

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.

THE FLORIDA BAR'S INITIAL BRIEF

Daniel James Quinn, Bar Counsel
Florida Bar No. 122435
The Florida Bar
1000 Legion Place, Suite 1625
Orlando, Florida 32801
(407) 425-5424
dqinn@floridabar.org
orlandooffice@floridabar.org
kperaza@floridabar.org

Patricia Ann Toro Savitz, Staff Counsel
Florida Bar No. 559547
Joshua E. Doyle, Executive Director
Florida Bar No. 25902
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
psavitz@floridabar.org
jdoyle@floridabar.org

M. Hope Keating
Florida Bar No. 0981915
Barry Richard
Florida Bar No. 105599
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, FL 32302
(850) 222-6891
keatingh@gtlaw.com
richardb@gtlaw.com
greenel@gtlaw.com

Counsel for Complainant, The Florida Bar

RECEIVED, 12/28/2020 03:52:31 PM, Clerk, Supreme Court

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
A. Pertinent Facts	1
B. Course of Bar Disciplinary Proceedings and Disposition by the Referee.....	8
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. THE REFEREE’S CONCLUSION THAT RESPONDENT IS NOT GUILTY OF VIOLATING RULE 4-8.4(d) IS ERRONEOUS BECAUSE THE RECORD EVIDENCE CLEARLY CONTRADICTS THE CONCLUSION.....	12
A. Standard of Review	12
B. Rule 4-8.4(d).....	12
II. A SUSPENSION OF NINETY-ONE DAYS IS THE APPROPRIATE DISCIPLINE GIVEN THE FACTS, CASE LAW, AND FLORIDA’S STANDARDS FOR IMPOSING LAWYER SANCTIONS.	19
A. Standard of Review	19
B. Suspension of Ninety-One Days is Warranted.....	20
CONCLUSION	29
CERTIFICATE OF SERVICE	31
CERTIFICATE OF COMPLIANCE.....	32

TABLE OF CITATIONS

	Page(s)
Cases	
<i>Fla. Bar v. Berthliaume</i> , 78 So. 3d 503 (Fla. 2011)	11, 12
<i>Fla. Bar v. Carswell</i> , 624 So. 2d 259 (Fla. 1993)	27
<i>Fla. Bar v. Committe</i> , 916 So. 2d 741 (Fla. 2005)	19
<i>Fla. Bar v. Draughon</i> , 94 So. 3d 566 (Fla. 2012)	11
<i>Fla. Bar v. Feinberg</i> , 760 So. 2d 933 (Fla. 2000)	11, 12, 13
<i>Fla. Bar v. Forrester</i> , 818 So. 2d 477 (Fla. 2002)	22
<i>Fla. Bar v. Lathe</i> , 774 So. 2d 675 (Fla. 2000)	11, 13, 25
<i>Fla. Bar v. Lopez</i> , 406 So. 2d 1100 (Fla. 1981)	27
<i>Fla. Bar v. Miller</i> , 863 So. 2d 231 (Fla. 2003)	23, 26
<i>Fla. Bar v. Mogil</i> , 763 So. 2d 303 (Fla. 2000)	13
<i>Fla. Bar v. Nicnick</i> , 963 So. 2d 219 (Fla. 2007)	22, 23, 26
<i>Fla. Bar v. Norvell</i> , 685 So. 2d 1296 (Fla. 1996)	13, 25
<i>Fla. Bar v. Nowacki</i> , 697 So. 2d 828 (Fla. 1997)	12
<i>Fla. Bar v. Petersen</i> , 248 So. 3d 1069 (Fla. 2018)	13

<i>Fla. Bar v. Scheinberg</i> , 129 So. 3d 315 (Fla. 2013)	13
<i>Fla. Bar v. Scott</i> , 810 So. 2d 893 (Fla. 2002)	13
<i>Fla. Bar v. Shankman</i> , 41 So. 3d 166 (Fla. 2010)	15
<i>Fla. Bar v. Tobkin</i> , 944 So. 2d 219 (Fla. 2006)	28
<i>Fla. Bar v. Von Zamft</i> , 814 So. 2d 385 (Fla. 2002)	13
<i>McArthur v. Mental Health Care, Inc.</i> , 35 So. 3d 105 (Fla. 2010)	8
<i>Pichirilo v. Am. Airlines</i> , 276 So. 3d 358 (Fla. 1st DCA 2019)	8

Statutes

§ 440.105, Fla. Stat.	7, 8
§ 440.106, Fla. Stat.	8

Rules Regulating The Florida Bar

Rule 3-4.3	8, 10, 24
Rule 4-3.4(a)	8, 10, 22, 23, 24
Rule 4-8.4(c)	24
Rule 4-8.4(d)	9, 10, 12, 13, 14, 17, 19

Florida's Standards for Imposing Lawyer Sanctions

2.3	9
3.2(b)(2)	27
3.2(b)(7)	27
3.2(b)(9)	27
6.1	20
6.1(b)	20, 21

6.2.....	21
6.2(b).....	20, 21
6.3.....	21
6.3(b).....	21
7.1.....	20
7.1(b).....	20
Other Authorities	
Fla. R. Civ. P. 1.285(b).....	3

STATEMENT OF THE CASE AND FACTS

A. Pertinent Facts

Respondent, Derek Vashon James, is a Florida attorney who represented an employer and its carrier in a workers' compensation case. (ROR¹ at 2; Tr. at 83:12-18²). The case settled for a sum of money. (TFB Ex. 14 at 2). However, the claimant/injured worker alleged that the original settlement checks were delivered to him after they had expired, and he was unable to cash the checks. (TFB Ex. 14 at 2; Tr. at 10:14-18). Thus, the claimant claimed penalties and interest for late payment of the settlement proceeds. (Tr. at 41:9-20). In response to this claim, Respondent set a deposition for Rene Gray, the adjuster assigned to claimant's file, for July 31, 2018. (Tr. 41:21 – 42:22). The deposition took place via telephone with the court reporter, Ms. Gray, Respondent, and Toni Villaverde, claimant's counsel, attending from four different locations. (TFB Ex. 19 at 1; Tr. at 45:15 – 46:4).³ The deposition began at 9:15 a.m. (TFB Ex. 5 at 1).

