IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

Case No. SC20-1693

The Florida Bar File
No. 2021-00,002(4B)

vs.

JEFFREY CHARLES REGAN,

Respondent
_____/

RESPONDENT'S ANSWER BRIEF AND

INITIAL BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

A. Abbreviated Names

The Florida Bar will be referred to as the Bar. Jeffrey Charles Regan, the Respondent, will be referred to as Respondent or the Respondent.

B. Citations to the Record

References to the Amended Report of Referee will be cited as (ROR p.**).

References to specific pleadings will be made by Tab number in the Amended Index of Record, and with further information when the document is large. (Tab-**).

The transcript of the final hearing will be cited as (T-**).

The Bar's exhibits will be cited as (TFB-Ex-*) with specific reference to the transcript page number when needed.

The Respondent's exhibits will be cited as (R. Ex. **).

NATURE OF THE CASE

The Florida Bar sought review of a Report of Referee that recommended that Respondent be found not guilty on all charges in this disciplinary proceeding that is premised upon two intemperate emails sent by Respondent. After the Bar filed the Formal Complaint, Respondent entered into a conditional plea for consent judgment for diversion to a practice and professionalism enhancement program. The referee approved the consent judgment; however, this Court did not approve it, and the case was set for a consolidated final hearing on the Complaint and potential sanctions. After the hearing, the Referee recommended that Respondent be found not guilty. The Referee also recommended diversion to a practice and professionalism enhancement program with respect to any sanctions and awarded costs against Respondent. Respondent cross petitioned for review of the recommendation of diversion and award of costs against him.

STATEMENT OF THE CASE AND FACTS

A. The Underlying Litigation and Emails

Respondent was admitted to the Bar in 1984. (T. 87). He is a business and construction trial lawyer. (T. 87). Respondent was board certified in construction law in 2005 and in 2008 he was board certified in business litigation and continues to be certified in both. (T. 91 - 92). Respondent has no prior disciplinary record, and this is his first disciplinary proceeding.

This case involves two intemperate emails sent by Respondent on June 20, 2020 to attorney Heather Tyson. (ROR p. 4). Respondent was lead plaintiff's counsel in a large, complex construction defect case involving a 38-story, waterfront condominium in Jacksonville that was filed in 2013. (ROR p. 5; T. 112 – 113). At the time of the emails, the case was seven years old. At one time there had been as many as thirty-five defendants or third-party defendants in the case. (ROR p. 5; T. 113). Ms. Tyson was an attorney for third-party defendant Sterling Dula. (ROR p. 6). Sterling Dula had filed objections late on the eve of a case management deadline to authenticity of deposition exhibits being used as trial exhibits even though they had been previously authenticated by its corporate representative in deposition. (ROR p. 10; T. 137 – 139, 152 – 153, 216). The intemperate

emails followed the objections.

The case was one of the most complex cases in which many of the attorneys appearing had ever been involved. (DeCandio, T. p. 79; Regan, T. p. 112). Voluminous documents were produced involving over a million pages and there had been numerous depositions, including in New York, Virginia, Pennsylvania, South Carolina, Miami, Ft. Lauderdale, West Palm Beach, Orlando, Ocala, and Jacksonville. (Regan, T. 114-115). The case had been designated complex by the trial court and the parties developed a cooperative attitude in an effort to get the case to trial. (ROR p. 10; T. 135 - 136). Nevertheless, the case was ultimately continued three times, twice due to unexpected judicial recusals. (ROR p. 6; T. 118 – 119, 214).

Late in the case, the insurance carrier for Sterling Dula suddenly changed law firms and in mid-November of 2019 the Moyer Law firm appeared on behalf of Sterling Dula. (ROR p. 6; T. 119). At that time, trial was set for March of 2020 and discovery was nearly completed. Ms. Tyson attended the last week of discovery depositions on behalf of Sterling Dula and Respondent and others believed she was new lead counsel for Sterling Dula. (ROR p. 6; T. 120 – 121, 145). Respondent cooperated with Ms. Tyson and provided her free copies of numerous documents that had been produced as well as access for inspections of ongoing repair work. (ROR p.

7; T. 121 – 122, 134 – 135).

After entering its appearance, Sterling Dula's new counsel served discovery past the disclosure deadline and a motion to reopen discovery. (ROR p. 7; T. 122 – 124, 152 – 153). In early December of 2019 Sterling Dula also filed a motion to amend to add new third-party defendants. (ROR p. 7; T. 127). Fearing another continuance, plaintiff objected to the late motion to amend. Soon thereafter the trial judge *sua sponte* recused himself with less than three months before trial.

Plaintiff and the performance bond sureties, who were lead defendants, jointly filed a motion with the chief trial judge for special appointment of a new judge in an effort to preserve the trial date. (ROR p. 7 – 8; T. pp. 124 – 125). Judge Dearing was appointed as the new judge and immediately set a status conference for January of 2020. (ROR p. 8; T. p. 125). In advance of the status conference, Sterling Dula filed thirty-four separate motions, including twenty-seven separate motions in *limine*, five separate motions for summary judgment, and a motion to amend its answer and affirmative defenses. (ROR p. 8; 127 – 128). Respondent and other attorneys believed the motions to be without merit and an attempt to further delay and continue the case. (ROR p. 8 – 9; T. 127 – 128, 152 – 153, 215).

At the status conference Judge Dearing continued the case to July of

2020 over Respondent's objections. (ROR p. 9; T. 128 – 129). She instructed the parties to negotiate a new, sixth amended case management order with new deadlines. (ROR p. 9; T. 129 – 130). Respondent's clients were extremely upset with the additional delays and escalating fees. (ROR p. 9; T. 128 – 129, 214). Respondent's client had grown angry with him for not getting the case to trial. (ROR p. 9; T. p. 136, 214).

The sixth amended case management order was agreed upon by all the parties. (ROR p. 9 – 10; T. 132 – 133). The order included a June 19, 2020 deadline to object to authenticity and hearsay of voluminous deposition exhibits already marked and used in depositions. (Regan, T. pp. 132- 133) Many witnesses in the case were either out of state or well outside Jacksonville and unavailable for trial so the intent was to minimize evidentiary disputes in advance of the trial. (ROR p. 9; T. 131 – 133).

