination by the State Attorney's Office during plea negotiations that a sentence of six months of house arrest and six months of jail on the weekends was appropriate—far below the mandatory minimum requirement for the first-degree felony drug trafficking charge. The assistant state attorney testified that the mandatory minimum requirement was reduced in respondent's case because "it didn't seem ... like he was a street trafficker. He accepted responsibility. He went into rehab immediately. He was drug tested routinely and was always negative."

Further, since the time of his own arrest and plea agreement, respondent has lived an exemplary existence as found by the referee:

> While his acceptance of responsibility and cooperation with the investigation and legal process is commendable, his resolve to turn his life around is impressive. Since the time of his arrest, nearly five and 1/2 years ago, Mr. Liberman has remained drug free (clean date is April 7, 2004). Over the past 3 1/2 years he has been a productive member of society working, continuing to contribute to the legal industry as a paralegal. He has also been a benefit to the community, initially volunteering as a tutor at Camillus House and now supervising the tutoring program and volunteering as a member of the Board of the Camillus House Young Leaders.

When determining the appropriate sanction, this Court should also consider the mitigating fact that respondent's crime, while serious, did not arise from the practice of law and resulted in no client harm. For example, this case stands in marked contrast to cases in which we have disbarred ***41** attorneys whose substance abuse and addiction contributed to misappropriation of funds or abandonment of clients. *See Fla. Bar v. Valentine–Miller,* 974 So.2d 333, 338 (Fla.2008) ("This Court has disbarred attorneys who misappropriated funds or abandoned their clients, despite the referees findings of substance abuse and rehabilitation, concluding that the mitigation was insufficient to overcome the seriousness of the misconduct.") (citing *Fla. Bar v. Prevatt,* 609 So.2d

37 (Fla.1992); *Fla. Bar v. Shuminer,* 567 So.2d 430 (Fla.1990); *Fla. Bar v. Golub,* 550 So.2d 455 (Fla.1989); *Fla. Bar v. Rodriguez,* 489 So.2d 726 (Fla.1986); *Fla. Bar v. Setien,* 530 So.2d 298 (Fla.1988)). In this case, there is no evidence of any client harm or any indication that respondent's addiction or crime impacted his performance as an attorney.

The majority distinguishes this case from *Florida Bar v. Rosen,* 495 So.2d 180 (Fla.1986), but in fact the circumstances are very similar. Like the attorney in *Rosen,* at the time of his arrest, respondent was heavily addicted to and impaired by drugs, specifically crystal methamphetamine. In *Rosen,* we explained:

> The referee's findings of fact, we believe, well support the recommendation of suspension rather than disbarment. First, the referee found that "[t]he respondent's involvement in the crime for which he pleaded guilty was a result of his own addiction to cocaine at the time," and that "respondent's addiction was the prime force behind his felony conviction."

495 So.2d at 181. Similarly, in this case, respondent's addiction directly contributed to his conduct. As found by the referee when comparing the instant case to *Rosen,* "[r]espondent also slid into deep and mind altering addiction and it was the addiction that caused the actions that led to his arrest."

I understand that respondent pled guilty to a drug trafficking crime. However, when looking at the actual substance of the charges for this crime, which occurred over six years ago, it is not comparable to the trafficking crimes at issue in *Hecker* and *Wilson,* which are relied on by the majority. In *Hecker,* the attorney pled guilty to criminal conspiracy to traffic in 1000 pounds of cannabis. 475 So.2d at 1241. Here, respondent's crime involved 270 Ecstasy pills, totaling 37.7 grams. In *Wilson,* the attorney pressured one of his clients who was incarcerated in jail to make arrangements to have one and a half pounds of cocaine delivered to the attorney. 425 So.2d at 2. In this case, respondent's drug trafficking crime resulted from the request of a fellow addict and friend, who was working undercover after having been arrested.

I also emphasize that, even if we were to accept the recommendation of a three-year suspension, this would not be a guarantee of reinstatement. Demonstrating rehabilitation is a very heavy burden to meet, especially in cases with the added concern of addiction.

Finally, to the extent the majority attempts to lessen the severity of the sanction of disbarment by finding that the mitigation is sufficient to justify making the order of disbarment effective, *nunc pro tunc,* to the date respondent was automatically suspended, I note that when this Court suspends an attorney, the suspension is usually effective, *nunc pro tunc,* to the date of original suspension.

In light of the foregoing, and because it has been over six years since the offense and respondent has lived an exemplary and drug-free existence for those six years, I would accept the referee's strong recommendation, joined by The Florida *42 Bar, that we approve the three-year suspension.

QUINCE, J., concurs.

All Citations

43 So.3d 36, 35 Fla. L. Weekly S455

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116 So.2d 741
Court of Appeal of Louisiana, Second Circuit.

John B. FLANDERS, Plaintiff-Appellant,
v.
Fluster J. GREENHOUSE, Defendant-Appellee.

No. 9142.
|
Dec. 22, 1959.

Synopsis

Action for damage to plaintiff's automobile which collided with defendant's automobile when plaintiff attempted to pass defendant who made a left turn with intention of driving into private driveway. The Twelfth Judicial District Court, Parish of Avoyelles, Francis J. Gremillion, J., rendered judgment for defendant and plaintiff appealed. The Court of Appeal, Hardy, J., held that evidence established that defendant gave a signal for a left turn and that plaintiff was guilty of contributory negligence in failing to observe such signal.

Affirmed.

West Headnotes (1)

[1] **Automobiles** Vehicles Following, Overtaking, or Passing

Automobiles Vehicles Overtaking or Passing

In action for damage to plaintiff's automobile which collided with defendant's automobile when plaintiff attempted to pass defendant who made a left turn with intention of driving into private driveway, evidence established that defendant gave a signal for a left turn and that plaintiff was guilty of contributory negligence in failing to observe such signal.

Attorneys and Law Firms

*742 Gist, Murchison & Gist, Alexandria, for appellant.

Edwin L. Lafargue, Marksville, for appellee.

Opinion

HARDY, Judge.

This is an action by plaintiff for the recovery of property damages to his automobile resulting from a collision with defendant's car and he appeals from judgment rejecting his demands.

The accident occurred on the morning of July 5, 1958, on what is known as the Spring Bayou Road just outside the limits of the Town of Marksville, in Avoyelles Parish. Plaintiff, driving west on the highway, attempted to pass defendant's automobile, which was moving at a slower rate of speed in the same direction. Defendant made a left turn with the intention of driving into a private driveway on the south side of the highway and the collision resulted. Plaintiff alleged negligence against defendant as the cause of the accident in failing to signal for a left turn; to keep a proper lookout for overtaking traffic; to keep his vehicle under proper control; in neglecting to yield the right-of-way to overtaking traffic, and in violating the statute governing the making of a left turn. To the contrary, defendant urged that he gave a proper signal for a left turn at a time when plaintiff's car was a safe distance to the rear, and, further, that plaintiff failed to give any audible horn signal of his intention to pass.

Obviously this appeal involves a purely factual issue which the trial judge resolved against plaintiff on the ground that he was guilty of contributory negligence, which barred recovery.

The testimony of plaintiff is the only evidence which supports his contentions. He testified, in accordance with his allegations, that defendant failed to give a signal of his intention to make a left turn, whereas plaintiff signalled his intention of passing by sounding his horn. This version of the accident was stoutly denied by defendant, who testified that he extended his arm in the approved signal for a left turn at a time when he observed plaintiff's car to be about 'four acres' (800 feet) to the rear, and that he did not hear any horn signal indicating that plaintiff was intending to

pass, notwithstanding defendant's signal. This testimony was substantially corroborated by defendant's witness, Landry Desselles, who testified that he was in his yard, observed the passage of defendant's Jeep, saw the defendant signal for a left turn by holding out his arm at a time when he was 'about an acre or an acre and a half' (200 to 300 feet) from the driveway into which he intended to turn, and that he did not hear the blowing of a horn by plaintiff.

In view of the above testimony it is clear that defendant has adequately established his contention that he gave a signal for a left turn and it follows that plaintiff was properly held guilty of contributory negligence in failing to observe and heed such signal.

We note that counsel for plaintiff relies heavily upon the opinion of the Supreme Court in Washington Fire & Marine Ins. Co. v. Firemen's Ins. Co., 232 La. 379, 94 So.2d 295. We think the facts of the instant case are easily to be distinguished from those involved in the cited case.

In consideration of the pertinent facts above noted, which we consider to have been established on trial, a conclusion that the judgment of the district court is manifestly erroneous would be completely unjustified.

For the reasons assigned the judgment appealed from is affirmed at appellant's cost.

All Citations

116 So.2d 741

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132 So.3d 165
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Peter M. MacNAMARA, Respondent.

No. SC11–1029.
|
Dec. 19, 2013.

Synopsis
Background: The Florida Bar filed complaint against attorney.

Holdings: The Supreme Court held that:

[1] Bar failed to meet its burden to demonstrate that referee's finding that attorney fabricated cover letter to Internal Revenue Service (IRS) was clearly erroneous;

[2] suspension of 90-days was warranted; and

[3] attorney violated Rules of Professional Conduct (RPC).

Suspended.

Canady, J., concurred in part, dissented in part, and filed opinion.

West Headnotes (8)

[1] **Attorneys and Legal Services** ⟶ Particular cases

Florida Bar failed to meet its burden to demonstrate that referee's finding that attorney fabricated cover letter to Internal Revenue Service (IRS) was clearly erroneous, although metadata on attorney's computer showed that file at issue suggested that letter was backdated, where metadata also showed that letter had been printed more than two years prior to the date it was created, and two experts testified that metadata could be misleading, and, thus, the evidence was inconclusive.

2 Cases that cite this headnote

[2] **Attorneys and Legal Services** ⟶ Evidence, verdict, and findings

Supreme Court review of a referee's factual findings in attorney discipline proceeding is limited; if a referee's findings are supported by competent, substantial evidence in the record, the Court will not reweigh the evidence and substitute its judgment for that of the referee.

[3] **Attorneys and Legal Services** ⟶ Presumptions and Burden of Showing Error

The burden is on the Florida Bar to demonstrate that the referee's findings of fact in attorney discipline proceeding are unsupported.

[4] **Attorneys and Legal Services** ⟶ Evidence, verdict, and findings

A party cannot meet its burden to show that referee's findings in attorney discipline proceeding were unsupported simply by pointing to contradictory evidence when there is also competent, substantial evidence in the record to support the referee's findings.

[5] **Attorneys and Legal Services** ⟶ Definite Suspension

Suspension of 90-days was warranted for attorney who provided false statements to the Florida Bar that he filed client's estate tax return with the Internal Revenue Service (IRS) in a timely manner, and, in cover letter to the IRS, referred to the return as a "duplicate estate tax return," which was dishonest, misleading, and designed to convey to the IRS that the estate tax

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return had been previously sent to the IRS. West's F.S.A. Bar Rules 4–1.4, 4–8.1, 4–8.1–4(c).

[6] **Attorneys and Legal Services** Disposition and punishment; sanctions

In reviewing a referee's recommended discipline, Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is Supreme Court's responsibility to order the appropriate sanction; however, generally speaking, Supreme Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

[7] **Attorneys and Legal Services** Cooperation and participation

Attorney who provided false statements to the Florida Bar that he filed client's estate tax return with the Internal Revenue Service (IRS) in a timely manner, and referred to return in cover letter to the IRS as a "duplicate estate tax return," which was dishonest, misleading, and designed to convey to the IRS that the estate tax return had been previously sent to the IRS violated Rules of Professional Conduct (RPC) that prohibited knowingly making a false statement of material fact in an attorney discipline proceeding, committing acts that adversely reflected on the attorney's fitness to practice law, and required attorney to keep client reasonably informed about the status of the matter. West's F.S.A. Bar Rules 4–1.4, 4–8.1, 4–8.1–4(c).

[8] **Attorneys and Legal Services** Disbarment; Revocation of License

Disbarment should be reserved for the most egregious misconduct.

Attorneys and Law Firms

***166** John F. Harkness, Jr., Executive Director and Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, Tallahassee, FL, and Jennifer R. Falcone Moore, Bar Counsel, The Florida Bar, Miami, FL, for Complainant.

Robert C. Josefsberg, Miami, FL, for Respondent.

Opinion

PER CURIAM.

The Florida Bar seeks review of the referee's report recommending that Peter ***167** M. MacNamara be found guilty of certain acts of professional misconduct and not others and recommending that MacNamara be placed on disciplinary probation for two years with specified conditions.[1] We approve the referee's findings of fact and recommendations of guilt. We disapprove the referee's recommended sanction that did not include a period of suspension and imposed only probation with conditions. Instead, we impose a ninety-day suspension in addition to the two-year probationary period with specified conditions.

This misconduct, which occurred in 2005 and 2006, arose out of the representation of a client in a probate matter involving the filing of federal estate taxes for the estate. The two issues the referee considered were whether Respondent actually filed an estate tax return and whether Respondent attempted to cover up his alleged failure to file an estate tax return. The Bar did not present clear and convincing evidence that Respondent failed to file the estate tax return or that there was a dishonest motive behind Respondent's failure to timely file the estate tax return. Nevertheless, Respondent failed to be forthright with the Bar about the circumstances of the filing.

This misconduct represents a single isolated incident in Respondent's thirty-seven-year history as a Florida lawyer. Although the facts could support a rehabilitative suspension, considering all the aggravating and mitigating circumstances, as well as the recommended sanction of the referee, we conclude that a ninety-day suspension is the appropriate discipline.

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FACTS

The Florida Bar filed a complaint alleging that Respondent, Peter M. MacNamara, had engaged in ethical misconduct and violated Rules Regulating the Florida Bar 4–1.4 (communication); 4–8.1 (maintaining the integrity of the profession); and 4–8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). A referee was appointed to hold hearings and provide a report to the Court. In the report, the referee made the following findings of fact and recommendations.

In 2004, Ms. Earl retained Respondent to represent the estate of her deceased mother (hereinafter "Mother"). Among his various duties, Respondent was to prepare an estate tax return to file with the IRS. He filed a request for an extension to file the estate tax return. The request was granted, giving Respondent until March 2, 2005, to file the return. However, on October 10, 2005, and again on December 5, 2005, the IRS sent letters to Respondent (the attorney of record), stating that the estate tax return had not been filed and was overdue. On December 16, 2005, Respondent sent the IRS a cover letter and an unsigned estate tax return, dated March 2, 2005. In the cover letter he stated, "[p]ursuant to your request, attached herewith please find a *duplicate copy* of the IRS Form 706, Federal Estate Tax Return for the Estate of [Mother]." (Emphasis added.) The IRS sent no further letters to Respondent stating that the estate tax return had not been filed and was overdue. Also, the IRS did not request a signed copy of the estate tax return that Respondent submitted on December 16, 2005.

Many months later, the IRS issued a $65,643.79 estate tax refund check to the estate, through Respondent, based upon the IRS zero estate tax determination as reflected in the 2005 unsigned estate tax return prepared and submitted by Respondent. ***168** The referee stated, "[d]espite the issuance of the refund, IRS records (admitted into evidence) do not indicate that an estate tax return was filed by Respondent on behalf of the estate." The referee noted that the Bar filed a Freedom of Information Act (FOIA) request with the IRS seeking copies of all IRS files concerning the estate of Mother. The IRS FOIA response did not include copies of Respondent's cover letter or the unsigned estate tax return (which Respondent had sent to the IRS on December 16, 2005). The referee reported, "[n]otably, approximately twenty (20) of fifty-three (53) known documents were missing from the IRS' FOIA file. No witnesses from the IRS were called by either party to explain that discrepancy."

Next, on or about October 27, 2006, Respondent and Ms. Earl received an administrative notice from the probate court, stating that unless a response was filed in the related probate matter, the probate court was going to dismiss the case due to inactivity. On October 31, 2006, Respondent filed a Petition for Extension of Time to Close the Estate Administration in the probate court, stating, "[t]his estate has filed a federal estate tax return which is under review and/or audit. That audit and/or review has not been concluded and the federal estate tax closing letter has not been issued."

After receiving the notice from the probate court, Ms. Earl contacted an accountant for advice. The accountant recommended a tax attorney, Mr. Gordon, who Ms. Earl subsequently hired. On November 7, 2006, Gordon sent his first request to Respondent seeking the files related to Mother's estate and Ms. Earl. Eventually, after numerous requests, Respondent sent the files to Gordon on January 9, 2007.

In May 2007, Gordon filed a new tax return with the IRS on behalf of the estate, reflecting that the estate actually owed federal taxes. Thereafter, in October 2007, Respondent provided Gordon with the $65,643.79 IRS refund check on behalf of Mother's estate. Gordon returned the check to the IRS. Based on the estate tax return Gordon prepared, the estate paid the IRS several thousands of dollars in penalties and interest.

Due to these events, Ms. Earl filed a complaint with The Florida Bar regarding Respondent. Before the referee, this disciplinary case presented two issues: (1) whether Respondent actually filed an estate tax return, and (2) whether Respondent attempted to cover up his alleged failure to file an estate tax return.

During the course of the Bar's investigation, Respondent repeatedly provided written responses in which he claimed that he sent the IRS "an original, no tax, estate tax return" before he received the October and December 2005 notices from the IRS and before he sent the cover letter and unsigned estate tax return on December 16, 2005. In one

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response, Respondent indicated that the tax return he mailed in December 2005 was the third copy of the return he had sent to the IRS. In another written response to the Bar, he referred to the December 16, 2005, unsigned tax return as a "duplicate" copy of the estate tax return. Similarly, in his December 16, 2005, cover letter to the IRS, he identified the unsigned estate tax return as a "duplicate" estate tax return.

