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
REPLY AND CROSS-ANSWER BRIEF

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I. The Referee's recommendation of guilt as to the violation of Rule 4-4.2(a) is supported by competent substantial evidence.

Mr. Schwartz in his cross-review argues that the Bar did not **"**prove" a violation of Rule 4-4.2. But the more accurate issue is whether there is competent substantial evidence to support the findings of fact in the Amended Preliminary Report of Referee. (A. 3-14). His brief does not identify a single finding of fact in that report that he claims is unsupported by the evidence.

Rule 4-4.2 states that a lawyer "must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter." Mr. Schwartz argues this violation was not proven primarily for five reasons. (AB:45-58). Each of these reasons is incorrect.

A. Mr. Johnson was not represented by the Public Defender or Mr. Schwartz in good faith believed he was not represented.

Mr. Schwartz position on whether he knew Mr. Johnson was represented on the day he came to Mr. Schwartz's office seems to have varied over time. In his initial letter to the Bar on January 17, 2020,

responding the complaint he stated: “I did not involve him in any substantive matters that were the subject of his representation by counsel.” (TFB-EX. 3, p. 2). He argued that Rule 4-4.2 “does not prohibit all communication with a represented client. . . .” (TFB-Ex. 3, p. 3). He explained that Ms. Del Sol “was the seventh Assistant Public Defender assigned to represent him” and that “it was evident when Mr. Johnson arrived at my office, without any compulsion, that he either had already discharged his assigned public defender or was planning to do so immediately in favor of obtaining privately retained counsel.” (TFB-Ex. 3, p. 6)(emphasis original).

At the hearing on the motion to sever the cases on July 19, 2018, before Judge Multack, when Mr. Johnson was put under oath by the judge, he testified that he was represented by the Public Defender’s Office at the time of the meeting with Mr. Schwartz. (TFB-Ex. 2, p. 12)(R.A. p. 14).[1] When the judge asked Mr. Johnson questions about the discussions at that meeting, Mr. Schwartz stated:

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[1] A reply appendix is provided with this brief, which will be cited as (R.A. p **). It includes only the transcript of the July 19, 2018, hearing before Judge Multack. The appendix provided with the initial brief states that this transcript is included in that appendix, but inadvertently the transcript in the appendix is the July 24, 2019, transcript of Mr. Schwartz’s opening statement in the trial of Mr. Maloy before Judge Multack.

> I can proffer, Judge, I did tell him *(Mr. Johnson),* you know, you have an absolutely right to have an attorney here, and you, you know, and I would recommend that you call your attorney here; your attorney is entitled to know about this and - - and you know, you have a right to call your attorney and frankly your attorney should be here, and --

(TFB-Ex. 3, p. 13-14)(R.A. p. 15-16).

So, Mr. Schwartz was telling Mr. Johnson to call his attorney when Mr. Schwartz understood the attorney "frankly" should be at the meeting. But now he claims that Mr. Johnson had no attorney because he had fired or was about to fire his attorney. He now claims in the alternative that he had a "good faith misunderstanding." (AB:47).

It is undisputed that the Office of the Public Defender represented Mr. Johnson as counsel of record until Mr. Tischler appeared to represent Mr. Johnson 77 days later. (ROR2, p. 5)(A. 7). If Mr. Schwartz had some good faith confusion about this, all he had to do was call the Office of the Public Defender. It is undisputed that he did not call despite the fact that he had the telephone number memorized.

B. Mr. Schwartz relied on *Inquiry Concerning a Judge: re Decker*, 212 So. 3d. 291 (Fla. 2017), when obtaining Mr. Johnson's affidavit.

At the final hearing and in his brief, Mr. Schwartz claims that he "reasonably understood *Decker* as allowing a person, formerly represented, to disclaim current representation *en route* toward obtaining a new lawyer." (AB:53)(emphasis original).

In his initial letter to the Bar on January 17, 2020, Mr. Schwartz did not make any reference to *Decker.* TFB-Ex. 2). At trial, he never claimed that he did any research on this issue when Mr. Johnson came to his office. He did not actually testify that he had even read the opinion prior to that time. The record reflects the following:

> Q: Is this the case with which you had some familiarity at the time of your filing of the Johnson Affidavit?
> A: Correct.
> Q: Now this case, you agree that this was the law as you understood it in March of 2017?
> A: I believe.
> (T3-19).