Prior to Sterling Dula's new counsel entering the case, counsel for the parties had worked together to efficiently manage the litigation. (ROR p. 10; T. 135 – 136). That cooperation changed when Sterling Dula retained new counsel. Just before midnight on the June 19, 2020 deadline, Sterling Dula filed objections based on authenticity and hearsay to approximately 90% of the deposition exhibits. (ROR p. 10; T. 137 – 138, 152 – 153, 216). These objections included records produced by Sterling Dula in the litigation,

including its subcontract, drawings, email communications and other records identified and testified to as corporate records by Sterling Dula's corporate representative during its deposition in Erie, Pennsylvania. (ROR p. 10; T. 137 – 138, 152 – 153, 216). These objections appeared to Respondent and other counsel to be wholly without merit. (ROR p. 10; T. 153 – 154).

At this point, Respondent had grown very frustrated with Sterling Dula's new counsel. (ROR p. 11; T. 135 – 136). In addition, Respondent was extremely distressed over a family disagreement that had erupted over his son's impending wedding. (ROR p. 11; T. 160, 189 – 194). The dispute involved very personal, cultural, and emotional family issues which again rendered Respondent visibly emotional and distressed at the trial. (ROR p. 11). Respondent's intemperate emails followed Sterling Dula's evidentiary objections.

The first email asserts that the exhibits should not be objectionable, that there will be no settlement unless a settlement tender is made, that Ms. Tyson is over her head and should get ready for battle. The second email is more disrespectful and again asserts that Ms. Tyson is over her head and accuses her of "f…ing up the case with frivolous objections, motions and tactics," states that "[w]e are coming at you personally very soon," that

"[e]very obstructionist move I will bury you," and "[g]et ready to get buried." (ROR p. 4). The emails were sent only to Ms. Tyson as private emails and were not published by Respondent to the trial court or other counsel in the case. (ROR p. 11; T. 79 – 80, 154, 217).

Several days later, attorney Kellie Caggiano filed a Motion for Sanctions and Civility with the trial court and attached the June 20 emails Respondent sent to Ms. Tyson. (ROR p. 20). Ms. Caggiano stated in the motion that Ms. Tyson was an associate in her firm and sought sanctions against Respondent for sending the emails. Respondent did not realize he had actually sent the second, more offensive email and thought that he had saved it and closed his computer without sending it. (ROR p. 11; T. 160, 189-194). Respondent also did not know that Ms. Tyson was an associate. (ROR p. 12; T. 163 - 164).

When he read the Motion and realized he had actually sent the second email, Respondent reached out to Ms. Tyson to personally apologize. (ROR p. 12; T. 161 – 164; R. Ex. 5). Ms. Caggiano responded and stated that she appreciated his efforts but that he was not to communicate directly with Ms. Tyson and that she was setting a hearing. (ROR p. 12; T. 163 – 164; R. Ex. 5]. Respondent replied that he understood and just wanted to do the right thing. (ROR p. 12; T. 164; R. Ex. 5).

Respondent filed a written response to the motion on July 3, 2020 apologizing to Ms. Tyson, fellow counsel, and the Court. (ROR p. 12; R. Ex. 2). On July 6, 2020 the trial court held a brief hearing without taking any evidence. (ROR p. 13; T. 166 – 167) ROR p. 10; T. pp. 137 – 138, 152 – 153, 216).

Respondent apologized again and the movant, Ms. Caggiano, stated she did not want to hurt anyone's career. (R. p. 14; T. 173 - 175]. Judge Dearing granted Sterling Dula's motion and assessed costs associated with the motion against Respondent. Additionally, she ordered Respondent to send communications to the designated email addresses and certify that he reviewed the Florida Bar's publication on best practices for electronic communication within 30 days. (ROR p. 13 – 14; R. Ex. 2).

The trial judge also found that Respondent was remorseful, apologetic, and appropriately embarrassed by his communications. (ROR p. 13; R. Ex. 2). The trial judge considered the emails to be an aberration of Respondent's normal standard of conduct but announced she had already referred the matter to the Bar for review. (Ex 2; T: 173). Respondent complied with the court's order.

The Referee found that the Bar failed to prove a violation by clear and convincing evidence. (ROR 18). Respondent did not realize he had sent the

second email but thought he had saved it and closed his computer without sending it. (ROR p. 11 – 12, T. 160, 189 – 194). When Respondent read the Motion for Sanctions and Civility and he realized he had actually sent the second email, he immediately reached out to Ms. Tyson in an effort to personally apologize. (ROR 12; T. 161; R. Ex. 5).

Although the emails were unprofessional, they did not disparage Ms. Tyson "on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic" as required by Rule 4-8.4(d). (ROR p.18). The Referee also agreed with the multiple witnesses' testimony that the emails had no prejudicial effect the underlying case. (ROR p. 20).

B. The Disciplinary Process and Proceedings

The Florida Bar initiated this case with a 15-day letter to Respondent on July 6, 2020 after Judge Dearing forwarded the Motion for Sanctions and Civility and Respondent's written response to the Motion. (ROR p. 14; R. Ex. 1). Judge Dearing did not file a formal grievance. (ROR p. 14).

The 15-day letter cited no Rules of Professional Conduct on its face. Rule 4-8.4(d) was only referenced in the attached Motion for Sanctions and Civility. (ROR p. 14) Respondent timely responded to the 15-day letter

pledging his full cooperation and again profusely apologizing for his statements. (ROR p. 14; R. Ex. 2).

Respondent heard nothing further from The Florida Bar until he received a telephone call from Bar Counsel James Fisher on the evening of October 23, 2020. (ROR p. 14; T. 104, 108 – 109) Fisher advised Respondent that the Board of Governors had just found probable cause that Respondent violated the Bar rules. Respondent was shocked. He had received no notice that the matter was assigned to a grievance committee, much less that it had been referred to the Board of Governors for consideration. (ROR p. 15; T. 16, 108 – 109).

Mr. Fisher explained that the matter had already been reviewed by a grievance committee which had found no probable cause with a letter of advice. (ROR p. 14 – 15; T. 108 – 109). The Bar confirmed the grievance committee found no probable cause with a letter of advice at the final hearing. (T.17 – 18). The designated reviewer had also agreed with the recommendation of no probable cause with a letter of advice; however, Bar Counsel Carlos Leon nevertheless referred the matter to the Board of Governors for reconsideration. (ROR p. 15; T. 11 – 13, 17 – 19, 109).

