IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JONATHAN STEPHEN SCHWARTZ,

Respondent.

Case No.: SC21-484

The Florida Bar File
No. 2019-70, 116 (11N)

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

A. Abbreviated Names

Jonathan Stephen Schwartz, the Respondent, will be referred to as Mr. Schwartz or the Respondent. The Florida Bar will be referred to as the Bar.

B. Citations to the Record

References to the Preliminary Report of Referee will be cited as (ROR1 p.**), references to the Amended Preliminary Report of Referee will be cited as (ROR2 p. **), and references to the Supplemental Report of Referee will be cited as (ROR3 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 final hearing occurred over three days and the transcripts will be cited as (T-**) for day one, (T2-**) for day two, and (T3-**) for day three. The sanctions hearing occurred over two days and the transcripts will be cited as (TS1-**) for day one and (TS2-**) for day two.

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

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

The Bar provides an appendix of critical portions of the record to facilitate review. This brief cites to the appendix as (A. **).

NATURE OF THE CASE

This case is Mr. Schwartz's ninth disciplinary proceeding.[1] In January 2022, in his seventh proceeding, which addressed his use of an altered photo lineup exhibit at the victim's deposition, this Court rejected the referee's recommendation of a 90-day suspension and imposed a three-year suspension followed by probation. In so doing, this Court explained that Mr. Schwartz "has been an overzealous advocate incapable of seeing the forest for the trees." *The Florida Bar v. Schwartz*, 334 So. 3d 298, 304 (Fla. 2022).

In this case, which occurred when the seventh case was pending in this Court, Mr. Schwartz had communications with his clients' co-defendant without the knowledge of the co-defendant's public defender. He had his staff prepare an affidavit for the co-defendant asking that he go to trial first so that he could testify for Mr. Schwartz's client in a later case. Mr. Schwartz filed this affidavit without providing a copy to the co-defendant's public defender. The Referee recommends that this Court find Mr. Schwartz in

[1] One of those cases, SC19-983, is still pending on the Referee's unchallenged recommendation of guilt. For five violations relating to a text message advertisement in October 2017, the Referee in that case recommends a 10-day suspension current with the suspension in SC17-1391

violation of Rule 4-4.2(a) (communications with a represented person) and Rule 4-8.4(d)(conduct prejudicial to the administration of justice).

Before this Court issued its opinion in the seventh case, the Referee in this case recommended a 90-day suspension followed by probation comparable to the sanction this Court rejected in the seventh case. The Bar seeks review of the recommended sanction, maintaining that enough is enough and it is time to disbar Mr. Schwartz with leave to reapply in five years. Mr. Schwartz seeks cross-review of the Referee's recommendations as to guilt and sanctions.

STATEMENT OF THE CASE AND FACTS

This disciplinary proceeding arises from a criminal case in which Mr. Schwartz represented Demarris Maloy, and the Office of the Public Defender in the Eleventh Circuit represented his co-defendant, Gabriel Johnson. (R-Ex. 6, 13). The two men were charged with drug-related offenses and Mr. Maloy was charged as a felon in possession of a firearm. (Tab 1). Both men were eligible for career criminal sentencing due to their prior records. (T2. 44-45, 126).

A. The facts concerning the underlying criminal cases.

The facts leading up to the arrest of the two men are described in the deposition of the detective who oversaw the surveillance and the subsequent search of an apartment in a quadruplex where the two men were arrested in 2016. (R-Ex. 11). That deposition was taken by an attorney from the public defender's office and by Mr. Schwartz's associate on May 25, 2017.

The detective explained that law enforcement surveilled the location from late August to late September 2016, conducting six controlled purchases of crack cocaine with the assistance of a confidential informant. (R-Ex. 11, p. 5-11). Mr. Maloy was not identified as one of the actual sellers of that crack. The detective obtained a search warrant for the location, which was executed on September 27, 2016. (R-Ex. 11, p. 35). Mr. Maloy and Mr.

Johnson were the two people in the house at the time of the search, and they were arrested at that time. (R-Ex. 11 p. 37-38).

When Mr. Johnson was searched, the detective recovered $881, ten baggies of crack cocaine, one unpackaged crack rock, and a single key on a ring that opened the front security door to the premises. (R-Ex. 11 p. 40). Mr. Maloy also had a key that opened a security gate to the premises and his car keys. (R-Ex. 11 p. 39). No drugs were found on Mr. Maloy, but one of the members of the entry team told the detective that he had seen Mr. Maloy stuff something in a lower kitchen cabinet. (R-Ex. 11 p. 44-45). In that location, the detective found a white bag with currency and marijuana, as well as a firearm. (R-Ex. 11 p. 47-48). He also found a Florida Power and Light statement belonging to Mr. Maloy in the garbage. (R-Ex. 11 p. 51). In the bedroom area where Mr. Johnson was apprehended, the detective found a loose one-dollar bill and a baggie of powder cocaine. (R-Ex. 11 p. 48).

On January 17, 2017, Mr. Schwartz entered his notice of appearance on behalf of Mr. Maloy, in *State v. Demarris Maloy*, Case No. F16-21853A (Miami-Dade County Circuit Court). (ROR2 p. 3). The Office of the Public Defender was appointed to represent Mr. Johnson in *State v. Gabriel Antwan Johnson,* Case No. F16-21853B (Miami-Dade County Circuit Court). (R-Ex.

13). The two cases have case numbers differentiated only by "A" and "B," and the two defendants were treated as co-defendants. The cases were set to be tried together on August 20, 2018, before Judge Multack. (R-Ex. 9). The information charged both Mr. Johnson and Mr. Maloy with cocaine offenses; it charged Mr. Maloy with possession of a firearm by a convicted felon, and it also charged Mr. Maloy with a felony marijuana offense. (R-Ex. 6, 13).

The misconduct alleged in this disciplinary proceeding commenced on June 12, 2018, when Mr. Maloy and Mr. Johnson both showed up at Mr. Schwartz's office unannounced. (ROR2 p. 3)(A. 5)(T2. 136). This occurred about two weeks after the lawyers for the two parties had taken the detective's deposition. It also occurred after Mr. Schwartz's seventh disciplinary proceeding involving the altered photo lineup was well underway. *See Schwartz*, 334 So. 3d at 300 (noting that the Bar's complaint in that case was filed on July 27, 2017).

It is undisputed that no lawyer from the Office of the Public Defender accompanied Mr. Johnson to Mr. Schwartz's office. Mr. Schwartz testified that he met with his client outside of Mr. Johnson's presence in his office. (T2. 37). Mr. Maloy told him that Mr. Johnson wanted to testify on his behalf. (T2. 138). Mr. Schwartz was "extremely hesitant" about this proposition.

(T2. 140). He went back to the waiting room and asked Mr. Johnson whether it was true that he wanted to testify on his client's behalf. (T2. 140). Mr. Schwartz testified that Mr. Johnson said "absolutely." (T2. 140).

Mr. Schwartz told Mr. Johnson that he was entitled to his lawyer and that he should call his lawyer. (T2. 141). As Mr. Schwartz put it:

> I was frankly not exactly sure whether there was a conflict or not at that point since they were charged with really two completely different acts but in an abundance of caution, they are at least charged right now as codefendants and it is a sensitive matter, any time someone says they want to testify against someone else, and that is what I thought was what I needed to do to comply with the Rules at the very minimum and to turn [Mr. Johnson] away unless he talked to his attorney.

(T2. 141-42) (emphasis added).

He asked Mr. Johnson whether he had a public defender. (T2. 142). Mr. Schwartz claims Mr. Johnson stated that (1) he was not represented, (2) that he did not know, (3) he had never met with anyone, and (4) he was firing them. (T2. 142). Obviously, this series of answers is a list of inconsistent answers.

Despite the fact that Mr. Schwartz admitted that he assumed "everyone in a felony case is assigned a public defender," (T2. 142), and knowing the public defender's number by heart, he did not attempt to call the public defender's office. (T2. 172)(ROR2 p. 8). Instead, he explained in his

testimony: "I really didn't think I had any other choice," (T2. 143), so he instructed another attorney in the office to prepare a "barebones" affidavit. (T2. 144).

