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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

RITA HORWITZ ALTMAN,

Respondent.
_______________________________/

Supreme Court Case
No. SC18-724

Florida Bar File
No. 2018-50,808(15C)OSC

RESPONDENT'S ANSWER BRIEF

On Petition for Review of Report of Referee

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PREFACE

The following record designations will be used:

(R___) – Record of Proceedings;

(TR__) – Transcript of Final Hearing;

(TFB Exh. __) – Complainant's Exhibits from Final Hearing;

(Resp. Exh. __) – Respondent's Exhibits from Final Hearing;

ROR __) – Report of Referee.

REQUEST FOR ORAL ARGUMENT

Respondent, pursuant to Rule 3-7.7(c)(4), RRTFB, respectfully requests the opportunity to present oral argument before the Court.

STATEMENT OF THE CASE AND FACTS

Proceedings Before Referee

This Contempt action was brought by The Florida Bar against Respondent seeking her disbarment following her late response to a follow-up letter with questions from the Grievance Committee Investigating Member regarding a Bar inquiry complaint, to which Respondent had previously responded, first, in a response letter to The Florida Bar's Attorney Consumer Assistance Program (ACAP), and, second, albeit to a second request, by providing all of the records requested by the Investigating Member of the Grievance Committee.

The Honorable Stacy M. Ross was appointed to preside as referee in this

proceeding. The final hearing was held on December 18, 2018. The Report of Referee was docketed with this Court on January 15, 2019. The Referee recommended Respondent be held in contempt and that she be disciplined by public reprimand, followed by five (5) years of probation with the following conditions: (1) evaluation by Florida Lawyers Assistance (FLA) and participation in any recommended counseling; (2) participation in a review by The Practice Resource Institute of The Florida Bar; and (3) supervision during probation, with monthly meetings and quarterly reports, by a member of The Florida Bar, specifically by her attorney, David Rothman, who has agreed to serve in this capacity on a pro bono basis.

The Florida Bar has sought review of the Referee's recommended sanction and is seeking disbarment.

Background

Ms. Altman, who is 70 years old, is a second career attorney. She comes from a working class family and worked her way through college as a live-in nanny. She got married at the age of 21, and she and her husband almost immediately started a family. (TR 103) She was a mother of three, living in New York, when, three decades ago, her husband divorced her. (TR 103-104) Determined to better herself and her children's lives, in her 40's, Ms. Altman decided to become a lawyer. She continued working to support her family, while attending law school at night, driving

more than 200 miles, three hours round trip, to attend classes in neighboring Massachusetts. (TR 104-105) Upon graduating, she briefly practiced in New York but soon decided to move closer to her mother in Florida and, in 1992, she became a member of The Florida Bar. (TR 105-106) After a very brief stint working for a lawyer, Ms. Altman went out on her own and practiced almost exclusively immigration law. (TR 106)

Over the last quarter of a century, Ms. Altman, as a solo practitioner, has represented thousands of immigration clients. (TR 108) She has grown her practice such that today she represents, hundreds of new immigration clients each year, with at least a thousand clients with open matters at any point in time. (TR 123)

Prior Discipline

Earlier in her legal career, Ms. Altman had several Bar cases. The conduct for which Ms. Altman was disciplined in her first Bar case, occurred in 2000, almost two decades ago. Her last Bar matter, which was not a disciplinary matter, but on an Order to Show Cause, concluded in 2007, more than a decade ago.

Supreme Court Case No. SC01-1199. In November 2000, a client filed a complaint, and Ms. Altman failed to respond to the complaint and multiple letters/inquiries from the Bar. In 2002, Ms. Altman entered into a conditional guilty plea and consent judgment, whereby she agreed to be publicly reprimanded and placed on probation for one year. She stipulated to violations of Rules 4-1.3

(diligence), 4-1.4(a)&(b) (communication), and 4-8.4(g) (failure to timely respond to Bar inquiries). As a condition of probation Ms. Altman was required to enter into a contract with Florida Lawyers Assistance (FLA). The Consent Judgment was approved by this Court on April 25, 2002.

Supreme Court Case No. SC04-1659. In 2003, a Bar complaint was filed by a client relating to Ms. Altman's representation of the client in immigration court in 2000-2001. Ms. Altman failed to respond to the complaint and multiple inquiries from the Bar and the Investigating Member of the Grievance Committee. In 2005, Ms. Altman entered into an unconditional guilty plea and consent judgment, agreeing to a 30 day suspension and probation for one year. She stipulated to violations of Rules 4-1.3 (diligence), 4-1.4 (communication), 4-3.2 (failure to expedite litigation) and 4-8.4(g) (failure to timely respond to Bar inquiries). As a condition of probation, Ms. Altman was required to enter into a contract with FLA. The Consent Judgment was approved by this Court on April 14, 2005.

Supreme Court Case No. SC05-715. After a Bar Complaint was filed in September 2003, Ms. Altman failed to respond to the Bar's inquires requesting a response. The matter was transferred to a grievance committee, which issued a subpoena duces tecum compelling respondent's appearance and the production of the client file. Respondent failed to appear as required under the subpoena. After she was threatened with contempt, she appeared before the grievance committee a

week later and produced the file. The grievance committee did not find probable cause on the underlying Bar complaint, but a formal complaint was filed regarding Ms. Altman's late compliance with the Bar's inquiries and the grievance committee's subpoena. In order to close the case out, Ms. Altman entered into a consent judgment, agreeing to a 30 day suspension *concurrent* with the 30 day suspension she agreed to and was serving in Case No. SC04-1659 (above), and one year of probation, with the condition she continue to comply with her FLA contract. Ms. Altman stipulated to a violation of Rule 4-8.4(g). The Consent Judgment was approved by this Court on November 10, 2005. Thus, no additional period of suspension was imposed for this matter.

Supreme Court Case No. SC06-790. In 2006, The Florida Bar filed a Petition for Contempt resulting from respondent's failure to respond to two Bar Complaints and her failure to appear and furnish two client files as required by two subpoenas duces tecum issued by the grievance committee. After Ms. Altman failed to respond to this Court's Order to Show Cause, the Court ordered her suspended "until she has certified compliance" with the two grievance committee subpoenas duces tecum. Ms. Altman did not comply with the two subpoenas for a year and therefore remained suspended from August 2006 through August 2007. Upon certifying compliance, Ms. Altman was "reinstated, effective immediately," by Order of the

Court, dated August 21, 2007. As this was not a disciplinary matter, the Court denied the Bar's request that Ms. Altman prove rehabilitation prior to her reinstatement.

Since her reinstatement more than a decade ago, Ms. Altman had not had any Bar complaints from any of her hundreds of clients until the underlying Bar inquiry which resulted in the instant contempt proceedings.

Factual Summary

This matter relates to the conduct of Rita Altman in failing to timely respond to the lawyer serving as the Investigating Member of the Grievance Committee investigating a complaint. The complaint had been filed against her by the new attorney representing a former client, who Ms. Altman represented in connection with her petition for asylum, which was denied by the Immigration judge. This is not a case in which Ms. Altman completely failed to respond to the Bar's inquiries. She had previously submitted a written response to the complaint to ACAP, and she produced all the records requested by the Investigating Member. It is uncontested that Ms. Altman responded to *all* official Bar inquiries *prior* to any finding of non-compliance by the Grievance Committee (Petition, ¶ 2) and the filing of the Petition for Contempt with the Court.