Respondent questioned Ms. Gray for about an hour, and then Ms. Villaverde began her cross-examination. (Tr. at 47:7-15). Soon after Ms. Villaverde began

¹ Citations to "ROR" are to the Report of Referee dated October 1, 2020.

² Citations to the transcript of the final hearing held on September 9, 2020, are to "Tr." followed by the page and line numbers. Citations to the transcript of the sanctions hearing held on September 17, 2020, are to "Sanc. Tr." followed by the page and line numbers.

³ The Florida Bar trial exhibits are cited to herein as "TFB Ex. __".

her cross-examination, she heard swishing and texting sounds. (Tr. at 47:24 – 48:6). Pursuant to the time-stamped deposition transcript, at 10:25 a.m., the following exchange occurred between Ms. Villaverde and Respondent:

MS. VILLAVERDE: I'm hearing, you know, like texts or dings going back and forth, and it's making me nervous. So I don't know who's receiving them, but could you put your phone away.

MR. JAMES: Toni, my daughter is getting out of tennis early today and I'm getting a text from her.

(TFB Ex. 5 at 45:18-24; Tr. at 11:22 – 12:5; 105:4-8). Respondent specifically denied that there were exchanges occurring pertaining to the deposition. (TFB Ex. 5 at 46:10-12). He agreed to put his phone away and the deposition continued. (ROR at 4; Tr. at 48:20 – 49:2).

A break was taken in the deposition from 11:39 to 11:50 a.m., and then Ms. Villaverde continued her cross-examination. (ROR at 8; Tr. at 49:3-11). She noticed that Ms. Gray was unwilling to provide direct answers to questions, and regardless of the question, Ms. Gray would have a response that was outside the boundaries of the question. (Tr. at 49:12-24). She also noticed that her phone was receiving texts. (Tr. at 49:25 – 50:1). During a long pause waiting for Ms. Gray to answer a question, Ms. Villaverde looked at her phone and noticed the texts she had been receiving were from Respondent. (Tr. 50:1-3). When she read them, she discovered that during her questioning of Ms. Gray, Respondent had inadvertently sent her the following text messages that were intended for Ms. Gray:

11:53 a.m.: Just say it anyway

11:53 a.m.: Just say 3/28

11:54 a.m.: In addition to the 03/28/2018 email containing the signed release I show . . .

11:55 a.m.: Don't give an absolute answer

11:55 a.m.: All I can see at this time but I cannot rule out existence

11:55 a.m.: It's a trap

11:56 a.m.: Then say that is my best answer at this time

(TFB Ex. 4 at 1; Tr. at 50:4-5).

Upon reading the texts, Ms. Villaverde suspended the deposition. (Tr. at 50:7-14). After the deposition ended, Respondent called Ms. Villaverde and tried to convince her that the text messages were sent during the break. (Tr. at 52:2-13). Respondent also sent Ms. Villaverde another text: "Toni, again, this 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 I hit send again and saw I texted you. Let me know what we need to do." (TFB Ex. 4 at 1; Tr. at 51:13-23).

Ms. Villaverde decided to raise the issue of the texts with the workers' compensation judge. (Tr. at 52:14-16). Thereafter, she received an e-mail from Respondent stating that he was asserting inadvertent disclosure of privileged attorney-client communications and demanding that Ms. Villaverde destroy the texts she had received to "compl[y] with the duties imposed under rule 1.285(b),

Fla. R. Civ. P.,” and giving her a deadline to do so. (TFB Ex. 11; Tr. 52:21 – 53:4; 53:16-22). He also accused her of “attempting to gain an unfair tactical advantage” by raising the issue of the texts. (TFB Ex. 11: Tr. at 53:11-15). In the e-mail Respondent continued to assert that the texts were intended to be sent to Ms. Gray during the recess. (TFB Ex. 11; Tr. 53:5-10).

Despite Respondent’s demands to the contrary, Ms. Villaverde filed an expedited motion for production and in-camera inspection of Respondent’s texts occurring during the deposition. (TFB Ex. 9 at 2; Tr. at 53:23 – 54:1). Respondent filed a response opposing the production and in-camera inspection. (TFB Ex. 9 at 2). A hearing was held on August 15, 2018. (TFB Ex. 21: Tr. 54:2-4). Throughout the hearing, Respondent argued that the attorney-client privilege should apply to the texts. (TFB Ex. 21). In doing so, he accused Ms. Villaverde of attempting to violate the rule of civil procedure pertaining to disclosure of privileged material. (TFB Ex. 21 at 12:16 – 13:22). Respondent continued to represent that he sent, or intended to send, the texts to Ms. Gray during a break in the deposition. (TFB Ex. 21 at 17:6-16, 28:7-8). At the same time, he also asserted that he sent the text messages because Ms. Villaverde “yelled” at Ms. Gray and was trying to “manipulate” the record and the evidence. (TFB Ex. 21 at 17:9-18). Respondent repeatedly accused Ms. Villaverde of attempting to “extort” him by raising the issue of the texts. (TFB Ex. 21 at 23:12-13; 28:14-15; 48:1). He further

represented to the judge that he was not “worried” or “concerned” about the content of the text messages with Ms. Gray because they consisted only of a picture of a puppy: “it’s a picture of puppy. It’s a picture of a puppy, you know, come on. Listen, that’s why I say I am not concerned about it, Judge.” (TFB Ex. 21 at 19:17, 21-22; 22:16-17; 24:18 – 25:2). He stated to the judge that he was otherwise only texting his wife and daughter during the deposition. (TFB Ex. 21 at 43:14-16).