The executed affidavit[2] is only four paragraphs long. (A. 42)(TFB-Ex. 1). It states:

1. I am prepared to offer testimony on behalf of the co-defendant Demarris Maloy.
2. At this time, I have a 5th Amendment right against self-incrimination.
3. As a result, I am seeking to have my case litigated first, thereby extinguishing my right to remain silent.
4. And thereafter I will testify on behalf of Mr. Maloy.

(TFB-Ex. 1). The affidavit is notarized by the same associate from Mr. Schwartz's office who had attended the detective's deposition with the public defender two weeks earlier. (TFB-Ex. 1). The affidavit was filed in Mr. Maloy's case that same day. (ROR2 p. 6). It was not separately filed in Mr. Johnson's case even though it was asking for that case to be tried first. (ROR2 p. 6). Mr. Schwartz made no attempt to contact the public defender's

[2] This affidavit is sometimes referred to as a *Byrd* affidavit. *See Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970).

office after he filed this affidavit to discuss it with that office. But, after he filed the affidavit, he reached out to the prosecutor, Mr. Daniel Walsh, to get his position on a severance. (T3. 12-13). He also explained to his client the consequences of holding Mr. Johnson's trial first, but Mr. Johnson did not receive the same benefit. (ROR2 p. 11).

Nearly a month later, on July 9, 2018, Mr. Schwartz filed a "Motion to Sever Defendants and For Subsequent Trial" only in his client's case. (A-44)(ROR2 p. 7). Judge Multack held a hearing on the motion on July 19, 2018. (ROR2 p. 7). At the hearing, the public defender currently assigned to represent Mr. Johnson, Ms. Del Sol, appeared on Mr. Johnson's behalf. (TFB-Ex. 2 p. 2). She had been unaware that Mr. Johnson had talked to Mr. Schwartz until the prosecutor, Mr. Walsh, reached out to her to discuss this development. (TFB-Ex. 2 p. 8).

The transcript of this hearing is probably worth a full read by this Court. Ms. Del Sol immediately stated that she was not joining in the motion. (A. 50). Despite his testimony at the final hearing in this matter that Mr. Maloy only told him Mr. Johnson wanted to testify on his behalf, at the motion to sever Mr. Schwartz described in some detail what Mr. Johnson would state under oath at the trial of his client if the cases were severed. (A. 51-53). He

claimed that Mr. Johnson would testify that the actual drugs were his drugs. (A. 53).

The judge immediately asked Mr. Schwartz how he knew those facts and indicated that he did not want to invade any attorney/client privilege. (A. 53). He asked whether Mr. Schwartz talked to Mr. Johnson.

Despite the judge's suggestion that Mr. Schwartz may have gotten this information from Mr. Maloy, Mr. Schwartz did not respond that he could not answer due to an attorney/client privilege. Instead, Mr. Schwartz did not answer the question. He claimed that how he knew the information was a "whole separate side issue." (A. 54). The judge indicated that there was an issue if Mr. Johnson "inculpated himself to you." (A. 55). The prosecutor, Mr. Walsh, suggested that Mr. Schwartz could be forced to testify because he had no attorney/client privilege with Mr. Johnson. (A. 55). Mr. Schwartz continued with his position that "whether it came from him, or whether it came from my client or where it came from, frankly, is irrelevant." (A. 56).

Ms. Del Sol responded that it has "everything" to do with the *Byrd* affidavit and the motion to sever because it was obtained without "counsel's knowledge." (A. 56). Once again, the prosecutor asked for a direct answer of whether Mr. Schwartz spoke to Mr. Johnson, and Mr. Schwartz simply stated that he "is not the one who is on the stand right now." (A. 57).

After reading the affidavit again, the judge concluded he needed to hear testimony from Mr. Johnson. After being sworn, Mr. Johnson explained he did not speak to Ms. Del Sol because she was not his lawyer at the time. He explained both that he did not have a lawyer and that the public defenders' office was switching lawyers at the time. (A. 58).

Mr. Johnson told the judge that he did meet with Mr. Schwartz without his lawyer. He said that he and Mr. Maloy came up with the idea that he would testify that the drugs were his. (A. 59). Then the judge asked whether this was the truth. Undoubtedly realizing that the question was improper, the judge instructed Mr. Johnson not to answer, but Mr. Johnson answered first: "Yes, sir." (A. 59).

Mr. Schwartz then tried to "proffer" a statement to which Mr. Johnson explained that he did not believe Ms. Del Sol was his attorney at the time of the meeting but that he did have an attorney. (A. 60). After further discussion, Mr. Schwartz took the position that the affidavit was no longer important because "the defendant just testified on the record." (A. 63). Thus, Mr. Johnson obeyed the judge at a hearing where Mr. Schwartz sought an early trial for Mr. Johnson, based on the improper affidavit Mr. Schwartz had prepared for Mr. Johnson even though he was not his lawyer. But Mr. Schwartz then attempted to argue that Mr. Johnson waived his Fifth

Amendment rights at the upcoming joint trial by answering the judge's question at the hearing.

The trial court denied the motion to sever. (TFB-Ex. 2 p. 33). Undeterred, Mr. Schwartz then filed a motion for a ruling on his right to use Mr. Johnson's testimony at the hearing on the motion to sever during the two defendant's joint trial. (R-Ex. 10).

Eventually in July 2019 these two criminal cases went to trial. (R-Ex. 12). Mr. Johnson agreed to a negotiated plea with the State prior to opening statements. Mr. Schwartz explained to the Court that Mr. Johnson had "flipped" and was going to implicate Mr. Maloy. (R-Ex. 12 p. 8). Mr. Schwartz then gave an opening argument explaining to the jury that they would see Mr. Johnson's affidavit and that Mr. Johnson had already testified "in this very spot right here those drugs were mine." (R-Ex. 12 p. 7-8.) Following the opening statements, Mr. Maloy negotiated a plea by which he pled guilty to four counts and received five years' probation to avoid the mandatory lengthy career criminal sentence for which he was eligible due to his prior record, which included a second-degree murder conviction. (R-Ex. 12 pp. 26-38).

B. The Guilt Phase of the Bar Proceeding.

When the Bar began this investigation, Mr. Schwartz had his attorney, Barry Wax, respond to the complaint. (R-Ex. 15). That response included a second affidavit from Mr. Johnson. (R-Ex. 15). That affidavit confirms that

> When [Mr. Johnson] saw Mr. Schwartz, he told me that he could not speak with me because I was represented by counsel and that I should call my lawyer. I told Mr. Schwartz that I was represented by a public defender, but that every time I saw or talked with my lawyer it was a different person. I was unhappy with my representation and wanted to fire my lawyer.

(R-Ex. 2).

After the Grievance Committee found probable cause, the Bar filed the formal complaint on March 30, 2021, reciting the facts about the meeting at Mr. Schwartz's office at which the *Byrd* affidavit was obtained and attaching the affidavit and a transcript of the hearing before Judge Multack. (Tab 1). The complaint charged violations of Rule 4-4.2(a), communications with a represented person, and Rule 4-8-4(d), conduct prejudicial to the administration of justice. Judge Chiaka Ihekwaba was assigned to be the Referee for the case. (Tab 7).

At the final hearing, Ms. Del Sol, Mr. Walsh, and Mr. Schwartz testified recounting the events just described. Mr. Schwartz also called the private

lawyer who entered an appearance for Mr. Johnson after these events, Mr. Tischler. He called Juan de Jesus Gonzalez as an expert on the application of these rules of professional conduct in a criminal context.

Ms. Del Sol testified that Mr. Schwartz never secured her permission to speak to her client, let alone inform her that he had obtained the *Byrd* affidavit from her client. (T. 65, 68). She also testified that she never had the opportunity to counsel her client as to the consequences related to his communications with Mr. Schwartz. (T. 66).

Mr. Schwartz testified that Mr. Johnson's decision to take the stand on Mr. Maloy's behalf was absolutely crucial information that had to be brought to the attention of the court and filed immediately. (T2. 147). He did not feel that he could just turn Mr. Johnson away. (T2. 147). And he did not think he was required to speak with Mr. Johnson's lawyer when Mr. Johnson said he did not have a lawyer. (T2. 152). Mr. Schwartz testified that he felt his conduct was "exactly the opposite" of conduct that is prejudicial to the administration of justice. (T2. 163).

