IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.: SC20-128

The Florida Bar File No. 2019-30,075(9B)

THE FLORIDA BAR,

Complainant,

v.

DEREK VASHON JAMES,

Respondent.

RESPONDENT'S AMENDED ANSWER BRIEF

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PREFACE

In this Answer Brief, the Respondent, Derek Vashon James, will use the following designations and references as set forth below.

The Respondent will be referred to as “Respondent”.

The Complainant will be referred to as “Complainant” or “TFB”.

Renee Gray will be referred to “Adjuster” or “Adjuster/Witness”.

References to The Florida Bar Exhibits will be in parentheses and designated as "TFB Ex." followed by the exhibit number, and appropriate page and line numbers.

References to the Sanction Hearing Transcript will be in parentheses and designated as: “Sanc. Tr.” followed by the appropriate page and line number(s).

References to the Final Hearing Transcript will be in parentheses and designated as: "Tr." followed by the appropriate page and line number(s).

References to the Report of Referee will be in parentheses and designated as “ROR” followed by the appropriate page and line number(s).

For any of the above items:

a. "Pg." for page, as necessary.

b. "Line" for Line, as necessary.

An Appendix is being filed along with this Answer Brief.

STATEMENT OF THE CASE

As the Statement of the Case and Facts of The Florida Bar is substantially accurate, the Respondent is not providing his own Statement of the Case and Facts. However, the Respondent's argument will contain substantial additional facts interwoven with argument.

SUMMARY OF ARGUMENT

As to the Bar's contention that the Referee erred in not finding a Rules Regulating The Florida Bar 4-8.4(d) violation, the Respondent maintains that this Court generally will not disturb a Referee's findings of guilt if the findings are supported by the evidence in the record. In this case, the Referee made detailed findings. The Bar seems to argue that it is impossible for the Referee to not have found the Rule 4-8.4(d) violation in light of the overall facts. However, the Bar is arguing, in addition to the Respondent's conduct at the unsworn statement, what then transpired before the Workers' Compensation Court. As those matters were not pled, those matters cannot be considered as evidence supporting a rule violation.

Furthermore, though the unsworn statement has been consistently referred to as a deposition, it lacked the formality of such. The Referee acknowledged that it was Ms. Villaverde who moved that the transcript be used in the Workers' Compensation proceeding. The Respondent texted the

witness that there would need to be another deposition, as the one on July 31, 2018 would not be usable, and in fact the Respondent filed a motion on August 5, 2018 requesting another deposition by telephone. This, coupled with the Referee's findings that the witness did not give any false answers, provides sufficient record evidence for the Referee's finding as to Rule 4-8.4(d).

As to the discipline of 30 days, Respondent maintains that this is actually a very harsh discipline. The Florida Bar concedes that there was no case law in which an attorney was disciplined for witness coaching (*See* TFB Initial Brief on Merits, Pg. 27, Footnote 7). All of the case law argued by the Bar in support of a harsher discipline involves more egregious conduct, a pattern of misconduct, and/or a Rule 4-8.4(c) violation. The Respondent, while arguing for a lesser sanction before the Referee, elected not to appeal or cross-appeal. He simply wants to accept and serve the recommended discipline and get this dreadful chapter of his professional career – brought on, not by being dishonest or malicious but, by letting his guard down during informal communications with familiar actors – behind him.

ARGUMENT

I. THE REFEREE DID NOT ERR IN DECLINING TO FIND A RULE 4-8.4(d) VIOLATION.

A. Standard of Review.

The Respondent adopts the Bar's statement of the standard of review. "A party contending that a referee's conclusions as to guilt are erroneous must demonstrate that there is no evidence in the record to support those findingsor that the record evidence clearly contradicts the conclusions. *E.g., Fla. Bar v. Nowacki,* 697 So. 2d 828, 832 (Fla. 1997)."

B. Workers' Compensation Practice.

Derek Vashon James ("Respondent") has worked exclusively as workers' compensation defense attorney since 2001. The practice of workers' compensation in Florida is different from all other areas of law. This area has its own administrative Judges whose power are strictly limited to those specifically enumerated by statute. *See Guckenberger v. Seminole County*, 979 So. 2d 407, 408 (Fla. 1st DCA 2008) the Judges of Compensation Claims are, "vested only with certain limited quasi-judicial powers relating to the adjudication of claims for compensation and benefits." *Smith v. Piezo Tech. & Prof'l Adm'rs*, 427 So.2d 182, 184 (Fla.1983). Indeed, "[u]nlike a court of general jurisdiction, a Judge of Compensation Claims

does not have inherent judicial power but only the power expressly conferred by chapter 440." *Pace v. Miami-Dade County Sch. Bd.*, 868 So.2d 1286, 1287 (Fla. 1st DCA 2004) (*citing McFadden v. Hardrives Constr., Inc.,* 573 So.2d 1057, 1059 (Fla. 1st DCA 1991)). Thus, "[a] JCC has no authority or jurisdiction beyond what is specifically conferred by statute." *Id.* (*citing Farhangi v. Dunkin Donuts*, 728 So.2d 772, 773 (Fla. 1st DCA 1999)).