1. **<u>Timeline of Bar Complaint Inquiry</u>**

More than three years ago, on March 9, 2016, a complaint against Ms. Altman was received by the Bar (ACAP) from an attorney representing a former client of

Ms. Altman (See Resp. Exh. 2), who was seeking to reopen the client's asylum proceedings.[1] On March 17, 2016, Ms. Altman and the complainant were informed the matter had been closed. Correspondence from Bar Counsel (ACAP) explained that "matters referenced in (the complainant's) inquiry do not constitute violations of the Rules of Professional Conduct…" and "Consequently, I have closed our record in this matter." (Resp. Exh. 1)

Two months later, on May 17, 2016, Ms. Altman received correspondence from a different Bar Counsel (ACAP), requesting a response to the complaint that had previously been dismissed (Resp. Exh. 2). On June 14, 2016,[2] Ms. Altman submitted a three page letter to ACAP, specifically responding to the allegations in the complaint (Resp. Exh. 3).

The complaint was subsequently referred to the Bar's Ft. Lauderdale local office. In September 2016, Bar Counsel who was initially assigned to the matter sent a letter to the complainant requesting information regarding the Immigration

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[1] Based upon a decision well-known to immigration attorneys and many who seek status in the United States, *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), if one loses before the immigration court, a motion to reopen or reconsider may be filed, claiming ineffective assistance of counsel. And in that motion, as stated in *Lozada* it is required "that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not."

[2] Ms. Altman could not recall if she had requested additional time to submit her response to ACAP. (TR 127) There was no evidence presented that an extension had not been requested and granted.

court appeal (Resp. Exh. 5), which was responded to by the complainant (Resp. Exh. 6). Ms. Altman was not copied on either letter.

On Nov 9, 2016, Bar Counsel formerly assigned to the matter, notified both Ms. Altman and complainant the matter had been placed on monitor status as the underlying immigration case was still pending (Resp. Exh. 7).

In December 2016, the complainant was in contact with a Bar Staff Investigator and Bar Counsel formerly assigned to the matter regarding the status of the immigration court appeal. Ms. Altman was not copied on any of these emails and correspondence. (See Resp. Exhs. 8, 9 &10) The complainant provided Bar Counsel a copy of the December 8, 2016, decision of the Board of Immigration Appeals remanding the matter to the immigration judge and requested the Bar complaint be taken off monitor status (Resp. Exh. 9). Ms. Altman was not aware the request had been made. (TR 132) On December 21, 2016, Bar Counsel formerly assigned to the matter informed complainant that he was declining her request because, based upon his review of the decision, the case was remanded back to the immigration judge, not just for consideration of additional evidence, but for consideration and determination of the issue/claim of ineffective assistance of counsel. (Resp. Exh. 10) Ms. Altman was not copied on this communication.

In a June 14, 2017, email, the complainant informed the Bar's Staff Investigator that the date of the final immigration hearing was scheduled for January

8, 2019, and requested that the Bar revisit its decision to hold this case in abeyance until a final decision of the immigration judge. (Resp. Exh. 11) Ms. Altman was not copied on the email or the response from the Bar's Staff Investigator, stating he would forward the request to the currently assigned Bar Counsel. Ms. Altman was not aware the request had been made. (TR 133-134)

In a November 8, 2017, email exchange between the Bar's Staff Investigator and the complainant, the complainant confirmed that the status of the immigration case had not changed and she would not have any update until after the hearing, which was still scheduled for January 8, 2019 (Resp. Exh. 12). Ms. Altman was not copied on any of these emails. (TR 133-134)

On Nov 16, 2017, more than one year since Ms. Altman had received anything from the Bar regarding the complaint, the Bar sent notice to her and the complainant that the case had been referred to the Grievance Committee and assigned to a lawyer member of the Grievance Committee, Scott Weiss, as Investigating Member (Resp. Exh. 13). Ms. Altman was surprised when she received the notice, which did not provide any explanation regarding why the matter had been taken off of monitor status even though the immigration case was still pending. (TR 135)

On Nov 21, 2017, Mr. Weiss sent a letter via certified mail to Ms. Altman requesting records. No due date was specifically provided in the letter. (TFB Exh. 1) Ms. Altman received the letter on Wednesday, November 22, 2017, which was

the day before Thanksgiving. Ms. Altman had just returned home from being in Colorado because her son had an unexpected heart procedure. Her son came back to Florida with Ms. Altman to spend the holiday with her. (TR 136-137) According to Ms. Altman, she put the letter in her pile of things to be done and intended to respond. (TR 35; 141) As always, Ms. Altman was very busy with her practice. Putting her clients and family first, the letter from the Investigating Member went to the bottom of the pile, and she did not provide the records in response to that request. (TR 46)

On Jan 3, 2018, a second letter from Mr. Weiss requesting the records was sent via certified mail to Ms. Altman (TFB Exh. 2). This letter informed Ms. Altman that:

> This letter is in follow up to my letter dated November 21, 2017, which you failed to respond to, a copy of which is attached.
>
> Pursuant to Rule Regulating The Florida Bar 4-8.4(g), you have ten (10) days to respond to my request. You are required to respond on or before January 14, 2018.

January 14, 2018, was a Sunday. On the next business day, January 15, 2018, Ms. Altman produced the requested records to Mr. Weiss (TFB Exh. 3). (TR 40, 142)

On January 22, 2018, Mr. Weiss sent a letter via certified mail to Ms. Altman, asking her to answer several questions. The letter did not specify a due date. (TFB Exh. 4) Pursuant to Bar Rules 4-8.4(g)(2) and 1-13.1(b), a response by Ms. Altman

was due on February 6, 2018.[3] (ROR p. 5, ¶11) According to Ms. Altman, when she received the third letter from the Investigating Member, she "became very frightened and scared" and did not understand why the Bar was requesting additional information after she had already produced the client's records. (TR 143) Ms. Altman admitted that she knew she was required to respond. (TR 143) Once again, she put it on her pile of things to be done. (TR 44, 46) According to Ms. Altman, she "never intended not to respond to the Bar." (TR 143) She was composing the answers in her head, but kept procrastinating because of the fear. (TR 162-164)

Then, an unexpected event diverted her attention from responding. On Sunday, February 4, 2018, Ms. Altman's 92 year old mother became ill. (TR 47) Her mother, who suffers from COPD and heart failure, had serious pneumonia and was hospitalized from February 4 until February 12, 2018. (TR 144-145) (Resp. Exh. 14) Then, her mother was moved to rehabilitation, where she remained until March 3, 2018. (TR 145-146) (Resp. Exh. 14) According to Ms. Altman, she placed her mother's health at the top of her list, visiting her one or more times each and every day, while continuing to attempt to manage her practice and attend the many

[3] There would have been an additional 5 days to respond pursuant to Bar Rule 1-13.1(b), RRTFB (Additional Time after Service by Mail or E-mail), which provides that, "[w]hen a person has the right or is required to do some act or take some proceeding within a prescribed period after service of a notice or other paper and the notice or paper is served by mail or e-mail, 5 days will be added to the prescribed period."

hearings for her clients. (TR 145-146)

On March 7, 2018, a follow-up letter from Mr. Weiss was sent via certified mail to Ms. Altman (TFB Exh. 5). This letter informed Ms. Altman that,

> This letter is in follow up to my letter dated January 22, 2018, which you failed to respond to, a copy of which is attached.
>
> Pursuant to Rule Regulating The Florida Bar 4-8.4(g), you have ten (10) days to respond to my request. You are required to respond on or before March 19, 2018.

According to postal records, the letter was received in Ms. Altman's office on March 12, 2018.