Mr. Tischler testified that the preparation of the affidavits and these events did not prevent Mr. Johnson from negotiating a plea that allowed him to plead guilty in exchange for imprisonment for two days and time served. (R-Ex. 14 p. 4).

Over the objection of the Bar that no expert testimony was necessary, Mr. Gonzalez was allowed to testify. (T2. 72-79). To be clear, Mr. Schwartz did not consult Mr. Gonzalez about these ethical issues prior to his conduct; he was merely providing after-the-fact opinions. Mr. Gonzalez described himself as a "regular" at the criminal courthouse in Miami. (T2. 81). His training to be an expert was attending "seminars often, as much as I can" on "topics of relevance to criminal law practice." (T2. 82). He had mentored young lawyers. In his thirty-seven years of practice he "believes" he had developed an understanding of the various rules of professional conduct that help guide criminal lawyers. (T2. 82). He believed his opinion was sought after by a number of his peers. (T2. 82).

Mr. Gonzalez opined that "when a client tells you he's not represented by a lawyer, doesn't want to be represented by a lawyer, I think you are supposed to take them at their word." (T2. 94). He recognized that a lawyer is counsel to a client until the court allows the lawyer to withdraw. But he explained "that is between the Court and the lawyer, that is not between the client and the lawyer." (T2. 113). Thus, apparently the fact that the docket clearly showed that Mr. Johnson was represented by the public defender's office, and that no motion to withdraw had ever been filed, much less ruled upon by the Court, was not a factor that affected his opinion. (R-Ex. 6).

Following the final hearing, the Referee prepared a Preliminary Report of Referee. (Tab 56). This reported was modified in an Amended Preliminary Report[3] that did not change the recommendations. (A. 3-14)(Tab 63). The Amended Report has the findings of fact concerning these events. It contains a finding that Mr. Schwartz testified that he "certainly did not know who the lawyer [for Mr. Johnson] was." (ROR2 p. 5)(A. 7). But the Referee found that Mr. Schwartz knew he was represented by an attorney from the office of the public defender. (ROR2 p. 9)(A. 11). The Referee relied on Mr. Gonzalez only for his opinion that a person stating that they committed a crime would constitute a "subject of the representation" for purposes of Rule 4-4.2(a). The Referee recommended this Court find Mr. Schwartz guilty of violating Rule 4-4.2(a) (communication with a represented person) and Rule 4-8.4(d) (conduct prejudicial to the administration of justice). (ROR2 p. 10)(A. 12).

[3] After the Referee issued her Preliminary Report of Referee, Mr. Schwartz moved to reopen the evidentiary hearing portion of the proceedings and/or vacate and reconsider the Report because he believed it contained and considered stricken evidence. The Referee denied his motion and issued an Amended Preliminary Report of Referee that clarified she was not relying on the stricken evidence. (Tab 56, 59, 62-63).

C. The Sanction Hearing.

The sanction hearing incorporated much of the material from the sanction hearing in the seventh disciplinary proceeding. (Tab 70-71). Similar to the earlier hearing he called many character witnesses—a total of 26 witnesses. Mr. Schwartz testified. (ROR3 p. 3)(A. 17). Of these 26 witnesses, 7 of them testified in the seventh disciplinary proceeding. Many of the letters he submitted into evidence in this case were written by people who also wrote letters on his behalf in the seventh disciplinary proceeding.

Many of the other witnesses who testified were former clients of Mr. Schwartz's, employees, and friends. Mr. Alan Soven testified that he is a criminal defense attorney who has known Mr. Schwartz both professionally and socially for 30 plus years. (TS1 116). He testified that Mr. Schwartz knows his way around the state criminal court system and is able to get desired results for his clients. (TS1 118). He described Mr. Schwartz's representation of clients as zealous, forceful, and honest. (TS1 120).

Mr. Juan Morin, Sr. is a certified court interpreter. (TS1 148). He described Mr. Schwartz as dedicated to the best interests of his clients and a passionate, fiery individual. (TS1 149). He explained that Mr. Schwartz still treats everyone with respect. (TS1 150).

Ms. Caridad Dearmas Acosta testified that Mr. Schwartz provided representation for her children. (TS1 159). She described him as a marvelous attorney and a genius. (TS1 159). She was unsure how it would be with another attorney. (TS1 160). Another client, Gloria McConnell, testified that she believed Mr. Schwartz was dedicated to improving himself. (TS2 37).

His paralegal, Janet Palacio, testified that Mr. Schwartz was her boss, and that he also represented her son. (TS2 26-27). He had become like a father figure to her son, and she would give credit to the Bar if he were allowed to continue to practice law. (TS2 27-28).

Mr. Schwartz's mother testified. She believes that he has an emotional attachment to his clients and is very motivated. (TS1 141). She explained that he can be very intense and tries hard to follow the rules. (TS1 143). She believes he can practice law again after learning from his mistake. (TS1 146).

Mr. Schwartz presented brief additional testimony from Dr. Weinstein, but it is unclear whether he is treating with Dr. Weinstein for matters related to this proceeding. (TS1 14-16). Nonetheless, Dr. Weinstein represents that Mr. Schwartz is still participating in group therapy. (TS1 15-16). Mr. Schwartz introduced Dr. Weinstein's January 2021 letter, prepared prior to

these proceedings. (Tab 74). It appears Dr. Weinstein's letter references the seventh disciplinary proceeding. (Tab 74).

Mr. Schwartz provided testimony at the sanction hearing that should be carefully reviewed by this Court. (TS1 39-98). He explains that he was driven to become a lawyer because of the traumatic experience he had when he was fifteen observing his father's trial for Medicare fraud. His father was ultimately convicted. (TS1 41-42). He explained:

> There was 12 jurors, there was 55 counts that he lost, and so I had to witness the jurors chant guilty 55 times, times 12, and I couldn't take that. I had to leave somewhere in the middle of that and so it created an enormous trauma for me that I've only recently with the help of Dr. Weinstein and FLA have begun to understand the effects of that and to unlock that and uncover that and to try to get beyond how that has affected me professionally and I do believe has some relation to creating the issues that came up with these cases.

(TS1 42).

However, he also explained that his search for emotional help began many years ago with training in primal therapy and that he actually became the vice-president of the International Primal Association. (TS1 49). He undertook Tai Chi training as early as 1987. (TS1 50). He traveled to visit the Dalai Lama on at least thirty occasions. (TS1 50). He trained under

Rabbi Joseph Gelberman and became on ordained interfaith minister. (TS1 50). All of this counseling was prior to the misconduct in his recent cases.

He has taken steps in his office to resolve these problems including adding "two assistants that operate as lawyers for the last – can do anything a lawyer can do. . . but for they have a law license, they're essential." (TS1 62).

Mr. Schwartz provides his own version of the events that generated his many disciplinary proceedings, (TS1 64-81), but the most he seems to say is that he "acknowledges and accepts responsibility for the conduct." (TS1 65, 66, 68, 70, 73, 75, 77). Even at the sanction hearing, he has no apologies for misconduct, only acceptance of responsibility for his conduct. And even at the sanction hearing, he claims that Mr. Johnson told him he was unrepresented and "not represented by the Public Defender. They're fired." And Mr. Schwartz claimed he "believe[d] that." (TS1 89-90).

The hearing, of course, occurred at a time when the referee in the seventh case was recommending a 90-day suspension. In the Referee's Supplement Report, she recommended a comparable, concurrent sanction. (A. 19). The details of the applicable standards and the aggravating and mitigating factors will be discussed in the argument section.