Their procedural rules arise from Florida Administrative Code Rule 60Q and apply in all workers' compensation proceedings before the Judges of Compensation Claims. *See Fla. Admin. Code R. 60Q-6.10*. The practice is informal. The lack of formality is codified specifically by statute, which provides that that, "[i]n making an investigation or inquiry or conducting a hearing, the Judge of Compensation Claims shall not be bound by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct such hearing, in such manner as to best ascertain the rights of the parties." (Emphasis Added) *See § 440.29(1), Fla. Stat.* Because the practice of workers' compensation is specialized, the Florida First DCA maintains exclusive statewide jurisdiction over all workers' compensation appeals. *See § 440.271, Fla. Stat.*

In 2018 nearly ninety percent of Respondent's caseload of approximately one hundred fifty cases were engaged in defending a single

employer. Nearly all of the injured workers bringing claims against that employer were represented by a single lawyer, Toni Villaverde. The employer's servicing agent employed a handful of dedicated claims examiners that adjusted the employer's numerous work injury claims throughout the state. Each claims examiner is responsible for well over a hundred claims.

The workers' compensation attorney witnesses in the instant hearing testified that depositions of adjusters are informal in workers' compensation claims. (Sanc. Tr. Pg. 53 Line 10-15) They largely focus on whether the employer or their carrier have timely paid or provided benefits that are due and owing under Florida's Workers' Compensation Law (*See Ch. 440, Fla. Stat.*)(Sanc. Tr. Pg. 55 Line 13-16)

Respondent called attorney David Mallen, a thirty-year workers' compensation attorney representing injured workers, as a witness. Mr. Mallen testified that the practice is, "very informal… the hearings are not formal… the Judges give us a lot of latitude and informality." (Sanc. Tr. Pg. 52 Line 19-20) Mr. Mallen further explained that, "the rules of evidence are informal and relaxed… it is a very collegial and enjoyable experience when you have a hearing in front of a Judge of Compensation Claims" (Sanc. Tr. Pg. 53 Line 10-15) In workers' compensation "there is no focus on liability

and the information is straightforward… You're just trying to get basic information" (Sanc. Tr. Pg. 55 Line 16-22) Mr. Mallen has taken thousands of depositions in workers' compensation cases over the last thirty years. When asked whether sometimes an attorney for the witness volunteers information, Mr. Mallen stated, "it is absolutely common on my [claimant] side, on the defense side… If somebody can't find information … you may point it out on the screen you may hold up the pay ledger. Sometimes you're trying to calm a witness down. Sometimes the witness doesn't understand the questions. It happens all the time… Yes that is common place… I rarely hear objection to it…I've had it happen in hearings…" (Sanc. Tr. Pg. 56 Line 2-11)

This focus to obtain accurate information results in the examination of objective date-driven data or documents stored in secured electronic claims files. The underlying workers' compensation claim was no different. Mr. Mallen testified in response to whether information in workers' compensation was susceptible to manipulation he stated, "I don't' think much is susceptible…This is a very sterile -- it's all medically driven… doctor's opinions…It's all dates…There's not any subjectivity. It's just a very consistent factual situation…Dates are not subject to manipulation… The documents are electronically filed and documented by the computer" (Sanc.

Tr. Pg. 57 Line 1-7 and Pg. 58 Line 2-20)

In the underling matter of *Ramon Pichirilo v. Am. Airlines, 276 So. 3d 358 (Fla. 1st DCA 2019)* the parties had reached settlement agreement and distributed the agreed upon sum of $335,000 nearly five months before the deposition of Renee Gray (hereinafter "Adjuster" or "Adjuster/Witness") noticed to occur on July 31, 2018. (Tr. Pg. 42 Line 7-11) At the time of the deposition the dispute between the parties was limited to whether the injured worker was entitled to additional post settlement penalties and interest for late payment of the settlement proceeds. (Tr. Pg. 40 Line 13-25 and Pg. 41 Line 1-20) The check payments were mailed more than ten days before their expiration date but due to mishandling by the United States Postal Service arrived were delivered after their expiration date and therefore void. (Tr. Pg. 41 Line 21-24 and Pg. 42 Line 1-6)

Because Attorney Villaverde had objected to the telephonic appearance of this Orlando based Adjuster for purposes of trial in Miami in the next several weeks, Respondent's staff set the Adjuster deposition. The Adjuster was a single mother at the time with two small children and could not appear live in Miami. (TFB Ex. 21 Pg. 30 Line 21-25 and Pg. 31 Line 1-11). In coordinating and scheduling the deposition, Respondent's staff mistakenly scheduled the Adjuster/Witness to appear telephonically from her

home office, with the court reporter inadvertently appearing outside the presence of the witness from Respondent's office. Attorney Villaverde appeared telephonically from her office in Miami as was her custom. On July 31, 2018 Respondent had taken ill and decided to appear telephonically from his home. (Tr. Pg. 84 Line 2-15)

At the outset of the July 31, 2018 proceedings the court reporter was not in the presence of the witness and was unable to swear in the witness. (Tr. Pg. 29 Line 23-25 and Pg. 30 Line 1-2) Respondent suggested a stipulation to the identity of the witness, but no agreement was reached at that time. The preliminary remarks were not incorporated into the original July 31, 2018 witness transcript and therefore the audio was played on the record at the Bar hearing. (Tr. Pg. 26 Line 6-15) Respondent believed at that time that what was only an unsworn witness statement would be inadmissible as evidence and would not be used for discovery purposes, except perhaps to educate each attorney as to what had transpired. (Tr. Pg. 91 Line 18-25 and Tr. Pg. 85 Line 12-19). Respondent conveyed that belief to opposing counsel during the July 31, 2018 witness statement. (Tr. Pg. 85 Line 24-25 and Pg. 86 Line 1-7) While Respondent agreed that counsel had stipulated to witness identify in past depositions they had never stipulated to admissibility of an unsworn statement. (Tr. Pg. 95 Line 10-23) There is no

deposition without a sworn testimony. (Pg. 95 Line 24-25 and Pg. 96 Line 1-3) Respondent texted this belief to the witness during the witness examination. (Tr. Pg. 85 Line 20-23) This belief was further confirmed when opposing counsel objected to characterizing the witness answers as "testimony" demonstrating opposing counsel also believed the witness answers on July 31, 2018 were inadmissible. (Pg. 85 Line 24-25 and Pg. 86 Line 1-7)