Decker is a JQC proceeding involving a judge in the Third Judicial Circuit, which is a circuit of seven small counties in northwest Florida. The JQC proceeding involved 16 charges and the opinion is rather lengthy. Charge 8 involved communications with a represented party. Judge Decker

was found not guilty of that charge. *See Decker*, 212 So. 3d 291, 306 (Fla. 2017).

The facts underlying Charge 8 involved a foreclosure case in which then attorney Decker represented some of the defendants. He and his client, who was also a lawyer, met with a Mr. White to discuss a possible settlement of a portion of the litigation. Attorney Decker was "directly and unequivocally informed by White that he was no longer represented by counsel of record. . . . " *Id.* at 306.

In *Decker,* this Court explained that attorney Decker did not have an obligation to confirm that Mr. White was no longer represented by counsel in that civil case. This Court also confirmed that Mr. White's unrepresented status was not dependent upon his former's counsel's compliance with Florida Rule of General Practice & Judicial Administration 2.505(f)(1). *Id.* at 306.

Assuming that Mr. Schwartz did actually read and study this opinion prior to his meeting with Mr. Johnson in June 2018, one would think that it might have occurred to him that this Court was not talking about a defendant charged with a major felony and represented by the public defender. It might have occurred to him that Mr. White had had no constitutional right to counsel, and that Mr. Johnson did have a constitutional right to counsel

because of *Gideon v. Wainwright*, 372 U.S. 335 (1963). It might have occurred to him that if Mr. Johnson wanted to fire his public defender when he did not currently have a private lawyer ready to appear on his behalf that Mr. Johnson needed to file a motion to discharge court-appointed counsel and request a *Nelson/Farretta* [2] hearing.

But despite years of experience as a criminal defense attorney, including experience as a public defender, Mr. Schwartz claims he believed in good faith that the very equivocal and conflicting statements of Mr. Johnson (with whom he was supposedly not communicating about the criminal case) gave him the right, if not the obligation, to obtain an affidavit from Mr. Johnson seeking to have his trial first without involving the Office of the Public Defender which he knew full well was counsel of record for Mr. Johnson in his case.

In the Supplemental Report of Referee as to Sanctions, the Referee did state: "As he testified at trial and during the sanctions hearing, Respondent believed, imperfectly, at the time that he was following the Florida Supreme Court precedent of *Inquiry Concerning a Judge (Decker),*

[2] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973); *Faretta v. California*, 422 U.S. 806 (1975).

212 So. 3d 291 (Fla. 2017).” (ROR3. p. 4)(A.18). That statement is difficult to square with the findings in the Amended Report of Referee addressing her recommendations as to guilt. The only way Mr. Schwartz could have believed, even “imperfectly,” that this Court in *Decker* authorized his conduct would have been to ignore the long-established law giving Mr. Johnson the constitutional right to representation by the Office of the Public Defender, and the well-established procedures that limited the waiver of Mr. Johnson’s protection by the assigned public defender to a waiver at a *Nelson/Faretta* hearing before the judge presiding over his felony proceeding.

C. The communication was not about the “subject of representation.”

Mr. Schwartz continues to claim that there is no competent substantial evidence that he communicated with Mr. Johnson about the “subject of representation.” (AB:49). His argument in his brief is based largely on a theory that the “subject matter” of Mr. Johnson’s case was the 11 baggies of cocaine found in his pocket. (AB:49).

Rule 4-4.2 states that a lawyer “must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.” The “matter” in this context – where the two cases are treated as a consolidated case set for a

simultaneous trial – is not really the counts against Mr. Maloy or the counts against Mr. Johnson. It is the criminal episode taking place inside the house that was the subject of the search.

In his brief, Mr. Schwartz repeatedly claims that the communications were not a violation because the underlying cases involved "two separate and completely distinct fact-based charges against two defendants." (AB:55). But he knows that both men were caught inside a drug house during the execution of a search warrant where a white bag was found in a kitchen cabinet under a kitchen sink. The white bag contained marijuana, currency, and a firearm. (R-Ex. 11 p. 47-48). One of the members of the search team claimed he saw Mr. Maloy stuff something into that cabinet.

The best way that Mr. Johnson could help Mr. Maloy at trial was to take responsibility for these drugs. And that is precisely what Mr. Schwartz promised Judge Multack would be Mr. Johnson's testimony if the cases were severed and Mr. Johnson went to trial first. Mr. Schwartz stated: :

> But what happens moreover in this case here, is that the codefendant not only will testify that there's a number of people, that it could have been several people that did the actual sales, he will testify that the actual drugs in a subsequent trial, after his Fifth Amendment rights have been extinguished were his..