D. Prior Disciplinary History.

This is Mr. Schwartz's ninth disciplinary proceeding. His eight prior disciplinary proceedings are summarized as follows:

- First Disciplinary Proceeding (1995): Mr. Schwartz was admonished for filing a false motion for continuance in which he misrepresented the basis for the continuance and the prosecutor's position on the matter. He also harassed opposing counsel. The Eleventh Judicial Circuit Grievance Committee found he violated Rule 4-8.4(d). Fla. Bar File No. 94-71,026(BIB). (TFB-Ex. Sanctions 1).
- Second Disciplinary Proceeding (1996): Mr. Schwartz was admonished for disseminating an advertisement that was not filed with the Bar and did not contain the word "advertisement" in red ink. The Grievance Committee found that he violated Rule 3-7.6(k)(1). Fla. Bar File No. 96-71,789(11B). (TFB-Ex. Sanctions 3).
- Third Disciplinary Proceeding (1997): Mr. Schwartz received a public reprimand through a consent judgment for failing to comply with numerous court orders, made misrepresentations to the court, and was found in indirect criminal contempt for his repeated failures to appear. This Court found him guilty of violating Rule 4-3.3(a), Rule 3-4.4(c),

Rule 4-8.4(c), and Rule 4-8.4(d). Case No. SC60-90204. (TFB-Ex. Sanctions 2)

- Fourth Disciplinary Proceeding (2002): Mr. Schwartz received a public reprimand through a consent judgment for making numerous unsubstantiated complaints against his former law partners and additional misrepresentations to the court, including telling the judge that the former partners were under criminal investigation despite being informed by police that there was no criminal investigation. This Court found him guilty of violating Rule 4-3.1, Rule 3.3(a)(1), Rule 4-4.1(a), Rule 4-4.4, Rule 4-5.6, Rule 4-8.4(a), Rule 4-8.4(c). Case No. SC02-787. (TFB-Ex. Sanctions 4).

- Fifth Disciplinary Proceeding (2007): Mr. Schwartz was admonished for disseminating a direct mail advertisement involving numerous violations, including making misleading statements and statements improperly promising results and failing to include the word "advertisement" in red ink. Fla. Bar File No. 2007-90,330(02S). (TFB-Ex. Sanctions 5).

- Sixth Disciplinary Proceeding (2012): Mr. Schwartz received a 90-day suspension through a consent judgment for knowingly filing multiple affidavits with improper notarizations and for lending a client

money in connection with a pending matter. This Court found him guilty of violating Rule 4-1.8(e), Rule 4-3.3(a)(1), Rule 4-4.1(a), Rule 4-8.4(a), Rule 4-8.4(b), and Rule 4-8.4(c). Case No. SC11-2143. (TFB-Ex. Sanctions 6).

- Seventh Disciplinary Proceeding (2022): Mr. Schwartz received a 3-year suspension for engaging in dishonest or deceitful conduct by doctoring a defendant's picture in photo lineup in a criminal matter. This Court found him guilty of violating Rule 3-4.3 and Rule 4-8.4(c). *The Florida Bar v. Schwartz*, 334 So. 3d 298 (Fla. 2022).

- Eighth Disciplinary Proceeding (Pending): This matter is pending before this Court. The Report of Referee found that Mr. Schwartz sent a text message soliciting a potential client. The client was already represented. The text message violated numerous advertising rules. Case No. SC19-983, ROR pp. 2-11.

SUMMARY OF THE ARGUMENT

In this Court's recent decision in Mr. Schwartz's seventh Bar disciplinary proceeding, this Court overrode the referee's recommendation and imposed a three-year suspension. *The Florida Bar v. Schwartz*, 334 So. 3d 298, 304 (Fla. 2022). The Referee in this case had recommended a concurrent 90-day suspension based on the referee's recommendation in that seventh proceeding. Because this Court rejected the referee's recommendation in the seventh proceeding, it is clear that the Referee's recommendation of a 90-day suspension in this case was based on a faulty assumption. This Court should reject the Referee's recommendation because it lacks a reasonable basis "in existing case law" due to the fact that the case law changed after the Referee's recommendation.

This is yet another case in which Mr. Schwartz's zeal to win has caused him to ignore some basic rules of professional conduct. It is another case in which he has violated Rule 4-8.4.

It is hard to fathom that a 30-year criminal law specialist who had spent years as a public defender would believe for a moment that his client's co-defendant in the underlying case was somehow not represented by the Office of the Public Defender. That Mr. Schwartz would meet with the co-defendant, and prepare and file an affidavit for him, asking to set his trial first

without any contact with or notice to the public defender is equally hard to fathom. Knowing the affidavit had been obtained from the co-defendant without the ability of the co-defendant to receive advice from his public defender, Mr. Schwartz justifies as "zeal" his decision to file a motion to sever the cases based on the affidavit without even contacting the co-defendant's lawyer.

This conduct occurred while the seventh disciplinary proceeding was pending. There can be little doubt that this Court would have disbarred Mr. Schwartz in its last opinion if both of these cases had come to the Court for a combined decision on sanctions.

Without factoring in Mr. Schwartz's prior discipline and extensive pattern of misconduct, the Standards support suspension in this case even if it were his first violation. But he has violated Rule 4-8.4 multiple times over a period in excess of 20 years. This Court has clearly announced a policy imposing harsher sanctions for cumulative misconduct. Although no single violation by Mr. Schwartz would warrant disbarment, his lengthy record now fully justifies disbarment.

The Referee found several mitigating factors that are not supported by the record. The Referee also found "remorse," but the transcript of Mr. Schwartz's testimony at the sanction hearing demonstrates a lawyer willing

to “acknowledge” and “accept” all of his conduct that this Court has found to violate rules—but not to say he regrets or is sorry for his misconduct. Mr. Schwartz has many supporters willing to vouch for his character; but his chronic misconduct, brought on by a long-term failure to separate his drive to win from legitimate professional zeal, is a better demonstration of his character as a lawyer.

This Court should impose a sanction of disbarment with leave to reapply in five years.

THE DECISION-MAKING PROCESS IN A DISCIPLINARY PROCEEDING AND THE STANDARD OF REVIEW

This is an original proceeding filed under this Court's exclusive jurisdiction to "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const. This Court has not entered its final judgment, and "standards of review" used to evaluate a trial court's final judgment do not apply here.

Nevertheless, it is still useful to begin a review of the referee's report with a consideration of this Court's decision-making process and the applicable rules governing this Court's ultimate determination on the issues presented in a disciplinary proceeding.

1. Findings of Fact

As this Court explained in *The Florida Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019); "This Court's review of a referee's findings of fact is limited. If a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *The Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000)." *See also, The Florida Bar v. Parrish*, 241 So. 3d 66, 72 (Fla. 2018); *The Florida Bar v. Vining*, 721 So. 2d 1164, 1167 (Fla. 1998);

The Florida Bar v. Jordan, 705 So. 2d 1387, 1390 (Fla. 1998); *The Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996).

2. Credibility

In reaching its findings of fact, the Referee has a heightened role in determining issues of credibility. This Court has long held, "The referee is in a unique position to assess the credibility of witnesses, and [the referee's] judgment regarding credibility should not be overturned absent clear and convincing evidence that [the referee's] judgment is incorrect." *The Florida Bar v. Tobkin,* 944 So. 2d 219, 224 (Fla. 2006) (quoting *The Florida Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991)); *see also The Florida Bar v. Petersen*, 248 So. 3d 1069, 1077 (Fla. 2018).

3. Recommendation of Discipline

"As [this Court has] often explained, in reviewing a referee's recommended discipline, the Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction." *The Florida Bar v. Schwartz*, 334 So. 3d 298, 302 (Fla. 2022)

"At the same time, this 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 standards. *See The Florida Bar v. Alters*, 260 So.

3d 72, 83 (Fla. 2018); *The Florida Bar v. De La Torre*, 994 So. 2d 1032 (Fla. 2008)." *The Florida Bar v. Altman*, 294 So. 3d 844, 847 (Fla. 2020).

"Significantly, however, the Court views cumulative misconduct more seriously than an isolated instance of misconduct, and cumulative misconduct of a similar nature warrants an even more severe sanction than might dissimilar conduct." *Schwartz*, 334 So. 3d at 302.

"Further, the Court has made plain that '[d]ishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole.' *The Florida Bar v. Head*, 84 So. 3d 292, 302 (Fla. 2012) (quoting *The Florida Bar v. Head*, 27 So. 3d 1, 8-9 (Fla. 2010))." *Id.* at 303.