While opposing counsel, toward the end of the deposition, did acknowledge with witness's identity, there is no stipulation to admissibility further reinforcing Respondent's belief that the July 31, 2018 proceedings were nothing more than an "expensive dress rehearsal" (Tr. Pg. 87 Line 6-9) Comparing the July 31, 2018 proceeding to a simple conversation within a group, Respondent agreed that participants could learn something about the claim in as much as people learn information from any conversation. (Tr. Pg. 92 Line 16-25 and Pg. 93 Line 1-6)

Because everyone had prepared, everyone had scheduled time to attend the deposition, and his office was responsible for accidentally scheduling the court reporter and the witness at separate locations, Respondent proceeded with what he believed to be a "dress rehearsal" examination of the witness on July 31, 2018. (Tr. Pg. 91 Line 10-17) Just like

a theatre play production, the actors say their lines in costume on stage, but no one cares if the actors look at their scripts or get assistance from their directors. Respondent testified there was no expectation or intent to use the July 31, 2018 witness statement as evidence in subsequent court proceedings.

The Respondent, days after the July 31, 2018 unsworn witness statement, would file motion with the Judge of Compensation Claims on August 5, 2018, asking the court to substitute telephonic testimony at trial and or offered a substitute deposition as remedy to cure the problems on July 31, 2018, which included no attorney communication while examination was in progress and presence of a court reporter to identify and swear the witness as required by law. (TFB Ex. 21 Pg. 4 Line 22-25 and Pg. 5 Line 1-7) Opposing counsel objected to the witness' telephonic appearance at trial and the parties would later depose the witness on February 19, 2019.

Because of illness or the rarity of setting his own client's deposition, Respondent had forgotten that as the noticing party he would conduct the initial direct examination of the Adjustor. Attorney Villaverde actually reminded him that the deposition was his, forcing him to decide whether to proceed or reschedule the matter. (Tr. Pg. 30 Line 19-25 and Pg. 31 Line 1-7) Embarrassed by the mistakes made in coordinating and preparing for the

deposition only a few weeks before trial, Respondent proceeded with the witness examination believing the witness statements were inadmissible even in the more procedurally relaxed workers' compensation hearings.

Believing that the July 31, 2018 proceedings were a "dress rehearsal" and needed to be retaken properly with the court reporter present with the witness, the Respondent casually began texting messages to his client using his laptop. The Respondent has acknowledged this was poor judgment regardless of whether he reasonably believed the witness statement were unusable for any purpose and would have to be redone. (ROR Pg. 3). Respondent mistakenly believed that because the witness was not sworn or identified at the beginning, the witness communication was not prohibited.

During the course of the instant Bar hearing, the parties, counsel and the Referee listened to the audio recording of the July 31, 2018 witness statement. Under the unusual circumstances of the July 31, 2018 witness statement, Respondent believed he was not prohibited from client communication. Respondent testified that the communication was done to encourage his client, prevent mistreatment of his client and prevent his client from making misstatements of fact. During the July 31, 2018 unsworn statement, Respondent in light of Attorney Villaverde' repetitious speaking objections (which flew in the face of what should have been a relaxed

exchange of information) encouraged his client texting, “you’re doing great she is just trying to rattle you with objections.” Respondent acknowledged the strangeness of doing a direct examination of his own client in deposition texting, “So awkward asking you the questions first.” At 10:19 AM, Attorney Villaverde asks the witness whether she remembered discussing the late settlement checks during another deposition with a different attorney in an unrelated case five months earlier. Because this attorney takes this Adjuster deposition on a weekly basis on hundreds of different cases, the witness does not recall what was discussed. The witness does recall the deposition because this was the rare occasion that Attorney Villaverde drove from Miami to Orlando to appear live for the Adjuster deposition. Respondent saw this as an unfair question and given the unusual circumstances of the July 31, 2018 proceedings, texts at 10:19 AM “You don’t” then at 10:20 AM “as to settlement checks expiration” then “You remember the deposition but not discussing checks.” Respondent, recognizing the witness will have difficulty finding specific information within electronic claims file notes for nine separate work injury claims, orients the witness to her electronic file within a specific date range texting at 10:21 AM “Just review notes from 02/20/2018 forward” to find the information needed to answer the pending question accurately. The witness, then still having difficulty searching through many

electronic claims files, Respondent then texts at 10:23 AM “Be careful just say” “you may not see today” reminding her that as discussed in deposition preparation, just because she cannot find information during the limited time frame to answer the question does not mean the information does not exist. Respondent then at 10:25 AM asked if the witness required a break which was ultimately taken just before 11:40 AM. None of the witness statements during this time frame were found by the Judge of Compensation Claims to false, misleading or incomplete.

During the course of the July 31, 2018 proceedings Attorney Villaverde heard “swooshing” sounds and asked Respondent to stop using any mobile devices. (Sanc. Tr. Pg. 18 Line 24-25 and Pg. 19 Line 7-15) Respondent was using his laptop to manage his text messaging which had a text messaging function known as “iMessage.” (Sanc. Tr. Pg. 17 Line 14-25 and Pg. 18 Line 1-8) When using this device and application, the texts typed on one device appear on every family member’s device, i.e., phone, laptop, desktop and iPad. Respondent testified at the sanction hearing that he believed Ms. Villaverde was asking about texting with his mobile phone and while he was not technically using the mobile phone for messaging, he understood that his answer was misleading, and he should have disclosed the messaging with his laptop. He agreed that his answer had been misleading. (Sanc. Tr. Pg.