The Bar issued a Notice of Probable Cause on October 28, 2020 for violation of Rule 3-4.2, including the Creed of Professionalism, and the

Professionalism Expectations, including Expectations 5.1, 5.2, and 5.3. (R. Ex. 3] On November 3, 2020 the Bar issued an Amended Notice of Probable Cause which added a violation of Rule 4-8.4(d). (R. Ex. 4) The Bar filed its Complaint against Respondent on November 17, 2020.(Tab 1). The Complaint now included violation of Rule 4-8.4 (a) in addition to Rules 4-8.4(d) and 3-4.2, including the Creed of Professionalism, and The Professionalism Expectations, including Expectations 5.1, 5.2, and 5.3.

Respondent filed his answer on December 11, 2020. (Tab 8). In his Answer, Respondent admitted that he sent the emails to Ms. Tyson and was again apologetic, but he denied that the emails were prejudicial to the administration of justice. Respondent denied that the Florida Bar Board of Governors had duly found probable cause and asserted that he never received notice that this matter had been forwarded to a grievance committee, he had never received notice of a grievance committee review or hearing, he had never received notice of referral to the Florida Board of Governors for reconsideration, and he had never been provided with an opportunity to be heard before the filing of the Complaint.

The Bar and Respondent entered into a conditional agreement, which the Referee adopted, for diversion to a practice and professionalism enhancement program. This Court disapproved of the recommended

sanction and stated it would accept a public reprimand. The parties were required to submit a revised conditional agreement within thirty days if Respondent agreed to a public reprimand; otherwise, the matter was to be scheduled for a hearing. The parties did not agree to a revised conditional agreement for a reprimand and proceeded to a hearing.

At the final hearing, the Bar argued that this Court had already found Respondent guilty upon rejection of the conditional plea agreement and that the trial was only for recommended discipline. (T. 4-6; T. 22; T. 64). The Bar further argued it was entitled to judgment on the pleadings as the emails were a violation of Bar rules as a matter of law. (T. 5 - 36). Respondent argued there were factual issues for trial and that the Bar had failed to follow required grievance procedures from the beginning and the case should be dismissed. (T. 36 - 52).

The Referee did not agree that this Court had found Respondent guilty by rejecting the conditional plea agreement and proceeded with a consolidated hearing on both the complaint and any potential sanctions. (ROR p. 5). The only evidence introduced by the Bar at the final hearing was the Complaint and attached Exhibits. (T. 74. 223; TFB Ex. 1).

After hearing the evidence and testimony and reviewing the exhibits, the referee found that Respondent's testimony and that of his four witnesses

were credible and that the Bar failed to prove a violation by clear and convincing evidence. (ROR p. 15-16, 18)

The Referee also made findings as to mitigating and aggravating factors with respect to potential discipline. The Referee found there was an absence of a prior disciplinary record, absence of dishonest or selfish motive, personal or emotional problems, timely good faith effort to rectify the consequences of misconduct, full and free disclosure to the Bar or cooperative attitude toward the proceedings, good character or reputation, interim rehabilitation, imposition of other penalties or sanctions and remorse as mitigating factors. (ROR p. 22-23). The Referee found substantial experience in the practice of law as the only aggravating factor. (ROR p. 23). The Referee found that the emails would not amount to more than minor misconduct and that he would recommend diversion in such event. (ROR p. 25-26)

SUMMARY OF THE ARGUMENT

Respondent sent two intemperate emails to Ms. Tyson while upset with her obstructionist tactics and while under considerable personal distress. The Referee observed Respondent and heard his testimony, listened to the testimony of all of the witnesses, reviewed all of the evidence and found Respondent and the witnesses credible. There was competent, substantial evidence to support the Referee's finding that the emails did not violate the Oath of Admission or any Bar rules.

The Oath of Admission is not a proper basis for finding a rule violation in any event as it was raised for the first time on appeal. The Bar also expressly agreed the Oath was not a basis of the charges at the hearing. The intemperate emails were not public, Respondent did not even know he had actually sent the second, most offensive email, and the emails were not prejudicial to the administration of justice in violation of Rule 4-8.4(d).

This Court should accept the recommendation of not guilty and reject the recommendation of diversion to a practice and professionalism enhancement program. In the event the Respondent is found guilty, the emails do not amount to more than minor misconduct under all the circumstances and diversion would be appropriate in view of the many mitigating factors.

STANDARD OF REVIEW

This is an original proceeding under this Court's exclusive jurisdiction pursuant to Art. V, §15, Fla. Const.

The Florida Supreme Court's review of a referee's finding of fact is limited to whether the referee's findings are supported by competent, substantial evidence in the record. *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016). "The referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." *Fla. Bar v. Tobkin, 944 So. 2d 219, 224 (Fla. 2006)* (quoting *Fla. Bar v. Thomas, 582 So. 2d 1177, 1178 (Fla. 1991))*.

The Referee's findings of fact regarding guilt carry a presumption of correctness. This presumption also applies to findings on mitigating and aggravating factors. *The Florida Bar v. Wolis*, 783 So. 2d 1057, 1059 (Fla. 2001). The burden of demonstrating that the findings are clearly erroneous lies with the party challenging the findings. *The Florida Bar v. Glick*, 693 So. 2d 550, 552 (Fla. 1997). The Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *The Florida Bar v. Frederick*, 756 So. 2d79, 86 (Fla. 2000).

ARGUMENT

I. The Oath of Admission Is not a Proper Basis For a Rule Violation in this Case

The Bar's entire argument in its brief appears to be premised upon the Oath of Admission, as amended in 2011, which added the Oath of Civility. The Bar asserts that the emails speak for themselves in violation of the Oath of Civility. The Bar then jumps to the conclusion that this is in itself a violation and clear and convincing evidence of violations of Rules 4-8.4(d) and 3-4.2.

Before addressing the merits of the Bar's position, Respondent would make it clear once again that he does not condone the content of his emails. The emails do not live up to Respondent's own personal convictions or reflect in any manner the high professional and ethical standards on which he has conducted his practice for thirty-seven (37) years.

Respondent is remorseful and strongly regrets his lapse in judgment made under difficult personal circumstances, and he remains a strong advocate of professionalism in the practice of law. Upon learning that he sent the second and most offensive email, Respondent immediately reached out to personally apologize to Ms. Tyson. He then took responsibility for his transgression and apologized to the trial court, Ms.