It is also important to consider that this Court has given notice to the members of the Bar that it is moving toward harsher sanctions than in the past. *See The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015). As a result, case law "decided more than a decade ago" is often not particularly useful in determining the appropriate sanction today. *See Schwartz*, 334 So. 3d at 304.

4. Consideration of Mitigating and Aggravating Factors – Both as Findings of Fact and as a Mixed Question of Law and Fact during the Decision to Select the Appropriate Sanction.

A Referee's findings on mitigating and aggravating factors are treated essentially like any other finding of fact:

> [A] referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See The Florida Bar v. Summers*, 728 So. 2d 739, 741 (Fla. 1999). This standard applies in reviewing a referee's findings of mitigation and aggravation. *See, e.g., The Florida Bar v. Wolis*, 783 So. 2d 1057, 1059 (Fla. 2001); *The Florida Bar v. Hecker*, 475 So. 2d 1240, 1242 (Fla. 1985).

The Florida Bar v. Arcia, 848 So. 2d 296, 299 (Fla. 2003).

"[A] referee's findings of mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record." *The Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007). The burden of demonstrating that the findings in aggravation or mitigation are clearly erroneous lies with the party challenging the findings. *See The Florida Bar v. Glick*, 693 So. 2d 550, 552 (Fla. 1997) (holding that the burden of disproving a referee's findings of fact or recommendations as to guilt is upon the party challenging those findings). *The Florida Bar v. Marcellus*, 249 So. 3d 538, 544 (Fla. 2018).

Once the factors of mitigation and aggravation are found to exist, they are applied to "justify" an increase or a decrease in the "degree of discipline to be imposed." *Florida Standards 3.2(a), 3.3(a).* This process of balancing the positive and negative factors is a mixed question of fact and law. It is part of the ultimate decision to impose a sanction.

This Court reviews issues of law de novo when the only disagreement is whether the material facts constitute unethical conduct. *The Florida Bar v. Brownstein,* 953 So. 2d 502, 510 (Fla. 2007); *The Florida Bar v. Pape*, 918 So. 2d 240, 243 (Fla. 2005).

ARGUMENT

I. The violations

The Bar is not challenging the recommendation concerning the two violations. Mr. Schwartz is seeking review of those violations. The Bar will briefly explain the two violations because they are the context for determining the appropriate sanction. But the Bar will wait to address the cross-review issues until after they have been raised by Mr. Schwartz.

Rule 4-4.2(a) prohibits a lawyer from "communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." The comments make it plain that there is no exception when the person initiates or consents to the conversation.

Even if one accepts Mr. Schwartz's version that he only talked with Mr. Johnson to determine if it was true that Mr. Johnson wanted to testify for Mr. Maloy – after Mr. Maloy apparently told him what that testimony would be – he knew he was seeking confirmation about a very important factual subject that directly related to "the subject of the representation" both for his client and Mr. Johnson. It was the fact that the communication dealt with the subject of the representation that made it crucial to Mr. Schwartz to prepare

the affidavit immediately. Indeed, he knew that the subject upon which Mr. Johnson wanted to testify, if true, was incriminating for Mr. Johnson; that is why he requested an early trial for Mr. Johnson. Mr. Schwartz's insistence that Mr. Johnson told him he was unrepresented, and he believed Mr. Johnson does not square with the evidence and it does not square with the knowledge Mr. Schwartz obtained as public defender and criminal defense attorney over a thirty-year career.

He knew he needed the consent of a lawyer in the office of the public defender, and he proceeded without it. He proceeded without it because he knew no lawyer representing Mr. Johnson would ever advise this client to sign such an affidavit. Thus, after talking to his client, Mr. Schwartz needed to walk out into the lobby and explain to Mr. Johnson:

Mr. Johnson, I can't talk to you because I am not your lawyer; I'm Mr. Maloy's lawyer. I am not allowed to give you legal advice. Your lawyer at the public defender's office can talk to you and give you legal advice.

But just like he did in the seventh disciplinary proceeding, he decided that he would rather try to win his client's case than obey the rules of professional conduct.

Rule 4-8.4(d) prohibits "conduct in connection with the practice of law that is prejudicial to the administration of justice." Mr. Schwartz convinced

Mr. Johnson to sign an affidavit, and then used the affidavit to seek to have Mr. Johnson's case tried first. He was not Mr. Johnson's lawyer and certainly has not in a position to give him legal advice about the wisdom of this strategy. He knew from the detective's deposition that Mr. Johnson had the evidence of dealing in crack cocaine on his person when arrested. He knew that both men were career criminals. For whatever reason, the State may have agreed to a favorable sentence years later for Mr. Johnson when he "flipped," but that would not have seemed likely when Mr. Schwartz proceeded to obtain an affidavit and file a motion to sever Mr. Johnson's trial without contacting Mr. Johnson's lawyer.

Then Mr. Schwartz was coy about where he learned all of the facts that he described at the hearing with Judge Multack. When this ultimately resulted in Mr. Johnson blurting out his incriminating testimony, Mr. Schwartz used the mess he had created to argue that Mr. Johnson had waived his Fifth Amendment rights and that he was entitled to use the incriminating testimony to help his client and hurt Mr. Johnson during a consolidated trial. Only a lawyer who does not value the rule of law would think this conduct was not prejudicial to the administration of justice.

II. The Referee did not have the benefit of this Court's recent decision and believed these events preceded the misconduct in the seventh proceeding.

The Referee's recommendation in this case does not need to be "second-guessed" as a matter of her judicial judgment. It can and should be rejected due to two errors. First, Mr. Schwartz emphasized to the Referee that he had received a recommendation for a 90-day suspension in the seventh proceeding and that the prior recommendation should guide her decision in this case. She had no way of knowing that this Court would impose a 3-year suspension instead. This change affects his prior record and the case law applicable for determining an appropriate sentence.

Second, the Referee in discussing prior disciplinary offenses oddly found that the misconduct in this ninth proceeding occurred before the misconduct in the seventh proceeding. (ROR3 p. 13-14). She appears to believe that the earlier case resulting in a 3-year suspension has less importance as an aggravating factor for this reason. But the meeting with Mr. Johnson occurred in June 2018 and the use of the altered photo lineup had occurred in February 2015. Indeed, the grievance committee had already found probable cause and the seventh proceeding was well

underway when Mr. Schwartz met with a represented co-defendant without his lawyer.

III. Prior to adjusting for the aggravating and mitigating circumstances, the Standards for this one case weigh in favor of at least a longer period of suspension.

The Referee's Report considers five standards, each supporting a suspension. The Referee explains that she is not considering disbarment, but she does not explain how she factors the five standards into her recommendation.

The Bar's proposed report had asked the Referee to consider three of those standards, as well as Standard 5.1. It is not clear why Standard 5.1 is not considered in the Report. The Bar asked the Referee to consider these standards, including the portion supporting disbarment. This brief discusses Standard 5.1 and the three other standards raised by the Bar, recognizing that the additional two standards relied upon by the Referee would also support at least a suspension.

5.1 FAILURE TO MAINTAIN PERSONAL INTEGRITY

(a)(6) Disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

(b) Suspension is appropriate when a lawyer knowingly engages in … other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Mr. Schwartz did not steal from a client or swindle anyone. But he knew Mr. Johnson was represented by the office of the public defender. Before he filed Mr. Johnson's affidavit in the court file, he knew – at a minimum – that he should coordinate with that office. But he also knew that no lawyer representing Mr. Johnson was going to agree to a strategy that only helped Mr. Maloy and simply created more problems for Mr. Johnson. Both men were facing the possibility of career criminal sentencing for selling crack cocaine. Attempting to try his case first with Fifth Amendment rights and then confess at the second trial was not a strategy that was going to

make life easier for the man holding the drugs when law enforcement executed the search warrant.

Mr. Schwartz also knew he needed the affidavit if he was going to have a solid chance to win. An affidavit from Mr. Maloy, a career criminal, allegedly based on a hearsay conversation with Mr. Johnson, also a career criminal, was not going to be sufficient to obtain a severance. So he prepared the affidavit, filed the motion to sever without notifying Mr. Johnson's counsel, and then presented a detailed description to the judge of what he claimed Mr. Johnson was willing to state under oath. When pressed, he would not reveal the source of his knowledge even to say that it was attorney/client privilege.