Before the referee, however, Respondent's testimony directly contradicted his prior written responses. Respondent admitted that the unsigned copy of the estate tax return he attached to the December 16, 2005, cover letter was in fact the first tax return that he had sent to the IRS. Based upon the evidence, the referee found that Respondent sent the unsigned tax return to the IRS in December 2005. ***169** In addition, the referee found that Respondent's written responses to the Bar were knowingly false statements, and that he employed language to deliberately mislead the Bar regarding the filing of the unsigned estate tax return. Further, Respondent's reference to the tax return as a "duplicate estate tax return" in his letter to the IRS was dishonest and misleading and was designed to convey to the IRS that the estate tax return had been previously sent to the IRS. Also, Respondent had failed to correct the misunderstandings created by his written statements to the IRS and the Bar. Based on these facts, the referee recommended that the Court find Respondent guilty of violating Bar rules 4–8.1 (maintaining the integrity of the profession) and 4–8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

In addition, as discussed above, Respondent filed a Petition for Extension of Time to Close the Estate Administration in the probate court, which stated incorrectly that a federal estate tax return had been "filed" as of October 31, 2006. In these disciplinary proceedings, Respondent repeatedly admitted that he never obtained Ms. Earl's signature on the estate tax return that he prepared. Also, he acknowledged that an unsigned tax return is not a valid return. Thus, Respondent knew that the unsigned tax return he submitted to the IRS on December 16, 2005, was not properly "filed" and, in turn, was not a valid return for purposes of the probate proceedings. Respondent knew his statement to the probate court was a misrepresentation. Based on the misleading pleading Respondent filed in the probate court, the referee recommended that the Court find Respondent guilty of a second violation of Bar rule 4–8.4(c). The referee directed Respondent to correct the record in the probate proceeding, as part of the recommendations in this disciplinary case.

Next, Ms. Earl testified that she was unable to adequately communicate with Respondent. Specifically, she stated that Respondent refused to respond to her or return her calls. Also, he refused to provide documentation upon request. Ms. Earl had to make several requests for the estate tax return before Respondent finally sent her a copy via fax in April 2006. Ultimately, Ms. Earl terminated Respondent's representation and hired a different attorney, Gordon. Thereafter, Respondent took approximately two months before he complied with Gordon's requests to provide the case files. Based on these facts, the referee recommended that the Court find Respondent guilty of violating Bar rule 4–1.4 (communication).

With respect to the remaining allegations in the Bar's complaint, the referee found that those allegations were not proven by clear and convincing evidence. In particular, the referee stated that he could not find by clear and convincing evidence that Respondent fabricated the December 16, 2005, cover letter to the IRS in an attempt to cover up his alleged failure to file the estate tax return. The competing testimonies from the expert witnesses regarding computer data were inconclusive.

After considering the evidence, the referee recommended that the Court find Respondent guilty of violating Bar rules 4–1.4 (communication) and 4–8.1 (maintaining the integrity of the profession). Further, the referee recommended that Respondent be found guilty of two violations of 4–8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

As a disciplinary sanction, the referee recommended probation for a period of two years. The recommended conditions of probation include: (A) Respondent shall ***170** attend and successfully complete a Professional Responsibility course within twelve months of the Court's opinion; (B) Respondent shall complete eight hours of Continuing Legal Education courses approved by The Florida Bar in the area of Ethics, within twelve months of this Court's opinion, and; (C) Respondent shall correct the record as to his October 31, 2006, request for extension in the probate court case regarding the estate of Mother, within sixty days

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of this Court's opinion. The referee awarded costs to the Bar of $6,790.26.

Respondent was admitted to The Florida Bar in 1976. He does not have any disciplinary history. However, the referee found three aggravating factors: (1) submission of false evidence, false statements, or other deceptive practices during the disciplinary process (Standard 9.22(f)); (2) refusal to acknowledge wrongful nature of conduct (Standard 9.22(g)), and; (3) substantial experience in the practice of law (Standard 9.22(i)). With regard to mitigation, the referee found three factors: (1) absence of a prior disciplinary record (Standard 9.32(a)); (2) absence of dishonest or selfish motive (Standard 9.32(b)); and (3) character or reputation—Respondent has a good reputation in the legal community and has made substantial contributions to his community and the legal profession (Standard 9.32(g)).

ANALYSIS

[1] [2] [3] The Bar challenges a portion of the referee's findings of fact. This Court's review of a referee's factual findings is limited; if a referee's findings are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *See Fla. Bar v. Frederick*, 756 So.2d 79, 86 (Fla.2000); *see also Fla. Bar v. Jordan*, 705 So.2d 1387, 1390 (Fla.1998). Thus, the burden is on the Bar to demonstrate that the referee's findings of fact are unsupported.

[4] In arguing that certain findings by the referee are not supported, the Bar points to its own evidence that contradicts the referee's findings. A party cannot meet its burden, however, by simply pointing to contradictory evidence when there is also competent, substantial evidence in the record to support the referee's findings. *See Fla. Bar v. Committe*, 916 So.2d 741, 746 (Fla.2005); *Fla. Bar v. Nowacki*, 697 So.2d 828, 832 (Fla.1997).

In addition, the Bar relies upon evidence that is inconclusive, such as the conflicting testimonies of the computer data experts regarding the metadata as it concerns a possible fabrication of the estate tax return. The referee considered the competing testimonies of the two computer experts and found that the Bar had failed to prove that Respondent fabricated the cover letter. When the Bar's computer expert testified, he stated that the file at issue on Respondent's computer was created on January 8, 2007, which suggested that Respondent fabricated and backdated the cover letter as being written on December 16, 2005. However, the Bar's expert then stated that the computer's data also showed that the same file had been printed on June 15, 2004, which was approximately two and one-half years before the file was supposedly created. Further, the two experts (one presented by the Bar and the other presented by Respondent) testified that metadata can be misleading because if someone moves a file or copies a file to another folder, or in some situations when someone re-saves the file, the creation date will change.

Because the evidence provided by both computer experts was inconclusive regarding a possible fabrication, the referee did not make any findings based on their testimonies. ***171** The referee's responsibility is to weigh all of the evidence and decide which factors have been proven by clear and convincing evidence. *See Fla. Bar v. Herman*, 8 So.3d 1100, 1106 (Fla.2009). Because the evidence was inconclusive, the referee's finding that the Bar failed to prove Respondent fabricated the cover letter subsequent to December 16, 2005, should not be disturbed. Accordingly, the Bar has failed to carry its burden on review. We approve the referee's findings of fact.

DISCIPLINARY SANCTION

[5] The Florida Bar argues that the referee's recommendation of probation for two years is unsupported and that disbarment is the appropriate sanction. Of course, its position that disbarment is appropriate is predicated on the filings before the IRS being fabricated.

[6] In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is our responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson*, 538 So.2d 852, 854 (Fla.1989). However, generally speaking, this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida

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Asturias, Jose 9/30/2020
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Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer*, 753 So.2d 555, 558 (Fla.1999).

[7] The referee recommended that Respondent be found guilty of violating Bar rules 4–1.4 and 4–8.1. Significantly, the referee also recommended that the Court find Respondent guilty of two violations of rule 4–8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The first recommendation that Respondent be found guilty of violating rule 4–8.4(c) is based upon Respondent providing several written responses to the Bar stating that he filed the tax return with the IRS in a timely manner in March 2005. Respondent eventually admitted while testifying before the referee that he did not send a tax return to the IRS until December 2005. When Respondent provided those earlier written responses to the Bar, he made knowingly false statements to the Bar and employed language to deliberately mislead the Bar regarding the filing of the unsigned estate tax return. In addition, in his December 2005 cover letter to the IRS, Respondent deliberately referred to that tax return as a "duplicate estate tax return," which was dishonest and misleading and designed to convey to the IRS that the estate tax return had been previously sent to the IRS. These are serious acts of misconduct.

The referee's second recommendation that Respondent be found guilty of violating rule 4–8.4(c) is based upon Respondent filing the Petition for Extension of Time to Close the Estate Administration in the probate court, in which he intentionally misled the probate court regarding the tax return. He deliberately and incorrectly told that court that a federal estate tax return had been "filed." Respondent knew that "filed" is a term of art in tax proceedings. He knew Ms. Earl had not signed the return and, therefore, the unsigned tax return he submitted to the IRS on December 16, 2005, was not properly "filed" and was not a valid tax return for purposes of the probate proceedings. This misconduct was of concern to the referee, who stated that courts need to be able to rely upon the statements of the lawyers practicing before them.

Although the referee recommended that Respondent be found guilty of four rule ***172** violations, the referee recommended a lenient sanction of probation for two years. We conclude that the referee's recommended sanction of probation without a suspension is not supported by the Florida Standards for Imposing Lawyer Sanctions or existing case law. Based upon the Standards and Respondent's repeated and intentional misrepresentations, a suspension is appropriate. Under Standard 7.0, "Violations of Other Duties Owed as a Professional," Standard 7.2 provides that suspension is "appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system." Respondent caused potential injury to the public, his client, and the legal system by submitting his misleading petition to the probate court, misleading the IRS with his December 2005 cover letter, and providing false statements to the Bar claiming that he filed the tax return in March 2005. Although the referee stated that Respondent's actions did not prejudice Ms. Earl, this statement overlooks the fact that Ms. Earl had to hire new counsel to resolve the difficulties that Respondent created. Further, Respondent was not forthcoming with Ms. Earl—he did not inform her that he failed to properly "file" the tax return and that he did not submit it to the IRS in a timely manner. Respondent also took approximately two months to provide the case file to Ms. Earl's new attorney, Gordon, thereby causing further delays for Ms. Earl. Thus, the Court disapproves the referee's conclusion that Ms. Earl was not caused any harm or prejudice by Respondent's misconduct.

In *Florida Bar v. Head*, 84 So.3d 292, 293–95 (Fla.2012), the Court found a ninety-one-day suspension appropriate for the respondent who, along with other misdeeds, misrepresented facts in an Affidavit of Compliance that he filed with a court. In that case, the respondent represented a commercial landlord in an eviction proceeding against a tenant whose business records were still at the rental property. In the affidavit, the respondent asserted that he made the business records available to the tenant, which was untrue. Further, the referee found that the respondent testified untruthfully regarding that matter during the disciplinary hearing. Thus, the respondent engaged in dishonest conduct before the civil court and the referee.

Similarly, in this case, Respondent misrepresented to the probate court that he had "filed" a tax return with the IRS that was still being considered, when he knew he had not sent the IRS a signed "filed" tax return. In addition, he sent the deliberately misleading cover letter to the IRS and failed to honestly inform his client about the status of the tax return.

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Also, Respondent made numerous misrepresentations to the Bar by claiming that he filed the tax return in March 2005. Respondent has engaged in numerous acts of dishonesty.

[8] Unlike the respondent in *Head,* whose conduct merited a ninety-one-day suspension, Respondent admitted before the referee that he did not send the unsigned tax return to the IRS until December 16, 2005. Thus, he admitted that his prior statements were misrepresentations.[2] Further, unlike the attorney in *Head,* Respondent, ***173** who has been a member of The Florida Bar since 1976, does not have a prior disciplinary history. In addition, Respondent has not been the subject of a disciplinary case since the events at issue in this proceeding. The events occurred in 2005 and 2006 but the Bar did not file its complaint until 2011. For all these reasons, and based upon the Standards and case law, we find that the appropriate sanction for Respondent is a ninety-day suspension.

CONCLUSION

Accordingly, we approve the referee's findings of fact, recommendations of guilt, and award of costs. We disapprove the referee's recommended sanction of two years probation. Peter M. MacNamara is hereby suspended from the practice of law for ninety days and then will be on probation for two years following the suspension. The suspension will be effective thirty days from the date of this opinion so that Peter M. MacNamara can close out his practice and protect the interests of his existing clients. If Respondent notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Peter M. MacNamara shall fully comply with Rule Regulating the Florida Bar 3–5.1(h), "Notice to Clients." Respondent shall accept no new business from the date of this opinion until the suspension is completed.

Further, we approve the referee's recommended special conditions of probation, which include: (A) Respondent shall attend and successfully complete a Professional Responsibility course within twelve months of this Court's opinion; (B) Respondent shall complete eight hours of Continuing Legal Education courses approved by The Florida Bar in the area of Ethics, within twelve months of this Court's opinion; and (C) Respondent shall correct the record as to his October 31, 2006, request for extension in the probate court case regarding the estate of Mother, within sixty days of this Court's opinion.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399–2300, for recovery of costs from Peter M. MacNamara in the amount of $6,790.26, for which sum let execution issue.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.

CANADY, J., concurs in part and dissents in part with an opinion.

CANADY, J., concurring in part and dissenting in part.

I concur with the majority's decision to approve the referee's findings of fact and recommendations of guilt. The record overwhelmingly supports the conclusion that Peter M. MacNamara violated Rules Regulating the Florida Bar 4–1.4 (communication); 4–8.1 (maintaining the integrity of the profession); and 4–8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). In addition, I concur with the majority's rejection of the finding that MacNamara's misconduct did not cause harm or prejudice to his client. But I dissent from the majority's decision to impose a non-rehabilitative suspension followed by probation. I would instead impose a one-year suspension.

MacNamara's misconduct was not "a single isolated incident in Respondent's thirty-seven year history as a Florida lawyer." Majority op. at 167. MacNamara engaged in a lengthy campaign of misrepresentations in an effort to cover up what ***174** likely began—but did not end—as an act of negligence in his representation of an estate. "Dishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members." *Florida Bar v. Korones,* 752 So.2d 586, 591 (Fla.2000) (quoting *Florida Bar v. Graham,* 605 So.2d 53, 56 (Fla.1992)). Because truthfulness is so essential to the practice of law, MacNamara's pattern

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of misrepresentations warrants at least a one-year suspension and the special conditions recommended by the referee and approved by the majority.

After failing to timely file a federal estate tax return on behalf of his client, MacNamara did not admit his error and take corrective measures. Instead, in December 2005, MacNamara sent an unsigned federal estate tax return to the Internal Revenue Service (IRS) and claimed that the unsigned return was merely a "duplicate," suggesting that a return had been properly filed several months earlier. As the referee concluded, MacNamara's correspondence with the IRS was "dishonest and misleading." In October 2006, MacNamara expanded the scope of his cover-up by deliberately misrepresenting a material fact to a state tribunal. MacNamara filed a petition for an extension of time in the probate court, in which he falsely stated that a federal estate tax return had been filed and was pending review by the IRS. Finally, "on multiple occasions" in 2011, MacNamara informed the Bar—in writing—that he "sent to the IRS an original, no tax, estate tax return prior to ... sending the cover letter and unsigned estate tax return on December 16, 2005." Again, the referee concluded that MacNamara's assertions "were knowingly false statements."

The Florida Standards for Imposing Lawyer Sanctions indicate that suspension is the appropriate discipline for MacNamara's repeated misrepresentations. As the majority acknowledges, standard 7.2 provides that a suspension is appropriate in a case such as MacNamara's because he "knowingly engage[d] in conduct that [was] a violation of a duty owed as a professional and cause[d] injury or potential injury to a client, the public, or the legal system." Additionally, because MacNamara knowingly made a false statement to the probate court in order to secure an extension, standard 6.11(a) applies. That standard provides that disbarment may be warranted where an attorney "with the intent to deceive the court, knowingly makes a false statement or submits a false document." These standards and our case law make clear that "[a]n officer of the court who knowingly and deliberately seeks to corrupt the legal process can logically expect to be excluded from that process." *Florida Bar v. Rightmyer,* 616 So.2d 953, 955 (Fla.1993).

But while the majority correctly concludes that a suspension is warranted, the majority errs in relying on *Florida Bar v. Head,* 84 So.3d 292 (Fla.2012), when determining that a non-rehabilitative suspension is appropriate. In *Head,* this Court concluded that a ninety-one-day suspension was appropriate where Head—who represented the landlord in a contentious landlord-tenant action—filed in the trial court an affidavit falsely claiming that he had made certain business records available to the defaulting tenant's comptroller, asserted the same misrepresentation during the disciplinary proceeding, and included a fictitious case number in a letter to the opposing party that was designed to give the impression that a cause of action had been filed. *Id.* at 294–95.

Contrary to the majority's characterization, Head's misconduct was not more serious than MacNamara's lengthy cover-up. In fact, Head's dishonesty was more limited ***175** in scope—he did not attempt to deceive the federal government in addition to a state court and the Bar—and Head's misconduct did not cause actual harm. *See* Fla. Standards for Imposing Lawyer Sanctions 12.1(b) (listing "[a]ctual harm to clients or third parties" as an aggravating factor). In *Head,* the referee expressly found that because there was no showing that "the letter was relied upon by anyone or caused damage or harm," Head's attempt to gain a tactical advantage by listing the fictitious case number "was minor and of no consequence in the case." *Id.* at 296. Further, this Court concluded that Head "caused potential injury to the public and the legal system by submitting his false affidavit to a civil court, providing his untruthful testimony before the referee, and by creating and posting the letter stating a false case number," *id.* at 303, but did not recite any evidence of actual injury.