19 Line 7-19)

A brief recess from the witness examination was taken at 11:38 AM. During the break Respondent sent the CMS Release signed by the claimant March 28, 2018 and received from Attorney Villaverde. The witness continued searching for the March 28, 2018 release in her own electronic file and located same per text sent at 11:44 AM. Respondent then at 11:45 AM texted the witness that she would need to testify telephonically at the merits hearing. These texts did include reference to and pictures of a puppy.

The participants reconvened after the break at 11:50 AM. The texts Respondent inadvertently sent to Attorney Villaverde were received at 11:53 AM. (TFB Ex. 4) The questions focused on when the witness had received the CMS Release. The witness had already located the CMS Release during the break. Respondent sent the text message to the witness because Attorney Villaverde was not allowing the witness to put her answer on the record. She repeatedly talked over the witness and because the court reporter was not present with the witness, Respondent was not certain that the witness answers were recorded. Respondent texted the witness in an effort to repeat her answer which was the March 28, 2018 CMS Release. Respondent texted at 11:53 AM “Just say it anyway” “just say 03/28”. Respondent continued to prompt the witness to repeat her answer texting at

11:54 AM “In addition to the 03/28/2018 email containing the signed release I show…” (TFB Ex. 4)

Attorney Villaverde continued to press the witness for a different answer asking her to search her electronic files containing hundreds of documents which given the time constraints was not feasible. As such, similar to the guidance given to the witness in pre-deposition texted 11:55 AM “Don’t Give an absolute answer” and “All I can see at this time but I cannot rule out the existence.” (TFB Ex. 4) This guidance was intended to let the witness acknowledge that given the vast number of documents within the electronic claims file, the witness could not search the entire claims file and so could not rule out the existence of such information within the file. Getting the witness to give absolute answers is nearly always a trap and Respondent reminded witness of this in the text sent at 11:55 AM. Because Ms. Villaverde continued with questions that had been asked and answered. Respondent texted at 11:56 AM “Then say that is the best answer at this time.” (TFB Ex. 4)

In reviewing whether some of the content of Respondent’s text communications were common, Mr. Mallen having practiced in workers’ compensation for thirty years, testified that many times he had instructed witnesses not to give an absolute answer. He had also warned the witness

of a trap (Sanc. Tr. Pg. 61 Line 2-11) Mr. Mallen explained in workers compensation “my clients get shown documents all the time will say here’s a 13-week wage statement to the penny. Is this what you earned in the three months before your accident seven years ago. I say, you know, you can tell him if that looks about right but don’t’ say yes or no until you compare it to your checks.” (Sanc. Tr. Pg. 61 Line 12-24)

Following the suspension of the July 31, 2018 witness proceedings Respondent sent a text to Ms. Villaverde that, “[t]his was an honest error. I was attempting to provide direction to the document during the break. I saw the text had not gone through so hit send again and saw I texted you. Let me know what we need to do.” Respondent believed that the texts inadvertently sent to Ms. Villaverde on July 31, 2018 had occurred around the break time which ended 11:50 AM. Later through research he was able to extract the specific time entries for each text and notified the Judge that his texts to Ms. Villaverde had begun at 11:53 AM. Ms. Villaverde also testified she was initially unable to extract the specific time entries for each text. (Tr. Pg. 51 Line 4-12)

Several days after the July 31, 2018 deposition, Respondent learned from another attorney in his Miami office, that Attorney Villaverde had attempted to offer the texts received during the July 31, 2018 deposition, in

another proceeding in an unrelated case. Because these communications were attorney client communications inadvertently sent by Respondent to Attorney Villaverde, the Respondent pursuant to Rule 1.285, Fla. R. Civ. P., prepared correspondence advising opposing counsel to act in accordance with the rule which states in pertinent part, “In order to assert the privilege, the party, person, or entity shall, within 10 days of actually discovering the inadvertent disclosure, serve written notice of the assertion of privilege on the party to whom the materials were disclosed. The notice shall specify with particularity the materials as to which the privilege is asserted, the nature of the privilege asserted, and the date on which the inadvertent disclosure was actually discovered.” (*See* Rule 1.285(a), Fla. R. Civ. P.) Further Respondent requested Ms. Villaverde destroy the inadvertent disclosure as is a duty of the recipient under Rule 1.285(b), Fla. R. Civ. P., which states the “[d]uty of the Party Receiving Notice of an Assertion of Privilege. A party receiving notice of an assertion of privilege under subdivision (a) shall promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material. The party receiving the notice shall also promptly notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule. That party shall also take reasonable steps to retrieve the materials disclosed.

Nothing herein affects any obligation pursuant to R. Regulating Fla. Bar 4-4.4(b)". (Emphasis Added)

Respondent had no intent to use the July 31, 2018 proceedings as evidence or discovery. Because Respondent believed the July 31, 2018 witness statements were not admissible and needed to be rescheduled and redone, he filed motion with the Judge of Compensation Claims on August 5, 2018 requesting permission for the Adjuster to testify telephonically at the upcoming trial scheduled shortly thereafter. This hearing occurred on August 15, 2018. (TFB Ex. 21) The motion further offered as an alternative, to reschedule the Adjuster deposition to be taken correctly in the presence of the court reporter to be properly sworn and identified. (TFB Ex. 21 Pg. 3 Line 14-21) This was the remedy Respondent believed was supported by the case precedent filed with the Judge of Compensation Claims for the August 15, 2018 hearing. (TFB Ex. 21 Pg. 5 Line 21-25 and Pg. 6 Line 1-21)

The Judge ultimately granted the Respondent's motion issuing an order striking the July 31, 2018 witness statement. The Judge later vacated that ruling which in part reinstated the July 31, 2018 witness statement and ordering a supplement to be taken of the Adjuster allowing Attorney Villaverde an opportunity to examine the basis of the witness answers and further determine what, if any, impact the text communications had made on

the answers.