Tyson, and fellow counsel in response to the Motion for Sanctions and Civility. Respondent is embarrassed by his conduct and remains deeply apologetic and remorseful.

Notwithstanding Respondent's personal disappointment and remorse for his emails, a violation of the Oath of Admission is not a proper basis for a rule violation warranting discipline in this case. Since 2011, the Oath has included a pledge of civility by which new lawyers expressly pledge civility to opposing parties and counsel in all written and oral communications. While Respondent agrees with the importance of civility and makes that a part of his daily practice, the oath of civility did not become part of the Oath of Admission until long after Respondent began the practice of law in 1984.

More importantly, a violation of the Oath of Admission was never a basis of the complaint against Respondent or previously included in any of the alleged charges against him. Reasonable notice must be given to attorneys of the charges they face before hearing by the referee. See *In re Ruffalo,* 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968); *The Florida Bar v. Vernell,* 721 So. 2d 705 (Fla. 1998). Rule 3-7.4 (h) of the Rules of Discipline also provides: "At a reasonable time before any finding of probable cause or minor misconduct is made, the respondent shall be advised of the conduct that is being investigated and the rules that may

have been violated." There is no mention of the Oath of Admission in the 15-day letter that initiated the grievance. There is no reference to the Oath of Admission in the original Notice of Probable Cause. There is no reference to the Oath of Admission in the Amended Notice of Probable Cause. There is no reference to the Oath of Admission in the Complaint. Moreover, when the Bar first raised the Oath of Admission in closing argument at the hearing it abandoned the Oath as a rule violation upon confirming that it was not included in the Amended Notice of Probable Cause. (T. 224-226). The Bar should not be permitted to raise the Oath of Admission now on appeal as a rule violation and the basis for discipline.

The Bar's reliance on the Oath of Admission now compounds the Bar's procedural irregularities that have plagued this case from the beginning. The Bar 15-day letter sent to Respondent initiating this grievance did not list any specific rule violations. The only reference to a rule was contained in the Motion for Sanctions and Civility filed with the trial court.

Respondent heard nothing further after he responded to the initial 15-day letter until Bar attorney Fisher called and advised Respondent that the Board of Governors had just found probable cause. Respondent was understandably shocked since he had not even been noticed of an

assignment to a grievance committee.

The grievance committee found no probable cause with a letter of advice. The Bar acknowledged at the hearing that the designated reviewer agreed with the grievance committee finding of no probable and did not seek review by the Board of Governors. (T. 12, 17 - 19). Rule 3-7.5 (a) provides in part: “The designated reviewer may request grievance committee reconsideration or refer the matter to the disciplinary review committee of the board of governors within 30 days of notice of grievance committee action. The request for grievance committee reconsideration or referral to the disciplinary review committee must be in writing and must be submitted to bar counsel.”

Rule 3-7.5 (a) (2) further provides: “If the designated reviewer refers the matter to the disciplinary review committee … Bar counsel must give notice to respondent and complainant that the designated reviewer has made the referral for review.”

The designated reviewer did not make the referral and no notice was provided to Respondent. Instead, Bar Counsel requested reconsideration by the Board of Governors pursuant to an alleged informal policy that all judicial complaints be reviewed by the Board of Governors. The Bar did not produce any such policy or provide any evidence of such policy. There is

also no notice of any such policy in the Rules Regulating the Florida Bar.

The Bar provided no notice to Respondent of the specific rule violations being alleged and reconsidered by the Bar or even that there was a reconsideration. The Oath of Admission was not included in the 15-day letter and has never been cited as the basis of a rule violation.

Further, the Rules of Discipline expressly make a Grievance Committee finding of no probable cause final if the designated reviewer does not seek reconsideration in writing within 30 days. Rule 3-7.5 (a) (4) provides: "If the designated reviewer fails to make the request for reconsideration or referral within the time prescribed, the grievance committee action becomes final." The designated reviewer did not request reconsideration. The grievance should have ended there and never proceeded to the Board of Governors for reconsideration.

After Mr. Fisher verbally advised Respondent that the Board of Governors found probable cause, the Bar served Respondent with a Notice of Finding of Probable Cause for violation of Rule 3-4.2, the Creed of Professionalism and Expectations 5.1, 5.2 and 5.3. Respondent had never been given any previous notice of these alleged violations. There was no reference to the Oath of Admission.

Thereafter, Respondent was served with an Amended Notice of

Finding of Probable Cause that added Rule 4-8.4(d) to the charges. Once again, there was no inclusion of the Oath of Admission. Ultimately, the Bar filed the Complaint, which yet again did not include the Oath of Admission. The Bar agreed at the conclusion of the final hearing that it was not relying on the Oath of Admission as a violation. (T. 224-226). Now, on review, the Bar for the first time asserts the Oath of Admission as the basis of an alleged Bar rule violation.

Notice is the hallmark of due process and the failure to provide notice and an opportunity to respond is a grave violation of due process. The Oath of Admission has never been used as the basis of an alleged violation in this case. The Bar argues that the Oath of Admission essentially elevates the emails to a rule violation as a matter of law. Respondent should not now be faced with discipline based upon violation of the Oath of Admission when he has never been given notice that violating the Oath of Admission is a rule violation.

Reliance on the Oath of Admission underscores the Bar's serious procedural irregularities in the handling of this grievance from the very beginning and it is unfair and inappropriate to use it as the basis of a rule violation and discipline in this case now. As important as civility and professionalism is in the practice of law, procedural fairness should not be

sacrificed and discarded. This is particularly so where the Bar, as here, has failed to properly follow the Rules of Discipline from the very beginning of the grievance process.

II. The Referee's Findings and Recommendation of Not Guilty are Supported by the Record and Should be Accepted

The Bar does not argue that the referee's findings are clearly erroneous or without support in the record. Rather, the Bar seeks to elevate the emails to a violation as a matter of law in spite of the referee's findings of fact. In asserting this position, the Bar ignores the actual requirements of Rules 4-8.4(d) and 3-4.2.