> He is going to accept full responsibility and claim those drugs were his.

(TFB-Ex. 2, p. 6-7)(R.A. p. 9-10).

Mr. Schwartz refused to tell Judge Multack how he knew this would be Mr. Johnson's testimony. (TFB-Ex. 2, p. 7-11)(R.A. p.9-13). His refusal is what caused Judge Multack to place Mr. Johnson under oath to confirm this would be his testimony. (TFB-EX. 2, p. 11-16)(A. 13-18).

In his letter to the Bar, Mr. Schwartz told an entirely different story. He said:

> I did not involve him in any substantive matters that were the subject of his representation by counsel. I only became aware of the fact that Mr. Johnson intended to take responsibility for Mr. Maloy's charges when the Judge, without first informing Mr. Johnson of his constitutional right to remain silent, made inquiry that led to Mr. Johnson confessing to the crime charged twice in open court.

(TFB-Ex. 3, p. 2).

Thus, in his letter to the Bar, Mr. Schwartz was claiming that it was all Judge Multack's fault that he became aware that Mr. Johnson claimed to be the person with the drugs and confessed to the crimes that were charged against Mr. Schwartz's client, Mr. Maloy.

Even if Mr. Schwartz used Mr. Maloy as his go-between to know what Mr. Johnson would be willing to say at trial, and even if the "matter" can somehow be divided into two separate parts, the violation still occurred. It is undisputed that he communicated with Mr. Johnson to obtain a *Byrd* affidavit to file in Mr. Maloy's case.

The *Byrd* affidavit was designed to sever the cases for trial and to try Mr. Johnson's case first, so he could take responsibility for the drugs in Mr. Maloy's later trial. This is a communication about the "matter' of the 11 baggies of cocaine because that "matter" will be tried first. It is a criminal case that is very straight-forward. Mr. Johnson had the drugs on his person inside a house where law enforcement had obtained a warrant to search for drugs. He could be sentenced to thirty years in prison for this offense. Mr. Schwartz is not merely communicating with Mr. Johnson about this matter; he is giving him advice to sign an affidavit that tries it first. Mr. Schwartz is giving Mr. Johnson legal advice about how to defend that case. Mr. Schwartz may have filed his motion to sever only in his half of the case, but it had a very direct impact on Mr. Johnson's half of the case. Mr. Schwartz cannot plausibly claim that Mr. Johnson's public defender did not need to be involved in this decision.

If the "matter" is the drug charge filed against Mr. Maloy, Mr. Johnson is filing the *Byrd* affidavit so that Mr. Johnson can testify the drugs are his without waiving his Fifth Amendment rights at Mr. Johnson's trial addressing the 11 baggies of cocaine. Mr. Schwartz seems to admit that this involved some conversation with Mr. Johnson about this supposedly separate and distinct matter of the 11 baggies. His claim is that these discussions do not impact Mr. Johnson. He argues that he is doing no harm to Mr. Johnson, so it is entirely appropriate for him to have these discussions.

In the next section, the Bar discusses whether an experienced criminal defense lawyer could conceivably believe this was true.

D. <u>He was not doing anything that might harm Mr. Johnson.</u>

Mr. Schwartz's theory is that, if Mr. Johnson were tried first, he would not need to worry about waiving his Fifth Amendment rights in Mr. Maloy's case because his own trial would already have been concluded. He can come down from prison after his conviction at the first trial, and he can then testify that the rest of the drugs (and the firearm for that matter) are his. No harm will come to Mr. Johnson, and Mr. Maloy might be found not guilty.

This is a wonderful theory, but for the very basic rules of double jeopardy in Florida. These are rules that any experienced criminal defense attorney understands.

As Mr. Schwartz emphasizes repeatedly, Mr. Johnson was only charged with possession of the 11 baggies of cocaine. That possession charge is the only charge that will be resolved at the first trial, and the only charge for which jeopardy will attach at the first trial. The "same elements" test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) plainly does not cover the elements of constructive possession of the drugs and the firearm in the kitchen. *See, e.g. State v. Gonzalez*, 685 So. 2d 934 (Fla. 2d DCA 1996). In *Gonzalez,* the court explained:

> The trial court erred in holding that the appellee's prosecution on the RICO and cashing or depositing an item with intent to defraud charges was barred by double jeopardy because these charges arose from the exact conduct that had led to the charge of grand theft. The test to be applied to determine whether the subsequent prosecution is barred by double jeopardy is the "same elements" .. .