According to Ms. Altman, when she received the fourth letter from the Investigating Member, dated March 7, 2018, which reminded her she failed to previously respond, her fear became "paralyzing." (TR 148-150) She testified that she was "absolutely terrified" (TR 117) and had a "fear of everything falling down" if she could not explain it correctly (TR 118). She began to imagine the worst of what could happen to her practice and how it could affect her clients, employees and family, all of whom depend on her. (TR 151-152, 162) She provides financial support for her mother and also pays her son's tuition, living expenses, and health insurance. (TR 152) Unlike the January letter, the March 7, 2018, letter requested a response to the questions by a specific date, March 19, 2018. According to Ms. Altman, she knew she was required to respond, but due to the fear, which she had difficulty overcoming, she did not timely respond. (TR 148-150)

On March 23, 2018, Bar Counsel filed a Request for Issuance of Notice of Non-Compliance and Finding of Contempt with the Grievance Committee, with a hearing date of April 18, 2018 (TFB Exh. 6) and sent a notice letter to Ms. Altman (TFB Exh. 7).

2. Compliance Prior to Grievance Committee Contempt Hearing

When Ms. Altman received notice that the matter was being sent to the Grievance Committee to find her in contempt, she reached out for help. On March 29, 2018, Ms. Altman telephoned Dr. Scott Weinstein, the Clinical Director of Florida Lawyers Assistance (FLA), who had personally counseled her in the past. (TR 154) He advised her to contact Bar Counsel. (TR 154) That same day, Ms. Altman telephoned The Florida Bar twice in an attempt to speak with Bar Counsel. (TR 155-156) On April 3, 2018, after her messages were not returned, Ms. Altman telephoned again and had a discussion with Bar Counsel. Ms. Altman requested additional time to respond to the Investigating Member's questions. Bar Counsel informed Ms. Altman that the matter was now with the Grievance Committee, and Ms. Altman would need to submit something in writing to the Grievance Committee. (TR 157) That same day, Ms. Altman telephoned Dr. Weinstein, who recommended that she hire undersigned counsel to represent her. (TR 158) She contacted undersigned counsel on April 4, 2018, the very next day. (TR 158-159)

Upon being hired on April 4, 2018, undersigned counsel "immediately" began

to work with Ms. Altman on preparing a response to the outstanding questions posed by the Investigating Member, as well as preparing a response to the Bar's Grievance Committee Contempt Notice. (TR 158-159) Counsel and Ms. Altman worked "feverishly" over the ensuing days, including over the weekend, in order to submit the responses as soon as possible to bring Ms. Altman into compliance. (TR 101; 158-159)

On April 10, 2018, only six days after counsel was engaged and more than a week before the scheduled Grievance Committee hearing, counsel on behalf of Ms. Altman filed a seven page Response to the Bar's Request for Issuance of Non-Compliance & Finding of Contempt, addressing the matters raised in the Bar's Request and asking that the Request be withdrawn, along with a five page letter from counsel to Mr. Weiss answering the questions he posed in his prior letters, as well as an apology letter from Ms. Altman to Mr. Weiss (TFB Exh. 8).

Bar Counsel declined Respondent's counsel's request to cancel the contempt hearing before the Grievance Committee. The meeting went on as planned on April 18, 2018, and the Grievance Committee issued its Finding of Non-Compliance & Failure to Respond to Official Bar Inquiry & Contempt (TFB Exh. 9).

On May 11, 2018, the Bar filed its Petition for Contempt and Order to Show Cause with the Florida Supreme Court. On May 14, 2018, an Order to Show Cause was issued by the Court, requiring a response by May 29, 2018 (TFB Exh. 10). On

May 29, 2018, Respondent timely filed her Response to TFB's Petition for Contempt and Order to Show Cause (TFB Exh. 11). This Court referred the matter for hearing, which was held on December 18, 2018.

3. Mitigation and Character Evidence

a. Dr. Scott Weinstein, Ph.D.

Dr. Weinstein is a licensed Psychologist and has been the Clinical Director of FLA since 2004. (TR 225, 227-228) He met Ms. Altman after she was referred to FLA in 2004 as a condition of her probation in other disciplinary matters, and she participated in group counseling with him for approximately one to two years. (TR 229-230) Dr. Weinstein testified that, based on the time he spent counseling Ms. Altman, he believes she has a propensity to put her own needs secondary to everyone else's needs. (TR 235) He found her to be very diligent in her clients' cases and other aspects of her life, but thought she was not so good at taking care of herself. (TR 233) He believes she is honest, a good person and does not disrespect authority. (TR 233, 235-236) He has never heard her talk badly about the Bar. (TR 233)

Dr. Weinstein had contacted Ms. Altman several times since she finished her FLA counseling, to touch base and see how she was doing. (TR 230) When Ms. Altman contacted him in April 2018, she told him her mother had gotten very sick and she became distracted and was delayed in responding to the Bar. (TR 235) According to Dr. Weinstein, during his interactions with her in 2005, Ms. Altman

was sincere, forthright about herself, accepting of responsibility and never indicated her failure to timely respond was because she wanted to delay or obstruct the Bar's investigation. (TR 235-236)

According Dr. Weinstein, Ms. Altman, as a solo practitioner, would benefit from having more support and that a contract of some length with FLA "could definitely help her." (TR 238)

b. Paul Auerbach, Esq.

Paul Auerbach, a member of The Florida Bar, met Ms. Altman at a North Palm Beach Bar Association Meeting and has known her professionally and socially for more than twenty-five years. (TR 186-189) According to Mr. Auerbach, Ms. Altman is extremely proud to be an immigration lawyer and feels she has a serious duty to protect her clients and help as many as possible. (TR 189) Even though she is very experienced, she attends seminars to keep up to date on changes in immigration law. (TR 189) She is always very focused on her clients and their problems and works long hours, often into the evening. (TR 190) He believes she is extremely honest. (TR 193)

c. Myranne Feinstein

Ms. Feinstein, who is a retired teacher, has known Ms. Altman for 62 years, since they were eight years old. (TR 196) She testified that Ms. Altman always has had a "huge sense of commitment to her family." (TR 199) She explained that, when

Ms. Altman was 18 years old, her father died in a car accident and, as the oldest of five children, Ms. Altman was there taking care of whoever needed to be taken care of. (TR 197) According to Ms. Feinstein, in more recent years, the burden of caring for her mother, financially, emotionally and physically, has fallen on Ms. Altman, and it has taken a toll on her. (TR 197-199) Ms. Altman gets up at five in the morning to handle her cases. She works all day, and every day also goes to her mother's to take care of her daily needs and care. (TR 197-199) Recently, when Ms. Altman's son needed to have a heart procedure and she went to Colorado to be with him, not one of her siblings would come to help out in caring for their mother; so Ms. Feinstein and her partner went to help. (TR 198) And, when Ms. Altman informed her siblings that their mother had run out of money, their response was that it was her problem. (TR 197-198)

d. Det. Patrick J. Dugan (Retired)