A. The Emails Are Not Prejudicial to the Administration of Justice

Rule 4-8.4(d) provides:

> A lawyer shall not: (d) ***engage in conduct*** in connection with the practice of law ***that is prejudicial to the administration of justice***, including to ***knowingly, or through callous indifference***, ***disparage, humiliate, or discriminate against*** litigants, jurors,witnesses, court personnel, or ***other lawyers*** on any basis, including, but not limited to, ***on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment or physicalcharacteristic***. (emphasis supplied)

By its terms, Rule 4-8.4(d) requires that the proscribed conduct be prejudicial to the administration of justice, such as knowingly, or through callous indifference, disparaging, humiliating, or discriminating against

other lawyers on the basis of age, gender or sexual orientation. The Bar fails to properly analyze the requirement of prejudice to the administration of justice and in doing so ignores the actual findings of the Referee.

The Referee found that the emails did not adversely affect the administration of the underlying case. (ROR p. 20). Indeed, none of the witnesses believed that the emails in question had any negative effect on the handling, fairness, prosecution, or defense of the matter. (DeCandio, T. p. 81; Gillum, T. p. 154; Atwood, T. p. 218). The Referee found the testimony of these witnesses to be highly credible. (ROR p. 15 – 16). The referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned unless there is no support in the record. *The Florida Bar v. Draughon,* 94 So. 3d 566, 570 (Fla. 2012). The Referee's findings of fact as to the absence of the prejudice required by Rule 4-8.4(d) are supported by competent, substantial evidence in the record. This Court should not reweigh the evidence now and substitute its judgment for that of the Referee.

The requirement of Rule 4-8.4(d) that the conduct be prejudicial to the administration of justice cannot be a hollow requirement without meaning. That is particularly true in the context of speech. The case of *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 888 (1991),

is instructive.

The *Gentile* case involved a Nevada rule of professional conduct that prohibited extra judicial statements that a lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. In *Gentile,* a defense attorney was critical of police at a news conference before his client's trial on criminal charges.

The United States Supreme Court confirmed in *Gentile* that states have a right to restrict attorney speech which has a substantial likelihood of prejudicing pending legal proceedings; however, the Supreme Court reversed sanctions against the lawyer in *Gentile* because the critical statements were not made in a time and manner that presented any threat of real prejudice to the case. The statements were made six months before trial and suggested there were crooked cops and that a police detective actually stole the drugs and money in question. *Id. at* 2736 -2737 *Gentile* established a "substantial likelihood of material prejudice" standard to attorney speech, particularly public speech, outside the courtroom.

The standard enunciated in *Gentile* is consistent with Rule 4-8.4(d) which requires that the sanctioned conduct be "prejudicial to the administration of justice." The emails here did not prejudice the underlying proceedings or create a substantial likelihood of such prejudice. They were

entirely private communications.

The emails did not seek to undermine the judicial system, did not seek to influence the trial court, did not seek to impugn Ms. Tyson to other counsel, and did not seek to preclude Ms. Tyson from properly representing her client in court. While Respondent does not condone his lapse in civility, his emails in and of themselves were not "prejudicial to the administration of justice."

To attempt proof by clear and convincing evidence that the emails were prejudicial to the administration of justice, the Bar should have presented some evidence that the speech did or was likely to impact the underlying case or at least the public's confidence in the judicial system. Here, the Bar relied solely upon the emails themselves and presented no evidence that there was a real or likely prejudice to the case or that the emails otherwise impaired confidence in the judicial system.

The Bar did not present evidence from Ms. Tyson that she was humiliated or in any way precluded from properly representing her client. The emails were sent over a year before the scheduled trial, were purely private, had no impact on the underlying proceedings and did not suggest a lack of confidence in the trial judge or judicial system.

The Bar ignores these facts and asserts that the emails in and of

themselves violate the Oath of Admission and Rule 4-8.4(d) as a matter of law. That cannot be the case under the facts here and would set a dangerous precedent that critical and uncivil speech alone, without more, violates the Bar rules.

In an effort to bolster its case on review, the Bar now asserts for the first time the following: "It seems highly unlikely that Respondent would have sent emails like this to an older, male partner. … Members of the Bar, young and old, without regard to gender or sexual orientation deserve the same amount of civility. Just because Respondent believed Ms. Tyson to be a young, inexperienced, female lawyer does not mean that he did not owe her any less respect than an older, experienced, male lawyer." (Bar Brief p. 27)

No suggestion has ever previously been made that Respondent treats female lawyers differently than male lawyers or young lawyers differently than older lawyers, that he intended to do so here, or that his emails were discriminatory based upon age, gender, or sexual orientation.

There is also no evidence that Respondent knowingly or with callous indifference disparaged or discriminated against Ms. Tyson on the basis of age, gender, or sexual orientation. The Referee specifically found to the contrary. "The emails in question certainly do not disparage others 'on account of race, ethnicity, gender, religion, national origin, disability, marital

status, sexual orientation, age, socioeconomic status, employment, or physical characteristic." (ROR p. 18). "Respondent did not use the emails to disparage or humiliate Ms. Tyson in front of her colleagues, the court, or others." (ROR p. 20).

The Bar's contention that Respondent must have known that the emails were sent to a young, inexperienced lawyer is without support. There is nothing in the record that supports the knowledge attributed to Respondent or the assertion that Ms. Tyson was young or inexperienced. There is nothing in the record that supports the suggestion that Respondent discriminates against young, female attorneys. The Bar wrongfully asserts that the emails violate Rule 4-8.4(d) as a matter of law and then improperly seeks to support this position with gratuitous suppositions.

The emails were purely private in nature; they were not made public to disparage Ms. Tyson. Ironically, the emails were published by Ms. Caggiano, who was not the recipient of the emails and who presumably could only have obtained them from Ms. Tyson. Respondent made no attempt to embarrass Ms. Tyson before the trial court or other counsel. Respondent publicly apologized to Ms. Tyson, the trial court and the other attorneys after Ms. Caggiano made the emails public.

Moreover, the Referee found that the Respondent did not know he

had actually sent the second email, which contains the most objectionable statements. (ROR p. 11 -12). Respondent testified that he thought he had closed his computer without sending the email. However, Respondent checked his email after the Motion for Sanctions and Civility was filed and confirmed that this email had actually been sent. (ROR p. 11; T. 160, 189 – 194).

The Bar cites no reasons or substantial evidence as to why the Referee's finding of credibility should not be accepted. Respondent did not knowingly send the second email to Ms. Tyson or knowingly disparage or discriminate against her. Under Rule 4-8.4(d) the conduct must knowingly disparage or humiliate another lawyer. (*Fla. Bar. v. Sayler,* 721 So. 2d 1152,1155 (Fla. 1998). The Referee's findings are supported by competent, substantial evidence in the record. The emails did not prejudice the administration of justice and violate Rule 4-8.4(d). This Court should accept and affirm the recommendation of not guilty.