The parties appeared on August 15, 2018 before the Judge of Compensation Claims on multiple motions filed by both counsels. Respondent began with their pending Motion to Allow Adjuster Testimony at the Final Merits Hearing which had been rescheduled for September 11, 2018. (TFB Ex. 21 Pg. 3 Line 14-21) Ms. Villaverde objected to the telephonic appearance, arguing instead for video conference at the local OJCC in Orlando, or a coordinated deposition, which she conceded Respondent had already offered to schedule at their expense. (TFB Ex. 21 Pg. 4 Line 22-25 and Pg. 5 Line 1-2) Respondent informed the Judge that the additional deposition of the witness was ultimately unnecessary but for the objection to the authenticity of the adjuster documents. (TFB Ex. 21 Pg. 46 Line 10-18) Ms. Villaverde did not agree to stipulate to authenticity of the dated documents beyond the settlement checks at issue in the underlying case. (TFB Ex. 21 Pg. 47 Line 6-18)

Before the next deposition of the Adjuster, Renee Gray, Ms. Villaverde requested ruling on the pending motion for *in-camera* inspection of the July 31, 2018 attorney client text communications. (TFB Ex. 21 Pg. 5 Line 8-20) Respondent cited to case authority provided to the Judge which held that an appropriate remedy to cure attorney client communication during deposition

would be to hold an additional deposition without that communication. (TFB Ex. 21 Pg. 5 Line 21-25 and Pg. 6 Line 1-21)

Respondent pointed out to the Judge that at the time of the hearing, he did not have client authority to waive attorney client privilege for the July 31, 2018 client communication. (TFB Ex. 21 Line 21-24) Ms. Villaverde argued that only an *in-camera* inspection of the electronic data in her possession and Respondent's possession would inform a ruling on the question of whether the text communication was discoverable to be used in later proceedings. (TFB Ex. 21 Pg. 7 Line 19-25 and Pg. 8 Line 1-12) Respondent argued that scheduling an additional deposition of the Adjuster/Witness was the best remedy to addressing the many issues raised by Ms. Villaverde in her own motions before the Judge at hearing. The issues included, but were not limited to, the absence of any stipulation to admissibility of the witness statement made in the absence of a sworn witness. (Pg. 9 Line 7-25 and Pg. 10 Line 1-6)

Respondent pointed out that he had notified Ms. Villaverde that he had invoked Rule 1.285 under the Florida Rules of Civil Procedure based on Ms. Villaverde producing the text communications she had received on July 31, 2018 to this same Judge of Compensation Claims days later in the unrelated matter of *Theresa Flowers v. American Airlines*, a separate case in which

Respondent was not defense counsel. (TFB Ex. 21 Pg. 13 Line 16-22) Respondent believed this was an attempt to use inadvertently received attorney client communication to gain an unfair tactical advantage in litigation, i.e. extortion. Even the Judge had difficulty understanding at hearing how the text messages would have any bearing on the July 31, 2018 examination of the Adjuster which would focus on dates of documents stating as follows:

> "… That's what I am trying to understand Ms. Villaverde I am really stuck on this relevancy issue because you know it seems to me now it seems to me that most of the information that is going to come about whether penalties and interest are due based on settlement documents is based on a document. And so what is the relevance in reference to this adjuster deposition testimony?" (TFB Ex. 21 Pg. 31 Line 17-25)

In the course of argument over the relevancy of the July 31, 2018 text communications, Respondent did refer to pictures of puppies as an example. (TFB Ex. 21 Pg. 24 Line 23-25) Respondent did not argue the texts were limited to pictures of puppies or communication with his family. The Judge did not give the impression that she believed Respondent had attempted to mislead the content of the text communications once she did review the text communications *in-camera*. Recall that the Judge had already seen the texts

in Ms. Villaverde' s possession in the earlier *Theresa Flowers v. American Airlines* hearing. The Judge already knew the texts were more than pictures. (TFB Ex. 21 Pg. 13 Line 16-22) Ms. Villaverde did admit to same and argued that she had not offered the July 31, 2018 text communications into evidence but instead used the texts as a basis to ask additional questions of a witness in a separate unrelated case. (TFB Ex. 21 Pg. 33 Line 17-25 and Pg. 34 Line 1-13)

Further, Respondent during the August 15, 2018 hearing also described another text communication as follows:

> "this occurred after Ms. Villaverde yelled over the answers of my client on three occasions to the extent where the court reporter said hey guys I cannot hear you guys… And I called for a break and when we came back from break she [witness] gave the answer" (TFB Ex. 21 Pg. 17 Line 9-18)

This was a description of communication regarding the much-discussed March 28, 2018 CMS Release. The Judge understood the texts went beyond pictures of puppies.

The Judge pointed out that the essence of Ms. Villaverde' s argument was that the text from Respondent had resulted in an answer other than what the witness would have otherwise given at the time. (TFB Ex. 21 Pg. 42 Line

21-25 and Pg. 43 Line 1-2) Ms. Villaverde pointed out that the July 31, 2018 transcript contained Respondent acknowledging receiving a text from his daughter. There is nothing in the transcript of the August 15, 2018 hearing where Respondent represented to the court that the texts were limited to this instance. (TFB Ex. 21 Pg. 43 Line 10-16) Respondent in the August 15, 2018 hearing did not represent to the Judge that his text messages were limited to his wife and daughter but did acknowledge text to his family were among the communications. The Judge in the subsequent order determining which text messages were discovery after *in-camera* production did not conclude that Respondent had misrepresented the text messages as limited to pictures or text from his family.