MacNamara's misconduct, in contrast, caused actual harm to his client. Due to MacNamara's failure to communicate with his client, the client was forced to incur the expense of hiring new counsel to complete the administration of her mother's estate. Once new counsel was hired, MacNamara failed to turn over the client's file in a timely manner—thereby causing further delay—despite knowing that the state and federal estate tax returns were overdue. Ultimately, due to the delay in filing the estate tax returns, the client paid penalties and interest to the IRS and interest to the State of Florida.

MacNamara's multiple acts of dishonesty and the harm they caused are analogous to the misconduct at issue in

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Florida Bar v. Rotstein, 835 So.2d 241 (Fla.2002). In count one of Rotstein's case, the referee determined that after negligently failing to file a personal injury action, Rotstein did not advise his client when the statute of limitations on her claim had run. Instead, when he realized his error, Rotstein "fraudulently created a letter that he backdated to July 8, 1998, purportedly advising [the client] that he was withdrawing as her representative and that the statute of limitations would run on December 25, 1998." *Id.* at 242. Although Rotstein eventually admitted his wrongdoing and offered to compensate his client for her injuries, Rotstein initially insisted to the Bar—in writing on three separate occasions—that the withdrawal letter was accurate and true. While there were additional charges stemming from other allegations against Rotstein, this Court concluded that the referee's recommended discipline of a one-year suspension was merited "[o]n the basis of the violations in count I alone." *Id.* at 246. This Court determined that Rotstein's "basic, fundamental dishonesty" was "intentional and egregious misconduct" that "demonstrated an attitude that is wholly inconsistent with professional standards." *Id.* at 246–47.

Florida Bar v. Hmielewski, 702 So.2d 218 (Fla.1997), is also instructive. In that case, this Court determined that a three-year suspension was warranted where Hmielewski repeatedly misrepresented the location of relevant medical records. Despite knowing that his client had taken the records from the Mayo Clinic and not disclosed them during discovery, Hmielewski falsely stated that the client had produced all of the records in his possession and disingenuously asserted to the trial court that the Mayo Clinic had lost the records. As a result of Hmielewski's dishonesty, "Mayo Clinic was put to substantial trouble and expense in attempting to locate and ascertain the medical information contained in the purloined medical records." *Id.* at 220. This Court determined that "Hmielewski's violations made a mockery of the justice system and flew in the face of Hmielewski's ethical responsibilities as a ***176** member of The Florida Bar," *id.,* but declined to disbar Hmielewski due to the character evidence presented on his behalf, his lack of selfish motive, and his lack of prior non-minor misconduct. This Court also noted that before the case was referred to the Bar, the trial court imposed sanctions and Hmielewski made some effort to allay the consequences of his misconduct by agreeing to hold his client harmless for the payment of the fine.

Based on these precedents, MacNamara's misconduct warrants at least a one-year suspension. Just as Rotstein backdated a letter purporting to withdraw from representation, MacNamara intentionally used the word "duplicate" in an attempt to deceive the IRS, his client, and the probate court. Both Rotstein and MacNamara persisted in their dishonesty by submitting false documents to the Bar. And like Hmielewski, MacNamara was indifferent to the harm his dishonesty caused. MacNamara knowingly allowed the IRS and new counsel to search for a document that did not exist. The IRS, MacNamara's client, her new counsel, the probate court, and the Bar were all put to "trouble and expense" by MacNamara's false statements and lack of cooperation. *Id.* at 220. MacNamara's case materially differs from these precedents only in that MacNamara did not concede that he was guilty of misconduct before the referee or make any effort to compensate the wronged client. As the referee stated during the hearing on the recommendation as to discipline, MacNamara "still doesn't seem to ... quite get it."

"The public expects and deserves fairness and candor from attorneys.... If we are to preserve the credibility of our self-regulated profession, we must address breaches of that trust in a manner that is commensurate with the severity of the breach." *Florida Bar v. Cox,* 794 So.2d 1278, 1286 (Fla.2001). In this case, the majority has failed to impose a suspension that is commensurate with MacNamara's calculated and persistent efforts to cover up his professional negligence in blatant disregard for his professional obligations. Accordingly, I dissent from the imposition of a non-rehabilitative suspension.

All Citations

132 So.3d 165, 38 Fla. L. Weekly S907

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Footnotes

1 We have jurisdiction. *See* art. V, § 15, Fla. Const.

2 Respondent's misconduct is serious, but it does not warrant disbarment. The Court has stated that disbarment "should be reserved for the most egregious misconduct." *Fla. Bar v. Summers,* 728 So.2d 739, 742 (Fla.1999); *see also Fla. Bar v. Kassier,* 711 So.2d 515, 517 (Fla.1998) (stating that the sanction of disbarment is to be imposed only in those cases where rehabilitation is highly improbable).

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KeyCite Yellow Flag - Negative Treatment
Distinguished by The Florida Bar v. Draughon, Fla., June 28, 2012

959 So.2d 163
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Reid Alexander COCALIS, Respondent.

No. SC05–1425.
|
May 24, 2007.

Synopsis
Background: Attorney disciplinary proceeding was commenced.

[Holding:] The Supreme Court held that public reprimand and participation in bar's practice and professionalism program was appropriate sanction for attorney's misconduct.

Public reprimand ordered.

West Headnotes (4)

[1] **Attorneys and Legal Services** Conduct as to Adverse Parties and Counsel

Attorneys and Legal Services Conduct as to witnesses

Attorney's conduct in connection with his representation of the defendant in a personal injury action of telephoning an adverse party's treating physician and failing to advise opposing counsel that he had inadvertently received an adverse party's medical records prior to trial, violated rule regulating state bar providing that commission by a lawyer of any act that was unlawful or contrary to honesty and justice might constitute a cause for discipline. West's F.S.A. Bar Rule 3–4.3.

[2] **Attorneys and Legal Services** Public Reprimand, Censure, or Admonition

Public reprimand and participation in bar's practice and professionalism program was appropriate sanction for attorney's misconduct of telephoning an adverse party's treating physician and failing to advise opposing counsel that he had inadvertently received an adverse party's medical records prior to trial, in violation of rule regulating state bar providing that commission by a lawyer of any act that was unlawful or contrary to honesty and justice might constitute a cause for discipline; attorney had no previous disciplinary record, cooperated with the bar throughout the proceedings, and he recognized the impropriety of his conduct. West's F.S.A. Bar Rule 3–4.3.

2 Cases that cite this headnote

[3] **Attorneys and Legal Services** Disposition and punishment; sanctions

Attorneys and Legal Services Disposition and punishment; sanctions

In reviewing a referee's recommended discipline of an attorney, Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because it is ultimately the Court's responsibility to order the appropriate sanction. West's F.S.A. Const. Art. 5, § 15.

1 Cases that cite this headnote

[4] **Attorneys and Legal Services** Disposition and punishment; sanctions

Generally, the Supreme Court will not second-guess the referee's recommended discipline of an attorney as long as it has a reasonable basis in existing case law and the standards for imposing lawyer sanctions.

1 Cases that cite this headnote

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Asturias, Jose 9/30/2020
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Attorneys and Law Firms

***163** John F. Harkness, Jr., Executive Director, Kenneth Lawrence Marvin, Director of Lawyer Regulation, The Florida Bar, Tallahassee, FL, and Alan Anthony Pascal, Bar Counsel, The Florida Bar, Fort Lauderdale, FL, for Complainant.

Kevin P. Tynan of Richardson and Tynan, PLC, Tamarac, FL, for Respondent.

Opinion

PER CURIAM.

We review a referee's report recommending that attorney Reid Alexander Cocalis be diverted to the Florida Bar's Practice and Professionalism Enhancement Program and, in particular, that Cocalis be directed to attend the Bar's Ethics School at his expense. *See* R. Regulating Fla. Bar 3–5.3(h)(2). The Bar petitions for review of that recommendation. We have jurisdiction. *See* art. V, § 15, Fla. Const.; R. Regulating Fla. Bar 3–5.3(h)(4).

***164 BACKGROUND**

The Florida Bar filed a complaint against Cocalis alleging that Cocalis engaged in misconduct in handling a personal injury suit. Specifically, the Bar alleged that Cocalis's phone call to an adverse party's treating physician and his handling of another physician's subpoenaed records violated Rules Regulating the Florida Bar 3–4.3 (engaging in misconduct or minor misconduct); 4–3.3(a)(1) (knowingly making a false statement of material fact or law to a tribunal.); 4–3.4(a) (unlawfully obstructing another party's access to evidence); 4–8.4(a) (violating the Rules of Professional Conduct); 4–8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 4–8.4(d) (engaging in conduct prejudicial to the administration of justice).

The referee conducted a hearing in January 2006. The initial referee's report made findings of fact and concluded that Cocalis's conduct was unprofessional, inappropriate, and sharp practice, but that it did not violate rules 4–3.3(a)(1), 4–3.4(a), or 4–8.4(a),(c), or (d). The referee conducted a second hearing in April 2006 to determine whether Cocalis's conduct violated rule 3–4.3 and, if so, what discipline to recommend. Following that hearing, the referee filed a second report. This report adopted the findings and conclusions of the first. The referee stopped short of deciding whether Cocalis's conduct violated the Rules Regulating the Florida Bar and instead recommended that Cocalis's case be referred to the Bar's practice and professionalism program and that Cocalis be ordered to take the Bar's course on ethics and professionalism. [1] The Bar petitioned for review. In its brief, the Bar argues that the referee erred in failing to find Cocalis guilty of unethical conduct and in failing to recommend that Cocalis be suspended.

Based on the facts found by the referee, which we approve, we cannot agree that diversion is appropriate. Because the referee stopped short of concluding whether Cocalis's conduct violated any of the Rules Regulating the Florida Bar with which he was charged, we first address this issue, which requires us to examine Cocalis's conduct.

Cocalis represented the defendant, Michelle Brotman, in *Bradley v. Brotman,* Case No. 98–020519(02), in Broward County Circuit Court. The plaintiffs, the Bradleys, alleged that Brotman's dog bit their two-year-old daughter and that the bite caused or aggravated permanent injuries, including alopecia areata, a skin disease resulting in hair loss on the scalp. The Bradleys were represented by Jon Krupnick.

Before trial, Krupnick listed several doctors in his expert witness list for trial. Cocalis filed a motion to limit this list, which the trial court granted. Krupnick amended his list to include only three physicians who would testify about whether the dog bite caused the child's alopecia. One of the plaintiffs' experts, Dr. Bernhardt, was not listed as an expert on causation.

A few days before the trial date and after the witness lists were finalized, Krupnick sent Cocalis a letter listing thirteen reasons why the defense should settle the case. One of these reasons was that "Dr. Bernhardt, whom you have not deposed, ***165** will testify unequivocally to the extensive hair loss and the fact that it was precipitated by the dog bite."

Shortly after receiving Krupnick's letter, Cocalis, without notifying Krupnick or the Bradleys, called Dr. Bernhardt,

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identified himself as defense counsel in *Bradley* and as a patient of Dr. Bernhardt, and asked whether Dr. Bernhardt intended to testify about causation.[2] The referee found that Cocalis told Dr. Bernhardt that he would not ask him about the patient's care and treatment. However, by asking Dr. Bernhardt whether he would be testifying for the plaintiff about causation, Cocalis effectively solicited the doctor's opinion of the patient's medical condition.

After Krupnick learned of Cocalis's call to Dr. Bernhardt, he filed a motion for sanctions and to strike the defense's pleadings in *Bradley*, arguing that Dr. Bernhardt's testimony had been tainted by his contact with Cocalis. Cocalis argued that there was no prejudice because Dr. Bernhardt could not testify on causation because he was not listed as a causation expert in the plaintiffs' pretrial witness list.

The trial judge ordered the child's guardian ad litem, Lawrence Kuvin, to investigate the phone call. The judge then held a hearing and denied Krupnick's motion. Dr. Bernhardt did not testify at trial because his testimony would not have helped the plaintiffs, not because he became hostile to his patient after talking to Cocalis.

Another treating physician, Dr. Unis, was deposed in September 1999. His records as of that date were attached to his deposition. Because Krupnick refused to stipulate before trial to the authenticity of the records, Cocalis sent a trial subpoena to Dr. Unis's records custodian. In response to the subpoena, Dr. Unis's records custodian mistakenly mailed the records to Cocalis. Cocalis returned the records and explained that they were to be brought to trial. Cocalis did not inform Krupnick that the records had been erroneously sent to him. The mailed copy of the records, later admitted by stipulation, contained a new entry not contained in the copy attached to Dr. Unis's deposition. The new entry documented a telephone conversation between Dr. Unis and Krupnick in May 2000. The note stated: "I advised him [Krupnick] that I did not think that the patient's persistent problem with alopecia areata at this point would be due to stress from a prior dog bite." When Cocalis called the records custodian as a witness during trial, Krupnick stipulated to admission of the medical records without reviewing them. Cocalis did not advise either Krupnick or the court about the added notation —the admission of which as evidence was at least debatable —which the referee later characterized as "sharp practice."

When Krupnick discovered the unfavorable notation in the stipulated records and realized that Cocalis intended to use the notation in closing arguments, he renewed his motion for sanctions and to strike the defense's pleadings. He also moved to have the notation redacted from the records.[3] The court denied Krupnick's motions. ***166** According to Krupnick, the trial judge told him, "You stipulated to it, you got [sic] to live with your stipulations." Cocalis blew up a posterboard-size version of the notation and made it the focus of his closing argument.

The jury awarded the Bradleys $8000 for past medical expenses, but no damages for future medical expenses. On appeal, the Fourth District reversed, finding the trial court had abused its discretion in admitting Dr. Unis's medical chart with the unfavorable notation. *Bradley v. Brotman,* 836 So.2d 1129, 1133 (Fla. 4th DCA 2003). The Fourth District opinion also commented on Cocalis's lack of professionalism in the underlying proceedings, stating, "[W]e condemn the actions of defense counsel as to both the contact with Dr. Bernhardt and the strategic concealment of Dr. Unis' records." *Id.* at 1136.

ANALYSIS

Rule 3–5.3 of the Rules Regulating the Florida Bar provides, under specified conditions, for diversion of disciplinary cases to practice and professionalism enhancement programs. Subdivision (b) provides that "[d]isciplinary cases that otherwise would be disposed of by a finding of minor misconduct or by a finding of no probable cause with a letter of advice are eligible for diversion to practice and professionalism enhancement programs." Recommendations of diversion can occur either before or after a formal complaint is filed. Subdivision (h) of the rule addresses diversions at the referee level, as occurred here. Rule 3–5.3(h)(2), titled "After Submission of Evidence," provides:

> A referee may recommend diversion of a disciplinary case to a practice and professionalism enhancement program if, after submission of evidence, but before a finding of guilt,

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> the referee determines that, if proven, the conduct alleged to have been committed by the respondent is not more serious than minor misconduct.

Either the Bar or the respondent can appeal a referee's recommendation of diversion, unless the parties stipulated to it. R. Regulating Fla. Bar 3–5.3(h)(4). The referee may also recommend that the attorney be required to participate in the Bar's practice and professionalism enhancement program as part of a disciplinary sanction. *Id.* 3–5.3(h)(5).

[1] **[2]** Rule 3–4.3, the only remaining rule violation alleged by the Bar in the complaint and unresolved at the time of the hearing on sanctions, is titled "Misconduct and minor misconduct."[4] This rule provides that the "commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline." We need not address whether the referee erred in concluding that Cocalis's conduct did not violate rules 4–3.3(a)(1), 4–3.4(a), and 4–8.4(a)(c) and (d), because we conclude that Cocalis's conduct violated 3–4.3 and that his misconduct was more than "minor," making true diversion inappropriate.

***167** While Cocalis's telephone call to Dr. Bernhardt was unprofessional and unethical, the Court is more troubled by Cocalis's "sharp practice" in failing to advise opposing counsel that he had inadvertently received the patient's medical records from one of the treating physicians prior to trial, that those records contained notes of a telephone conversation between the physician and plaintiffs' counsel that was damaging to plaintiffs' case, and that the records he was asking the trial court to admit into evidence were not the same records as those attached to the treating physician's deposition. Under these circumstances, Cocalis's conduct offends our well-recognized policy that cases should be decided on the merits and not by a lawyer's stooping to sneaky or underhanded trial tactics. *See Colby Materials v. Caldwell Constr.*, 926 So.2d 1181, 1183 (Fla.2006) (stressing the importance of deciding cases on their merits); *Bell v. State*, 930 So.2d 779, 781 (Fla. 4th DCA) (holding that the state's failure to timely advise the defendant that a witness intended to recant her earlier deposition testimony was prejudicial error requiring a new trial and that the purpose of the discovery rules is to facilitate a truthful fact-finding process), *review denied*, 941 So.2d 367 (Fla.2006); *Tetrault v. Fairchild*, 799 So.2d 226, 228 (Fla. 5th DCA 2001) (reversing a verdict in plaintiffs' favor where the trial court allowed the plaintiffs' medical expert to testify based on MRIs even though the plaintiff had not disclosed the topic of the testimony during discovery); *id.* at 229 (Harris, J., concurring and concurring specially) (stating that the "courts should not permit trial by ambush regardless of which party is riding blithely through the pass").

In our estimation, this is not the kind of minor misconduct sufficiently addressed by diversion. On the other hand—and although it is a close call—we do not believe that the two actions at issue, which occurred about six years ago, warrant a thirty-day suspension, as the Bar urges.