Mr. Schwartz may not value money enough to steal. But he values winning. He is willing to be deceptive – repeatedly – to win. Just like in the seventh violation, the Bar submits this is intentional when the conduct is committed by a lawyer with 30-years of criminal experience. At a minimum it is knowing conduct. *See The Florida Bar v. Fredericks*, 731 So. 2d 1249, 1252 (Fla. 1999)("In cases such as this one, in order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing.") The Bar submits that it seriously adversely reflects on Mr. Schwartz's fitness to practice. When one later applies the aggravating factor that he has

committed multiple violations involving dishonesty over a period in excess of twenty years, it becomes abundantly clear that this seriously adversely reflects on him.

It is unclear why the Referee did not consider this Standard, especially when she considered the following Standards involving false statements and misrepresentation:

> 6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION
>
> *(a) Disbarment is appropriate when a lawyer:*
>
> *(2) improperly withholds material information and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.*
>
> *(b) Suspension is appropriate when a lawyer knows . . . that material information is improperly being withheld and takes no remedial action.*

Mr. Schwartz's affidavits and the motions that were withheld from the public defender, and his full explanation of claimed testimony to the judge without explaining how it was obtained would also fit this standard.

7.1 DECEPTIVE CONDUCT OR STATEMENTS AND UNREASONABLE OR IMPROPER FEES

(a) Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public, or the legal system.

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

Mr. Schwartz violated Rule 4-4.1(a) with the intent to obtain a benefit for Mr. Maloy, causing potentially serious injury to Mr. Johnson and the legal system. Mr. Schwartz's affidavit essentially forewarned the prosecutors that Mr. Johnson was involved with the drugs in the kitchen adjacent to the firearm. In a classic case of Prisoners' Dilemma, each man could achieve a better negotiated plea by selling out the other first. Without advising Mr. Johnson's attorney, he was trying to place his client in the better place both during negotiations and at any eventual trial. When he failed to achieve the

severed trial for his client, he filed his motion to use Mr. Johnson's evidence from the hearing at the joint trial. The fact that Mr. Johnson ultimately received a favorable negotiated plea when he flipped for the State does not mean that the earlier misconduct did not create the risk of serious consequences for Mr. Johnson. The harm to the public and the legal system is admittedly hard to measure, but this type of misconduct does not promote public confidence in our system of justice. The Bar submits this standard supports disbarment, and the Referee recognized it supported a suspension.

STANDARD 8.1 – VIOLATION OF COURT ORDER OR ENGAGING IN SUBSEQUENT SAME OR SIMILAR MISCONDUCT.

(a) Disbarment is appropriate when a lawyer:

(2) has been suspended for the same or similar misconduct and intentionally engages in further similar acts of misconduct.

(b) Suspension is appropriate when a lawyer has been publicly reprimanded for the same or similar conduct and engages in a further similar act of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

In 2012, Mr. Schwartz was suspended for 90 days in Case No. SC11-2143 because, in order to keep a paternity action pending in the United States, he repeatedly filed financial affidavits that were not properly executed. The first filing had a deficient notarization. The second was signed "JS for E. Ocampo." The third crossed through the "before me" portion on the notarization, and he personally notarized that document with his own expired notary license. (TFB-Ex. 7, ROR paragraphs 2-17). The referee in that case found these acts to be misrepresentations.

His conduct here is not identical. But it once again involves misrepresentations designed to win when the actual rules got in the way of that goal.

In the seventh proceeding involving the photo lineup, his conduct was also similar to this conduct. He did not prepare an affidavit based on improper contact with a co-defendant. But he justified a similar violation of the Florida Rules of Professional Conduct as a badge of his "zealous" representation of clients. He chose to attempt to win at the expense of the rules.

The seventh proceeding occurred before this proceeding, but the sanction was not imposed until after this conduct. This Court has held that "cumulative misconduct can be found when the misconduct occurs near in

time to the other offenses, regardless of when discipline is imposed." *The Florida Bar v. Baron*, 392 So. 2d 1318 (Fla. 1981). Whether the same is true for Standard 8.1 has apparently not been discussed in case law. If the standard above for disbarment is dependent upon the lawyer having knowledge of the earlier suspension at the time he acts, the Bar would admit that only the standard for suspension would apply. The question then would become how the aggravating and mitigating factors affected the standard's recommendation of a suspension.

Thus, the Referee is correct that these standards support a suspension. The Bar submits that under the evidence and the findings in the guilt phase they also support disbarment.

IV. The appropriate balance of the aggravating and mitigating factors justifies disbarment in this case.

Mr. Schwartz has been a criminal defense lawyer for 30 years. This will be the ninth sanction imposed upon him. Many of his cases involve misrepresentations and the pattern of misconduct has gotten worse, not better, as he has aged.

The difficulty in this decision for this Court arises from the fact that no one of his many violations, standing alone, would warrant disbarment. And

Mr. Schwartz has always had a crowd of admirers for the good he does in the community.

But there comes a point when this Court cannot simply continue to process disciplinary proceedings and encourage Mr. Schwartz to try harder. If his misconduct really stems from the childhood trauma of his father's criminal trial, after a lifetime of various and extensive modalities of therapy and spiritual search have not addressed this core problem, it is not time for another rehabilitative suspension with the expectation that group therapy will suffice to solve such a core problem; it is time for a disbarment from which he will still have the opportunity to seek to reapply.

a. Aggravating factors.

The Referee found three aggravating factors, and the Bar maintains that an additional factor is supported by the record.

Standard 3.2(b)(9) Substantial experience in the law.

Mr. Schwartz has been a lawyer since 1986. (ROR-17). Initially, he was a public defender for six years. Since that time he has had his own law firm with a specialty in criminal law. Few lawyers would have had more experience with both criminal law and the Rules of Professional Conduct when his client's co-defendant appeared at his office unaccompanied by his

own lawyer. Mr. Gonzalez testified that this situation was "tricky." (ROR-8). While the situation does not seem all that tricky to the Bar, assuming a criminal attorney would think it to be tricky, Mr. Schwartz did not pause to read the relevant rules or to have a discussion with another experienced lawyer about how to handle the situation ethically. Instead, he immediately obtained and filed the affidavit only in his client's half of the case. He waited almost a month to file the motion to sever based on the affidavit, and in that time he does not claim he checked with anyone about the ethics of relying on the affidavit. Especially given his prior disciplinary history, his failure to consider the ethics of this situation despite his substantial experience is very troubling.

Standard 3.2(b)(3) Pattern of Misconduct.

The Supplemental Report lists all seven prior cases in which an order had been entered as part of Mr. Schwartz's pattern. (ROR3 p. 15-16). It omits only the pending case involving an advertising violation. Those violations are also described in the statement of facts for this brief. *Supra* pp. 20-23.

Within this list, Mr. Schwartz was found to have violated a subsection of Rule 4-8.4 on nine occasions. This case will be the tenth. His pattern

begins with two admonishments, followed by two public reprimands. When he improperly notarized documents for his overseas client, he received a 90-day suspension. Most recently he received a three-year suspension for the photo lineup case. It would be hard to find many examples of other disciplinary cases with such an extensive list of prior cases over a twenty-year period, especially with so many violations of Rule 4-8.4. This Court views cumulative misconduct more seriously, and this compilation deserves to be treated seriously. It does not deserve a concurrent sanction as recommended by the Referee.

Standard 3.2(b)(1) Prior Disciplinary Offenses.

Although this aggravating circumstance overlaps to some extent with the pattern of misconduct, the Supplemental Report finds this factor. But it does so relying only on the 2012 suspension and the recent case that ultimately resulted in a three-year suspension. (ROR3 p. 13). The report in footnote 1 rejects the Bar's position that the prior discipline should include a public reprimand for two rule violations involving dishonest conduct in 1997, and another public reprimand in 2002 for seven violations, including three involving dishonesty.