Ms. Villaverde argued the crime-fraud exception to attorney client privilege asserting the fraud as any change in the witness answers on July 31, 2018 based on the text communication. (TFB Ex. 21 Pg. 18 Line 1-17) Respondent did argue, based on the case authority presented at that hearing, that he was not concerned about the content of the text communications and instead was concerned about the potential precedent in allowing a party to require *in-camera* inspections of any attorney client communication based on an allegation that a crime had been committed through that communication. (TFB Ex. 21 Pg. 19 Line 17-25 and Pg. 22 Line

6-25) Respondent did argue to the Judge that Ms. Villaverde' s efforts to produce the text communications were seen as an effort to extort a better settlement on whether penalties and interest were due on settlement proceeds received by the Ms. Villaverde' s client five months before the August 15, 2018 hearing. The text communications would be of no help to the court in disposing of the limited issues. (TFB Ex. 21 Pg. 23 Line 12-25 and Pg. 28 Line 16-25 and Pg. 29 Line 1-6) Respondent believed that case precedent did not prevent a client witness from speaking to their attorney during deposition and provided for replacement deposition as remedy to issue at bar before the Judge of Compensation Claims.

Respondent testified that this was his opinion at that time and noted that circulating the text messages before the Judge had ruled on the question of privilege was an attempt to create an unfair tactical advantage commensurate with his earlier concerns pursuant to Rule 1.285, Fla. R. Civ. P.

Respondent ultimately produced the text communications between himself, the witness and Ms. Villaverde. Later at the September 24, 2018 hearing, the Judge of Compensation Claims clarified that her order included any and all text communication sent or received during the course of the July 31, 2018 witness examination. Respondent was unable to recover the text

sent from his daughter and communicated same explaining that he had therefor produced all text communications in his possession to the Judge. The Judge accepted this explanation and took no further action regarding compliance with her order.

Ultimately the Judge rendered decision regarding the discoverability of text communications that were testimonial in nature. These did not include texts sent during the 11:38 to 11:50 AM break. Nevertheless, because Respondent secured permission for waiver of the text communications not deemed discoverable and produced these voluntarily. This was done in the spirit of full transparency regarding the nature of the communication on July 31, 2018.

Respondent filed their Motion for Summary Final Order on the limited question of whether the Judge of Compensation Claims had jurisdiction under Chapter 440 Florida Workers' Compensation Law to determine whether the Employer/Carrier had violated Section 440.105, Florida Statutes. Respondent cited to the case on point answering the well settled question in the negative given the authority of the Judge of Compensation Claims are limited to those enumerated by statute. The Judge of Compensation Claims agreed and granted the Respondent's Motion for Summary Final Order. Ms. Villaverde appealed but the Florida First District

Court of Appeals affirmed the lower court ruling pursuant to well settled case precedent. (*See McArthur v. Mental Health Care, Inc./Summit Claims Ctr.,* 35 So. 3d 105, 107 (Fla. 1st DCA 2010)(holding Florida Statute 440.105 does not grant the JCC any authority to determine whether an attorney or carrier has violated Section 440.105, nor does it give the JCC any authority to impose sanctions for such violations.

The Judge of Compensation Claims ruling notwithstanding, Ms. Villaverde on behalf of her client, pursued sanctions remedies which potentially allowed the Judge to strike the defenses of the employer/carrier, award additional fees and costs or refer the Respondent to the Florida Bar as per § 440.106, Fla. Stat. The underlying dispute was ultimately resolved between the parties which removed the evidentiary hearing for sanctions filed against either party from the docket. The presiding Judge of Compensation Claims did not refer the Respondent to the Florida Bar.

The parties convened for trial on the underlying claims to resolve claims for post settlement penalties and interest. During the course of the workers' compensation trial proceedings the Judge of Compensation Claims reviewed the evidence the parties intend to offer into evidence. This is the time the Judge hears any argument regarding the probative value of the evidence. The injured worker is given first opportunity to identify and offer

evidence to the Judge as the trier of fact. Attorney Villaverde, on behalf of her client, tendered the July 31, 2018 witness transcript. At that time Ms. Villaverde did not challenge the accuracy or the credibility of the witness statements. There was no argument to limit the July 31, 2018 witness transcript in any way. Because the parties had been given opportunity to examine the texts and review the basis of the answers given, Respondent did not object to consideration of the July 31, 2018 witness statements ultimately making the deposition a joint exhibit. Ultimately the Judge of Compensation Claims also accepted the witness statement without limitation. If either party, or the Judge, had considered the witness answers as anything other than truthful, accurate and complete this would have been argued in trial and addressed by the Judge in the final compensation order.

Following conclusion of the Bar final hearing and sanctions hearing, Judge James Hill ("Referee") published his report of October 1, 2020. The Report of Referee was thorough and detailed, including the following findings. The undisputed facts show that because the July 31, 2018 deposition was not by video, the court reporter refused to swear in the witness and the testimony was unsworn. (ROR Pg. 2) There was no agreement as to the witness identification until the final stages of the examination. Respondent believed that the July 31, 2018 proceedings would

need to be redone or the witness would need to testify at trial. (ROR Pg. 3) The transcript did show that Ms. Villaverde objected to the characterization of the witness' answers as testimony given the statements were unsworn. Under these circumstances, Respondent incorrectly believed that communicating with the witness while the deposition was in progress was not improper. (ROR Pg. 3)