[3] **[4]** In reviewing a referee's recommended discipline of an attorney, our scope of review is broader than that afforded to the referee's findings of fact because it is ultimately the Court's responsibility to order the appropriate sanction. *Fla. Bar v. Miller*, 863 So.2d 231, 235 (Fla.2003); *Fla. Bar v. Sayler*, 721 So.2d 1152, 1155 (Fla.1998); *see also* art. V, 15, Fla. Const. Generally, however, we will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. *Miller*, 863 So.2d at 235.

Here, the referee made no recommendation of discipline. Diversion alone is not a sanction. R. Regulating Fla. Bar 3–5.3(i). Therefore, we proceed in determining the appropriate sanction without remanding this matter to the referee for further proceedings and for guidance review existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. The standards applicable to these circumstances are 5.13 and 6.13. Standard 5.13 provides that a public reprimand is appropriate "when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." Standard 6.13 provides that a public reprimand is appropriate "when a lawyer is negligent either in determining whether statements or documents are false or

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in taking remedial action when material information is being withheld."

We also find helpful the case of *Florida Bar v. Sayler*, 721 So.2d 1152 (Fla.1998). In *Sayler*, the respondent represented the claimant in a worker's compensation case. He sent opposing counsel a letter with an article about the murder of an attorney ***168** who represented an employer and a worker's compensation servicing agent, in violation of the rules against the commission by a lawyer of any act unlawful or contrary to honesty and justice, including rule 3–4.3. We imposed a public reprimand in combination with participation in the Bar's practice and professionalism program, a six-month probationary period, and a psychological evaluation. While Sayler's conduct was different in character from Cocalis's, in terms of egregiousness it was similar.

Based upon the case law and standards, as well as the referee's findings that Cocalis, a Bar member since 1987, had no previous disciplinary record, cooperated with the Bar throughout the proceedings, including stipulating that he would reimburse the Bar's costs, and recognized the impropriety of his conduct, we hold that a public reprimand by the Board of Governors of The Florida Bar and participation in the Bar's practice and professionalism program on the terms recommended by the referee to be the appropriate discipline in this case.

CONCLUSION

Accordingly, Reid Alexander Cocalis is hereby ordered to appear before the Board of Governors of The Florida Bar to receive a public reprimand for his misconduct. He is also ordered to enroll in The Florida Bar's Practice and Professionalism Enhancement Program and to attend the Bar's Ethics School at his own expense.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399–2300, for recovery of costs from Reid Alexander Cocalis in the amount of $1775, for which sum let execution issue.

It is so ordered.

WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

LEWIS, C.J., recused.

All Citations

959 So.2d 163, 32 Fla. L. Weekly S269

Footnotes

1 The referee determined that the interests of justice would be best served by diversion because Cocalis "appears to be an otherwise good lawyer, who has learned from his mistakes in the *Bradley* litigation." The referee emphasized that Cocalis, a member of the Bar since 1987, had no previous disciplinary record. The referee further noted that the Fourth District's opinion has already served as a "very effective public reprimand."

2 Dr. Bernhardt was a prominent dermatologist in the Fort Lauderdale area and had treated Cocalis, his family, and defense counsel Rogers. Before the phone call, neither party was concerned about this relationship.

3 The Bar's complaint also alleged that Cocalis made a misrepresentation to the trial court during the sanction hearing. During the hearing, Krupnick asked Cocalis if he had had any other contacts with his experts. Cocalis did not disclose the inadvertent receipt of Dr. Unis's records. The referee found there was no misrepresentation because Cocalis believed that issuing a trial subpoena to a disclosed witness was not an ex parte communication. The referee further found that issuing the subpoena without additional notice beyond the witness and exhibit list did not violate Florida law and that Cocalis acted ethically in issuing the subpoena.

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32 Fla. L. Weekly S269

4 The referee, in his initial report, "concluded that Attorney Cocalis did not violate most of the Rules of Professional Conduct set forth in The Florida Bar Complaint" and listed rules 4–3.3(a)(1), 4–3.4(a), and 4–8.4(a)(c) and (d) as the rules Cocalis did not violate.

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Supreme Court of Florida

THURSDAY, JUNE 25, 2020

CASE NO.: SC19-910
Lower Tribunal No(s).:
2018-00,110(14)

THE FLORIDA BAR vs. STEVEN MITCHELL DEVER

Complainant(s) Respondent(s)

The Court approves the uncontested referee's report and reprimands respondent.

Respondent is further placed on probation for one year under the terms and conditions set forth in the report and consent judgment. Respondent shall comply with all other terms and conditions in the report and consent judgment.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Steven Mitchell Dever in the amount of $2,316.31, for which sum let execution issue.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

as
Served:
HON. COLEMAN LEE ROBINSON, JUDGE
PATRICIA ANN TORO SAVITZ
OLIVIA PAIVA KLEIN
STEVEN MITCHELL DEVER

RECEIVED 06/10/2020 FLORIDA SUPREME COURT

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

STEVEN MITCHELL DEVER,

Respondent.

_____/

Supreme Court Case
No. SC19-910

The Florida Bar File
No. 2018-00,110(14)

CONSENT JUDGMENT

Steven Mitchell Dever, respondent, hereby files this Consent Judgment in the above captioned matter, pursuant to R. Regulating Fla. Bar 3-7.9, and would state:

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, admitted on July 2, 1992, and subject to the jurisdiction of the Supreme Court of Florida.

2. On January 31, 2020, the Referee granted The Florida Bar's Motion for Summary Judgment on all the factual allegations in The Florida Bar's Complaint, including all rule violations. Therefore, the sole remaining issue for disposition is the appropriate disciplinary sanction.

3. To avoid the necessity of a Final Penalty Hearing in this case, respondent hereby tenders a Consent Judgment wherein he agrees to the following discipline:

A. A public reprimand by publication pursuant to R. Regulating Fla. Bar 3-5.1(d).

B. One-year probation from the date of the issuance of the Final Order in this case during which time respondent agrees to:

i. attend The Florida Bar's Professionalism Workshop and pay the $750.00 workshop fee; and

ii. complete 15 credits of Continuing Legal Education in the area of civil litigation. Respondent is responsible for any costs associated with taking the CLE courses.

4. Respondent is acting freely and voluntarily in this matter and tenders this Consent Judgment without fear or threat of coercion. Respondent is not represented in this matter.

5. If this Consent Judgment is approved, then respondent agrees to pay all reasonable costs associated with this case pursuant to Rule 3-7.6(q). These costs are due within 30 days of the court order. Respondent agrees that if the costs are not paid within 30 days of this court's order becoming final, respondent shall pay interest on any unpaid costs at the statutory rate. Respondent further agrees

not to attempt to discharge the obligation for payment of The Florida Bar's costs in any future proceedings, including, but not limited to, a petition for bankruptcy. Respondent shall be deemed delinquent and ineligible to practice law pursuant to Rule 1-3.6 if the cost judgment is not satisfied within 30 days of the final court order, unless deferred by the Board of Governors of The Florida Bar.

6. Respondent acknowledges the obligation to pay the costs of this proceeding and that payment is evidence of strict compliance with the conditions of any disciplinary order or agreement and is also evidence of good faith and fiscal responsibility. Respondent understands that failure to pay the costs of this proceeding may reflect adversely on any reinstatement proceedings or any other bar disciplinary matter in which respondent is involved.

7. Respondent acknowledges that he has been afforded all procedural and substantive due process guarantees regarding these disciplinary proceedings, and that for the purpose of tendering this Consent Judgment, respondent hereby waives any objections relative to the denial of same and waives any right to any formal hearing.

8. If this matter had gone to a final penalty hearing, respondent would have shown the following mitigating factors:

(a) absence of a prior disciplinary record-admitted 1992.

(b) absence of a dishonest or selfish motive.

(e) full and free disclosure to disciplinary board and cooperative attitude towards proceedings.

(g) character and reputation—Respondent presented 5 letters showing substantial pro bono work as well as community activities.

(k) imposition of other penalties or sanctions—Respondent was ordered to pay opposing counsel $22,000.00 plus interest by the court in the underlying civil case.

(l) remorse- Respondent regrets any reflection on the legal profession or The Florida Bar by his actions.

9. The Florida Bar has approved this proposed Consent Judgment in the manner required by Rule 3-7.9.

10. If this Consent Judgment is not finally approved by the referee and the Supreme Court of Florida, then it shall be of no effect and neither the Consent Judgment nor the statements contained herein can be used against respondent in any subsequent proceeding.

11. Should the Supreme Court of Florida approve this Consent Judgment, respondent hereby agrees and acknowledges that same will not be the subject of future modification.

12. This Conditional Guilty Plea for Consent Judgment fully complies with all requirements of the Rules Regulating The Florida Bar.

Dated this 24 day of Feb, 2020.

Steven Mitchell Dever
PO Box 9811
Panama City Beach, FL 32417-0211
850/234-5555
Florida Bar No. 939730
mitchdever@comcast.net

Dated this 24th day of February, 2020.

Olivia Paiva Klein, Bar Counsel
The Florida Bar
Tallahassee Branch Office
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 970247
olklein@floridabar.org

RECEIVED 06/10/2020 FLORIDA SUPREME COURT

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

STEVEN MITCHELL DEVER,

Respondent.

_____/

Supreme Court Case
No. SC19-910

The Florida Bar File
No. 2018-00,110(14)

REPORT OF REFEREE ACCEPTING CONSENT JUDGMENT

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to R. Regulating Fla. Bar 3-7.6, the following proceedings occurred:

On June 3, 2019, The Florida Bar filed its Complaint against respondent, and a Referee was appointed on June 10, 2019. Respondent filed his Answer to The Florida Bar's Complaint on June 24, 2019. A Notice of Case Management Conference was issued on August 16, 2019, and the Referee held the case management conference on September 18, 2019. A final hearing was scheduled on January 23, 2020, with venue in Panama City, Florida. Respondent filed a Verified Motion for Summary Judgment on October 30, 2019, with attached exhibits. With the agreement of the Referee and respondent, a Motion to Extend Time for Filing

Report of Referee was submitted to the Florida Supreme Court on November 4, 2019, and the Court granted the motion on November 6, 2019, extending the Referee's due date until March 31, 2020.

The Referee scheduled Respondent's Verified Motion for Summary Judgment on January 23, 2020 and moved the final hearing date to February 28, 2020. An Agreed Pretrial Order was entered on December 19, 2019, and The Florida Bar as well as respondent submitted Lists of Witnesses and Documents. On December 26, 2019, The Florida Bar filed a Motion for Summary Judgment, a Notice of Summary Judgment Evidence with attachments, and Notice of Summary Judgment Hearing for January 23, 2020. The Referee denied Respondent's Summary Judgment Motion at the motion hearing and took The Florida Bar's Motion for Summary Judgment under advisement. Via an email on January 31, 2020, the Referee granted the Florida Bar's Motion for Summary Judgment and rescheduled the final hearing as a final penalty hearing on February 28, 2020.

On February 24, 2020, the parties entered into a consent judgment on the discipline, and the final penalty hearing on February 28, 2020 was cancelled. The Florida Bar filed a Motion to Assess Costs on March 9, 2020. On May 26, 2020, the Referee entered an Order Denying Respondent's Motion for Summary Judgment, *nunc pro tunc*, January 23, 2020. On May 26, 2020, the Referee also entered an Order Granting The Florida Bar's Motion for Summary Judgment, *nunc*

pro tunc, January 31, 2020. On May 28, 2020, the parties filed an Agreed Motion for an Extension of Time to File the Report of Referee which was granted by the Court on May 29, 2020. All of the aforementioned pleadings, responses thereto, exhibits received in evidence, and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

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

B. Narrative Summary Of Case. Based on the Order Granting The Florida Bar's Motion for Summary Judgment, I hereby make the following findings of fact:

1. On March 18, 2014, Miguel Amador ("Mr. Amador") filed a complaint on behalf of his clients, Christian and Elizabeth Burgwald ("Plaintiffs"), alleging a negligent security claim against Donovan's Reef Lounge and Package Store ("Defendants") represented by Respondent.

2. On April 16, 2014, Respondent filed a Defendants' Motion to Dismiss Action or in the Alternative, For More Definite Statement.

3. On June 16, 2014, the circuit court denied Defendants' Motion to Dismiss, and denied Defendants' Motion for Protective Order, reserving ruling on both plaintiffs' motions for fees and costs.

4. On January 8, 2015, the circuit court entered an Order granting Plaintiffs' Motion to Compel Compliance with Court Order, Motion to Compel Better Answers, Motion to Compel Depositions and Motion for Sanctions requiring Respondent to comply with various discovery requests and reserving ruling on the Plaintiffs' Motion for Sanctions.

5. On January 21, 2015, the circuit court entered an Order on Plaintiffs' Motion to Overrule Defendants' Bad Faith Objections to Plaintiffs' Notice of Production from a Non-Party dated September 30, 2014, and for Sanctions, overruling Defendants' Objection to the Request and allowing Plaintiffs to issue a Notice of Production for a Non-Party, while reserving ruling on Plaintiffs' Motion for Sanctions.

6. On the same date, the circuit court entered an Order granting Plaintiffs' Motion to Compel Date Certain and Better Answers to Plaintiffs' Discovery requiring Respondent to provide additional answers to interrogatories and responses to requests for production.

7. On July 28, 2015, the circuit court entered an Order granting in part and denying in part (1) Plaintiffs' Motion for Sanctions Pursuant to

Section 57.105, Florida Statutes, referencing Defendants' Motion to Dismiss Action, or, in the Alternative, for More Definite Statement, and Defendants' Motion for Sanctions pursuant to Section 57.105 filed on May 12, 2014, (2) Plaintiffs' Motion to Strike Defendants' Affirmative Defenses and Sanctions filed on July 3, 2014, and (3) Plaintiffs' Motion for Sanctions Regarding Defendants Bad Faith Notice and Motion for Sanctions and Attorney's Fees Pursuant to Section 57.105 filed on October 29, 2014.

8. As to Respondent's Motion to Dismiss, the circuit court found that the "motion to dismiss was not supported by the application of existing law to the facts" and Respondent "failed to show that he acted in good faith based on the representation of his client." The circuit court granted Plaintiffs' Motion for Sanctions pursuant to 57.105, Florida Statutes, and ordered Respondent "to pay Plaintiffs' attorney's fees incurred as a result of the filing of a frivolous motion to dismiss."

9. As to Plaintiffs' Motion to Strike Defendants' Affirmative Defenses and for Sanctions, the circuit court found that "many of the affirmative defenses filed on June 26, 2014, were frivolous," that most of the 27 affirmative defenses "were completely inapplicable to this premises liability case," and Respondent's defense of failure to state a cause of action was contrary to the court's "previous ruling expressly finding that the

complaint states a cause of action." After a sanctions hearing, the circuit court granted Plaintiffs' Motion to Strike Defendants' Affirmative Defenses and ordered Respondent to pay the Plaintiffs' attorney's fees "incurred as a result of filing of the frivolous affirmative defenses."

10. The circuit court denied Plaintiffs' Motion for Sanctions Regarding Defendants' Bad Faith Notice and Motion for Sanctions and Attorney's Fees Pursuant to Section 57.105, Florida Statutes.

11. On July 28, 2015, the circuit court also entered an Order Granting Plaintiffs' Motions for Sanctions Pursuant to Rule 1.380 and Denying Plaintiffs' Motion for Sanctions Pursuant to the Inequitable Conduct Doctrine. The circuit court noted that it had ruled in favor of Plaintiffs on four motions to compel and one motion for protective order. The circuit court found that Respondent was "not substantially justified in pursuing or opposing these discovery motions,' and ordered Respondent to pay the reasonable expenses incurred as a result of the motions, including attorney's fees.

12. When the parties' counsel could not resolve the amount of the attorney's fees for the above motions, on January 22, 2016, the circuit court held an evidentiary hearing at which Respondent was ordered to pay opposing counsel $22,975.00 in fees and costs.

13. The circuit court entered an Order on Plaintiffs' Motion for Entry of Final Judgment Against Defense Counsel, Mitch Dever granting judgment in the amount of $22,975.00 plus a 4.75% interest per annum against Respondent on August 19, 2016.

14. Respondent appealed the circuit court's final judgment on sanctions but, on March 15, 2017, the First District Court of Appeal confirmed per curiam the lower court's order.

15. Respondent filed nonmeritorious claims and contentions with the circuit court as shown by the circuit court's orders findings that he filed a frivolous motion to dismiss and frivolous affirmative defenses in the course of the proceedings which subjected Respondent to monetary sanctions.

16. Respondent failed to comply with legally proper discovery requests by opposing counsel, for which he was sanctioned by the circuit court.

17. Respondent obstructed opposing counsel's access to evidence by failing to respond to opposing counsel's discovery requests.

18. Respondent knowingly disobeyed an obligation under the rules of the tribunal that required him to respond to the opposing party's discovery requests.

19. Respondent's actions were prejudicial to the administration of justice by delaying the judicial process and requiring the circuit court to waste judicial resources on frivolous claims and contentions.

III. RECOMMENDATIONS AS TO GUILT

Based on the Order Granting The Florida Bar's Motion for Summary Judgment, I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar:

4-3.1 (Nonmeritorious Claims and Contentions), 4-3.4(a),(c), and (d) (Fairness to Opposing Party and Counsel), and 4-8.4(d)(Conduct Prejudicial to the Administration of Justice).

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

Based on the Consent Judgment, I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. A public reprimand by publication pursuant to R. Regulating Fla. Bar 3-5.1(d).