Det. Dugan was a Lt. Commander for a Police Department in New York before retiring and moving to Florida. He is Myranne Feinstein's long-time domestic partner and has known Ms. Altman for 18 years. (TR 201-202) According to Det. Dugan, Ms. Altman is a solid, steady person who is respectful to authority. (TR 204) He has never heard her disparage anyone. (TR 204) He also described her as a warm and loving person. (TR 202-203) He testified that it is admirable to see the way she cares for her mother and that she carries the burden with love. (TR 204)

e. <u>Shelley Sellinger, MD</u>

Dr. Sellinger is a board certified psychiatrist who has known Ms. Altman for 32 years. (TR 206) They met when their husbands were medical residents together at Albany Medical Center in New York in the Eighties and became close friends. (TR 206) After Ms. Altman's husband left her, Dr. Sellinger and her family were in need of housing, and Ms. Altman opened up her home and offered them a place to stay. (TR 206-207) Dr. Sellinger returned the favor by assisting in caring for Ms. Altman's children in the evenings while Ms. Altman was traveling back and forth to law school. (TR 207) Dr. Sellinger described Ms. Altman as one of the most caring and honest people she has ever met. (TR 208) According to Dr. Sellinger, Ms. Altman is always taking care of everyone else to the detriment of herself. (TR 208) She puts her own needs to the side. (TR 209) She takes care of her mother and son, while working for her clients, staying at her office until 7 or 8 at night and on weekends. (TR 209)

f. <u>Pascual Mendez</u>

Mr. Mendez is 24 years old and came to this country from Guatemala with his single mother when he was a child. He is a DACA recipient. (TR 210-211) He met Ms. Altman when he was a senior in high school and did an internship at her law office. (TR 211) He has been employed by Ms. Altman as a full-time paralegal for the past five years. (TR 211, 215) Ms. Altman is flexible with his hours because he

is attending college. (TR 213) According to Mr. Mendez, he would not be in the position he is in today without Ms. Altman because she has given him the ability to go to school and also afford it, as he is not eligible for any financial aid. (TR 216)

Mr. Mendez described Ms. Altman as honest, caring, responsible and a true professional. (TR 212) He views her as a role model and aspires to be a professional like her. (TR 215) He testified that Ms. Altman is very welcoming with her clients and takes the time to go over the details of the cases with them. (TR 212-213) She treats her employees with respect and like they are family. (TR 213) He has never observed her being disrespectful to judges, immigration prosecutors or anyone else. (TR 214) He has never observed her expressing anger towards The Florida Bar. (TR 215)

Mr. Mendez is aware the Bar is seeking disbarment in this matter and acknowledged that, if that occurred, he would need to find a new job. (TR 217) However, his employment is not the only reason he does not want Ms. Altman to be disbarred. According to Mr. Mendez, Ms. Altman helps hundreds of immigrants and deserves to keep working as an attorney. (TR 218-19)

4. **Mitigating Factors Found by the Referee**

In recommending that this Court sanction Ms. Altman with a public reprimand and five years of probation with various conditions, the Referee found that the

following mitigating factors "justify a substantial reduction in the degree of discipline to be imposed":

> Personal or emotional problems- At the time of her conduct, Respondent was experiencing multiple family circumstances. Both her son and elderly mother had serious health issues. She was juggling their care, while running her busy law practice. While this is not an excuse for her failure to timely respond, it should be considered as mitigation.
>
> Timely good faith effort to rectify consequences of misconduct- Within two weeks of receiving notice from Bar Counsel that the Grievance Committee would be holding a hearing on the Bar's Request For Issuance of Notice of Non-Compliance and Finding of Contempt, and prior to the Grievance Committee hearing and any finding of non-compliance and contempt, Respondent responded to the pending inquiry by sending a letter to the Investigating Member answering the questions posed in his January and March letters and apologizing in writing to him for her failures to promptly respond.
>
> Character and reputation- As attested to by several character witnesses who testified for the Respondent . . . [t]here is substantial evidence of her good character.
>
> Remorse- Respondent has expressed remorse in a personal letter of apology she sent to the Investigating Member on April 10, 2018, and during her testimony at her final hearing before this Referee.
>
> Remoteness of prior offenses- The conduct for which Respondent was disciplined in her first Bar case occurred in 2000. Her last Bar matter concluded in 2007, more than a decade ago.

(ROR p. 24-25)

5. **<u>Alleged Misrepresentations</u>**

During rebuttal closing argument at the final hearing on the contempt charges filed against Respondent, without any prior notice to Respondent and her counsel, Bar Counsel informed the Court that the Bar would be requesting that the Referee enter findings that Ms. Altman had made intentional misrepresentations in the Response to the Grievance Committee (TFB Exh. 8), the Response to this Court's Order to Show Cause (TFB Exh. 11), and Ms. Altman's apology letter to the Investigating Member. (TR 308-309)

In the Response submitted to the Grievance Committee (TFB Exh. 8), which was prepared by counsel while working "feverishly" with Ms. Altman over the weekend and within a matter of days after being retained, counsel misinterpreted information provided by Ms. Altman and made a mistake in asserting Ms. Altman was her mother's "only child living in Florida." (TR 101; 159) The identical mistake was carried over and repeated by counsel in the later filing with this Court (TFB Exh. 11), which tracked the same factual assertions used in the Response to the Grievance Committee. (TR 65) Ms. Altman reviewed the documents but did not catch the mistake. (TR 102) The Responses should have stated that Ms. Altman is the only child in Florida involved in the care of her mother. (TR 101-102) Although one sister lives in Sarasota, her employment makes it difficult for her to help, so she has no active involvement (TR 110, 147). Another sister, living locally in Pompano,

due to “family history,” has chosen not to be involved in their mother’s care. (TR 100) Ms. Altman’s other sister lives in New York and, although she is somewhat involved, she cannot assist in physically caring for their mother. (TR 100) Several witnesses who testified at the hearing confirmed Ms. Altman bears the sole responsibility for the physical care of her 92 year old mother. (TR 99-102, 147; 197-198; 2018-209) Ms. Altman testified that she was not trying to mislead the Grievance Committee or this Court, as she was, in fact, the only one of her siblings in Florida involved in her mother’s care. (TR 102-103) Ms. Altman did not try to hide the fact that she had two siblings who reside in Florida. When she was deposed by Bar Counsel and asked about her siblings, Ms. Altman testified honestly that she had a sibling “on the west coast of Florida; and one in South Florida.” (TFB Exh. 16, at p. 13)

In addition, Ms. Altman personally wrote a letter to the Investigating Member, Mr. Weiss, apologizing for her failure to timely respond. (TR 160-161) In her apology letter, Ms. Altman mistakenly stated that she “timely responded to [his] first inquiry” when she provided the documents he requested. (TFB Exh. 8) Ms. Altman testified that her misstatement was not intentional. She explained that, when she drafted the letter, she was thinking of Mr. Weiss’ follow-up letter providing a due date for production, to which she had timely complied. (TR 175-176)

In its proposed Report of Referee submitted to the Referee, the Bar requested that the Referee find that Ms. Altman made material misrepresentations to the Grievance Committee, the Florida Supreme Court and the Investigating Member and to consider it as an aggravating factor. Respondent filed a written Objection to the Bar's request. (R 37)

The Report of Referee notes as follows:

> the Response to the Committee specifically states, "As the only child living in Florida ..." The undersigned Referee finds that this misrepresentation was an attempt to minimize her culpability in failing to timely respond. Respondent corrected her testimony at the Final Hearing, stating that she is the only child living in Florida who cares for her mother.

(ROR p. 9) The Report of Referee does not make any mention of the misstatement contained in Ms. Altman's apology letter.

Although the Referee found that Respondent should be held in contempt for failing to timely respond to the Bar in violation of Rule 4-8.4(g)(2), the Referee did not recommend that Ms. Altman be found in violation of Rule 4-8.4(c). (ROR p. 13) Nor did the Referee find the alleged misrepresentations to be an aggravating factor in determining the sanction to be imposed. (ROR p. 24)

STATEMENT OF THE STANDARD OF REVIEW

The Court is "precluded from reweighing the evidence and substituting its judgment for that of the referee" and should presume that the factual findings are

correct and uphold the findings "unless clearly erroneous or lacking in evidentiary support." *The Florida Bar v. Wohl*, 842 So. 2d 811, 814 (Fla. 2003) (citations omitted).