The undisputed evidence shows that among the texts sent by Respondent to the witness was a communication at 11:45 AM informing the witness she would need to testify telephonically again at trial (ROR Pg. 3) Respondent's texts included coaching and specific directions on how to respond to Ms. Villaverde' s questions. That said, no evidence was presented at the Referee hearing or in the underlying workers' compensation litigation that any of the witness answers were untruthful. In fact, Attorney Villaverde was the initial moving party to offer the July 31, 2018 transcript into evidence in the underlying case without objection. The trial record of the proceedings shows the Judge of Compensation Claims also accepted the witness' answers as truthful. (Emphasis Added) (ROR Pg. 3)

Respondent filed motion on August 6, 2018 asking the Judge of Compensation Claims to allow the witness to testify telephonically and strike the July 31, 2018 transcript. Respondent offered a second deposition of the

witness. The Judge of Compensation Claims granted that request striking the July 31, 2018 transcript but this was later vacated on September 17, 2018. The Judge of Compensation Claims ultimately entered an order finding the text messages dealt with "testimonial matters and some of them constituted witness coaching." (ROR Pg. 5) This order was later clarified on October 5, 2018 to include any texts sent or received during the July 31, 2018 witness statement, not just those between the witness and counsel.

Respondent testified that he searched for his daughter's text but was unable to retrieve the specific texts due to his technological limitations. There was no evidence that the Judge of Compensation Claims found the inability as willful or wanton disregard of a judicial order. (ROR Pg. 6) Respondent did volunteer, with his client's permission, to produce the remaining texts that the Judge of Compensation Claims had deemed not discoverable in the spirit of full transparency and so that the Bar and the public would have full access to the subject text communications. (ROR Pg. 6)

Respondent, witness David Mallen and witness Frank Johnson, all of whom are career workers' compensation attorneys, testified consistently as to the nature of workers' compensation in as much that unlike traditional civil litigation, workers' compensation proceedings are informal with Judges having flexibility in applying rules of procedure. Both Mallen and Johnson

testified to Respondent's long reputation of honesty and fairness within the workers' compensation community. (ROR Pg. 6)

Respondent testified that he felt his client/witness was being mistreated by Ms. Villaverde constantly talking over the witness' answers or interrupting with speaking objections. Respondent testified further that Ms. Villaverde deposes this witness repeatedly over hundreds of cases and was compelled to come to the aid of his client. (ROR Pg. 7)

The Referee did ultimately conclude that Respondent's answer to Ms. Villaverde' s question about the text messages was misleading. The texts starting at 10:19 AM to the witness regarding how to answer questions was contrary to honesty. Ms. Villaverde, who was then in possession of the text messages, was ultimately given opportunity to conduct a second deposition on February 19, 2019 to determine whether the witness' answers were accurate and whether the answers existed independently of the text messages from the Respondent. (ROR Pg. 9)

The Referee, having reviewed the record of the underlying September 19, 2019 workers compensation trial proceedings and resulting October 17, 2019 Final Compensation order, found no evidence that the Judge of Compensation Claims had found the witness' answers to be untruthful, incomplete or misleading. (ROR Pg. 9) The Referee also noted

that Attorney Villaverde also did not appear to challenge the accuracy of the witness' answers, going so far as to offer the July 31, 2018 transcript into evidence without objection at the beginning of the trial proceedings. Based on the Referee findings, Respondent was found to have violated Rule 3-4.3 and Rule 4-3.4(a). The Referee found Respondent had not violated Rule 4-3.4(b), Rule 4-3.4(d) or Rule 4-8.4(d). Respondent did not appeal the findings or recommendation of the Referee.

Because the Referee identified clear record evidence in support of his finding that Respondent had not violated Rule 4-8.4(d) and the Florida Bar did not meet their burden of demonstrating rule violation by clear and convincing evidence, the Referee finding must stand. Because the witness was not sworn or identified at the beginning of the July 31, 2018 witness examination, Respondent, having practiced exclusively in the informal practice of workers' compensation mistakenly believed that he was permitted to communicate with his client/witness based on his reasonable belief that the entire deposition was inadmissible and would be redone at a future date. These were mistakes, but honest mistakes. Respondent concedes that his answer to Ms. Villaverde about putting away his phone while technically correct was misleading and improper.

Ultimately the end result at trial were witness answers on July 31, 2018

that were not challenged as inaccurate in any way during any stage in the underlying workers' compensation proceedings or the instant Bar proceedings. The witness had testified truthfully.

Respondent's request for relief under Rule 1.285, Fla. R. Civ. P were precisely the remedy following the inadvertent production of privileged attorney client communication. This rule provides for the recipient's destruction of the inadvertently received communication to avoid circulation to other recipients. Respondent was justified in this request given Ms. Villaverde's attempt to offer these then-privileged text communications in a separate hearing on an unrelated case with the same Judge of Compensation Claims.

Respondent reasonably believed that given the attempted circulation at another hearing and the lack of any relevancy to the underlying issues, that Ms. Villaverde was using the text communications she received as an attempt to gain an unfair tactical litigation advantage. Because Ms. Villaverde was using these to press for a better settlement of the underlying issues, Respondent interpreted this as extortion of his client. He argued this at the August 15, 2018 hearing before the Judge of Compensation Claims.

During the August 15, 2018 hearing Respondent clearly did not intend to use the July 31, 2018 witness statements as evidence. He had already

filed motion seeking to substitute telephonic testimony at trial, for the Judge to strike the July 31, 2018 witness statement and offered a second deposition at his expense. In explicably, Ms. Villaverde ultimately offered the July 31, 2018 witness transcript into evidence without argument as to the truthfulness or credibility of that witness.