The case law also does not support a finding of guilt in this case. In *Fla. Bar v. Martocci,* 699 So.2d 1356 (Fla. 1997) this Court upheld a referee's report that found no violation of Rule 4-8.4 (d). In *Martocci,* the respondent poked opposing counsel in the chest while saying "F___ you" and then called him an "a __hole" just after a deposition was adjourned.

This language was caught in part on the court reporter's tape recorder and included in the transcript. It was also witnessed by a psychologist working in the office. Later that day the lawyer pointed his finger at the deponent in another deposition and said, "I'm going to get that woman if it is the last thing I do." The lawyer accused the court reporter of making a false and fraudulent transcript. The comments were public. Nevertheless, the referee found that the lawyer was under stress and that the Bar failed to prove by clear and convincing evidence a violation of Rule 4-8.4(d) prejudicial to the administration of justice.

Respondent's statements were not made in front of others in a deposition as in *Martocci,* Respondent also did not physically touch anyone, and the Referee here found Respondent was under substantial duress and did not mean to even send the second email. This case is far less egregious than *Martocci* where the finding of not guilty was upheld.

In *The Florida Bar v. Sayler,* 721 So. 2d 1152 (Fla. 1998), this Court upheld a referee's finding of guilt under Rule 4-8.4(d) and issued a public reprimand. Sayler sent a letter to an opposing, female defense attorney enclosing an article about the murder of another attorney in a similar case. Sayler was also accused of stalking the attorney and she testified she was fearful of him. Sayler intended his actions to frighten opposing counsel in

defense of the case and the effect of such threats on the administration of justice is obvious. Respondent's emails do not even remotely rise to the level of intentional conduct in *Sayler.* Respondent did not even realize he sent the second email.

Other cases involving findings of guilt for unprofessional behavior affecting the administration of justice are much more egregious than this case. In *Fla. Bar. v. Martocci,* 791 So. 2d 1074 (Fla. 2001) (*Martocci 2),* the lawyer repeatedly referred to opposing counsel in racist and sexist terms, as being "crazy" and "a nut case" in court and publicly threatened to beat her father. In *Fla. Bar v. Norkin,* 132 So. 3d 77 (Fla. 2013), an attorney was found guilty of violating Rule 4-8.4(d) after being disruptive in court and making disparaging comments about a judge and senior judge, including unfounded statements implying corruption.

In *Fla. Bar v. Varner,* 780 So. 2d. 1 (Fla. 2001) the lawyer was found guilty of violating Rule 4-8.4(d) after settling a case and then sending the insurer a false notice of dismissal of the case even though he had never actually filed suit. These actions are certainly deemed to be prejudicial to the administration of justice and are far more egregious than the Respondent's.

In *Fla. Bar v. Knowles,* 99 So. 3d 918 (Fla. 2012), the lawyer was

found guilty of violating Rule 4-8.4(d) for conduct prejudicial to the administration of justice because, among other things, she reported that her client would lie in an upcoming proceeding and offered to provide confidential information.

In *Fla. Bar v. Patterson,* 257 So. 3d 56 (Fla. 2018), the lawyer was found guilty of violating Rule 4-8.4(d) for conduct prejudicial to the administration of justice because he placed his own interests above his client during appellate arguments over a fee award, made disparaging comments in appellate filings and sent a letter to the judiciary disparaging another lawyer.

Each of the above cases involved public statements or behavior that affected the administration of justice. Respondent's emails were not public, were not nearly as egregious and did not prejudice the administration of justice in violation of Rule 4-8.4(d). This Court should accept the Referee's recommendation of not guilty.

B. The Emails in Themselves are Not Cause for Discipline Under Rule 3-4.2

In its initial brief, the Bar erroneously quotes from Rule 3-4.3 instead of Rule 3-4.2.

Rule 3-4.2 provides:

> Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is cause for discipline.
>
> Rule 3-4.3 in part provides:
>
> ***The commission by a lawyer of any act*** that is ***unlawful or contrary to honesty and justice*** may constitute a cause fordiscipline whether the act is committed in the courts of the lawyer's relations as a lawyer or otherwise, whether committed within Florida or outside the state of Florida, and ***whether the actis a felony or misdemeanor.*** (emphasis supplied)

The Notices of Finding of Probable Cause and the Complaint reference an alleged violation of Rule 3-4.2, not Rule 3-4.3. As argued above, the Bar has improperly raised the Oath of Admission as a violation of the rules governing The Florida Bar for the first time on appeal. Furthermore, The Oath of Admission, and the oath of civility contained therein, is not a Rule of Professional Conduct and should not be enforced through Rule 3-4.2 regardless.

Rule 3-4.3 can be used to form an independent basis for discipline in certain instances. *See, e.g., Fla. Bar. V. Draughon,* 94 So. 3d 566 (Fla. 2012) (involving the fraudulent transfer of property). But Rule 3-4.3 certainly cannot be used to enforce the Oath of Admission when it is raised for the first time on appeal. Moreover, Rule 3-4.3 requires that the conduct be unlawful or contrary to honesty and justice, such as the commission of a felony or misdemeanor. The rule focuses on truthfulness, honesty and

fairness in the practice of law, not a lapse in civility.

The emails do not involve dishonesty or unlawful conduct. The first email complains that the exhibits Ms. Tyson filed objections to were not objectionable, that there would be no settlement without a tender and that Ms. Tyson should get ready for battle. The second email contains profane criticism of obstructionist tactics and suggests Ms. Tyson will get buried at trial.

While unprofessional, these statements are not dishonest or unlawful. The Bar presented no evidence that Ms. Tyson's tactics up to and including the objections to previously authenticated deposition exhibits were not obstructionist. The Bar identifies no legal violations based upon the email statements. The emails do not threaten crimes or bodily harm. They do not remotely amount to misdemeanors or felonies. They were not public statements, do not impugn the judicial system, and did not prejudice the underlying proceedings. Rule 3-4.3 has never been raised before this appeal and is simply not applicable in this case.

III. Diversion is Not Applicable Based Upon the Recommendation of Not Guilty

After evaluating the mitigating and aggravating factors, the Referee recommended that this "minor misconduct matter be diverted pursuant Rule

3-5.3(b), Rules Regulating the Florida Bar." (ROR p. 26). However, in view of the recommended finding of not guilty, diversion is not applicable.