B. One-year probation from the date of the issuance of the Final Order in this case during which time respondent agrees to:

i. attend The Florida Bar's Professionalism Workshop and pay the $750.00 workshop fee; and

ii. complete 15 credits of Continuing Legal Education in the area of civil litigation. Respondent is responsible for any costs associated with taking the CLE courses.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following personal history of Respondent, to wit:

Age: 56

Date admitted to the Bar: July 2, 1992

Prior Discipline: None

Florida Standards for Imposing Lawyer Sanctions

I considered the following mitigating factors as set forth in the Consent Judgment :

(a) absence of a prior disciplinary record-admitted 1992

(b) absence of a dishonest or selfish motive.

(e) full and free disclosure to disciplinary board and cooperative attitude towards proceedings.

(g) character and reputation—Respondent presented 5 letters showing substantial pro bono work as well as community activities.

(k) imposition of other penalties or sanctions—Respondent was ordered to pay opposing counsel $22,000.00 plus interest by the court in the underlying civil case.

(l) remorse- Respondent regrets any reflection on the legal profession or The Florida Bar by his actions.

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

I find the following costs were reasonably incurred by The Florida Bar:

Investigative Costs	$100.80
Court Reporters' Fees	$729.50
Bar Counsel Costs	$236.01
Administrative Fee	$1,250.00
TOTAL	$2,316.31

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and that should such cost judgment not be satisfied within thirty days of said judgment becoming final, Respondent shall be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 8 day of June, 2020.

Judge Coleman Lee Robinson, Referee
M.C. Blanchard Judicial Building
190 W. Government Street
Pensacola, FL 32502-5773

Original To:

Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, Florida, 32399-1927

Conformed Copies to:

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Olivia Paiva Klein, Bar Counsel, at oklein@floridabar.org, dlee@floridabar.org

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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, **Complainant,**	**Supreme Court Case No. SC17-1391**
v.	
JONATHAN STEPHEN SCHWARTZ, **Respondent.**	**The Florida Bar File No. 2016-70,106 (11J)**

_____/

RESPONDENT'S NOTICE OF FILING PROPOSED REPORT OF REFEREE ON SANCTIONS

Respondent submits his proposed Report of Referee on Sanctions for the Referee's Consideration.

Respectfully submitted,

KUEHNE DAVIS LAW, P.A.
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By: S/ *Benedict P. Kuehne*
BENEDICT P. KUEHNE
Florida Bar No. 233293
MICHAEL T. DAVIS
Florida Bar No. 63374

CERTIFICATE OF SERVICE

I certify this document was emailed on September 30, 2020, to:

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S/Benedict P. Kuehne
BENEDICT P. KUEHNE

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, **Complainant,**	**Supreme Court Case No. SC17-1391**
v.	
JONATHAN STEPHEN SCHWARTZ, **Respondent.**	**The Florida Bar File No. 2016-70,106 (11J)**

_____/

RESPONDENT'S PROPOSED REPORT OF REFEREE ON SANCTIONS

I. Summary of Proceedings.

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, this matter was remanded by the Florida Supreme Court for sanctions proceedings in accordance with *The Florida Bar v. Jonathan S. Schwartz*, 284 So. 3d 393 (Fla. 2019). As directed by the Supreme Court, a sanctions hearing was held on August 21, 2020. All pleadings, notices, motions, orders, transcripts, and exhibits are forwarded to the Supreme Court of Florida with this Report and constitute the record in this case.

At the sanctions hearing, Respondent submitted documentary evidence in the form of letters of support and good works, and presented the testimony of these witnesses: Pamela Barrett; Nancy Browne; Richard Browne; Hon. Al Milian, Circuit

Judge (appearing pursuant to subpoena); Dr. Bruce Frumkin; Crystal Beale; Michael Graham; William Heck; Gloria Heck; Patricia Rossato; Michelle Clarke; Stella Schwartz; and Respondent Jonathan Schwartz.

The following attorneys appeared as counsel for the parties:

For The Florida Bar:
Jennifer R. Falcone, Bar Counsel

For the Respondent:
Benedict P. Kuehne
Barry Wax
Richard Baron

II. Recommendation as to Disciplinary Measures to Be Applied.

A. Purposes of Discipline.

The purposes of discipline, as enunciated in *Florida Bar v. Poplack*, 599 So. 2d 116, 118 (Fla. 1992) (citing *Florida Bar v. Lord*, 433 So. 2d 983 (Fla. 1983)), are considered by this Referee in evaluating the recommended discipline. These purposes include: (1) "the judgment must be fair to society . . . by protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer;" (2) the sanction "must be fair to the respondent," punishing for ethical breaches and yet encouraging reformation and rehabilitation; and (3) the sanction "must be severe enough to deter others who might be . . . tempted to become involved in like violations." *Id*.

Based on a showing by clear and convincing evidence, in light of the specific fact-based circumstances of this case arising from Respondent's good faith efforts to fully and fairly provide effective representation to a criminal defense client in a serious criminal prosecution, and Respondent's discovery conduct evincing no intention to mislead or act in any deceptive or deceitful manner, I find that a suspension for thirty (30) days fairly sanctions Respondent while encouraging the reformative practices he had implemented immediately upon becoming aware of the complaint initiated by the State Attorney's Office, almost 6 years ago, through a subsequently withdrawn motion seeking sanctions in the underlying criminal case. *State v. Virgil Woodson*, Circuit Case No. F13-012946 (Miami-Dade County).

A rehabilitative suspension (more than 90 days) is unnecessary, excessive, and would excessively deny the public the services of an otherwise qualified lawyer who focuses his legal practice on the defense of persons accused of criminal conduct, many of whom are otherwise unable to afford the services of private defense counsel. This Referee has reviewed and considered Respondent's prior disciplinary matters but does not find them material to this proceeding or constituting any pattern of misconduct, as most are well over 20 years old or are inapposite to this proceeding.

Accordingly, I recommend a suspension for thirty (30) days followed by a term of probation for one (1) year that will most appropriately balance the

seriousness of the conduct with the rehabilitative measures already undertaken by Respondent.

B. Standards for Imposing Lawyer Sanctions.

I reviewed and considered the following Standards.

1. 2.3. Suspension:

Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. A suspension of 90 days or less does not require proof of rehabilitation. A suspension of more than 90 days requires proof of rehabilitation and may require passage of all or part of the bar examination. No suspension is ordered for a specific period of time in excess of 3 years.

2. 2.5. Public Reprimand:

Public reprimand is a form of public discipline which declares the conduct of the lawyer improper but does not limit the lawyer's right to practice.

3. Standard 2.7. Probation:

Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in connection with any other disciplinary measure. Probation can also be imposed as a condition of reinstatement.

4. Standard 6.1(b) & (c), False Statement, Fraud, Deceit, and Misrepresentation:

Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation:

* * *

(b) Suspension. Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld.

5. Standard 6.2(b) & (c). Abuse of the Legal Process:

Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

* * *

(b) Suspension. Suspension is appropriate when a lawyer knowingly violates a court order or rule and causes injury or potential injury to a client or a party or causes interference or potential interference with a legal proceeding.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule and causes injury or potential injury to a client or other party or causes interference or potential interference with a legal proceeding.

6. Standard 7.1(b) & (c). Deceptive Conduct or Statements and Unreasonable or Improper Fees.

Absent aggravating or mitigating circumstances and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving deceptive conduct or statements, improper division of fees, or unreasonable or improper fees.

* * *

> **(b) Suspension**. Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
>
> **(c) Public Reprimand**. Public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

In considering the referenced standards, I have taken into account the description of Respondent's misconduct contained in the Supreme Court decision and the record of proceedings in this disciplinary case, the Florida Supreme Court's opinion that the use of the altered photo line-up is itself deceptive without a showing of Respondent's intent or purpose to mislead, and Respondent's motive, purpose, and actual intent in using the altered line-up during deposition, Respondent's prompt withdrawal of the line-up and explaining its creation upon objection by opposing counsel, Respondent's "absence of a dishonest or selfish motive" as used in Standard 3.3(b)(2), and Respondent's deeply held understanding and acknowledgment of the wrongful nature of his misconduct. Respondent's negligence in failing to determine that his altered line-up was likely to be perceived by the deponent as deceptive and false, coupled with his remedial, corrective action when opposing counsel objected to his use of the altered line-up, caused "little or no actual or potential injury to a party, or cause[d] little or no adverse or potentially adverse effect on the legal

proceeding."

Significantly, although Respondent's reliance during the deposition on the precedent of *State v. Kuntsman*, 643 So. 2d 1172 (Fla. 3d DCA 1994), and *State v. McWilliams*, 817 So. 2d 1036 (Fla. 3d DCA 2002), was deemed by the Florida Supreme Court to be misplaced, there is no evidence in this record that Respondent intentionally or purposely avoided compliance with this precedent or understood at the time the absolute limitations on the use of defense-created line-ups during depositions. *Contra Florida Bar v. Rose*, Florida Supreme Court Case No. SC10-1309 (October 5, 2010) (repeat misconduct after notice); *Florida Bar v. Rosenberg*, 169 So. 3d 1155 (Fla. 2015) (multiple instances of the same offense); *Florida Bar v. Fortunato*, 788 So. 2d 201, 202 (Fla. 2001) (finding that respondent's testimony "was verifiably false, confusing, and deliberately misleading[,]" and that respondent engaged in a "pattern of neglect that caused injury or potential injury to a client.").

In making this recommended discipline, I considered the entirety of the evidence. The thoughtful testimony of two witnesses, Circuit Judge Al Milian and Dr. Bruce Frumkin, is particularly noteworthy. Judge Milian recognized Respondent as a competent lawyer who is a passionate and effective advocate for his clients who approached his cases in a very measured manner. Respondent demonstrated a mastery of the law, and was always well prepared, exhibiting a great deal of

compassion and empathy for his clients. He always demonstrated attention to helping others practice responsibly and ethically.

Dr. Bruce Frumkin, who has worked closely with Mr. Schwartz for many years, knows Mr. Schwartz to be absolutely dedicated to his clients. He routinely strives for the very best in advancing his clients' interests without concern for the clients' financial status. Respondent's involvement with *pro bono* cases has been a constant throughout his career. Respondent approaches all his cases with a sound degree of ethics and professionalism and has never given Dr. Frumkin any reason to believe Mr. Schwartz is capable of deceit. In testament to Mr. Schwartz striving for the best possible outcomes for his clients, Dr. Frumkin observed that Respondent even went to school to study psychology in order to be better equipped to identify potential mental health issues that might impact client cases.

I also found in the letter from Scott M. Weinstein, Ph.D., a Florida licensed psychologist providing therapy and treatment as recommended by FLA (Florida Lawyers Assistance), confirmation that Respondent's conduct in this instance was "without malice" and that Respondent fully and completely accepted responsibility for his conduct and harbors not a scintilla of negative feelings toward the Bar or his accuser. In the same vein are the letters and testimony of Dr. Richard and Nancy Browne who see Mr. Schwartz's passion in the pursuit of justice and willingness to

work to obtain fair and equitable results for his clients.

The letter from Pamela Barrett, the mother of Respondent's client Virgil Woodson, is striking for its directness in describing Respondent's zeal to uncover all evidence of her son's misidentification and to secure his release that enabled him to pursue a college degree in business administration and thereby make something of himself. Mr. Schwartz saved her son's like by working diligently to uncover the errors in the prosecution's case.

Letters from Respondent's clients and others in the community corroborate Mr. Schwartz's professionalism and dedication to the pursuit of justice. Arthur Brown writes: "[Respondent] is my friend and someone I rely on to steer me in the right direction. I have spoken with him more than 100 times. He has often come to my house to speak and counsel with me regarding the situation between me, my wife and my now deceased girlfriend. The state wanted 5 years in prison, but thanks to Jonathan and his hard work, I am now on probation. He makes the impossible possible. He simply doesn't give up no matter what. He has also become close with my wife and now, he has taught me how to stay out of trouble. As a person of color, I have witnessed Jonathan Schwartz fighting for all human beings to have an equal right and for those who fear not getting justice and only have found despair in the system. He is one of the few that I feel really does not see color."

Gene Rosow stated: “I consider [Jonathan Schwartz] one of the most able, honorable and skillful attorneys I’ve ever had the pleasure to know. He is well versed in Psychology and Linguistics from his studies at Univ. of Chicago, Tulane, and Wesleyan. His philanthropic and conservation activities are well-known and highly respected in non-profit circles and commitment to botany and preservation in the Peruvian Amazon for the last 25 years. If I had to name one attorney who stands head and shoulders above others … that man would be Atty. Jonathan Schwartz.”

Gloria Heck described Jonathan as spending “his life defending those in our criminal system who were unjustly accused and didn’t have the means to state their case. He has nobly fought for those whom no one would defend and he has given himself to improve the lives of many. Our judicial system needs people like Jonathan, now more than ever to help heal the systemic discrimination that must be remedied. I appreciate his passion for serving our disenfranchised populations.”

Bill Heck wrote: “We studied tai chi together beginning in 1987, the beginning of his relationship with meditation and other stress reducing therapies that he would go on to learn and incorporate into his career. They are at the forefront of what is possible when we speak of counselors at law. One of the most creative people period. There is no one more dedicated and passionate about his profession, no one more concerned about his clients. His mentoring for 2 years in order to get to the

truth of a defendant on trial for murder is typical of his persistence and commitment. He has great vision and wisdom and is a counselor to all, and he doesn't pull any punches. He tells the truth whether you want to hear it or not. He is a warrior for justice and persistently and creatively finds the doorway to stand for what's right and just for 4 decades. He is about helping people. No one deserves mercy and justice more than him who lives and breathes mercy and justice with every second of his existence."

Rosa Villadamigo commented: "My fate was being held by a thread. No one was driven to proceed with my case, I needed someone with an ethical mind set … one thing that made Jonathan stand out was his confidence and his approach…. He explained everything in great detail…. He is brilliant at his craft and his intelligence of the law on any criminal case is beyond compare … he will go to bat for any of his clients … he has a strong eye for detail. He has a presence about himself that is extraordinary … he is one of a kind…. His wife picked me up at the county jail when I was 6 months pregnant with water and snacks and transported me to eat … and then to probation and then to the program. I've hired lawyers before, but Mr. Schwartz is truly the best I have ever worked with and I'm able to raise my son thanks to him.

Rufus Dean told a personal story about respondent: "Mr. Schwartz will be my

attorney forever … he is very honest, professional, knowledgeable and down to earth. Not only thorough but easy to work with and always willing to take the time to discuss my concerns and respond to questions. His staff is responsive, creative and a pleasure to deal with…. You are always made to feel like your business is important to them. He is like my family and I can always count on him to do a great job. Five stars and beyond.

Louis Beale remarked in his compelling letter: I have been knowing him for 30 years. I am proud to say that I named my first-born child after him. He always puts my mind at ease…. He is an excellent attorney and friend. He fights relentlessly for his clients and always has their best interests at heart…. He is available all hours to answer and to offer advice legal or personal. Flexible payment plans allow his services to give more people opportunity to have the proper representation. Patience, professionalism and desire to help others is what makes him unique and highly admirable.

Jo Ann Mayer underscored Mr. Schwartz's "passion for honesty and truth. I have come to see how passionate and caring Jonathan is of his clients. He often assists not only with legal needs but their personal needs as well. This level of concern and responsibility is often missing in today's professionals. He holds himself to the highest ethical standards in the practice of law. Honest and trustworthy

… highly recommend for any legal issue."

Carmen Gaskell, a longtime friend, described Mr. Schwartz's "deep involvement with social issues and going the extra mile to defend and help the less fortunate has become apparent. He regularly visits the jails to make sure the prisoners are being treated justly and know about their rights … often on a pro bono basis. He works day and night to help get people out during Covid. A man of many talents, teaching yoga to the inmates, beautiful Spanish guitarist… he does it all without ever boasting about it or mentioning it.

Patricia Rossato wrote in her letter: "It is hard for me to even begin to find the proper words and the gratefulness to describe my appreciation for his altruistic and professional legal services which literally saved my life. Working in the prison system teaching meditation in one of the programs started years before by Jonathan's Freedom Yoga.I had a highly publicized case where I was going into prison with a radio and was charged with a trafficking amount of drugs. As a fellow prison yoga worker, he took my case *pro bono* from beginning to end. It was an extremely complex litigation involving various conversations with State, substantial assistance, prosecution of 2 other inmates and then termination of probation. He was more than supportive every step of the way … both him and his wife are very special people dedicated to healing and therapy and peace and justice…. I open my mind and soul

to thank him, his amazingly inspiring team, and heavenly light that connected me with this special professional Angel Attorney."

C. Case Law.

1. A Period of Rehabilitative Suspension Is Not Supported.

The Florida Bar has requested a significant period of rehabilitative suspension, but I find its cases and argument do not support its position.

Contrary to the Bar's cited precedent, the facts here do not reflect that Respondent acted for any personal or improper benefit. Instead, his misconduct for which he has accepted full responsibility arose from his good faith effort to fully and effectively provide competent, meaningful, and constitutionally directed effective assistance of counsel in a criminal prosecution in which he had strong and corroborative evidence to believe his client had been misidentified as a result of a suggestive police line-up. His use of his deceptively prepared photo line-up was not intended to mislead the witness or the prosecutor or otherwise interfere with the administration of justice.