The Court's scope of review in considering discipline is broader and should uphold the referee's recommended sanction if it has a "reasonable basis in existing case law." *Id.* at 815.

SUMMARY OF ARGUMENT

The Referee's recommendation regarding the sanction to be imposed should be approved by this Court as it is supported by the evidence, the case law, recent dispositions of this Court for violations of Rule 4-8.4(g) and The Florida Standards for Imposing Lawyer Sanctions. As found by the Referee, a public reprimand in combination with a five year probationary period with significant and meaningful conditions, including participation in FLA and monthly supervision by undersigned counsel, are sufficient, but not greater than necessary, to satisfy *all* the purposes of discipline. Given the significant passage of time since Ms. Altman's prior Bar matters and the limited nature of Ms. Altman's non-compliance with Rule 4-8.4(g)(2) in the current matter, as well as the other significant mitigating factors found by the Referee, including remorse, timely good faith effort to rectify consequences of misconduct, personal/family problems and good character, the facts and circumstances do not support a suspension, let alone disbarment. The Bar's

request for disbarment is excessive and contrary to fairness and justice. The Bar's request should be rejected.

The Court should reject the Bar's claim that the factual mistake made by counsel in the Responses filed with the Grievance Committee and this Court, both of which were prepared by counsel, and the misstatement made in the apology letter to the Investigating Member, were intentional misrepresentations by Ms. Altman. The misstatements were not material and the Bar failed to present clear and convincing evidence that Ms. Altman "deliberately or knowingly" made the incorrect statements and intended to deceive the Bar, the Grievance Committee and this Court. Moreover, Ms. Altman was not provided sufficient notice and opportunity to be heard on this issue in violation of her constitutional right to due process. As notice was not provided until the Bar's rebuttal closing argument that the Bar would be asking the Referee and this Court to find that Ms. Altman engaged in dishonest conduct, Ms. Altman was not provided a sufficient opportunity to defend against the new accusations. Counsel is an essential witness and, had notice been provided prior to the final hearing, appropriate steps could have been taken so that undersigned counsel could have testified on her behalf.

ARGUMENT

A Public Reprimand with Five Years of Supervised Probation and Participation in FLA is Appropriate Under the Specific and Unique Circumstances of this Case and the Substantial Mitigating Factors Found by the Referee and Supported by the Evidence

1. Ms. Altman Did Not Knowingly and Intentionally Make False Statements to the Bar, the Investigating Member, the Grievance Committee and the Court

Honesty and integrity are paramount in our profession. More so as a lawyer than in any other profession, candor is critical. A lawyer's word must be his or her bond. But the difference between a lie and a misstatement is night and day. Ms. Altman has been accused by the Bar of an outright lie for the misstatement regarding her siblings. (TR 309) The Referee concluded that the "only child living in Florida" was a "misrepresentation" made in "an attempt to minimize her culpability in failing to timely respond." The facts and circumstances do not support the Bar's characterization or the Referee's conclusion.

First, it was counsel's mistake that was the genesis of this situation. As counsel informed the Referee and Ms. Altman confirmed in her testimony, counsel worked with Ms. Altman over the weekend and misunderstood when Ms. Altman explained her family circumstances regarding the care of her mother. The incorrect, identical language was carried over to the Response to this Court's Order to Show Cause. Given the underlying circumstances, Ms. Altman's failure to catch the error when she reviewed documents drafted by her counsel is insufficient to establish by

clear and convincing evidence that she knowingly and intentionally made any false statement.

Second, although the comment was technically incorrect, it was not a material misstatement. The point counsel was trying to make on Ms. Altman's behalf was that no one else from Ms. Altman's family was available to care for her mother when she became ill and went to the hospital. In fact, substantial and unrefuted evidence was presented at the final hearing, proving that the burden for her mother's physical care always fell on Ms. Altman. Thus, the essence of the argument was the same even though the exact details were not. Moreover, it was counsel who made the misstatement while advocating on behalf of Ms. Altman and providing relevant, mitigating context for her failure to timely respond. And, finally, Ms. Altman, at her deposition, correctly and truthfully testified her two sisters live in Florida. Under all the circumstances, it would be unfair to punish Ms. Altman for counsel's error.

As for Ms. Altman's apology letter to the Investigating Member, her statement that she had "timely" responded to his first inquiry was a mistake, which counsel did not catch before the letter went out. As the Referee must have realized in not entering any finding that this was a misrepresentation, only a fool would attempt to lie to the very person who had made the request. The letter was prepared by Ms. Altman under rushed circumstances, when she was working with counsel over the weekend to answer the follow-up questions from Mr. Weiss to bring her into

compliance and prepare the Response to the Grievance Committee. Clearly, Ms. Altman made an error in remembering the sequence of events between the time she received the first letter from the Investigating Member on the day before Thanksgiving 2017 (after she had returned from Colorado after her son's heart procedure) and her mother's hospitalization on February 4, 2018.

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 *The Florida Bar v. Dupee*, 160 So. 3d 838, 844 (Fla. 2015) (citing *The Florida Bar v. Barley*, 831 So. 2d 163, 169 (Fla. 2002); *The Florida 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*." *Id.* (citing *The Florida Bar v. Johnson*, 132 So. 3d 32, 36 (Fla. 2013); *The Florida Bar v. Brown*, 905 So. 2d 76, 81 (Fla. 2005) (emphasis added). The Florida Bar failed to present clear and convincing evidence that Ms. Altman "deliberately or knowingly" made the alleged misrepresentations.

Moreover, Ms. Altman was not provided sufficient notice and opportunity to be heard on this issue in violation of her constitutional right to due process under Article I, § 9, Florida Constitution. See *The Florida Bar v. Vernell*, 721 So.2d 705 (Fla. 1998); *The Florida Bar v. Rousso*, 117 So.3d 756 (Fla. 2013); *The Florida Bar v. Committe*, 916 So.2d 741 (Fla. 2005); *The Florida Bar v. Fredericks*, 731 So.2d

1249 (Fla. 1999); *The Florida Bar v. Carricarte*, 733 So. 2d 975, 978 (Fla. 1999) (due process requires that the attorney be allowed to explain the circumstance of the alleged offense *and to offer testimony* in mitigation of any penalty to be imposed). The alleged conduct was not "clearly within the scope of the Bar's accusations." See *The Florida Bar v. Norkin*, 132 So. 3d 77 (Fla. 2013). And, thus, the alleged conduct could not properly be considered to find a new uncharged Rule violation. *The Florida Bar v. Batista*, 846 So. 2d 479 (Fla. 2003).

Although this Court also found in *Batista* that uncharged improper conduct occurring during the course of the disciplinary proceedings (witness tampering) could properly be treated as an aggravating factor and utilized to enhance Batista's discipline, the circumstances in that case are distinguishable from those in Ms. Altman's case. Batista argued that his due process rights were violated when the referee increased the severity of the recommended discipline based on the witness-tampering allegations because they were neither presented in the Bar complaint nor within the scope of the allegations set forth in the complaint. There is no indication in the Court's decision that Batista asserted or the Court considered whether he was afforded a sufficient opportunity to defend against the new accusations before the conduct could be used to aggravate his discipline. As noted in *Batista*, "the referee heard the testimony of the witnesses," as well as Batista, prior to finding that "Batista

had improperly attempted to have the witnesses sign false affidavits in exchange for the return of their attorney fees." *Id.* at 484.

In contrast, Ms. Altman was not otherwise put on notice prior to the end of the final hearing in this matter regarding the need to defend against a finding of dishonest conduct. Notice was not provided until the Bar Counsel's *rebuttal* closing argument that the Bar would be asking the Referee and this Court to find that Ms. Altman engaged in dishonest conduct.