Rule 3-5.3(b) states:

> (b) Types of Disciplinary Cases Eligible for Diversion. Disciplinary cases that otherwise would be disposed of by a finding of minor misconduct or by a finding of no probable cause with a letter of advice are eligible for diversion to practice and professionalism enhancement programs.

The Grievance Committee found no probable cause with a letter of advice which would make diversion appropriate. However, as the Referee found the Bar failed to properly follow the Rules of Discipline in the grievance process and the Bar ultimately rejected that finding. After hearing all the facts and circumstances, the Referee expressly found the Respondent not guilty. Therefore, imposition of Diversion does not now appear appropriate.

Rule 3-5.3(h)(2), Diversion at Trial Level, provides:

> (h)(2) After Submission of Evidence
>
> A referee may recommend diversion of a disciplinary case to a practice and professionalism enhancement program if, after submission of evidence, <u>but before a finding of guilt</u>, the referee determines that, if proven the conduct alleged to have been committed by the respondent is not more serious than minor misconduct. (emphasis added).

The Rule on its face allows for a recommendation of diversion "before a finding of guilt." That suggests that where there is a withholding of adjudication of guilt that the Referee has otherwise found would exist under

all the facts and circumstances, diversion is appropriate. An express finding of not guilty on the other hand does not support diversion. Obviously, the Referee believed diversion would be appropriate if the facts otherwise established guilt. This can only fairly be viewed as an alternative recommended disposition in the event that this Court disagreed with the not guilty determination.

The Referee's findings on the mitigating and aggravating factors along with the recommendation of diversion were appropriate in view of the consolidation of both the guilt and sentencing phases. The Referee had the benefit of hearing all the evidence at one time, including evidence of mitigation and aggravation.

The Referee stated that "upon consideration of all underlying facts and circumstances, Respondent's emails *would no*t *amount* to any more than minor misconduct under Rule 3-5.1(b), Rules Regulating The Florida Bar." Although somewhat inartful, the phrase "would not amount to any more than minor misconduct…" suggests that had the Referee ruled the evidence supported guilt there would be no more than minor misconduct under all the circumstances.

Stated another way, if the Referee had withheld a formal recommendation of guilt instead of making an express finding of not guilty,

he would have found no more than minor misconduct under all the facts and circumstances. The Referee's findings of fact throughout the Recommendation of Referee are consistent with his recommendation of not guilty and the reference to diversion should be viewed as an alternative recommendation in the event this Court disagrees with the not guilty recommendation. However, based upon the finding of not guilty, diversion is not appropriate.

IV. Had the Referee Withheld a Finding of Guilt, Diversion for Minor Misconduct Would be Appropriate

The Court will generally not second-guess the referee's recommended discipline, as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer,* 753 So. 2d 555, 558 (Fla. 1999). The Bar acknowledges that for the violations arising from the new sentence added to the Oath of Admission in 2011, there currently is no standard that squarely applies; therefore, it would be unfair to discipline Respondent without a clear standard being announced by this Court and a public reprimand would not be consistent with prior Florida Bar cases and the Florida Standards for Imposing Lawyer Sanctions. As argued above, the Oath of Admission is not a proper basis for discipline in this case in any event.

The Bar recognizes that the record supports the Referee's findings on the mitigating factors. (Initial Brief at 17, 37) These factors include absence of dishonest or selfish motive, personal or emotional problems, timely good faith effort to rectify the consequences of misconduct, full and free disclosure to the Bar or cooperative attitude toward the proceedings, character or reputation, interim rehabilitation, imposition of other penalties or Sanctions and remorse. The only aggravating factor was Respondent's substantial experience in the practice of law.

The Bar nevertheless recommends a public reprimand; however, a public reprimand is not consistent with existing case law. All the cases cited by the Bar were properly distinguished by the Referee.

The Bar continues to rely upon *The Florida Bar v. Ratiner,* 46 So. 3d 35 (Fla. 2010). In *Ratiner*, the lawyer attempted to run around the table toward opposing counsel in a deposition, tore up an evidence sticker and threw it at counsel and struck fear into the witness. This was public and physically aggressive behavior during a deposition proceeding. The lawyer had already been given diversion in a previous grievance. Thus, there was an established pattern. *Ratiner* does not support the imposition of a public reprimand here.

The Bar also cites to *The Florida Bar v. Abramson*, 3 So. 3d 964 (Fla.

2009) for support. *Abramson* was openly disparaging and disrespectful to the trial judge in court and before a jury throughout *voir dire*. Ultimately his client discharged him as a result and the case did not proceed to trial that day. The lawyer's conduct was determined by the Referee to be knowing and intentional. The conduct was clearly contrary to the proper administration of the underlying case. Respondent's conduct does not approach the conduct in *Abramson.*

Neither does *The Florida Bar v. Libow,* No. SC21-805, 2021 WL 2376382 (Fla. June 10, 2021) support a public reprimand. First, *Libow* was a consent judgment and is therefore not precedent. Furthermore, *Libow* involved repeated behavior. After the judge verbally warned Libow to refrain from sending emails accusing misconduct to opposing counsel, Libow disparaged the judge in a motion for recusal. Libow was also vexatious and unprofessional in fee litigation. These are much different facts. In effect, the Bar asserts that Respondent should not get the benefit of the judicial warning Libow first received, but instead should be sanctioned by both the trial court and now by this Court.

The out of state cases cited by the Bar are also distinguishable. In *In re Panetta*, 127 A.D. 3d 99 (N.Y. App. Div. 2015), the lawyer sent an email to a juror who had served in a case he tried four years earlier accusing the

juror of lying and making other personal attacks. Panetta directly challenged the administration of justice through the judicial process by accosting a juror. Panetta's behavior could certainly undermine public confidence in the judicial system. This is much different than the facts in this case.

In *Yetiv v. Commission for Lawyer* Discipline, No. 14-17-00666-cv, 2019 WL1186822 (Tx. Ct. App. 2019), the lawyer threatened another lawyer with a grievance unless the lawyer admitted he had no factual or legal basis for allegations in the underlying case. Those threats amount to extortion. Further, is the threats were clearly designed to affect the result of the underlying litigation and the administration of justice. Respondent's emails do not remotely rise to that level.