On August 24, 2018, the judge issued an order granting the motion for in-camera inspection and ordered that Respondent deliver to her all text messages sent or received by Respondent from 9:15 a.m. (the start of deposition) until 12:00 noon (the conclusion of the deposition). (TFB Ex. 7). Subsequently, Respondent provided two pages of text messages to the court. (TFB Ex. 9 at 3). However, Respondent produced only texts related to the case and did not produce any texts involving his daughter. (ROR at 5). On September 28, 2018, the judge entered an order clarifying that Respondent was required to produce all text messages sent or received during the deposition. (TFB Ex. 9 at 4, 12). Despite the judge’s orders to Respondent to produce all text messages he sent or received from 9:15 a.m. to noon on July 31, 2018, and despite Respondent’s representation to the court that he would do so (TFB Ex. 9 at 4), Respondent never produced any text messages or

text threads between Respondent and his daughter. (TFB Ex. 10 at 2; Tr. at 58:18 – 59:2).

On October 5, 2018, and judge entered an order stating that she had reviewed the two pages of time-stamped messages produced to her by Respondent, the transcript of Ms. Gray’s deposition, and that she had listened to an audio recording of the deposition. (TFB Ex. 10). The judge found that the text messages between 11:53 a.m. and 11:56 a.m. (set forth above) that had inadvertently been sent to Ms. Villaverde had occurred during the deposition and not during a break in the questioning. (TFB Ex. 10 at 3). Therefore, these messages were not covered by the attorney-client privilege. (TFB Ex. 10 at 3). The judge also found that text messages occurring between 10:12 and 10:25 were not covered by the privilege because they occurred while the deposition was in progress. (TFB Ex. 10 at 3). The judge found that the following text messages were sent/received by the Respondent and Ms. Gray during Respondent’s questioning of Ms. Gray:

10:12 a.m. (Respondent): your (sp) doing great she is just trying to rattle You with objections

10:12 a.m. (Ms. Gray): (emoji of face with tongue stuck out)

10:12 a.m. (Respondent): So awkward asking you the questions first

10:13 a.m. (Ms. Gray): I know

(TFB Ex. 4; ROR at 7). The judge also found that soon after Ms. Villaverde began her cross-examination of Ms. Gray, the following text messages were sent/received between Respondent and Ms. Gray during the questioning:

10:19 a.m. (Respondent): You don't

10:20 a.m. (Respondent): As to settlement checks expiration

10:20 a.m. (Respondent): You remember the deposition but not discussing checks

10:20 a.m. (Respondent): yes

10:21 a.m. (Respondent): Just review notes from 02/20/2018 forward

10:23 a.m. (Respondent): Be careful just say

10:23 a.m. (Respondent): You may not see today

10:25 a.m. (Respondent): Take a break in 15 minutes?

10:25 a.m. (Ms. Gray): Up to you

(TFB Ex. 4; ROR at 7-9). The judge found that the non-privileged text messages “instruct[ed] the adjuster on how and what to respond to the questions being asked while the deposition was in progress.” (TFB Ex. 9 at 7). Therefore, the judge found that the texts dealt with “*testimonial matters* and some of them constitute witness coaching.” (TFB Ex. 9 at 7) (emphasis in original).

After the attorney-client privilege issue had been resolved, Ms. Villaverde attempted to raise a claim of fraud or bad faith under section 440.105, Florida Statutes, with regard to the text messages. (Tr. at 59:3-10; *see* TFB Ex. 18).

However, the workers' compensation judge found that she did not have subject-matter jurisdiction under the workers' compensation statutes to determine fraud or bad faith or to impose any sanctions for such misconduct. (Tr. at 59:11-20; TFB Ex. 19). The judge ruled that pursuant to section 440.106, Florida Statutes, the appropriate remedy for such a violation would be to pursue a remedy in circuit court or to pursue a grievance with a grievance committee under the jurisdiction of the Florida Supreme Court, i.e., The Florida Bar. (Tr. at 59:14-20; TFB Ex. 19 at 3). Ms. Villaverde appealed to the First District Court of Appeal. (Tr. at 59:21 – 60:7). On appeal, Respondent's law firm argued that the process by which an attorney or carrier may be determined to have violated section 440.105 would be under section 440.106 providing for a remedy in circuit court or The Florida Bar. (Tr. at 60:8-14; TFB Ex. 20 at 12). The First DCA agreed and affirmed. *Pichirilo v. Am. Airlines*, 276 So. 3d 358 (Fla. 1st DCA 2019) (citing *McArthur v. Mental Health Care, Inc.*, 35 So. 3d 105 (Fla. 2010) ("process by which an attorney or carrier may be sanctioned for violating section 440.105 is set forth in section 440.106").

B. Course of Bar Disciplinary Proceedings and Disposition by the Referee

Based on the rulings of the workers' compensation judge and the First DCA, Ms. Villaverde filed a grievance with The Florida Bar against Respondent. (TFB Ex. 1). This Court referred the complaint to a Referee, who conducted disciplinary

proceedings including an evidentiary hearing and a sanctions hearing. The Referee issued a Report of Referee finding Respondent guilty of violating Rules Regulating The Florida Bar 3-4.3 (prohibiting the commission by a lawyer of any act that is unlawful or contrary to honesty and justice), and 4-3.4(a) (prohibiting the unlawful obstruction of another party's access to evidence or otherwise the unlawful alteration or concealment of material that the lawyer knows or reasonably should know is relevant to a proceeding, or assisting another person to do any such act). (ROR at 10) The Referee recommended that Respondent be disciplined by paying the Bar's costs and by a suspension of thirty days. (ROR at 17-18).