The Referee based this decision on the provision in Standard 3.2(b)(1) that limits the use of a finding of minor misconduct "after 7 or more years in which no disciplinary sanction has been imposed." Although it may be unclear from the text of this Standard if Mr. Schwartz ever had such a seven-year period, the two offenses rejected by the Referee are not "minor misconduct." *See Florida Rule of Professional Conduct 3-5.1(b).* "Minor misconduct" as explained in Rule 3-5.1(b)(1)(E) does not include misconduct involving dishonesty. Both of the excluded cases did involve dishonesty and the sanction was more than an admonishment.

Moreover, it is likely that the pending proceeding for the advertising violations with the unopposed recommendation for a 10-day suspension should be added to this list.

Standard 3.2(b)(7) Refusal to acknowledge the wrongful nature of the conduct.

The Referee refused to find this factor and instead found that Mr. Schwartz was remorseful. As explained in the statement of the facts, during his lengthy presentation at the sanction hearing, Mr. Schwartz did not ever say that he was sorry or that his conduct had been wrongful. Over and over again, he says he "accepts responsibility" for this violation and prior violations. (TS-65, 66, 67, 68, 69, 73, 77, 80). Both in this proceeding and

in the seventh proceeding, he is careful to say that he accepts this Court's ruling that his doctored photo lineup was inherently misleading, but he claims he was not trying to mislead the prosecutor. (TS-80).

Respectfully, there is a big difference between accepting the ruling of this Court or a referee, and actually having "remorse" for one's own conduct. "Remorse" is "a gnawing distress arising from a sense of guilt for past wrongs."[4] This record does not demonstrate remorse.

Likewise, there is no acknowledgement by Mr. Schwartz of the wrongful nature of his conduct. In Mr. Schwartz's descriptions to the Referee of his prior violations, there are lots of rationalizations, but there is no remorse or recognition of the wrongful nature of his own conduct. (TS 66-82). He simply does not comprehend that "zealous advocacy" is limited by the rule of law and the Rules of Professional Conduct.

The Bar is not contending that Mr. Schwartz needed to wear sackcloth to the sanction hearing. But a lawyer who repeatedly over the span of a generation violates Rule 4-8.4 and cannot say aloud that he has a serious, long-term problem drawing the line between zeal and deceptive or misleading conduct does not establish a mitigating factor of remorse; he

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[4] *Remorse*, (https://www.merriam-webster.com/dictionary/remorse).

establishes a greater concern that he will repeat the same conduct yet again. Thus, the testimony actually establishes this aggravating factor as a circumstance that should be considered in determining the appropriate sanction.

b. Mitigating Factors.

The Referee found eight mitigating factors. The Bar submits that the Referee erred in four of these findings, and that the weight to be given to the remaining factors is limited.

Standard 3.3(b)(11) Imposition of other penalties or sanctions.

The Referee found this factor, explaining that the "length of time this disciplinary case has been pending has extracted a considerable toll on Respondent." (ROR3 p. 20). Typically, "other penalties or sanctions" involve criminal sanctions, contempt sanctions in the underlying matter, or other similar penalties imposed by a court. *See The Florida Bar v. Koepke,* 327 So. 3d 788 (Fla. 2021)(respondent disbarred despite incarceration for contempt); *The Florida Bar v. Kinsella,* 260 So. 3d 1046 (Fla, 2018)(criminal sanctions); *The Florida Bar v. Gardiner*, 183 So. 3d 240 (Fla. 2014)(former judge disbarred despite the sanction related to being a judge); *The Florida Bar v. Ross*, 140 So. 3d 518, 520 (Fla. 2014)(contempt sanctions in

underlying court proceeding not enough to prevent this Court from increasing sanctions to a three-year suspension): *The Florida Bar v. McKeever*, 766 So. 2d 992, 993 (Fla. 2000)(overriding referee, respondent disbarred despite prior incarceration); *The Florida Bar v. Liberman*, 43 So. 3d 36, 38 (Fla. 2010)(overriding referee, respondent disbarred despite prior incarceration). Economic losses related to the conduct have not been treated as a sanction. *See The Fla. Bar v. Ticktin*, 14 So. 3d 928, 939 (Fla. 2009). *See also*, *The Florida Bar v. Neely*, 372 So. 2d 89, 94 (Fla. 1979)(respondent's argument that length of time of proceeding should be a factor is rejected).

While an extraordinary delay in a proceeding might occasionally be a factor to consider, the complaint in this Court was filed on March 30, 2021, after a grievance committee found probable cause for events in June 2018. (Tab 1). Despite the complications created in court proceedings by COVID, and the many filings by Mr. Schwartz in this proceeding, the Referee entered her preliminary report on the guilt phase in October 2021. The sanction hearing occurred about seventy-five days later, but the delay in that hearing was caused by Mr. Schwartz's need to attend a trial for a client. (TS1 5-6). This proceeding, of course, was also occurring while Mr. Schwartz had two other pending disciplinary complaints.

This Court has previously disapproved a referee's finding in mitigation based on an unreasonable delay where there was a delay of 38 months before the Bar filed its complaint. *See The Florida Bar v. Alters*, 260 So. 3d 72, 83 (Fla. 2018). The time in this case is even less. Simply put, the timing of this proceeding is neither a sanction nor otherwise a factor that warrants mitigation.

Standard 3.3(b)(4) Timely good faith efforts to make restitution or to rectify consequences of misconduct.

The Referee found that Mr. Schwartz "made a full and complete disclosure of the circumstances surrounding the preparation of the *Byrd* affidavit and his reason for doing so." (ROR-18). But Mr. Schwartz essentially stonewalled Judge Multack at the hearing on July 19, 2018. (A. 54-57). When that resulted in the judge calling Mr. Johnson to give evidence, Mr. Schwartz maintained that the resulting testimony constituted a waiver of Mr. Johnson's Fifth Amendment rights for the upcoming joint trial.

Simply testifying voluntarily about the circumstances of a Bar complaint at the guilt phase of a disciplinary proceeding is not evidence of a respondent making restitution or rectifying consequences of misconduct. The

competent, substantial evidence conflicts with the Referee's finding, and these circumstances do not actually fall within the concept of restitution.

Standard 3.3(b)(5) Full and free disclosure to the Bar.

Mr. Schwartz was not uncooperative in this case. The weight of this mitigating factor is for this Court, but the record does not reflect that Mr. Schwartz cooperated in an exceptional manner that differs from the cooperation that most lawyers demonstrate when they receive a Bar complaint.

Standard 3.3(b)(3) Personal or emotional problems; and Standard 3.3(b)(10) Interim rehabilitation.

The Referee bases these two mitigating factors on Mr. Schwartz's participation for several years in a Florida Lawyers Assistance Program. The Bar recognizes that Mr. Schwartz is engaged in this program.

But typically the factor of "personal and emotional problems" relates to some acute emotional problem that caused a lawyer to do something out of character. For example, it applies when a lawyer is dilatory while suffering from depression or dealing with a family crisis. This Court has recognized that an abusive relationship with a spouse can be such a factor. *See The*

Florida Bar v. Del Pino, 955 So. 2d 556 (Fla. 2007). There is no competent, substantial evidence of such a problem in this case.

Instead, Mr. Schwartz's self-diagnosis is that he is overly zealous because of the trauma suffered as a child when his father was convicted of Medicare fraud. If that is the case, he has been dealing with this emotional problem for forty years. He describes a life-long search through various therapies and spiritual outreach that preceded his misconduct in his last several disciplinary cases. Such chronic mental conditions are not a mitigating factor for a lawyer acting out of character. They are an explanation for why someone has a core character problem that causes them repeatedly to return to inappropriate behavior.

Dr. Weinstein at FLA wrote his letter of support for Mr. Schwartz before this proceeding was filed. (Tab 74). He saw the trauma arising from the long proceeding addressing the photo lineup. He does not address whether group therapy in 2021 is addressing the childhood trauma that supposedly causes Mr. Schwartz to view misconduct as zealous advocacy.

The Bar suspects it is likely that Mr. Schwartz does have some long-term psychological issues that affect his character. But those problems need to be resolved before Mr. Schwartz is allowed to practice law. The Bar is not seeking permanent disbarment. But, at this point, it is time to make Mr.

Schwartz establish he has overcome his issues when he reapplies in five years.