Florida Bar v. Adorno, 60 So. 3d 1016 (Fla. 2011), is cited by the Bar in support of a rehabilitative suspension despite the considerable differences from the present case. In *Adorno*, the Supreme Court imposed a 3-year rehabilitative suspension arising from the lawyer's breach of a fiduciary duty owed to the putative

class that prejudiced the class when the lawyer settled on behalf of individual plaintiffs to the detriment of the putative class. The Supreme Court found that the attorney's actions regarding the disproportionate settlement amount, as well as the terms of the settlement, created a conflict of interest that prejudiced the remaining class members. Further, the lawyer abandoned the putative class via the settlement negotiations, hid the terms of the settlement agreement from the class through a nondisclosure agreement, and stopped litigating on behalf of the class as a result of a standstill agreement. The sanction of a 3-year suspension was deemed required since the lawyer's severe misconduct was deceitful and deceptive, prejudicial to the administration of justice, and inured to the lawyer's personal, financial benefit at the expense of his clients. I do not consider *Adorno* to be analogous to this case.

The Florida Bar also cited *The Florida Bar v. Hmielewski,* 702 So. 2d 218 (Fla. 1997), in support of a 3-year suspension. That case presents a far more extreme case of professional misconduct involving the lawyer's intentional and material misconduct during a medical malpractice action. The lawyer withheld information concerning the location of the patient's medical records, and misled the court, opposing counsel, and third parties in the process. The lawyer deliberately and intentionally made misrepresentations to opposing counsel and the court, acted with dishonesty, fraud, and deceit, knowingly made false statements to the court, and

concealed relevant material, all of which impacted the course of the case. As applied to Respondent', there was no personal benefit or any intention to mislead the litigants. I do not consider *Hmielewski* to be analogous to this case.

The Bar's citation to *Florida Bar v. Cox*, 794 So. 2d 1278 (Fla. 2110), does not support its request for a rehabilitative suspension. There, the offending lawyer, a federal prosecutor, engaged in deceptive misconduct in direct response to a court order during a pornography case that impacted the administration of justice and endangered the fairness of the proceedings against the defendant. The prosecutor gave a critical witness a fictitious name and assured her that she would not have to testify at trial, which she feared because of a Florida custody dispute with her former husband. Before trial, the magistrate ordered respondent to provide the informant's true name to the defense. Although that prosecutor knew the woman's name, he nonetheless informed the defense, the court, and the jury venire that the woman's name was the fictitious one. Her identity was only revealed midtrial, resulting in the defense moving for and receiving a mistrial, then dismissal of the indictment. The Florida Supreme Court concluded that the prosecutor's misconduct caused serious injury to the legal system and potentially serious injury to the defendant. While disbarment was the presumptive penalty, substantial evidence of mitigation resulted in the lawyer's suspension from the practice of law for a period of one (1) year. By

way of contrast, Respondent's conduct in this case was not presented to the tribunal, was promptly corrected, and had no appreciable impact on the administration of justice or the fairness of the proceedings. I do not consider *Cox* to be analogous to this case.

The intentionally deceptive conduct in filing a knowingly false financial affidavit, submitting knowingly deceptive interrogatory answers, and allowing the client to testify falsely during a deposition and taking no remedial action in *Florida Bar v. Dupee*, 160 So. 3d 838 (Fla. 2015), warranted a one-year suspension. The grievousness of the lawyer's misconduct in numerous instances, coupled with evidence of mitigation, led the Supreme Court to conclude the suspension was appropriate. That purposeful deception is not present in Respondent's case, however. I do not consider *Dupee* to be analogous to this case.

Nor do I rely on the gravity of the misconduct in *Florida Bar v. Whitney*, 132 So. 3d 1095 (Fla. 2013), as support for a rehabilitative suspension. The repeated misconduct in *Whitney* included that the disciplined lawyer making false representations to the tribunal in response to opposing counsel's motion to compel and not producing the required documents sought by the request for production. The lawyer's misconduct encompassed numerous instances pertaining to both client representation and discovery-related violations, warranting a one-year suspension. I

do not consider *Whitney* to be analogous to this case.

The three-year suspension in *Florida Bar v. Peterson*, 680 So. 2d 425 (Fla. 1996), arose from the lawyer's involvement in a multi-million dollar scheme that adversely affected a client, entering into a disallowable business relationship with the client, charging an excessive fee, and not responding to the Bar's inquiries. The multiple violations of the Bar rules over a period of time warranted the significant rehabilitative suspension, in contrast with this matter in which Respondent took full responsibility for his deposition conduct and implemented remedial action. I do not consider *Peterson* to be analogous to this case.

The Bar's suggestion that *The Florida Bar v. Adler*, Case No. SC14-1026, TFB 2014-50,956 (09B), is applicable is misplaced in this case. Adler's disbarment on consent arose from his conviction of a federal elections law felony and his involvement in fraudulent conduct. Respondent's case has none of those elements.

The one-year suspension authorized in *Florida Bar v. Dunne*, 2020 WL 257785 (Fla. 2020), arose from a prosecutor's purposeful and repeated deception that withheld the existence of the criminal defendant's recorded jailhouse telephone calls, and then lying to the court when confronted with the suppression. Since the prosecutor eventually acknowledged the misconduct and had a significant mitigation history, the Supreme Court approved a one-year suspension. In contrast with

Respondent's conduct that did not interfere with the administration of justice, was promptly identified and corrected during the deposition, and arose from Respondent's good faith effort to provide effective representation to his client, the *Dunne* case is sufficiently dissimilar and inapplicable.

Nor do I find that Respondent has engaged in cumulative and similar misconduct that might otherwise justify a rehabilitative suspension. *Compare Florida Bar v. Bosecker*, 259 So. 3d 689 (Fla. 2018) (disbarment appropriate for lawyer's repeated similar misconduct, violation of previous disciplinary suspension order, and continuing to practice law while suspended). The Respondent's prior discipline, all of which he recognized and accepted responsibility for his misconduct, is not of the same or similar quality as the present misconduct. The 1995 Minor Misconduct in *The Florida Bar v. Schwartz*, TFB 94-71,026 (11B), occurring more than 25 years ago, involved erroneous assertions made in connection with motions for continuances that resulted from Respondent's heavy calendar, and for which Respondent instituted corrective practices. As this prior matter involves minor misconduct and is more than seven (7) years old and therefore as defined in Standard 3.2(b)(1), it is not prior discipline. So, too, the Bar's other cases falls outside the 7-year period and therefore cannot be considered in aggravation: TFB Case No. 96-71,789 (11B) (minor misconduct); TFB 2007-99,330 (02S) (advertising violation

more than 7 years ago).

The matter of *The Florida Bar v. Schwartz*, Case No. SC11-2143 (TFB 2011-70,673(17A)), involving a consent judgment for which Respondent accepted responsibility, arose from Respondent's submission of a factually accurate financial affidavit that had not been signed in Respondent's presence when she was out-of-the-country and acknowledged by telephone that she approved the declaration. Respondent, providing *pro bono* representation to a Venezuelan single mother whose child was fathered by an internationally famous baseball player who abandoned mother and child, did not claim the client executed the affidavit in his physical presence. Respondent affirmatively omitted any reference to the client appearing before him and inserted his initials next to his signing of her name, thereby making it clear on the face of the document he signed the declaration in her stead. As he well knew, the statute at the time required an affiant's physical presence when signing, although the statute has since been amended to allow an audio-video appearance in the instance of a known person whose signature is being notarized. § 117.107(9), Fla. Stat. (2019).

2. Substantial Precedent Supports a Non-Rehabilitative Suspension.

I considered the recent disciplinary case of *The Florida Bar v. Eduardo Enrique Dieppa III*, Case No. SC20-883, TFB 2018-70,588 (11A), involving a

consent judgment for a public reprimand arising from the lawyer's misstatement concerning his client's availability for disposition despite the client's cognitive impairment.

The Florida Bar v. Steven Mitchell Dever, Case No. SC19-910, TFB 2018-00110 (14), also involving a consent judgment, approved a public reprimand with one (1) year of probation during which time the lawyer is required to attend a Professionalism Workshop, and obtain 15 continuing legal education credits in civil litigation. The underlying misconduct for which the lawyer accepted responsibility involved the filing of non-meritorious claims, failing to comply with discovery requests and rules, and engaging in conduct prejudicial to the administration of justice during civil litigation.

Although these are unpublished decisions, I have reviewed Justice Pariente's dissenting opinion in *Florida Bar v. Kinsella*, 260 So. 3d 1046, 1052 (Fla. 2018), in which she relies upon an unpublished disposition and instructs that the Court "must keep in mind the facts and circumstances of each individual case and the purposes of Florida Bar discipline."

Disciplinary cases addressing lawyer conduct in the discovery or litigation contexts generally look to whether the offending lawyer violated controlling court orders, a fact that is not involved here. For example, in *Florida Bar v. Vugin*, Florida

Supreme Court Case No. SC11-1786 (October 9, 2012), in which the lawyer received diversion with conditions, the respondent was the subject of two sanctions orders that were highly critical of his conduct. In, the trial court issued an order to show cause why the lawyer should not be held in contempt for his misconduct.

Respondent here did not run afoul of any court order and did not engage in conduct that was reviewed by the trial judge. This case is therefore not as serious as the conduct involved in *Florida Bar v. Rose*, Florida Supreme Court Case No. SC10-1309 (October 5, 2010), in which The Florida Bar agreed to and the Court approved diversion for the attorney's refusal to pay a sanctions order.

The case of *Florida Bar v. Fortunato*, 788 So. 2d 201 (Fla. 2001), resulting in a 90-day suspension for a lawyer's failure to "respond to two related appellate court orders" included findings that "Fortunato 'gave no credible reason whatsoever for her failure to respond to the Orders in question or comply with their terms. On the contrary, her testimony was verifiably false, confusing, and deliberately misleading.'" *Id*. at 202. By contrast here, Respondent Schwartz's testimony was truthful and forthright, and indicated his sincere apology and remorse for having transgressed the allowable boundaries of the law. Importantly, Respondent immediately put into place significant remedial and corrective protocols to endure that such circumstances will not be repeated, including consultation with

experienced appellate and criminal defense counsel whenever Respondent encounters a new or previously unknown situation.

I also reviewed several disciplinary cases based on a court finding of dishonesty committed by the responding attorney, since The Florida Bar argues that dishonesty and deceit are the at the core of Respondent's violation. In *Florida Bar v. Cocalis*, 959 So. 2d 163 (Fla. 2007), the Court considered findings by the Fourth District Court of Appeal that condemned the offending attorney's actions as being unprofessional and misleading. The referee found the lawyer violated Rule 3-4.3 (any act that is unlawful or contrary to honesty and justice). The Court determined that a public reprimand was the appropriate sanction.

A suspension for ninety (90) days resulted in *Florida Bar v. MacNamara*, 132 So. 3d 165, 171 (Fla. 2013), involving repeated dishonesty by a respondent during litigation. The lawyer misrepresented to the probate court that he had "filed a tax return with the IRS that was still being considered, when he knew he had not sent the IRS a signed filed tax return." The lawyer sent a deliberately misleading cover letter to the IRS and failed to honestly inform his client about the status of the tax return. Also, that lawyer made repeated misrepresentations to the Bar by claiming he filed the tax return in March 2005, when in fact he had not done so. Even with a finding that the lawyer directly engaged in numerous acts of dishonesty, the Court

did not impose a rehabilitative suspension.

A more serious breach of discovery obligations and misconduct resulted in a 90-day suspension in *Florida Bar v. Committe*, 916 So. 2d 741 (Fla. 2005), involving a lawyer who pursued frivolous claims and failed to comply with discovery in order to harass the opposition. The Court reasoned that "presenting [an unsuccessful argument] once or moving for rehearing is one thing" but filing "the same ground numerous times" and then pursuing the same claims in two federal actions was frivolous and "for the purpose of harassment." By contrast here, even though Respondent Schwartz mistakenly relied on Third District precedent for believing his advocacy came within the safe harbor allowance for pursuing legitimate claims of misidentification, he immediately disclosed his offending line-up, never repeated his conduct, accepted full responsibility for his impermissible actions, and took corrective actions.

D. Mitigating Factors in the Florida Standards for Imposing Lawyer Sanctions Support Non-Rehabilitative Suspension.

1. **Absence of dishonest or selfish motive, Standard 3.3(b)(2)**. Respondent's conduct was done without any selfish or dishonest motive. Respondent acted in good faith in challenging the deposition witness as to what was believed to be a suggestive line-up. Respondent has fully accepted the wrongfulness of his actions. In the criminal trial court, he had filed a motion to suppress the line-

up as unduly suggestive because of the differently colored background of suspect Number 5, who turned out to be Respondent's client. Further, Respondent had presented witnesses to the State Attorney's Office who testified consistent with Respondent's alternative suspect theory, all to no avail. As demonstrated in the underlying trial, Respondent prefaced the use of his black and white defense-altered line-up with instructions that he believed in good faith distanced the photographs from the color copy line-ups shown to the witness by the police. Respondent had a substantial amount of information corroborating the contention that the defendant (his client) had been misidentified. He did not press the witness concerning her identification of anyone on the defense-crafted line-up, and he readily explained the origins of the line-ups when challenged by opposing counsel. Respondent acknowledged his transgression and endeavored to not engage in any similar breach of his professional responsibilities.

2. **Personal or emotional problems, Standard 3.3(b)(3)**. As presented by Respondent, who has been involved in counseling and therapy supervised by Florida Lawyers Assistance (FLA), Mr. Schwartz is dealing with his deep-seated need to correct instances of manifest injustice. This defining value motivates him to be especially diligent in identifying creative solutions to his cases. Although unknown at the time of the misconduct here, Respondent's impetus

resulted from his early life experience seeing his father accused of criminal conduct and imprisoned for an offense his father did not believe he committed. Respondent's therapeutic program has given him significant insight into his drive to represent his clients against overwhelming odds and provided him with the decision-making skills to know when his efforts come too close to the line of professionally acceptable behavior. As is evident from the entirety of the evidence in this matter, Mr. Schwartz is well on the path toward transformation and reform following his willingness to work diligently to better channel his emotional needs. I find this to be a meaningful mitigation factor. *See Florida Bar v. Liberman*, 43 So. 3d 36, 40 (Fla. 2010) (consideration of rehabilitation efforts in determining whether to make disbarment order effective *nunc pro tunc* to the date of the emergency suspension).

3. **Timely good faith efforts to make restitution or rectify consequences of misconduct, Standard 3.3(b)(4)**. As is evident from the record of proceedings, Respondent made a full and complete disclosure of the circumstances surrounding the preparation and employment of the defense line-ups when challenged by opposing counsel. He also immediately terminated his inquiry when an objection was made.

4. **Full and free disclosure to the bar or cooperative attitude toward the proceedings, Standard 3.3(b)(5)**. Even as Respondent challenged the

disciplinary proceedings, he nonetheless disputed the charge as a matter of legal principle without any lack of cooperation and readily acknowledged the impact of his actions on the course of his client representation.

5. **Character or reputation, Standard 3.3(b)(7)**. I considered the significant testimony of the mitigation witnesses, and carefully evaluated the entirety of Jonathan Schwartz's testimony at the original trial and the sanctions hearing. I have no doubt that Mr. Schwartz is a criminal defense lawyer who is passionate about protecting his clients' rights and providing the constitutionally required effective assistance of counsel. Mr. Schwartz provides effective assistance to clients who may not be financially eligible for appointment of defense counsel but who are not of sufficient means to engage private counsel. Depriving clients of the representation provided by Mr. Schwartz and his firm would be disproportionate to Respondent's acknowledged misconduct. He has earned a well-respected reputation as the "private Public Defender's Office" for those in need. He rarely turns away a potential client charged with serious felonies who cannot otherwise engage counsel. His representation above and beyond the obligations of cases to include mental health or environmental factors was explained by several of his character witnesses. I have also considered evidence of Respondent's extensive charitable and community contributions.

Mr. Schwartz has engaged in stress reduction, meditation, and yoga services to those in need, including prisoners in the Miami-Dade County Corrections system, battered women in the Lotus House, abused children in the custody of the Department of Children and Families, and after-school programs for disadvantaged children throughout Miami-Dade County. He founded a prison yoga program, Freedom Yoga, that has spread from Miami-Dade County to other jurisdictions in the Florida Corrections System. Mr. Schwartz and his firm handle dozens of *pro bono* cases, as he has done for every year over the past 30 years.

5. **Interim rehabilitation, Standard 3.3(b)(10)**. Substantial uncontested testimony was offered by both witnesses and Respondent as to Mr. Schwartz's meaningful and diligent self-correction and rehabilitation efforts, especially in the extensive time period following the bringing of the Bar's charges and the setting of the sanctions hearing. Even when Respondent originally prevailed at his trial, he continued to take considerable action to implement corrective protocols and systems in his practice, to redouble his legal education on criminal law and ethics topics, to surround himself with other experienced practitioners who could provide him with impartial feedback concerning his creative approaches to client representation, and developing a support and communication infrastructure to ensure that he is always attuned to the professionalism required of the practice. In addition,

Respondent involved himself in a structured and rigorous FLA therapeutic program that continues to this day.

6. **Imposition of other penalties or sanctions, Standard 3.3(b)(11)**. The length of time this disciplinary case has been pending has extracted a considerable toll on respondent. His referral to the bar and the occurrence of disciplinary proceedings ware universally known and talked about at the criminal courthouse, and Respondent has taken it upon himself to speak with judges to let them know he is a significantly different practitioner from the one who was the subject of the Bar disciplinary grievance. As Circuit Judge Milian noted in his compelling testimony, Respondent has made a habit of helping others practice with professionalism by using his own misconduct as an example of the aggressive advocacy that can run afoul of Bar rules.