The Florida Bar seeks review of the Report of Referee finding Respondent not guilty of violating rule 4-8.4(d) (prohibiting conduct that is prejudicial to the administration of justice). The Bar also appeals the disciplinary recommendation for Respondent and seeks a suspension of at least ninety-one days.⁴

SUMMARY OF ARGUMENT

During the course of a deposition that was conducted by telephone, Respondent sent the witness a series of text messages telling the witness what to say, what to remember, to avoid providing certain information, and to not give an absolute answer. Respondent then proceeded to lie to opposing counsel first

⁴ A lawyer who has been suspended for more than ninety days should not be reinstated without showing proof of rehabilitation. Fla. Stds. Imposing Law. Sancs. 2.3.

denying that he sent the messages at all and then, after being caught red-handed, denying that he had sent them during the course of questioning. After failing in his attempts to intimidate the opposing counsel into not disclosing to the court his misdeeds, Respondent made multiple misrepresentations to the workers' compensation judge in an effort to justify the texts and to prevent their production. But once she ordered the texts to be produced, the judge found that they occurred during the questioning of the witness, were "testimonial" in nature, and constituted witness coaching. However, in the additional litigation that followed, the judge found she had no subject-matter jurisdiction to impose sanctions.

In these disciplinary proceedings that ensued, the Referee found Respondent guilty of violating rule 3-4.3 that prohibits the commission by a lawyer of any act that is unlawful or contrary to honesty and justice, and guilty of violating rule 4-3.4(a) that prohibits the obstruction to and concealment of material relevant to a proceeding. Given the Referee's findings that supported these findings of guilt, along with the record evidence, the Referee should also have found Respondent guilty of violating of rule 4-8.4(d) that prohibits conduct in connection with the practice of law that is prejudicial to the administration of justice. Indeed, the record evidence contradicts the Referee's finding of not guilty.

The Referee recommendation of a thirty-day suspension is neither supported by the Referee's findings, nor does it have a reasonable basis in the record

evidence, in existing case law, or in Florida's Standards for Imposing Lawyer Sanctions. Given the seriousness of the misconduct, the discipline of a suspension of at least ninety-one days is warranted.

ARGUMENT

As this Court has explicitly and consistently stated: “basic, fundamental dishonesty . . . is a serious flaw, which cannot be tolerated because dishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members.” *Fla. Bar v. Berthiaume*, 78 So. 3d 503, 505 (Fla. 2011); *Fla. Bar v. Draughon*, 94 So. 3d 566, 571 (Fla. 2012). *See also Fla. Bar v. Feinberg*, 760 So. 2d 933, 938 (Fla. 2000) (“Truth is critical in the operation of our judicial system.”); *Fla. Bar v. Lathe*, 774 So. 2d 675 (Fla. 2000) (“there is no more serious impact upon the integrity of our judicial system” than attorneys who make misrepresentations to a court).

The case at bar involves dishonest conduct contrary to justice followed by an attempted cover-up that included multiple affirmative misrepresentations to opposing counsel, multiple affirmative misrepresentations to the court, along with deceitful, threatening, and unremorseful behavior. The Referee disregarded his own findings, the clear record evidence, and principles that go to the very core of our legal system in concluding that Respondent's misconduct was not prejudicial

to the administration of justice and by imposing a relatively minor suspension for some of the most egregious violations a lawyer can commit.

I. THE REFEREE’S CONCLUSION THAT RESPONDENT IS NOT GUILTY OF VIOLATING RULE 4-8.4(d) IS ERRONEOUS BECAUSE THE RECORD EVIDENCE CLEARLY CONTRADICTS THE CONCLUSION.

A. 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 findings or that the record evidence clearly contradicts the conclusions. *E.g., Fla. Bar v. Nowacki*, 697 So. 2d 828, 832 (Fla. 1997).

B. Rule 4-8.4(d)

Rule 4-8.4(d) provides that a lawyer shall not:

engage in conduct in connection with the practice of law that is prejudicial to the administration of justice. . . .

R. Regulating Fla. Bar 4-8.4(d). This Court has interpreted the rule to mean that all members of the legal profession must conduct themselves responsibly and professionally to preserve the integrity of our system. *Berthliaume*, 78 So. 3d at 505.

In considering violations of the rule, this Court has held that dishonesty in connection with the practice of law is prejudicial to the administration of justice and is a violation of the rule. *See, e.g., Feinberg*, 760 So. 2d at 938 (lawyer who falsely denied when confronted by opposing counsel that he met with opposing

counsel's client violated rule 4-8.4(d)); *Fla Bar v. Mogil*, 763 So. 2d 303, 310-11 (Fla. 2000) (steadfast denial by lawyer in judicial removal investigation that he had sent e-mail to the White House was misleading and false and such dishonesty fell within scope of rule 4-8.4(d)); *Fla. Bar v. Scheinberg*, 129 So. 3d 315, 317-18 (Fla. 2013) (failure to disclose to opposing counsel personal text messages to judge unrelated to case was violation of rule 4-8.4(d)); *Fla. Bar v. Norvell*, 685 So. 2d 1296, 1297 (Fla. 1996) (misrepresentations on application to act as attorney in bankruptcy proceeding was violation of rule 4-8.4(d)); *Lathe*, 774 So. 2d at 678-79 (misrepresentation to court is a violation of rule 4-8.4(d)). A violation of rule 4-8.4(d) occurs regardless of whether the opposing party benefits from or is not harmed by a lawyer's deception, or whether the lawyer believes he or she had a good motive for such deception. *See Feinberg*, 760 So. 2d at 938; *Fla. Bar v. Von Zamft*, 814 So. 2d 385, 389 (Fla. 2002).