II. A THIRTY DAY SUSPENSION IS AN ALREADY- HIGH DISCIPLINE FOR THE CONDUCT IN QUESTION AND IT SHOULD NOT BE INCREASED.

A. Standard of Review.

The Respondent again adopts the Bar's statement of the standard of review. "In reviewing the referee's recommendation as to discipline, the Court's scope of review is broader because the Court has the ultimate responsibility to order the appropriate sanction. *E.g., Fla. Bar v. Committee,* 916 So. 2d 741, 748 (Fla. 2005). A referee's recommendation as to discipline will not be upheld if it is contrary to Florida's Standards for Imposing Lawyer Sanctions or does not have a reasonable basis in existing case law. *Id.*"

B. Suspension of Thirty Days is High Under the Facts

Respondent contends that the cases cited by the Bar are not analogous to the case at hand. In most of those cases, the Referee had before it a Rule 4-8.4(c) violation. That was not alleged in the Complaint

here, meaning that after its investigation, the Grievance Committee declined to find probable cause to prosecute an alleged violation of that rule dealing with dishonesty, fraud, deceit or misrepresentation.

Respondent contends that *Fla. Bar v. Cocalis*, 959 So. 2d 163 (Fla. 2007) - public reprimand and participation in Bar's practice and professionalism program – provides guidance as to the appropriate sanction here. Cocalis' misconduct consisted of telephoning an adverse party's treating physician and failing to advise the opposing counsel that he had inadvertently received an adverse party's medical records prior to trial. Like Respondent in the present case, Cocalis had no previous disciplinary record. Respondent understands and concedes that this Court has made clear that it is dealing more harshly with attorneys now than in years past. Thus, Respondent understands that this Court would not view a public reprimand as the appropriate discipline for Cocalis' or Respondent's conduct in 2021. However, the conduct did not leap from being public-reprimand appropriate in 2007, to warranting a rehabilitative suspension. Despite the Bar's extraordinary efforts to cast this as a case about dishonesty even without a Rule 4-8.4(c) alleged violation, it simply is not a case that warrants more than a 30-day suspension. The Referee got it right.

Respondent contends that the Bar is taking liberties in arguing how this

Court's decisions should be applied to the case at hand, warranting harsher discipline. As an example, the Bar's Initial Brief, on page 24, contains the statement "However, by comparison, Respondent's misconduct is significantly more serious than the respondent in Forrester." That simply is an outrageous statement. Respondent was texting his daughter, and this was never disproven. He simply did not have the technological skills to recover the texts from whatever app his daughter was using, and it must be remembered that he was messaging from two devices – the fact that these messages didn't display alongside the other messages produced *in-camera* does not prove that said messages never existed. (Tr. Pg. 105-107) Respondent did not know when the texting occurred until later. And Forrester was obstructing a formal deposition and hiding evidence, while Respondent was trying to ensure that his witness gave an accurate and truthful answer, instead of being bullied and tricked by opposing counsel. Forrester's conduct was substantially more egregious, and she received a sixty-day suspension even though she had a disciplinary history and even though she'd been found guilty of a Rule 4-8.4(c) violation. Thus, that case does not warrant an increase in discipline for the Respondent, nor do any of the other cases cited by the Bar.

The Respondent urges the Court to be mindful of the fact that the

events in question took place in 2018, before Covid-19 and the current prevalence of remote proceedings. There was little guidance for attorneys at that time, and in fact, only now is The Florida Bar promulgating standards for best practices. (See Appendix A - The Florida Bar Recommended Best Practices Guide for Remote Court Proceedings December 3, 2020)

In Footnote 7 of the Initial Brief, the Bar concedes that there is no authority for disciplining an attorney for witness coaching. The Respondent did not coach toward false answers or enhanced answers. He tried to ensure accurate answers. From the standpoint of due process, it is inconceivable that the Respondent could expect to receive a suspension for what took place in a botched attempt at a deposition, while trying to help a witness give honest, accurate, truthful answers. The stumble came upon being caught, and flustered, trying to deny what he had done. For a moment's failure to think, Respondent is facing a thirty-day suspension. That is more than enough.

This Court has stated many times, that the sanction "must be fair to society, fair to the attorney, and severe enough to deter other attorneys from similar misconduct." *Fla. Bar v. Committe*, 916 So.2d 741 (Fla. 2005). To increase the Respondent's discipline to more than thirty days is unfair to Respondent.

Just as the Bar concedes that there was no case law putting Respondent on notice of a sanction for witness coaching, the Respondent concedes that this appeal was necessary.

CONCLUSION

The record evidence supports the Referee's conclusion that Rule 4-8.4(d) was not violated. In light of the totality of the circumstances – the Respondent's lack of a prior disciplinary history, the Respondent's reputation for professional character, and the lack of case law or other guidance in respect to remote proceedings and discipline for witness coaching, the thirty-day suspension is severe. The opinion to come from this appeal will provide a further sanction for Respondent, in the damage to his reputation and the public embarrassment. The findings and recommendation of the Referee should be upheld.

Finally, while the Bar has the right to request oral argument, the Respondent is not doing so, for this reason. The opinion to come from this appeal is coming at a crucial time. The sooner this opinion is published, the sooner the members of The Florida Bar will have a greater understanding of the importance that the Bar and this Court place on maintaining a pristine environment for witness testimony during remote proceedings. The Respondent, in the interest of the entire membership of The Florida Bar,

respectfully requests that the Court expedite its ruling and opinion, so that something good will come from his dreadful mistake.

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, a copy of the foregoing was E- filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida with a copy provided via email to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is prepared in Arial, 14-point font and is 8972 words, in compliance with the applicable font and word count limit requirements pursuant to Rule 9.045(e) of the Florida Rules of Appellate Procedure.

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