7. **Remorse, Standard 3.3(b)(12)**. Respondent demonstrated remorse through his testimony that was corroborated by witnesses, including a Circuit Judge before whom Respondent has practiced, evidence of significant revisions to his practice, voluntarily pursuing FLA evaluation, treatment, and therapy, and implementation of procedures to better enable him and his firm to recognize the ethical issues that arise in a criminal defense practice.

E. Aggravating Factors, Standard 3.2.

1. **Prior discipline, Standard 3.2(b)(1)**. Respondent's prior discipline has been previously discussed and does not favor a rehabilitative suspension.

2. **Dishonest or selfish motive, Standard 3.2(b)(2)**. This factor is not present here as discussed in my finding that the clear and convincing evidence is that Respondent did not act with a selfish or dishonest motive.

3. **Multiple offenses, Standard 3.2(b)(4)**. As Respondent's conduct is limited to this singular incident, the multiple offenses aggravator is inapplicable.

4. **Refusal to acknowledge the wrongful nature of the conduct, Standard 3.2(b)(7)**. As I previously found, Respondent fully and completely accepted responsibility for his transgression, and has endeavored to learn from his misconduct.

5. **Vulnerability of the victim, Standard 3.2(b)(8)**. The Bar did not prove by clear and convincing evidence that this factor applies. I find, based on consideration of the entire record, that Respondent's misconduct did not involve a vulnerable victim.

6. **Substantial experience in the practice of law, Standard 3.2(b)(9)**. While Mr. Schwartz has been a lawyer since 1986, I do not find that this

factor aggravates the offense conduct. Rather, Mr. Schwartz's experience as a criminal defense lawyer has enabled him to better appreciate the significance of his misconduct and implement meaningful corrective actions.

III. Sanctions to be Imposed.

I recommend that Respondent be suspended from the practice of law for thirty (30) days followed by a one (1) year term of probation. As special conditions of probation, I require that Respondent continue his therapeutic treatment with the counselor recommended by FLA, Scott Weinstein. Additional terms of the probation include successful completion of The Florida Bar's Ethics School and Professionalism School within the period of probation. Also, Respondent must complete at least ten (10) hours in additional ethics CLE, over the required minimum, including The Florida Bar's 2019 and 2020 Masters in Ethics courses.

In addition to paying the Bar's reasonable costs of this proceeding within thirty (30) days of the date of the Order, Respondent will reimburse the Bar for costs of supervision and will pay all fees and costs of the required probationary conditions.

IV. Personal History and Past Disciplinary Record.

After the finding of guilt and prior to recommending discipline pursuant to Rule 3-7.6(k)(l), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Year of Birth: 1959.

Date Admitted to Bar: August 13, 1986.

Prior Disciplinary convictions and Discipline:

1. TFB 94-71,026 (11B);

2. TFB 96-71,740 (11B), Case No. 90,204;

3. TFB 96-71,789 (11B);

4. TFB 2001-71,404 (11C), Case No. SC02-782;

5. TFB 2007-90,330 (02S);

6. TFB 2011-70,673 (17A), Case No. SC11-2143;

7. TFB 2018-90,035 (02S).

V. Statement of Costs and Manner in Which Costs Should Be Taxed.

I find the following costs were reasonably incurred by The Florida Bar:

A. Grievance Committee Level Costs

1. Transcript Costs

2. Bar Counsel/Branch Staff Counsel Travel Costs

B. Referee Level Costs

1. Transcript Costs

2. Bar Counsel/Branch Staff Counsel Travel Costs

C. Administrative Costs

Rule 3-7.6(q): $1,250.00

D. Miscellaneous Costs

1. Investigator Expenses

2. Telephone Costs

3. Witness Fees

4. Copying Costs

TOTAL ITEMIZED COSTS:

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses, together with the foregoing itemized costs, be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated on October __, 2020.

_____

HON. LIZETT MARTINEZ, Referee

Copies:
Jennifer R. Falcone, Bar Counsel, jfalcone@floridabar.org
Benedict P. Kuehne, ben.kuehne@kuehnelaw.com
Richard Baron, rb@richardbaronlaw.com

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JONATHAN STEPHEN SCHWARTZ,

Respondent.

_____/

Supreme Court Case
No. SC17-1391

The Florida Bar File
No. 2016-70,106(11J)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

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

On July 27, 2017, The Florida Bar filed its Complaint against Respondent in these proceedings. The Honorable Celeste Hardee Muir was initially appointed as the referee in this cause. On April 4 and 18, 2018, a final hearing was held in this matter. On May 21, 2018, the referee served her Report of Referee, finding the Respondent not guilty of professional misconduct.

The Referee's report was appealed by The Florida Bar and the parties' briefs were submitted to the Florida Supreme Court. On November 7, 2019, this Court entered an Opinion specifically disapproving the referee's findings of fact and

recommendation that Respondent did not violate any Bar rules. By Order dated the same day, the Court further ruled that the matter be remanded to a newly appointed referee for further proceedings.

On November 25, 2019, the undersigned was appointed as the new referee. On August 21, 2020, a sanctions hearing was held in this cause.

All items properly filed including pleadings, recorded testimony (if transcribed), exhibits in evidence and the report of referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

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

Narrative Summary of Case. As previously noted, in its November 7, 2019 Opinion, the Florida Supreme Court held, "We *disapprove the referee's findings of fact* and recommendation that Schwartz did not violate any Bar rules in his use of two defense exhibits during a pre-trial deposition, and we remand to a newly appointed referee for further proceedings consistent with this opinion." *The Florida Bar v. Schwartz*, 284 So.3d 393, 394 (Fla. 2019)(emphasis added).

Accordingly, the narrative summary of the case is taken directly from the factual and legal findings made by the Florida Supreme Court in its November 7, 2019, Opinion:

> Schwartz is primarily a criminal defense attorney who was admitted to The Florida Bar (Bar) in 1986. He became the subject of these Bar proceedings based upon his use of two defense exhibits during a pretrial deposition conducted on February 13, 2015, while representing the defendant in the case of *State v. Virgil Woodson*, Circuit Case No. 13-2013-CF-012946-0001-XX (Miami-Dade County, Florida). The exhibits at issue included two photocopied versions of black and white police photo lineups in which the victim had originally signed her name and identified the defendant by circling both the defendant's photograph and the designation below it of subject number five. The exhibits also included the signature of the police officer who conducted the photo lineup. The disciplinary issue here centers on the fact that Schwartz altered the photo lineup by replacing his client's image in one exhibit with the image of an alternate suspect whom witnesses other than the victim had identified as the perpetrator and by changing the client's image in the other exhibit by imposing the alternate subject's hairstyle on the client's image. Although the images in the exhibits were altered in this manner, they nonetheless retained the circle around subject number five and the signatures of the victim and police officer below the photographs.

Id. at 395. In discussing the prior Referee's findings and recommendations, the Court noted the undisputed facts that Respondent "*knowingly and deliberately* created the defense exhibits by altering photocopies of the police lineups and showing them to the victim at the deposition." *Id*. at 396. (emphasis added).

Accordingly, the Court held:

> Our consideration of the defense-altered exhibits leads to the inevitable conclusion that *they are deceptive on their face*. . . . The

> exhibits retained the witness's circle identifying subject number five in the lineup as the perpetrator and the victim's and detective's signatures. *By their very nature, they conveyed the false message that the substituted photograph was the photograph that had been previously identified by the victim*.

Id. at 396-397. (emphasis added).

III. RECOMMENDATIONS AS TO GUILT.

In the Court's Opinion entered on November 7, 2019, Respondent was found guilty of violating the following Rules Regulating The Florida Bar:

Rule 3-4.3 (Misconduct and Minor Misconduct), and

Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

5.1 FAILURE TO MAINTAIN PERSONAL INTEGRITY

(a)(6) Disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

(b) Suspension. Suspension is appropriate when a lawyer knowingly engages in . . . other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

The Florida Supreme Court's holding in this case found that Respondent knowingly and deliberately altered the lineup in a manner that was deceptive on its face. He showed it to the victim with her circle and signature around the altered photograph, which by its very nature "conveyed the false message that the substituted photograph was the photograph that had been previously identified by the victim." *The Florida Bar v Schwartz*, 284 So.3d at 396-397. The deliberate act of creating this false message regarding the victim's identification was inherently deceptive conduct. Accordingly, Standard 5.1(a)(6) and 5.1(b) are clearly applicable in the instant case.

6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION

The following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation:

(a) Disbarment is appropriate when a lawyer:

(1) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or

(2) improperly withholds material information and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

(b) Suspension. Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action.

Respondent's creation of the altered and inherently deceptive photo line-up occurred during a pre-trial deposition in a criminal matter. The discovery process is part of the legal proceeding, and accordingly, this standard is applicable. The altered photo line-up was a false document. Here, had the Respondent been successful in his effort to obtain evidence to support a misidentification defense through deception and artifice, and the victim was tricked into believing she had previously identified the individual depicted in the altered line-up, that "false identification" could have been introduced into the trial record at a subsequent trial.

700 VIOLATIONS OF OTHER DUTIES OWED AS A PROFESSIONAL

7.1 DECEPTIVE CONDUCT OR STATEMENTS AND UNREASONABLE OR IMPROPER FEES

(a) Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public, or the legal system.

(b) Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

It is apparent that, as an officer of the court, a lawyer owes a duty of candor to the tribunal. Similarly, he has a duty to ensure that false messages and false evidence are not introduced into the litigation process. Respondent violated that duty with his inherently deceptive conduct. The potential for injury to the process is evident when a lawyer alters evidence in such a fundamentally dishonest manner, and seeks to use same in the pre-trial and/or trial proceedings.

800 PRIOR DISCIPLINE ORDERS

8.1 VIOLATION OF COURT ORDER OR ENGAGING IN SUBSEQUENT SAME OR SIMILAR MISCONDUCT

The following sanctions are generally appropriate in cases involving prior discipline:

(a)(2) Disbarment is appropriate when a lawyer has been suspended for the same or similar misconduct and intentionally engages in further similar acts of misconduct.

(b) Suspension is appropriate when a lawyer has been publicly reprimanded for the same or similar conduct and engages in a further similar act of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

In 2012, the Respondent plead guilty, and was found guilty, of dishonest or deceptive conduct pursuant to three separate Rules Regulating the Florida Bar, including: Rule 4-3.3(a)(I)(A) lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer), Rule 4-4.l(a) (In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person), and Rule 4-8.4(c)(A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent was suspended for ninety (90) days and placed on probation for one year in that case. Accordingly, this standard is clearly applicable.

V. CASE LAW

I considered the following case law prior to recommending discipline:

- In *The Florida Bar v. Adorno*, 60 So.3d 1016, 1035 (Fla. 2011), the Court reiterated its obligation to impose sanctions consistent with the purposes of lawyer discipline. Specifically, when considering lawyer discipline, the Court "must impose a discipline that is severe enough to deter other attorneys who might be prone to engage in similar misconduct."

- In *The Florida Bar v. Peterson*, 248 So.3d 1069, 1081 (Fla. 2018), the Court reiterated general principles for imposing lawyer sanctions, and stated, "significantly, the Court has moved towards imposing harsher sanctions." (*citing*

Fla. Bar v. Rosenberg, 169 So.3d 1155, 1162 (Fla. 2015) ("[S]ince the decision in *[Fla. Bar v.] Bloom*[, 632 So.2d 1016 (Fla. 1994)], the Court has moved toward imposing stronger sanctions for unethical and unprofessional conduct."); *Fla. Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2002) ("In recent years, this Court has moved towards stronger sanctions for attorney misconduct."). See also *The Florida Bar v. Adler*, 126 So.3d 244, 247 (Fla. 2013)("Since then, this Court has moved towards stronger sanctions for attorney misconduct.").

- In *The Florida Bar v. Cox*, 794 So.2d 1278 (Fla. 2001), the Court determined that, based upon the significant mitigation presented, a one year suspension was the appropriate sanction for a criminal prosecutor with a stellar reputation and no prior discipline, who allowed a fearful confidential informant to testify under a false name.

In the case at bar, Respondent Schwartz engaged in analogous conduct. Respondent similarly attempted to interject false evidence into a criminal case, by presenting the victim with an altered photo lineup portraying the false message that the victim had previously identified a different individual, in the hope of creating evidence to support a misidentification defense. Unlike Cox, however, Respondent in the instant case has been previously disciplined multiple times for similar misconduct.

- In *The Florida Bar v. Dunne*, 2020 WL 257785, the Court accepted a consent judgement imposing a one year suspension on a prosecutor who engaged in gamesmanship during the pre-trial discovery process by withholding information relevant to the defendant's insanity defense prior to deposing the defendant's mental health experts. When confronted by defense counsel and the court, Dunne misrepresented what she knew and when she knew it. Dunne had no prior disciplinary history.

Similarly, in the instant case, Respondent Schwartz engaged in pre-trial gamesmanship in his efforts to create evidence to support a misidentification defense with the altered photo lineup. At the final hearing before Referee Muir, Respondent set forth his position that there was no attempt to trick the victim because he told her to look at the line up as if she had not seen it before. Such a comment would in no way alert the victim that the photographs had been, or could have been, switched in the lineup. Notwithstanding same, the Court rejected this defense in its Opinion finding Respondent guilty. The Court specifically stated that the altered photo line up with the victim's circle around one of the photographs, with her signature, the date and the officer's signature, in and of itself, was deceptive because it conveyed the false message that the victim previously identified the individual depicted in the altered photograph. Respondent's contention on this point, is therefore, inapposite.

Indeed, this very fact distinguishes Respondent's actions from Dunne's, and demonstrates that Respondent's actions were more serious. While Dunne engaged in pre-trial gamesmanship, she did not interject false evidence into the criminal case. She issued denials in order to cover up her own conduct, but did not in any way alter the evidence available to the defense. By contrast, in the case *sub judice*, Respondent altered physical evidence and presented it to the victim as if it were an accurate and truthful representation of her prior identification. But for the prosecutor's intervention, Respondent's actions would have had the effect of deceiving the victim into believing she had previously identified another individual. The potential ramifications of such an action are evident.

- In *The Florida Bar v. Dupee*, 160 So.3d 838 (Fla. 2015), the Court determined a one year suspension was the appropriate sanction for an attorney's filing of an inaccurate financial statement of her client in a dissolution action knowing it was inaccurate, and for her withholding relevant financial documents requested in discovery. Dupee also failed to disclose the location of a coin collection over which there was disputed ownership. Respondent Dupee had no prior disciplinary history and presented evidence of good character and reputation.

Analogous to Dupee, Respondent in the instant case also engaged in deceptive practices in the pre-trial discovery process, specifically the deposition of

the victim. However, as previously noted, Respondent has a significant prior disciplinary history for similar and cumulative misconduct.

- In *The Florida Bar v. Whitney*, the Florida Supreme Court imposed a one year suspension on an attorney who engaged in dishonest and deceitful discovery tactics in his own defense in a legal malpractice action. This is analogous to Respondent's own dishonest discovery tactics in the case at bar.

- In *The Florida Bar v. Hmielewski*, 702 So.2d 218 (Fla. 1997), the Court considered a matter similar in many ways to the case *sub judice*. In *Hmielewski*, the client took his father's medical records from the Mayo clinic. The respondent, along with his client, had a sincere belief that the hospital would falsify the medical records. Respondent withheld his knowledge of the location of the records during the discovery process and accused the hospital of deliberately concealing the records when the hospital was unable to produce same. Hmielewski even allowed his expert to file a report opining that the hospital's inability to produce the records in discovery was evidence of the hospital's malfeasance.

Most significantly for purposes of this proceeding, the Referee found that Hmielewski had no selfish motive, his actions, though over-zealous, were taken to promote the client's interests and from his own conviction that the hospital would create false records. Once the hospital tried to introduce the falsified records,

Hmielewski would be able to produce the true records and catch the hospital "in the act."

Although Hmielewski had only one prior admonishment twenty-one years prior to these events, and the Referee determined he was merely an overly zealous advocate for his client, the Court found that Hmielewski's actions made a mockery of the judicial system and his actions flew in the face of his ethical responsibilities. The Court determined that a three-year suspension was the appropriate sanction for Hmielewski's misconduct.

Similarly, in the instant disciplinary case, Respondent Schwartz testified he was acting in the best interests of his client. Respondent believed there was a misidentification and engaged in subterfuge in order to "catch the victim in the act," just as Hmielewski did. Respondent's alteration of the photo lineup so as to convey the false message that the substituted photograph was the photograph that had been previously identified by the victim similarly made a mockery of the judicial process and flew in the face of his ethical responsibilities. The fact Respondent believed his motives were pure is irrelevant. The ends do not justify the means.

- *In the Matter of Gross*, 759 N.E.2d 288 (Mass. 2001), presents persuasive authority in this matter. At a calendar call for the case, the respondent allowed an alibi witness to come forward and impersonate the criminal defendant

at the podium. The respondent hoped to obtain a misidentification that he could use in his defense of the case. When confronted, the respondent lied, and also requested the defendant and the alibi witness to lie and indicate they were simply "confused." In exchange for an agreement not to prosecute, the alibi witness testified that respondent suggested the impersonation scheme. The Massachusetts Supreme Court ordered that the respondent be suspended for a period of eighteen (18) months.