Further, where a lawyer's conduct disrupts or stalls the progress of a proceeding, or results in multiplied proceedings, such conduct is prejudicial to the administration of justice and a violation of rule 4-8.4(d) occurs. *Fla. Bar v. Scott*, 810 So. 2d 893, 899 (Fla. 2002) (the respondent was guilty of rule 4-8.4(d) where his conduct necessitated that proceedings be rescheduled); *Fla. Bar v. Petersen*, 248 So. 3d 1069, 1081 (Fla. 2018) (the respondent's conduct resulting in additional litigation supported the referee's recommendation that the respondent's conduct

was prejudicial to the administration of justice in violation of rule 4-8.4(d)); *Fla. Bar v. Shankman*, 41 So. 3d 166, 172 (Fla. 2010) (the respondent's conduct that delayed the administration of justice and increased the proceedings and cost to the client was a violation of rule 4-8.4(d)).

Here, although the Referee recommended that this Court find Respondent not guilty of violating rule 4-8.4(d), he made several specific findings pertaining to Respondent's dishonesty based on the record evidence that contradict this recommendation. For example, the Referee found:

Respondent's texts included coaching and specific directions on how to respond to Ms. Villaverde's questions.

(ROR at 3).

I find that respondent's response that he was just responding to his daughter when in fact texts were being sent to the adjuster was misleading and a matter contrary to honesty.

(ROR at 7).

I find that these specific texts . . . where respondent was telling Ms. Gray how to answer . . . are contrary to honesty.

(ROR at 8).

The text messages from respondent to the adjuster, the deponent, while she was being questioned by Ms. Villaverde, telling the deponent what to say, to avoid providing certain information, to remember the deposition but not discussing the checks, and to not give an absolute answer are dishonest Additionally, respondent misrepresented to Ms. Villaverde that he had concluded the text messaging when in fact he had not.

(ROR at 10-11).

...respondent was texting the deponent and concealed this fact by telling opposing counsel, when she heard texting noises, that he was just texting his daughter. When asked to stop texting during the deposition, respondent stated he would do so but, in actuality, he continued to do so.

...

...respondent concealed his texting to the deponent by stating he was just texting his daughter and, despite stating he would stop texting during the deposition, he did not.

(ROR at 12).

...respondent was dishonest by secretly coaching the witness as to what to say and by lying to opposing counsel about his texting.

(ROR at 17).

As reflected in the Referee's findings, and as conclusively shown by the record evidence, Respondent engaged in dishonesty in connection with the practice of law. During the course of a deposition that was conducted by telephone, Respondent sent the witness, Ms. Gray, a series of text messages telling her what to say, what to remember, to avoid providing certain information, and to not give an absolute answer. (TFB Ex. 4). When confronted by Ms. Villaverde, Respondent denied texting with Ms. Gray and stated that he was texting with his daughter. (TFB Ex. 5 at 46:10-12). He agreed to stop texting and to put away his phone. (ROR at 4; Tr. at 48:20 – 49:2). However, Respondent did not stop texting. During her questioning of Ms. Gray, Ms. Villaverde noticed that she was receiving text messages on her phone. (Tr. at 49:12 – 50:1). During a lull in the

questioning, she discovered that the texts were from Respondent who had been inadvertently sending her messages intended for the deponent. (Tr. at 50:1-3). The messages had begun almost immediately upon the start of Ms. Villaverde's cross-examination. (TFB Ex. 4). After getting caught in the act, Respondent attempted to justify the texts by falsely stating that they were sent during a break. (TFB Ex. 4: Tr. 51:13-23; 52:2-13).

Following the deposition, Respondent – admittedly “disturb[ed]” that Ms. Villaverde was going to raise the issue of the texts with the judge – attempted to intimidate Ms. Villaverde into “destroy[ing]” the texts under the pretext that such messages were protected by the attorney-client privilege. (TFB Ex. 11; Tr. 52:21 – 53:4; 53:16 – 22). Respondent continued to falsely represent to Ms. Villaverde that his text messages in question were sent to Ms. Gray during a break in the deposition, not during her questioning. (TFB Ex. 11; Tr. 53:5-10). He continued to maintain this position when the issue of the texts was brought before the workers' compensation judge. He misrepresented to the judge at the hearing that the texts messages were sent during a break in the deposition. (TFB Ex. 21 at 17:6-16, 28:7-8). He also falsely stated to the judge that the content of the messages only consisted of a “picture of a puppy.” (TFB Ex. 21 at 24:18 – 25:2). He fought the disclosure of the texts by claiming attorney-client privilege, blamed

any misconduct on Ms. Villaverde, and repeatedly accused her of extortion. (TFB Ex. 9 at 2; TFB Ex. 21 at 17:9-18; 23:12-13; 28:14-15; 48:1).