In *Attorney Grievance Commission v. Markey*, 230 A.3d 942, 944-45 (Md. 2020) cited by the Bar, the emails in question were exchanged for almost seven years and included "many racist, misogynic [sic], xenophobic, and homophobic statements." Racist and misogynist emails squarely fit within Rule 4-8.4(d)'s prohibitions against conduct that knowingly, or through callous indifference, disparages, humiliates, or discriminates against litigants, jurors,witnesses, court personnel, or other lawyers on the basis of race, ethnicity, gender, sexual orientation or physical characteristic.

Markey's conduct also occurred over many years. The *Markey* case is not remotely analogous to this case and is inconsistent with the Referee's findings of fact here.

Notwithstanding the lack of support in both the Florida Standards for Imposing Lawyer Sanctions and the existing case law, the Bar nevertheless recommends that Respondent receive a public reprimand after previously recommending diversion in the conditional plea agreement. The Bar makes this recommendation even though at the time of the conditional plea agreement the facts supporting Respondent's defense had not been fully detailed or evaluated at an evidentiary hearing. When the conditional plea was submitted no evidence had been taken. Moreover, the Bar introduced no additional evidence or aggravating facts at trial.

Respondent can only surmise that the Bar now takes the position that there should be a public reprimand because it is laboring under an incorrect assumption that this Court has predetermined guilt and agreed with a public reprimand. This is evident from the Bar's position that the final hearing was for recommended discipline only, not guilt. (T. 64). In its initial brief the Bar continues with this position as follows:

> Originally, the hearing was only supposed to be on matters concerning the sanction. (T. 4). The Bar's counsel contended that this Court had already found that there was a rule violation. (T. 6). The Bar's counsel maintained that there were no facts in dispute. (T. 6).

> Respondent's counsel argued that this Court did not tell the Referee that he had to find a violation of a rule. (T. 8). Essentially, Respondent's counsel wanted "a trial de novo." (T. 8). (Initial Brief p. 12).

The Bar's position that that this Court had already found a rule violation and that the final hearing should concern only sanctions is truly incredible. There can be no "trial de novo" when there has never been a trial or evidentiary hearing in the first place.

Finding that a rejection of a conditional plea agreement constitutes this Court's finding of guilt before there has been any evidentiary hearing would be a denial of fundamental due process. The Bar's position further underscores the Bar's procedural irregularities in the handling of this grievance from the very beginning and its later efforts at trial to deny due process. Such a predetermination of guilt as the Bar suggests would defeat both the purposes and desirability of lawyers entering conditional plea agreements.

The Order disapproving the conditional plea agreement did not find Respondent guilty and did not predetermine that there should be a public reprimand. The Order was merely an offer to accept a public reprimand on the limited facts disclosed should the parties so agree. Respondent did not accept a new conditional plea agreement as permitted by the Order.

The conditional plea agreement did not recite the details of all the

surrounding facts and circumstances that were later developed at trial. These include the Bar's ongoing failure to comply with the grievance rules, the case history leading up to the day of the emails, the extent of Respondent's personal circumstances at the time, the lack of prejudice to the underlying case and the lack of knowledge that the second email was even sent.

This Court's Order clearly allowed Respondent the option of requiring the Bar to prove guilt by clear and convincing evidence at trial and to fully establish the mitigating circumstances. To the extent this Court disagrees with the Referee's recommendation of not guilty now, it should find no more than minor misconduct and accept the Referee's recommendation of diversion.

The Bar nevertheless argues that a public reprimand is necessary to protect the public from unethical conduct and to deter other lawyers. The Bar provides no persuasive reason why a public reprimand will protect the public. The emails were not made public by Respondent and they were entirely private. They did not publicly seek to undermine the administration of justice. Ironically, the emails were only made public by the Motion for Sanctions and Civility.

The communications in the emails were not made in court, were not

made in depositions, were not made in a public forum, and did not have any effect on the underlying proceedings. Further, while certainly not appropriate, the emails were sent in part under frustration with obstructionist tactics by opposing counsel. This was also an isolated matter which the trial judge herself found to be an aberration. This is simply not a case where sanctions are necessary for protection of the public interest.

This is also not a case in which the facts suggest that a public reprimand is necessary to deter other lawyers. Again, this was an isolated occurrence on the part of Respondent in what has otherwise been an ethical and admirable career. Respondent has otherwise upheld the highest standards of professionalism throughout his career. He made every effort to apologize directly to Ms. Tyson once he realized he had sent the second, most offensive email. Respondent's emails did not live up to his own personal standards.

Respondent freely admitted to the trial court, Ms. Tyson, and his colleagues his own abhorrence with his behavior and profoundly apologized in response to the Motion for Sanctions and Civility. Respondent fully cooperated with the Bar throughout these proceedings.

Rather than deter other attorneys, the sanction of a public reprimand

may actually have the negative affect of discouraging attorneys from freely acknowledging their mistakes, cooperating with the Bar and making immediate efforts to rectify their conduct.

A public reprimand is not appropriate under all the facts and circumstances of this case and the Court should accept the referee's finding of not guilty. To the extent that this Court finds a violation, it should be no more than minor misconduct under the circumstances and the Court should accept the Referee's recommendation of diversion.

CONCLUSION

This Court should accept the Referee's recommendation of not guilty and reject the recommendation of diversion to a practice and professionalism enhancement program because diversion is not applicable. If this Court finds there is a violation of the rules, such finding should be limited to the diversion recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Answer and Initial Cross Brief has been e-filed with the Supreme Court of Florida, and a true and correct copy of same has been furnished to Chris W. Altenbernd, Bar Counsel, at his designated email address of caltenbernd@bankerlopez.com, James Keith Fisher, Bar Counsel, The Florida Bar, at his designated e-mail address of jfisher@floridabar.org, and Patricia Savitz, Staff Counsel, at her designated e-mail address of aquintel@floridabar.org this 8th day of November, 2021.

/s/ Joseph A. Corsmeier
Joseph A. Corsmeier, Esq.

CERTIFICATE OF TYPE SIZE & STYLE

I hereby certify that this document complies with the applicable font and word count limit requirements of Florida Rule of Appellate Procedure 9.045 and 9.210(a)(2)(B). The font is 14-point Arial. The word count is 9,617. It has been calculated by the word-processing system, and it excludes the content authorized to be excluded under the rule, but it includes any footnote.

/s/ Joseph A. Corsmeier
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