Thus, Ms. Altman was not provided a sufficient opportunity to defend against the false statements accusations. Although she was given the opportunity during her own testimony to explain what had occurred, she was not afforded the opportunity to offer other critical testimony to disprove the accusations. Counsel is an essential witness and, had notice been provided prior to the final hearing, arrangements could have been made so that undersigned counsel could have testified on her behalf. Therefore, because Ms. Altman was not provided an opportunity to present an adequate defense to the Bar's uncharged allegations that she knowingly engaged in false statements to the Grievance Committee and the Court, such alleged misrepresentations should not be considered by this Court in determining an appropriate sanction for her untimely responses.

2. Ms. Altman's Prior Disciplinary Matters Are Too Remote in Time and Her Recent Conduct Does Not Support a Suspension, Let Alone Disbarment

In arguing that disbarment is the only appropriate sanction, the Bar cites to Standard 8.1, Florida Standards for Imposing Lawyer Sanctions, and claims that Ms. Altman "engaged in the same exact misconduct as she did in all four of her prior disciplinary cases." Bar Brief at p. 35. The Bar's argument is wrong for two reasons.

First, "remoteness of prior offenses" is specifically recognized in the Standards as a "mitigation" factor. Standard 9.32(m). The conduct for which Ms. Altman was disciplined in her first Bar case occurred in 2000, almost two decades ago. Her last Bar matter concluded in 2007, more than a decade ago. Ms. Altman has not been continually engaging is similar misconduct since 1998, as the Bar suggests. As properly found by the Referee, Ms. Altman's prior Bar offenses are too remote to justifying disbarment, or even a suspension, for her recent isolated conduct.[4]

Second, Ms. Altman's recent conduct, is not the "same exact misconduct" as

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[4] In arguing that the Court should not give any weight to this mitigation factor, the Bar's reliance on *The Florida Bar v. Varner*, 992 So. 2d 224 (Fla. 2008), in which the Court imposed a one year suspension, is misplaced. Although it is a 2008 decision, it involves misconduct which occurred in 2003, which was only two years after the attorney's prior disciplinary case concluded in 2001. In contrast to Ms. Altman's case, as noted by the Court, the respondent attorney's prior discipline was only "somewhat remote," and there was a "striking similarity to the present case." In both matters, unlike Ms. Altman, the attorney was found to have engaged in dishonest conduct in connection with the representation of clients, by filing fictitious notices of voluntary dismissal.

in her prior cases, where she completely and repeatedly failed to respond. In trying to justify its request for disbarment, the Bar has repeatedly stressed that Ms. Altman only responded when she was faced with the threat of contempt and suspension, claiming this is consistent with her prior discipline record. This argument ignores the critical factual distinction between her old cases and this one. Here, prior to ever being threatened with contempt, Ms. Altman responded to the underlying Bar Complaint, not just once, but twice: first, in her response letter to ACAP, and, second, by producing her client's file as requested by the Investigating Member. In addition, here, after receiving the contempt notice from the Bar, she immediately sought help and brought herself into *full* compliance *prior* to the Grievance Committee hearing.

The Bar also claims that this is "the fifth disciplinary case in which Respondent has effectively thwarted a Bar investigation." Bar's Brief at p. 33. To say that Ms. Altman "effectively thwarted" or in other words, successfully obstructed, the investigation is, at best, hyperbole. The Bar did not submit any evidence to the Referee regarding any actual prejudice, other than a short delay, to the Grievance Committee's investigation.[5] The underlying complaint does not

[5] Not that it in any way further mitigates Ms. Altman's conduct, it does seem more than a little ironic, and relevant to this particular argument, that the Bar first dismissed the underlying complaint and then the local office put the case on the back burner for many months, failing along the way to notify Ms. Altman while the lawyer for the complainant and the Bar were contacting each other.

involve a trust account matter or client funds. When Ms. Altman received the letters dated January 22, **2018**, and March 7, **2018**, requiring her to respond to the follow-up questions posed by the Investigating Member, the client's immigration case had already been remanded and was not scheduled to be reheard until January of the following year, **2019**.[6] There were no apparent circumstances necessitating a response by a specific date. Although Ms. Altman's conduct caused a delay in the investigation, such delay was minimal (at most, two months) and did not obstruct or impede the investigation, which as of the date of the final hearing, eight months after Ms. Altman complied, in full, remained pending at Grievance Committee level. Thus, Ms. Altman's conduct did not result in any real prejudice to the Bar or its investigation.

As this Court has noted, "disbarment is an extreme form of discipline and should be reserved for the most egregious misconduct, and 'occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings.'" *The Florida Bar v. Summers*, 728 So. 2d 739 (Fla. 1999), (quoting *The Florida Bar v. Hirsch*, 342 So. 2d 970, 971 (Fla. 1977)). We are in agreement that it is a serious matter for a lawyer to fail to timely respond to Bar inquiries. However, as recognized by the Referee, Ms. Altman "has not been charged with conduct resulting in harm to

[6] It is counsel's understanding that, subsequent to the final hearing in this matter, as a result of the federal government shutdown, the client's hearing before the immigration judge had to be reset to a later date and has not yet occurred.

a client or the public." (ROR p. 26) In support of her sanction recommendation, the Referee noted that Ms. Altman "ultimately responded to the Bar's inquires relating to the underlying Bar complaint." (ROR p. 27)

Moreover, contrary to the Bar's claim to the contrary, the Referee found that Ms. Altman's "efforts to ask for assistance and bring herself into compliance before the contempt hearing before the Grievance Committee, and continue her compliance throughout these proceedings, shows that Respondent is amenable to rehabilitation and is willing to remain in compliance with her obligations to The Florida Bar and the Florida Supreme Court." (ROR p. 27) See *The Florida Bar v. Kassler*, 711 So. 2d 515, 517 (Fla. 1998) ("The extreme sanction of disbarment is to be imposed only in those rare cases where rehabilitation is highly improbable.").

The Bar's assertion that this Court should reject the Referee's recommendation that Ms. Altman be sent back to FLA because she did not present evidence of "any diagnosis or any apparent ailment," (Bar Brief at p. 37) is troubling, given the Bar's recent priority initiative to foster and support the mental health and wellbeing of its members. See *Mental Health & Wellness of Florida Lawyers,* www.floridabar.org (Committee web page) (one of the goals of the recently established Mental Health & Wellness of Florida Lawyers Committee is to "provide health and wellness programs to provide Florida lawyers with healthy strategies to deal with the pressures of their practices to enhance the mental health and wellness

of Florida lawyers"); see also Michael J. Higher, *Recognizing We Have a Problem: The Mental Health and Wellness of Lawyers*, The Florida Bar Journal, Vol. 92, No. 1 (Jan. 2018). Significantly, Dr. Scott Weinstein, the Clinical Director of FLA who had personally counseled Ms. Altman in the past, testified that a contract of some length with FLA "could definitely help" Ms. Altman.[7]

Furthermore, the record is replete with evidence of potential harm to Ms. Altman's practice if she is disbarred or a suspension is imposed. Due to her age and nature of her practice, it is highly unlikely she will be able to recover from a disbarment or even a rehabilitative suspension. Any suspension would negatively affect her numerous immigration clients, most of whom do not have the means to hire alternate counsel and may experience delays in their pending immigration matters. Also affected by any suspension would be Ms. Altman's employees who depend on her for their livelihood. There was also evidence presented that Ms. Altman provides financial support for her son and mother, both with serious health conditions.