Despite Respondent's attempts to prevent the court from reviewing the inappropriate text messages, the judge ordered the messages sent and received by Respondent during the time period of the deposition to be delivered to her for in-camera inspection. (TFB Ex. 7). Although Respondent had represented to opposing counsel that he was texting with his daughter during the deposition, he produced absolutely no text messages to or from his daughter. (TFB Ex. 10 at 2; Tr. at 58:18 – 59:2). All messages produced were either to or from Ms. Gray. (TFB Ex. 4). And despite his representation otherwise to the judge, only one of the many text messages was a picture of a puppy. (TFB Ex. 4 at 2). The judge found that the majority of the messages were sent to Ms. Gray during the course of the questioning and pertain to "testimonial matters" and "constitute witness coaching." (TFB Ex. 9 at 7). The texts consist of Respondent telling the deponent what to say, what to remember, to avoid providing certain information, and to not give an absolute answer. (ROR at 10-11). As found by the Referee, such conduct was "dishonest" and "contrary to honesty," as was Respondent's conduct in "lying to opposing counsel." (ROR at 7, 8, 10-11, 12, 17).

Therefore, the Referee's findings and the record evidence are contradictory to the recommendation of not guilty of a violation of rule 4-8.4(d). Pursuant to the

precedent of this Court as set forth above, Respondent's conduct of dishonesty during the course of the proceedings was prejudicial to the administration of justice. In fact, Respondent engaged in some of the most prejudicial ethical violations that a lawyer can commit: multiple misrepresentations to opposing counsel and multiple misrepresentations to the court.

Moreover, as reflected in the record evidence and in the Referee's findings, Respondent's conduct disrupted and stalled the progress of the proceedings and resulted in multiplied proceedings. As found by the Referee:

Ms. Villaverde noticed on her cell phone that she was receiving the text messages from respondent and stopped the deposition. The parties conducted a second deposition of the witness on February 19, 2019, at which time Attorney Villaverde, who was then in possession of the text messages, was allowed to examine the basis of the witness's answers given on July 31, 2018 to determine whether the witness's answers were accurate and whether the information in support of the answers existed independently of the text messages from the Respondent.

(ROR at 9).

Thus, because of Respondent's conduct, a second deposition was necessitated. At the second deposition, Ms. Villaverde was obligated to spend time attempting to determine whether Ms. Gray's answers were accurate in light of the text messages from Respondent. (ROR at 9). Also, Respondent's conduct resulted in much additional and unnecessary litigation including motions, orders, and hearings involving the production of the texts, and review of the texts by the court.

(TFB Exs. 7-13, 16, 17, 21). Once the texts were produced, there was further litigation involving fraud and misrepresentation under the workers' compensation statute as a result of Respondent's misconduct, including an appeal in the First DCA. (TFB Exs. 18-20). Respondent even admitted at the sanctions hearing that he was taken off the client account because of the additional litigation expenses caused by the issue of the text messages. (Sanc. Tr. at 33:17 – 34:25). Respondent's misconduct unquestionably and substantially multiplied the proceedings and, pursuant to the precedent of this Court, was prejudicial to the administration of justice.

In sum, Respondent violated rule 4-8.4(d), and the Referee erred in finding otherwise.

II. A SUSPENSION OF NINETY-ONE DAYS IS THE APPROPRIATE DISCIPLINE GIVEN THE FACTS, CASE LAW, AND FLORIDA'S STANDARDS FOR IMPOSING LAWYER SANCTIONS.

A. 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 Ninety-One Days is Warranted

As set forth above, this is a matter involving a lawyer's dishonest and inappropriate behavior followed by a tightly woven web of deception and much needless litigation. The perpetuation of Respondent's deception involved affirmative misrepresentations and untruthful statements to both opposing counsel and to the court. Based on the Referee's findings, the record evidence, Florida's Standards for Imposing Lawyer Sanctions, and the available case law, the Referee's recommendation of a thirty-day suspension is not reasonable and is too lenient.

As recognized by the Referee, pursuant to the applicable standards, suspension is the presumptive discipline in this case. (ROR at 12).⁵ However,

⁵ The Referee relied upon Standard 7.1 that sets forth the appropriate standards for deceptive conduct or statements:

(b) Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Fla. Stds. Imposing Law. Sancs. 7.1(b). The following standards also indicate that a suspension is applicable:

Standard 6.1 sets forth the appropriate standards for false statements, fraud, and misrepresentation:

(b) Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action.

because the standards do not distinguish among suspensions of differing lengths, the Court considers case law to determine whether the recommended term of suspension has a reasonable basis. Here, when the case law is considered in light of the egregious conduct at issue, along with the aggravating and mitigating circumstances, the appropriate level of discipline is at least a suspension of ninety-one days from the practice of law.

This Court has typically not dealt lightly with attorney misconduct involving misrepresentations, dishonesty, and deception during the course of judicial

Standard 6.2 sets forth the appropriate standards for abuse of the legal process:

(b) Suspension is appropriate when a lawyer knowingly violates a court order or rule and causes injury or potential injury to a client or a party or causes interference or potential interference with a legal proceeding.

Standard 6.3 sets forth the appropriate standards for improper communications with individuals in the legal system:

(b) Suspension is appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that the communication is improper and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

Fla. Stds. Imposing Law. Sanctions. 6.1(b), 6.2(b), 6.3(b).

proceedings. In *The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002), the respondent concealed an exhibit under the table during the questioning by opposing counsel in the deposition of the respondent's witness. When confronted about the exhibit by opposing counsel, the respondent answered, "I'm not seeing it." *Id.* at 480. Later in the deposition, the respondent ultimately gave opposing counsel the exhibit when she was asked directly if she had it. *Id.* The Court found the respondent guilty of rule 4-3.4(a) that prohibits the concealment of evidence, improperly influencing witnesses, and obstructive tactics in discovery procedure, and the like. *Id.* at 481-83. The Court found that the availability of multiple copies of the document in question did not negate the prohibited conduct. *Id.* at 482. The Court also rejected the respondent's argument that there was no active concealment because the document was uncovered by the end of the deposition. *Id.* The Court also found that the respondent's answer to opposing counsel was misleading because the respondent in fact knew where the document was located and failed to disclose that information to opposing counsel. *Id.* at 483. The Court held that the respondent's conduct was dishonest and deceitful. This Court suspended the respondent for sixty days. *Id.* at 485.