Standard 3.3(b)(2) Absence of dishonest or selfish motive.

The Referee bases this factor on her assessment that Mr. Schwartz "acted in good faith in seeking a severance of his client from the co-defendant and did so in a manner that caused no . . . potential harm to either defendant." (ROR-17). The same referee ten weeks earlier had found that Mr. Schwartz knew that Mr. Johnson was represented, but he nevertheless advised him to sign an affidavit that would cause him to go to trial first. He did this without the knowledge or consent of Mr. Johnson's lawyer, and he did not even file the affidavit and motion in Mr. Johnson's pleading file. Respectfully, these are not acts of good faith by a lawyer with thirty-years' experience.

As to "potential harm," the Referee is confused in her timing. The question is: When the misconduct occurred, did it create the potential for harm to Mr. Johnson? As explained earlier, the answer to that question is clearly yes.

Both men ended up pleading guilty to serious offenses, but the Bar is not suggesting that they were innocent and harmed by their pleas. Mr.

Schwartz's client received probation, but as a career criminal any substantive violation of his probation could result in him receiving a very long sentence. It is hard to view the two men's ultimate judgments and sentences as evidence of either harm or lack of harm in this case. The potential harm from the misconduct involved interfering in Mr. Johnson's defense and taking steps in his defense without his lawyer's knowledge and participation.

Over and over again, Mr. Schwartz has shown that his motive is to win and that he will attempt to win without regard to the Rules of Professional Conduct. His motive is not a mitigating factor in this case.

Standard 3.3(b)(12) Remorse.

This factor was addressed earlier in the section of aggravating factors. The Bar submits that Mr. Schwartz's testimony at the sanction hearing does not demonstrate remorse.

Standard 3.3(b)(7) Character or reputation.

Similar to the seventh proceeding, the Bar recognizes that Mr. Schwartz presented many witnesses that think highly of him. There obviously is a side of Mr. Schwartz that people respect and even love. The Bar does not wish to denigrate that side of him. But the difficulty in this case

is how to address the other side of Mr. Schwartz that repeatedly causes him to commit serious misconduct.

The Bar recognizes that Mr. Schwartz should not be permanently disbarred. But when one weighs the list of aggravating factors against the list of mitigating factors, the balance really does not favor Mr. Schwartz in this ninth proceeding. The Referee relied on *The Florida Bar v. Liberman*, 43 So. 3d 36 (Fla. 2010), which is a case where disbarment was imposed *nunc pro tunc* to the date of an emergency suspension that had been imposed due to pending criminal proceedings. Those specific circumstances are different than a case without an emergency suspension. But Mr. Schwartz did begin a three-year suspension earlier this year, and he has another pending case that normally would result in another short suspension. It may be appropriate for this Court to at least consider the unusual step of running the period of disbarment from the date of the recent suspension rather than from a date at the end of this proceeding.

V. Given his three major disciplinary proceedings since 2012 and Mr. Schwartz's persistent disregard of the importance of his role in maintaining the legitimacy of the judicial process, the case law supports disbarment with leave to reapply in five years.

In many cases in which disbarment has been determined to be the appropriate sanction, the sanction is based largely on one very serious

violation. *See, e.g. The Florida Bar v. Koepke*, 327 So. 3d 788 (Fla. 2021). The misconduct often has resulted in serious harm to a client. *See The Florida Bar v. Alters*, 260 So. 3d 72 (Fla, 2018). Mr. Schwartz's case is different because no one event in his career would warrant disbarment and the injuries are either to the judicial system or to people who are not his clients.

But in the 2012 case he received a 90-day suspension because he filed a document that he notarized himself when his license as a notary had expired. In the recent case, he received a three-year suspension because he doctored a copy of an exhibit prepared by law enforcement, inserting another photo inside the circle the victim had drawn around his client. He did this in hopes that he could trick the victim into a misidentification. In this case, he attempted to have Mr. Johnson tried first (when some of the drugs were found on his person and he faced career criminal sentencing) in order to have Mr. Johnson testify in his clients' trial that the drugs were all Mr. Johnson's. Not only did he have no idea whether that testimony would be truthful, he did not bother to have Mr. Johnson's actual lawyer give him legal advice before signing the affidavit.

This cumulative conduct is not negligent conduct. It is all intentional conduct. And when Mr. Schwartz gets caught in the process of this

misconduct, he "acknowledges" his conduct; essentially promising not to do exactly the same thing again. But he shows no sign of remorse, no deep sense of wrongdoing. He thinks people just do not appreciate that he is zealous and other lawyers are not.

Mr. Schwartz has just begun serving a three-year suspension. Running another three-year suspension concurrent, as the sanction in this case, would effectively be no sanction. Running a second three-year suspension consecutively would be unusual and little different than imposing disbarment in this case. If this case and the seventh case had been sanctioned together, it seems obvious that this Court would have imposed disbarment for the combined proceedings. As a deterrent to others, imposing disbarment would better serve the purposes of sanctions in discipline proceedings. *See The Florida Bar v. Pahules,* 233 So. 2d 130, 132 (Fla. 1970).

The Bar recognizes that disbarment is an extreme form of discipline and is reserved for the most egregious misconduct. *See The Florida Bar v. Ratiner,* 238 So. 3d 117 (Fla. 2018); *see also*, *The Florida Bar v. Summers*, 728 So. 2d 739, 742 (Fla. 1999); *The Florida Bar v. Kassier*, 711 So. 2d 515, 517 (Fla. 1998) (holding that disbarment is an extreme sanction that should

be imposed only in those rare cases where rehabilitation is highly improbable).

But this Court has now repeatedly emphasized that it is taking cumulative misconduct far more seriously, especially when the misconduct is similar in character. *See The Florida Bar v. Bosecker*, 259 So.3d 689, 699 (Fla. 2018); *The Florida Ba v. Walkden*, 950 So. 2d 407, 411 (Fla. 2007). It even announced this in Mr. Schwartz's last decision. *See The Florida Bar v. Schwartz*, 334 So. 3d 298, 303 (Fla. 2022).

To be clear, the Bar does not contend that there is a prior case with the same collection of past misconduct. But this case stands out due to Mr. Schwartz's long history of violating Rule 4-8.4. As this Court observed in its decision for his seventh proceeding: "This cumulative misconduct by Schwartz, of the most egregious type (dishonesty) and where he has previously received the longest non-rehabilitative suspension permissible under the rules, . . . surely necessitates an escalated sanction by this Court for that same repeated type of misconduct." *The Florida Bar v. Schwartz*, 334 So. 3d 298, 303 (Fla. 2022). Now, this case adds one more violation of Rule 4-8.4 to his record.

This Court overrode a referee to impose disbarment in *The Florida Bar v. Bitterman*, 33 So. 3d 686, 689 (Fla. 2010), observing that Ms. Bitterman's

cumulative misconduct in 2010 dated back to 1996. Mr. Schwartz's misconduct dates back to 1995, and his disciplinary history is actually years longer than Ms. Bitterman's. The respondent's defiance concerning his non-payment of taxes in *The Florida Bar v. Behm,* 41 So.3d 136, 151 (Fla. 2010) was extreme, but this Court imposed permanent disbarment in that case stating: "The only appropriate sanction under these circumstances—cumulative misconduct and a persistent course of unrepentant misconduct—is permanent disbarment from the practice of law."

Thus, while it is not surprising that there is no spot-on controlling case, the body of law developed by this Court since it announced the policy of harsher sanctions demonstrates that disbarment would be a proportionate sanction for Mr. Schwartz at this time. It is not unfair to the public to extend Mr. Schwartz's current three-year hiatus from the practice of law until he demonstrates that he can successfully reapply after five years. This sanction is fair to the court system, which depends upon the integrity of lawyers to preserve the legitimacy of the judicial system. It will deter lawyers from the temptation of committing knowing and intentional violations of the Rules of Professional Conduct under the false justification that they are merely being more zealous than most lawyers.

CONCLUSION

The Bar asks this Court to reject the recommendation of the Referee for a 90-day suspension and impose disbarment with leave to reapply in five years. The Court should impose the costs recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 1st day of June, 2022 to:

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