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[7] See S. Weinstein, *Florida Lawyers Assistance: Saving Lives and Legal Careers*, The Florida Bar Journal, Vol. 92, No. 1 (Jan. 2018) ("FLA's monitoring functions have expanded to the point where FLA now monitors more individuals than any similar lawyer assistance program in the United States, and has developed what is regarded as one of the most sophisticated and robust monitoring programs in the country.").

Based upon the mitigation evidence presented at the final hearing, the Referee concluded that "the impact of a disbarment and/or suspension on Respondent and her clients, employees and family would outweigh any benefit to The Florida Bar, the profession or to the community at large that might be achieved." (ROR p. 28) Noting that "[t]he primary purpose of a lawyer's discipline is to protect the public and administer justice," the Referee found that "[d]isbarment, as requested by the Bar, or a suspension in this case would defeat that purpose." (ROR pp. 27-28)

Therefore, based upon the foregoing, given the significant passage of time since Ms. Altman's prior Bar matters and the limited nature of Ms. Altman's non-compliance with Rule 4-8.4(g)(2) in the current matter, as well as the other significant mitigating factors found by the Referee, including remorse, timely good faith effort to rectify consequences of misconduct, personal/family problems and good character, the Bar's request for disbarment should be rejected.

3. The Referee's Sanctions Recommendation Has a Reasonable Basis in Existing Case Law and Prior Bar Dispositions in Similar Cases and is Supported by the Standards for Imposing Lawyer Sanctions

Case Law and Prior Bar Dispositions in Similar Cases

As the Bar has acknowledged, this Court usually will not second-guess a referee's recommended discipline if it has a reasonable basis in existing case law. *The Florida Bar v. Temmer*, 753 So.2d 555 (Fla. 1999). The Referee's recommended discipline in this matter is clearly supported by the "published

dispositions"[8] from this Court in Bar disciplinary matters in which the *only* offense the respondent attorney was found to have committed, like Ms. Altman, was failing to timely respond to investigative inquiries from The Florida Bar.

In *The Florida Bar v. Vaughn*, 608 So. 2d 18 (Fla. 1992), the Court imposed a public reprimand for an attorney who engaged in a continuing pattern of not participating in disciplinary proceedings and who had prior discipline. The record reflected that Vaughn failed to cooperate with the Bar prior to the filing of the formal complaint and that he continued that pattern of conduct even after the complaint was filed. It was ultimately determined that the underlying complaint filed by a client of the lawyer had no merit. However, the Court determined that the attorney should be disciplined with a public reprimand for his repeated failures to respond to the Bar, noting that "[c]onsiderable time and expense have been expended on a matter that might have been resolved at the early stages of the investigation." Vaughn's prior disciplinary record included a private reprimand for personal checking account violations and a public reprimand for "personal behavior." See *The Florida Bar v. Vaughn*, 562 So. 2d 348 (Fla. 1990).

In *The Florida Bar v. Grigsby*, 641 So. 2d 1341 (Fla. 1994), the respondent attorney was appointed to represent an indigent inmate who subsequently filed a

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[8] While we concede, under *The Florida Bar v. Wynn*, 210 So.3d 1271, 1274 (Fla. 2017), "unpublished dispositions" of the Court do not constitute controlling "case law," we believe such case dispositions are instructive.

grievance with the Bar alleging that he failed to communicate with him concerning his case. Twice the Bar asked Grigsby for a response and a copy of a letter he wrote the inmate. When neither was received, the matter was referred to the grievance committee. On several occasions the committee asked Grigsby for a response and the letter, but Grigsby failed to present either. Grigsby finally presented the letter at the grievance committee hearing, where it was determined that the inmate's complaint lacked merit. The Bar charged Grigsby with violating Rule 4-8.1(b) for failing to respond to a lawful demand for information and the matter was referred to a referee, who recommended a public reprimand and three years of probation, finding that the attorney was suffering from depression. Before making this recommendation, the referee considered Grigsby's prior disciplinary record which consists of two prior instances of discipline. In the first, Grigsby was admonished before the Board of Governors for inadequate communication with a client and failure to respond to the Bar's inquiries concerning that grievance. In the second, Grigsby was given a three month suspension because, on three separate occasions, he failed to act with reasonable diligence in representing his clients and failed to keep them informed. The Court approved the referee's recommendation, rejecting the Bar's request for a 90 day suspension.

In *The Florida Bar v. Grosso*, 647 So. 2d 840 (Fla. 1994), the respondent attorney was charged with failure to respond to an investigative inquiry initiated by

the Bar and conceded his guilt. The Court's opinion does not provide details of the specific conduct involved in the matter. The Bar had requested a 10 day suspension, but the referee recommended 60 days. On appeal, the Court considered the attorney's unblemished 15-year record and reduced his suspension to 10 days, which was the Bar's original recommendation.

In more recent "published dispositions" of this Court, attorneys found in violation for failing to timely respond to Bar inquiries were also found to have committed other more serious violations. See, e.g., *The Florida Bar v. Petersen*, 248 So. 3d 1069, 1071 (Fla. 2018) (the attorney failed to move a case forward for two years, resulting in dismissal of the action for lack of prosecution, took a fee of $6,500 in a case but took little or no action to prosecute the case, entered into a fee agreement with a client that gave the attorney a 15% ownership interest of any recovery from any source resulting from a case and then filed a charging lien to secure his fee, and failed to timely respond to Bar inquiries; While the referee recommended a 91-day suspension, the court found a three year suspension appropriate given the extensive rule violations by the attorney, the number of aggravating factors, and the lack of mitigation except a finding of good character); *The Florida Bar v. Polk*, 126 So. 3d 240 (Fla. 2013) (suspending attorney 90 days for failing to communicate with a client for almost two years, failing to return the

client's documents when requested, and failing to timely respond to the Florida Bar's inquiry).

Given the lack of any recently published cases on point, recent "unpublished dispositions" for attorneys who were disciplined for untimely responding to inquiries from the Bar or grievance committee subpoenas are instructive. In the following recent cases, this Court imposed public reprimands, *without any additional discipline*, and, in almost all of the Court's orders noted that "[t]he Court takes very seriously every attorney's obligation to completely and timely respond to inquiries made by The Florida Bar." All of the following recent dispositions, for more egregious conduct than Ms. Altman's, support the Referee's recommended discipline:

In *The Florida Bar v. Kelly Anne McCabe*, Case No. SC18-1551 (Fla. Nov. 29, 2018), the respondent did not comply with the Bar's inquiries until *after* the Court issued its Order to Show Cause and even *after* the time required to respond to the Order to Show Cause. The attorney was 9 days late in filing a response to the Court's Order to Show Cause.

In *The Florida Bar v. Jesus Elizarraras*, Case No. SC18-298 (Fla. May 1, 2018), the respondent attorney failed to comply with a grievance committee subpoena for trust account records and produced the records *after* the Court issued

its Order to Show Cause, but prior to the time required to respond to the Order to Show Cause.

In *The Florida Bar v. Roy*, No. SC16-268, 2016 WL 1298334 (Fla. March 31, 2016), the respondent attorney responded to the Bar's inquiries *after* the Court issued its Order to Show Cause, but prior to the time required to respond to the Order to Show Cause.

In *The Florida Bar v. Fries*, 143 So. 3d 923 (Fla. 2014) (unpublished table opinion), the respondent attorney responded to the Bar's inquiries *after* the Court issued its Order to Show Cause, but prior to the time required to respond to the Order to Show Cause.