In *The Florida Bar v. Nicnick*, 963 So. 2d 219 (Fla. 2007), the respondent knowingly concealed a signed settlement agreement from opposing counsel. The respondent alleged that he felt compelled to investigate the authenticity of the

document before turning it over to opposing counsel. *Id.* at 223. He also claimed that he believed opposing counsel was aware of the settlement agreement. *Id.* In finding the respondent guilty of rule 4-3.4(a), the Court found that the respondent's assertion that it was within ethical boundaries to conceal a potentially forged settlement agreement until he felt the time was right for it to be revealed, was not a decision that the respondent was entitled to make. *Id.* The Court also found that whether opposing counsel or the opposing party knew that the settlement agreement existed or even had a copy of it was irrelevant to whether the respondent was guilty of rule 4-3.4(a). *Id.* The Court held that the respondent's failure to share the settlement agreement with opposing counsel was deceptive and suspended the respondent for ninety-one days. *Id.* at 225.

In *The Florida Bar v. Miller*, 863 So. 2d 231 (Fla. 2003), the respondent concealed his awareness of a document. At an evidentiary hearing pertaining to the document, the respondent attempted to prevent his associate from testifying about the document, arguing to the magistrate judge that her testimony was unnecessary. *Id.* at 233. The magistrate judge disagreed, and it was revealed that the firm's file showed that the document had been received by the respondent's office and that the respondent had reviewed it. *Id.* The Court found the respondent guilty of violating rule 4-3.4(a), and that he had engaged in a "prolonged pattern of deceit." *Id.* at 235. The Court imposed a one-year suspension. *Id.*

Here, as the respondents in *Forrester*, *Nicnick*, and *Miller*, Respondent was found by the Referee to be guilty of 4-3.4(a) for obstructing the opposing party's access to or concealing relevant material. Also, as the respondents' conduct in those cases, Respondent's conduct here was found by the Referee to be dishonest and deceitful. (ROR 7, 8, 10, 11, 12, 17).⁶

As the respondent in *Forrester*, Respondent acted dishonestly during a deposition and then made knowing misrepresentations to opposing counsel. Respondent sent text messages to the deponent during the course of being questioned by opposing counsel "telling [her] what to say, to avoid providing certain information, to remember the deposition but not discussing the checks, and to not give an absolute answer." (ROR at 10-11). Respondent "misrepresented" and "concealed his texting" from opposing counsel (ROR at 12), and "was dishonest by secretly coaching the witness as to what to say and by lying to opposing counsel about his texting." (ROR at 17). Thus, Respondent's misconduct is similar to that of the respondent in *Forrester* who misled opposing counsel about concealed and relevant material. However, by comparison, Respondent's misconduct is significantly more serious than the respondent in

⁶ The Court in *Forrester*, *Nicnick*, and *Miller* held that the respondents in those cases violated rule 4-8.4(c) that prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Here, the Referee found that Respondent violated rule 3-4.3 that prohibits the commission by a lawyer of any act that is unlawful or contrary to honesty and justice.

Forrester. Unlike in *Forrester*, Respondent's conduct was not willingly admitted upon being directly confronted. Respondent stated that he was texting with his daughter. (TFB Ex. 5 at 45:18-24). Respondent only admitted to texting the deponent after being caught. (TFB Ex. 4 at 1; Tr. at 51:13-23). Then, Respondent continued to mislead and lie to opposing counsel about when the texting occurred. (Tr. at 51:13 – 52:13; TFB Ex. 11).

Moreover, unlike the respondent in *Forrester*, Respondent not only made misrepresentations to opposing counsel, but he also made misrepresentations to the court. The record conclusively shows that Respondent misrepresented to the court that the text messages occurred during a break in the deposition. (TFB Ex. 21 at 17:6-16; 28:7-8). He also misrepresented to the court that the content of the messages consisted only of a "picture of a puppy." (TFB Ex. 21 at 24:18 – 25:2). This Court has historically dealt harshly with attorneys who make such blatant misrepresentations to a court. *E.g., Lathe*, 774 So. 2d at 679 (imposing a suspension of ninety-one days on the respondent for making a misrepresentation to a judge in a hearing and stating that the respondent's "blatant misconduct poses a serious threat to the integrity of the justice system, and cannot be dealt with lightly"); *Norvell*, 685 So. 2d at 1297-98 (imposing a suspension of ninety-one days on the respondent for making false statements to a tribunal in an application to represent a party in bankruptcy proceeding).

Further, unlike the situation in *Forrester*, Respondent's conduct disrupted and stalled the progress of the proceedings. Because of Respondent's conduct, a second deposition of Ms. Gray was necessitated. (ROR at 9). Also, Respondent's conduct resulted in much additional and unnecessary litigation including motions, orders, and hearings involving the production of the texts, and review of the texts by the court. (TFB Exs. 7-13, 16, 17, 21). Once the texts were produced, there was further and substantial litigation involving fraud and misrepresentation under the workers' compensation statute as a result of Respondent's misconduct, including an appeal in the First DCA. (TFB Ex. 18-20).