While the Massachusetts case is arguably more serious because the respondent tried to cover up his misconduct and enlisted others to lie on his behalf, the core conduct at issue in the case was similar in all respects to that engaged in by Respondent Schwartz. Respondent similarly engaged in pre-trial trickery in an attempt to obtain evidence of misidentification. Whether it occurs by altering the person standing at the podium at a calendar call, or by altering the photo lineup so that it appears the victim previously identified a different suspect, is irrelevant; the conduct is the same.

- In *The Florida Bar v. Bosecker*, 259 So.3d 689, 699 (Fla. 2018), the Court reiterated the long standing principle that, "the Court views cumulative misconduct more seriously than an isolated instance of misconduct, and cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct."

- In *Fla. Bar v. Walkden*, 950 So.2d 407, 410 (Fla. 2007), the Court stated, "As noted by the Bar, this Court views cumulative misconduct more seriously than an isolated instance of misconduct. *Fla. Bar v. Carlon*, 820 So.2d 891, 899 (Fla.2002). In determining the appropriate discipline, we consider prior misconduct and cumulative misconduct, and treat cumulative misconduct more severely than isolated misconduct. Disbarment is appropriate where, as here, there is a pattern of misconduct and a history of discipline. Additionally, cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct. *Fla. Bar v. Vining*, 761 So.2d 1044, 1048 (Fla.2000)."

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be disciplined by:

A. Suspension from the practice of law for a period of three years.

B. Payment of The Florida Bar's costs in these proceedings.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

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

Personal History of Respondent:

Age: 60

Date admitted to the Bar: August 13, 1986

Prior Discipline:

- Respondent received an admonishment for minor misconduct by the Eleventh Judicial Circuit Grievance Committee "B" by service of a Grievance Committee Report of Minor Misconduct dated March 29, 1995, in The Florida Bar File No. 1994-71,026(11B) for violation of Rule 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice) of the Rules Regulating The Florida Bar.

- Respondent tendered a consent judgment and received a public reprimand by Order of the Florida Supreme Court dated April 10, 1997 in Supreme Court Case No. SC90-204; The Florida Bar File No. 1996-71,740(11B) for violating Rules 4-3.3(a) (A lawyer shall not knowingly make a false statement of material fact or law to a tribunal), 4-3.4(c) (A lawyer shall not knowing disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists), 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation), and 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice) of the Rules Regulating The Florida Bar.

- Respondent received an admonishment for minor misconduct by the Eleventh Judicial Circuit Grievance Committee "B" by service of a Grievance

Committee Report of Minor Misconduct dated December 19, 1996, in The Florida Bar File No. 1996-71,789(11B) for violation of advertising rule requirements of the Rules Regulating The Florida Bar.

- Respondent tendered a consent judgment and received a public reprimand by Order of the Florida Supreme Court of Florida dated June 20, 2002 in Supreme Court Case No. SC02-787; The Florida Bar File No. 2001-71,404(11C) for violating Rules 4-3.1 (Meritorious Claims and Contentions), 4-3.3(a)(1) (A lawyer shall not knowingly make a false statement of material fact or law to a tribunal), 4-4.1(a) (A lawyer shall not knowingly make a false statement of material fact or law to a third person), 4-4.4 (Respect for Rights of Third Persons), 4-5.6 (Restrictions on Right to Practice), 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct), and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules Regulating The Florida Bar.

- Respondent received an admonishment for minor misconduct by the Second Judicial Circuit Grievance Committee "S" by service of a Grievance Committee Report of Minor Misconduct dated May 23, 2007, in The Florida Bar File No. 2007-90,330(02S) for violation of advertising rule requirements of the Rules Regulating The Florida Bar.

- Respondent tendered a consent judgment and was suspended for a period 90 days by Order of the Florida Supreme Court dated May 29, 2012 in Supreme Court Case No. SC11-2143, The Florida Bar File No. 2011-70,673(17A) for violating Rules 4-1.8(e) (Financial Assistance to Client), 4-3.3(a)(l) (A lawyer shall not knowingly make a false statement of material fact or law to a tribunal), 4-4.1(a) (A lawyer shall not knowingly make a false statement of material fact or law to a third person), 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another), 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules Regulating The Florida Bar.

Aggravating Factors:

- 3.2(b)(1) Prior Disciplinary Offenses. I recognize that admonishments imposed more than seven years prior are not considered aggravating factors. Accordingly, only the three following prior disciplinary offenses are applicable to this aggravating factor:

- An April 10, 1997 public reprimand in Supreme Court Case No. SC90-204; The Florida Bar File No. 1996-71,740(11B) for four rule violations, including two rule violations involving dishonest or deceitful conduct.
- A June 20, 2002 public reprimand in Supreme Court Case No. SC02-787; The Florida Bar File No. 2001-71,404(11C) for seven rule violations, including three rule violations involving dishonest or deceitful conduct.
- A May 29, 2012 suspension for a period of 90 days in Supreme Court Case No. SC11-2143, The Florida Bar File No. 2011-70,673(17A) for six rule violations including four violations involving dishonest or deceitful conduct.

- 3.2(b)(3) A Pattern of Misconduct. While all of Respondent's prior disciplinary offenses are not considered aggravating factors for purposes of factor 3.2(b)(1) (Prior Disciplinary Offenses), each of his prior disciplinary offenses may be considered for purposes of determining whether there is a pattern of misconduct. "The Court views cumulative misconduct more seriously than an isolated instance of misconduct, and cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct." *The Florida Bar v. Bosecker*, 259 So.3d 689, 699 (Fla. 2018). Several of Respondent's prior offenses involve dishonest or deceitful conduct:
  - In 1995, Respondent received an admonishment for filing a false motion for continuance in which he misrepresented the basis for the

continuance as well as the prosecutor's agreement to same. Respondent aggravated his offense when he threatened a witness against him at the grievance committee. (TFB Ex. 2)

- In 1997, Respondent received a public reprimand for failure to comply with numerous court orders, for which conduct he was held in contempt. That case involved two rule violations for dishonest or deceitful conduct, including Rules 4-3.3(a) (A lawyer shall not knowingly make a false statement of material fact or law to a tribunal), and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation). (TFB Ex 3)

- In 2002, Respondent received a public reprimand for making numerous unsubstantiated complaints against his former law partners, and made an additional misrepresentation to the judge stating that the former partners were under criminal investigation, despite having been informed by the police that there was no criminal investigation. Thereafter, when these matters were investigated by the Bar, Respondent misrepresented to the grievance committee that he filed a suit against the former partners when it could not be determined a suit was ever filed, and the former partners were never served with any such lawsuit. This case involved three rule violations for dishonest or deceitful conduct. (TFB Ex. 5)

- In 2012, Respondent received a ninety-day suspension with probation for a period of one year, for conduct involving Respondent's signing his

client's affidavit and improperly notarizing same. This case involved three rule violations for dishonest or deceitful conduct. (TFB Ex. 7)

- In addition to demonstrating a pattern of dishonest or deceitful conduct, Respondent's prior disciplinary history demonstrates a pattern wherein Respondent engages in a "the ends justifies the means" approach to lawyering.

- 3.2(b)(7) Refusal to Acknowledge the Wrongful Nature of the Conduct. Although Respondent indicated that he acknowledged the wrongful nature of his conduct, his actual testimony and other evidence demonstrated that in fact he did not, and still does not, understand his conduct was wrongful. Throughout his testimony, Respondent stated he understood the Court said his behavior was wrong, and that he accepts the Court's pronouncement. This is significantly different than his own acknowledgement and understanding regarding the wrongfulness of his conduct. Moreover, as Respondent's Exhibit A, Respondent introduced a letter from Dr. Weinstein of Florida Lawyer's Assistance. According to Dr. Weinstein, Respondent was willing to admit to pushing the boundaries of ethical conduct, however, Respondent firmly believed the boundaries were never crossed. This independent evidence of Respondent's statements to Dr. Weinstein clearly demonstrates that he does not understand or recognize the wrongfulness of his actions.

- 3.2(b)(8) Vulnerability of the Victim. Here, as the Court found, the altered photo lineup was inherently deceptive. Respondent showed the altered lineup to the victim with her circle and signature around the altered photograph, which by its very nature "conveyed the false message that the substituted photograph was the photograph that had been previously identified by the victim." The victim would have no suspicion that a lawyer could engage in such trickery, and could thereby be deceived.

- 3.2(b)(9) Substantial Experience in the Practice of Law. Respondent was admitted to the Bar on August 13, 1986.

Mitigating Factors:

3.3(b)(7) Character or Reputation; and

3.3(b)(12) Remorse.

Respondent contends that 3.3(b)(2) "the absence of a dishonest or selfish motive" should be applied as a mitigating factor. However, I find that same cannot be considered as a mitigating factor in this case. Indeed, the Court rejected Respondent's contention that he was not acting from any dishonest motive, but rather was merely using a "defense created" lineup, as permitted by law, to test the victim's identification. Here, Respondent did not create his own line up, but rather, he altered the existing line up in a deceptive way. Accordingly, there was a dishonest motive inherent in his actions.

Respondent contends that 3.3(b)(4) Timely Good Faith Effort to Make Restitution or to Rectify the Consequences of the Misconduct, should be applied as a mitigator, because he was one hundred percent open with the prosecutor about what he was doing. Respondent's contention is without merit. Respondent did not openly disclose the alteration to the photo lineup until after he was caught and the prosecutor intervened. The fact that Respondent stopped using the altered lineup after he was caught and the prosecutor objected is inapposite. But for the prosecutor's intervention, Respondent's ploy would have proceeded unchecked.

Respondent further contends that 3.3(b)(11) Imposition of Other Penalties or Sanctions should be applied as a mitigator. However, I decline to find this mitigating factor because the sanction in the trial court was withdrawn. It was not imposed. The mere possibility of a sanction being imposed is not sufficient to support this mitigating factor.

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

The Florida Supreme Court previously held that the Florida Bar, having been successful in this matter, shall be awarded their necessary taxable costs of this proceeding and shall submit their statement of costs, as well as a motion to assess costs against Respondent.

Dated this _____ day of _____, 2020.

_____
Honorable Lizzett Martinez, Referee
County Court Judge
Richard E. Gerstein Justice Building
1351 NW 12th Street, Room 505
Miami, FL 33125

Original To:

Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, Florida, 32399-1927

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Benedict Kuehne, Attorney for Respondent, via email at ben.kuehne@kuehnelaw.com

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JONATHAN STEPHEN SCHWARTZ,

Respondent.
_____/

Supreme Court Case
No. SC17-1391

The Florida Bar File
No. 2016-70,106 (11J)

Supreme Court Case
No.: SC19-983

The Florida Bar File
No. 2018-90,035 (02S)

AMENDED INDEX OF RECORD*

1. Order appointing Referee dated 11/12/2019 case number SC17-1391
2. Order disqualifying The Honorable Celeste H. Muir as Referee and appointing Referee dated 11/28/2019 case numbers SC17-1391 and SC19-983
3. Notice of Substitution of Bar Counsel and Designated E-mail Address dated 12/4/2019
4. Index of Record filed by The Honorable Celeste H. Muir as Referee dated 5/18/2018 and filed 5/22/2018 along with all the items provided with the index of record as Composite 4 case number SC17-1391
5. Revised and Supplemented Index of Record filed by The Honorable Celeste H. Muir as Referee dated 6/4/2018 and filed 6/11/2018 along with all items provided with the revised and supplemented index of record are attached as Composite 4 case number SC17-1391 (The revised and supplemented index of record begins with entry number 48 of the Revised Index.)
6. Report of the Referee dated 5/21/2018 and filed 5/22/2018 with Exhibit list and Exhibits case number SC17-1391

7. Notice of Status Conference set for 11/11/2019 at 1:30pm case numbers SC17-1391 and SC19-983, Order on Status Conference held on 12/11/2019 and dated December 20, 2020 case numbers SC17-1391 and SC19-983, Order Respondent's Amended Motion For Extension of Deadlines and Continuance of Final Hearing entered 12/18/2019 case number SC19-983, Supreme Court Order dated 1/14/2020 granting The Florida Bar's request for extension of time to file Referee Report until May 15, 2020, and Motion for Extension of Time to File Report of Referee dated 1/13/2020
8. Email communication to all parties from Judicial Assistant to Referee confirming telephonic Status Hearing held on 2/18/2020 on case numbers SC17-1391 and SC19-983
9. Notice of Telephonic Status Conference scheduled for 3/6/2020 at 1:30pm for case numbers SC17-1391 and SC19-983 and dated 2/18/2020, Order on Status Conference held on 3/6/2020 dated 4/16/2020 on case numbers SC17-1391 and SC19-983, Supreme Court Order dated 4/17/2020 granting The Florida Bar's Request for Extension of Time to file Referee Report to 7/31/2020, and Motion for Extension To File Report of Referee dated 4/16/2020
10. Motion for Continuance to Schedule an "in Person" hearing and Response to the Florida Bar's opposition to Respondent's Request for "in Person" hearing dated 6/18/2020 in case number SC19-983, Motion for Continuance to Schedule an "in Person" hearing and Response to the Florida Bar's opposition to Respondent's Request for "in Person" hearing (Corrected) dated 6/18/2020 in case number SC19-983, The Florida Bar's Response in Opposition to Respondent's Request for "in Person" hearing dated June 16, 2020 in case number SC19-983, and Motion for Continuance of Final Hearing set for July 17, 2020 in

Order to Facilitate Scheduling of In Person Hearing dated 7/1/2020 in case number SC19-983

11. Zoom Meeting Invite email communication dated 7/7/2020 scheduling status conference for 7/8/2020 at 10:30am, Agreed Motion for Extension of Time to File Reports of Referee dated 7/2020 in case numbers SC17-1391 and SC19-983, and Supreme Court Order dated 7/10/2020 granting The Florida Bar's request for extension of time to file Referee Report to September 21, 2020
12. Re-Notice of Final Hearing for 8/21/2020 at 9:30am (Notice is dated 7/9/2020) case numbers SC17-1391 and SC19-983 and Subpoena for Trial dated 8/21/2020 in case number SC17-1391
13. The Florida Bar's documentation exhibits for the Advertising Grievance hearing and Sanctions Hearing in case numbers SC17-1391 and SC19-983
14. Respondent's Documentation Exhibits For Sanction Hearing dated 8/21/2020 and Corrected Respondent's Documentation Exhibits for Sanctions Hearing in case number SC17-1391
15. Respondent's Documentation exhibits for Advertising Grievance Hearing case number SC19-983
16. The Florida Bar's case law cited in case numbers SC17-1391 and SC19-983
17. Respondent's Notice of Filing Case Law Cited in Proposed Report of Referee on Sanctions dated September 30, 2020 and case law in case number SC17-1391
18. The Florida Bar's Standards for Imposing Lawyer Sanctions
19. Agreed Motion For Extension of Time to File Report of Referee dated 9/8/2020, in case numbers SC17-1391 and SC19-983, Agreed Motion for Extension of Time To File

Proposed Reports of Referee and For Extension of Time for Filing Report of Referee in case numbers SC17-1391 and SC19-983, Supreme Court Order dated 9/9/2020 on Request for Extension of Time to File Referee Report to 10/16/2020, and Order Granting Agreed Motion For Extension of Time To File Proposed Reports of Referee dated 8/31/2020

20. Notice of Filing Transcripts from Original Bar Grievance Trial filed by Respondent in case number SC17-1391 dated 9/1/2020 and Transcript of the Grievance Hearing dated April 4, 2018, Volumes I, II and III
21. Transcript of Advertising Hearing and Sanctions Hearing held on August 21, 2020, Volumes I and II
22. Formal Complaint dated 6/14/2019 and Exhibit A in The Florida Bar File No. 2018-90,035 (02S), Answer to Complaint and Affirmative Defenses SC19-983, Notice of Final Hearing for 11/25/2019 before Honorable Celeste H. Muir, Motion for Extension of Deadlines and Continuance of Final Hearing dated 11/19/2019, and Amended Motion for Extension of Deadlines and Continuance of Final Hearing dated 11/21/2019
23. Report of Referee in SC17-1391
24. Report of Referee in SC19-983
25. Motion to Assess Costs dated October 16, 2020 with Exhibit A and Order Granting The Florida Bar's Motion to Assess Costs dated October 20, 2020 in case number SC 19-983.
26. Amended Motion to Assess Costs dated October 16, 2020 with Exhibit A and Order Granting The Florida Bar's Motion to Assess Costs dated October 22, 2020.

*Amended to include items 25 and 26

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JONATHAN STEPHEN SCHWARTZ,

Respondent.
_____/

Supreme Court Case
No. SC17-1391

Supreme Court Case
No.: SC19-983

CERTIFICATION OF AMENDED INDEX OF RECORD

I HEREBY CERTIFY that the above record and index are complete pursuant to R. Regulating Fla. Bar 3-7.6(n)(3).

Dated this 22nd day of OCTOBER 2020.

Honorable Lizzet Martinez, Referee
County Court Judge
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Email: lmartinez@jud11.flcourts.org

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Patricia Ann Toro Savitz, Staff Counsel, via email at psavitz@floridabar.org
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Richard Baron, Attorney for Respondent, via email at rb@richardbaronlaw.com
Barry M. Wax, Attorney for Respondent, via email at barry@barrywax.com

CERTIFICATE OF SERVICE

I certify the foregoing was emailed on March 1, 2021, to:

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