In *The Florida Bar v. Eric Daniel Frommer*, Case No. SC15-1707 (Fla. Dec. 10, 2015), the Court approved a consent judgment and publicly reprimanded attorney for failing to timely respond to the Bar initial inquiry letter, as well as follow-up telephone calls and a letter from the investigating member. Respondent responded to the follow-up inquiries from the investigating member upon being subpoenaed by the Grievance Committee. Respondent had very recent prior discipline, receiving an admonishment in 2013 for failing to respect the rights of third persons and failing to maintain proper trust account records.

In *The Florida Bar v. Maria De Los Angeles Torres*, Case No. SC15-871 (Fla. July 8, 2015), the respondent attorney failed to respond to repeated investigative

inquiries by the Bar and failed to respond to the Request for Issuance of Notice of Non-Compliance and Finding of Contempt. The attorney did not respond and comply until *after* the court issued its Order to Show Cause, but did so prior to the time required to respond to the Order to Show Cause.

In *The Florida Bar v. Lourdes Esther Ferrer*, Case No. SC14-2243 (Fla. May 15, 2015), the attorney failed to respond to repeated investigative inquiries by the Bar and failed to respond to the Request for Issuance of Notice of Non-Compliance and Finding of Contempt filed with the grievance committee. The attorney did not respond until *after* the Bar petitioned the Court for contempt and the Court issued its order to show cause. In the response, her counsel explained that the attorney was experiencing the break-up of her marriage brought about by financial issues.

In *The Florida Bar v. Long*, Case No. SC15-484 (Fla. June 12, 2015), the attorney failed to respond to the Bar's investigative inquiries and to provide proof of compliance with the Court's prior disciplinary order, requiring restitution as part of his disciplinary sanction in a prior case. The attorney did not respond until *after* the Court issued its Order to Show Cause. The attorney explained that his financial circumstances prevented him from making restitution until shortly before filing his response to the Order to Show Cause. The attorney did not provide an explanation for his failure to respond to the Bar's inquiries.

In *The Florida Bar v. Clifford*, Case No. SC15-332 (Fla. May 26, 2015), the attorney failed to respond to the Bar's investigative inquiry regarding whether he had practiced law during his disciplinary suspension. After sending a second notice to an alternate address, the attorney contacted the Bar and advised he had not received the first notice sent to his record Bar address but that he would respond to the second notice he received at his alternate address. Thereafter, he failed to do so. The attorney did not respond until *after* the Court issued an Order to Show Cause, explaining that, due to an out-of-state family member's serious illness that required the attorney's travel to that location on multiple locations, he simply forgot to respond to the Bar's investigative inquiry.

The cases relied upon by the Bar to support its request for disbarment are clearly distinguishable. In *The Florida Bar v. Horowitz*, 697 So.2d 78 (Fla. 1997), the Court disbarred the respondent attorney in connection with three consolidated cases involving three different clients with a total of 15 separate counts. Horowitz not only failed to respond to the Bar's inquiries, he was found to have failed to provide competent representation, failed to act with diligence in the representation of his clients, engaged in conduct involving dishonesty, collected an illegal, prohibited or clearly excessive fee, and committed multiple trust account violations. The Court noted "[t]here is no doubt that Horowitz' violation of numerous ethical requirements and total neglect of his clients was extreme misconduct." In noting

that "evidence of Horowitz' clinical depression helps to explain but not excuse his pattern of neglect of his clients and his failure to respond to communications from the Bar," the Court stressed that "Horowitz' neglect caused significant actual and potential injury to his clients." 697 So.2d at 83. In upholding the referee's recommendation of disbarment, the Court also took into account that Horowitz had received prior discipline, the last case occurring in the prior year. Unlike *Horowitz*, this contempt proceeding does not involve "total neglect" and "callous disregard for clients." Horowitz' pattern of misconduct was recent and, unlike Ms. Altman, involved "extreme misconduct," including trust account violations.

In *The Florida Bar v. Walkden*, 950 So.2d 407 (Fla. 2007), Walkden was disbarred after a more than four year period of time during which Walkden violated multiple discipline orders of this Court. In May 2002, the Court suspended Walkden for 90 days to be followed by three years of probation, during which he was required to attend FLA and abstain from alcohol. In September 2002, after going to an FLA meeting intoxicated, the Bar filed a contempt petition. In March 2004, the Court imposed a 91 day suspension. Walkden practiced law in violation of the Court's 91 day suspension order. The Bar commenced contempt proceedings and, in June 2005, the Court imposed a one year suspension. Walkden continued to practice law in violation of the Court's one year suspension order. In imposing disbarment, the Court noted that "[t]his is the second time Walkden has come before the Court on

contempt charges for continuing to practice law while suspended [and] [h]eedlessly Walkden continued to practice law even while [the first contempt] proceedings were pending against him." *Walkden*, 950 So.2d at 411. Ms. Altman's conduct and disciplinary history are in no way similar to Walkden's. Moreover, unlike Walkden, her prior discipline is substantially remote in time to her current conduct.

Standards for Lawyer Sanctions

In addition to the case law and recent dispositions of this Court for violations of Rule 4-8.4(g), the Florida Standards for Imposing Lawyer Sanctions supports the Referee's recommended discipline. As noted by the Referee, the Standards "constitute a model, setting forth a comprehensive system for determining sanctions, **permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct."** Standard 1.3, Florida Standards for Lawyer Sanctions (Purpose of These Standards) (ROR p. 28) (emphasis added in ROR).

Furthermore, as required by the Standards, the Referee properly took into account the following three purposes of lawyer 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 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. Behm, 41 So.3d 136, 150 (Fla. 2010) (quoting *The Florida Bar v. Barrett*, 897 So.2d 1269, 1275-76 (Fla. 2005)); (ROR p. 27). Relying upon the Standards and based upon the evidence presented at the final hearing, the Referee found that "[t]he combination of a lengthy period of probation and the several significant and meaningful recommended conditions[9] is sufficient, but not greater than necessary, to satisfy *all* the purposes of discipline. (ROR pp. 27-28) (Emphasis in original).

Here, the Bar is advocating for a strict application of one particular Standard (Standard 8.1), and the complete disregard for the Standards "comprehensive system for determining sanctions," which specifically calls for the consideration of both aggravating and mitigating factors. Although the Bar has not appealed the Referee's findings regarding application of any of the particular mitigation factors, the Bar, in essence, is asking the Court to reject the numerous and significant mitigation factors, which the Referee found "justify a substantial reduction in the degree of discipline to be imposed." (ROR pp. 24-25)

The Referee's recommendation regarding the sanction to be imposed should be approved by this Court as it is supported by the evidence, the case law, recent

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[9] Undersigned counsel (David Rothman) has volunteered to supervise Ms. Altman on a pro bono basis during the five years of the recommended probation, including meeting with Ms. Altman on a monthly basis and filing quarterly reports.

dispositions of this Court for violations of Rule 4-8.4(g) and The Florida Standards for Imposing Lawyer Sanctions. The Bar's request for disbarment is excessive, contrary to fairness and justice and should be rejected.

CONCLUSION

Based upon the underlying conduct, the person before the Court and the substantial and compelling mitigating factors presented at her final hearing, it is respectfully submitted that disbarment clearly is excessive and a public reprimand, particularly with a five year probationary period and the specified conditions, is appropriate.

WHEREFORE, Respondent requests that this Court enter an Order approving the Referee's recommended sanction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-filing Portal; with copies provided via e-mail to Staff Counsel, The Florida Bar (aquintel@floridabar.org) and Bar Counsel, Linda Ivelisse Gonzalez (lgonzalez@floridabar.org), on this 17th day of May, 2019.

/S/ Jeanne T. Melendez

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that the type size and style of this Brief is Times New Roman 14pt.

/S/ Jeanne T. Melendez

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