In short, Respondent's conduct was more egregious than that of the respondent in *Forrester*. Respondent's conduct is as egregious as that of the respondents in *Nicnick* and *Miller*. As the respondents in those cases, Respondent concealed material relevant to a proceeding, and then perpetuated the concealment and deceit, and prolonged the proceedings. Respondent's motive is irrelevant, as is the ultimate effect of the deceit on the outcome of the proceedings. *E.g.*, *Nicnick*, 983 So. 2d at 222. A serious dishonest act occurred, and Respondent then went to great lengths to deceive opposing counsel, as well as the court, to conceal his misdeeds. *See Miller*, 863 So. 2d at 234-35. The relevant case law indicates that

a suspension requiring proof of rehabilitation for reinstatement – a suspension of at least ninety-one days – is the appropriate discipline for Respondent.⁷

The aggravating factors set forth in the Standards for Imposing Lawyer Sanctions also support such a suspension. The Referee found that three aggravating factors applied to Respondent: 3.2(b)(2) (dishonest or selfish motive); 3.2(b)(7) (refusal to acknowledge wrongful nature of conduct); and 3.2(b)(9) (substantial experience in the practice of law). (ROR at 12-13). The Referee’s finding of a dishonest and selfish motive was based on Respondent’s concealment of his texting and lying to opposing counsel, as discussed above. (ROR at 12).

With regard to the finding of a refusal to acknowledge the wrongful nature of conduct, the Referee stated that he “did not see any acknowledgement of that wrongful behavior until the sanction hearing.” (ROR at 13). Indeed, throughout the state court proceeding Respondent not only never acknowledged his wrongful conduct, but he continually lied to opposing counsel and to the court about his improper texting and coaching of the witness. Moreover, Respondent tried to turn

⁷ While there apparently is no published precedent of this Court pertaining to attorney discipline for witness coaching, it should be noted that this Court does not take lightly an attorney’s inappropriate interaction with witnesses in a proceeding. *See Fla. Bar v. Carswell*, 624 So. 2d 259 (Fla. 1993) (imposing 180-day suspension on the respondent who tried to tell witness what to say and to lie to FDLE investigators); *Fla. Bar v. Lopez*, 406 So. 2d 1100 (Fla. 1981) (imposing one-year suspension on the respondent who urged two parties to change their future testimony).

his improprieties onto opposing counsel, Ms. Villaverde, by sending her a threatening e-mail when she decided to raise the issue of Respondent's improper conduct. (TFB Ex. 11). He then changed his story and blamed his improper texting on Ms. Villaverde by alleging that she "yelled" at the witness and tried to "manipulate" the record and the evidence. (TFB Ex. 21 at 17:9-18). What's more, Respondent repeatedly accused Ms. Villaverde in open court of extortion because she raised with the court the issue of his improper behavior. (TFB Ex. 21 at 23:12-13; 28:14-15; 48:1).

Then, as noted by the Referee, Respondent continued to refuse to accept responsibility for his actions throughout the disciplinary proceedings. (ROR at 12-13). Although he acknowledged sending the texts, Respondent continued to try to justify them including by blaming Ms. Villaverde. (Tr. 99:2-8; 101:23 – 103:21; 104:8-14; 123:16-21; 127:17 – 128:2). He only acknowledged any wrongdoing at the sanctions hearing after he had been found guilty of rule violations, and when he was attempting to get a reduced discipline. (ROR at 12-13). But even then, he admitted that he would not have disclosed to Ms. Villaverde the text messages if he had not inadvertently sent them to her. (Sanc. Tr. at 31:16-23). Such an unwillingness on the part of Respondent to comprehend that his conduct was inappropriate supports a suspension of at least ninety-one days. *See Fla. Bar v. Tobkin*, 944 So. 2d 219, 224 (Fla. 2006) (lawyer's misconduct, especially in light

of unwillingness to accept responsibility for such conduct, warranted suspension of ninety-one days).

At bottom, based on the seriousness of the misconduct at issue as reflected in the Referee's findings, the record evidence, the relevant case law, and the Standards for Imposing Lawyer Sanctions, at least a ninety-one-day suspension is the appropriate sanction in this case. Such a sanction is particularly appropriate given the advent of remote depositions and proceedings in the current legal environment. Such proceedings which are necessarily removed from direct oversight by the other participants require a higher degree of self-discipline and place an increased responsibility on lawyers to adhere to their ethical obligations. Imposing a lesser sanction would send a message that a lawyer may take advantage of the unsupervised nature of remote proceedings without serious consequence.

CONCLUSION

Based on the foregoing, The Florida Bar respectfully requests that this Court reject the Referee's recommendations that Respondent Derek Vashon James be found not guilty of violating rules 4-8.4(d) and instead find that he is guilty of violating that rule. The Florida Bar also respectfully requests that the Court reject the Referee's recommended discipline of a thirty-day suspension and instead impose a suspension of at least ninety-one days.

/s/ M. Hope Keating
M. HOPE KEATING, FBN 981915
BARRY RICHARD, FBN 105599
GREENBERG TRAUIG, P.A.
101 East College Avenue
Tallahassee, FL 32302
(850) 222-6891 Phone
KeatingH@gtlaw.com
RichardB@gtlaw.com
GreeneL@gtlaw.com

*Counsel for Complainant,
The Florida Bar*

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2020, 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:

Barry William Rigby
Law Offices of Barry Rigby, P.A.
2462 East Michigan Street
Suite 208
Orlando, Florida 32806
barryrigbylaw@gmail.com
rigbylaw@yahoo.com
*Counsel for Respondent,
Derek Vashon James*

Daniel James Quinn
Bar Counsel, The Florida Bar
1000 Legion Place, Suite 1625
Orlando, Florida 32801
(407) 425-5424
dquinn@floridabar.org
orlandooffice@floridabar.org
kperaza@floridabar.org
and
Patricia Ann Toro Savitz
Staff Counsel, The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
psavitz@floridabar.org
*Co-Counsel for Complainant,
The Florida Bar*

/s/ M. Hope Keating
M. HOPE KEATING

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ M. Hope Keating
M. HOPE KEATING