Id. at 935.

The Blockburger test, of course, is also fully codified in section 775.021(1)(b), Florida Statutes.

The only way for Mr. Schwartz's scheme to help Mr. Maloy escape conviction for the charges pending against him is to allow Mr. Johnson to have the first trial, and then subpoena Mr. Johnson to testify at Mr. Maloy's trial – where Mr. Johnson would not have a constitutional right to counsel – and have Mr. Johnson testify that the drugs were his. Mr. Schwartz is absolutely correct that this would not waive Mr. Johnson's Fifth Amendment rights concerning the 11 baggies of cocaine. Unfortunately, the Fifth Amendment will be waived for the drugs in the kitchen. Mr. Johnson's confession at Mr. Maloy's trial would open the door for the state attorney to file new charges against Mr. Johnson and seek another 30-year sentence for the crimes to which he confessed, or possibly to seek a conviction for perjury if he changed his story. Double jeopardy would not bar this second prosecution, and the four-year statute of limitations was not going to prevent the filing of these charges after Mr. Maloy's trial. *See* § 775.15, Fla. Stat.

Mr. Schwartz claims that there was no potential harm to Mr. Johnson in this scheme because Mr. Johnson was ultimately allowed to enter a favorable plea. (AB:20-21). He claims that there is no evidence that Mr. Johnson obtained that favorable plea by resolving his case first and agreeing

to testify against Mr. Maloy. (AB:21). Yet, in the opening statement at Mr. Maloy's trial before that case was resolved by a plea, Mr. Schwartz told the jury that:

> Gabriel Johnson is the guilty party. Two people were found inside there. C,[3] manipulated testimony of the co-defendant or shall I say attempted manipulated testimony by the prosecution of the witness who they know has already said I'm going to testify for the defendant.
>
> Has already testified in this very spot right here those drugs were mine. And they offered him **the sweetest, sweetheart deal to change his testimony**.

(R-Ex. 12, p. 7)(A. p. 53)(emphasis supplied).

When the State objected to this argument, Mr. Schwartz explained that he was entitled to go into the entire plea deal "any time a co-defendant has pled and supposedly flipped . . . ." (R-Ex. 12, p. 8)(A. p. 54)

Mr. Johnson avoided the serious potential harm that Mr. Schwartz had created for him by preparing a *Byrd* affidavit for him to sign because of the actions of Judge Multack and the subsequent negotiations of Mr. Johnson's

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[3] Mr. Schwartz's argument was a list of items. This part was "C."

lawyer – not because of anything that Mr. Schwartz did in what is yet another example of his willingness to win for his client at all costs.

E. It was necessary to talk to Mr. Johnson without his lawyer to comply with a court rule.

Finally, Mr. Schwartz argues that his conduct fits into the "safe harbor provision" in Rule 4-4.2(a) that permits communication "to meet the requirements of any court rule." (AB:50). He claims that, because he needed a *Byrd* affidavit to file his motion to sever, he was relieved of the requirement to obtain prior consent from Mr. Johnson's public defender. Suffice it to say that nothing in Florida Rule of Criminal Procedure (b) governing severance of defendants remotely suggests that one defendant can properly move to sever his case from a co-defendant's case by obtaining an affidavit from the co-defendant without involving the co-defendant's counsel or obtaining prior consent from that attorney. In this case, at the hearing on the motion for severance, Mr. Johnson's attorney did not join in the motion and was clearly upset by the communication that had occurred. (TFB-Ex. 2, p. 4, 8)(R.A. p.6, 10). As explained earlier, Mr. Schwartz proffered to Judge Multack that he told Mr. Johnson he ought to have his lawyer involved. This "safe harbor" argument border on the frivolous.

II. The Referee's recommendation of guilt as to the violation of Rule 4-8.4(d) is supported by competent substantial evidence.

Mr. Schwartz's argument on this issue of his cross-review is quite brief. Rule 4-8.4(d) prohibits a lawyer from engaging in "conduct in connection with the practice of law that is prejudicial to the administration of justice." Mr. Schwartz claims that his "actions in representing his client affirmatively furthered the administration of justice, significantly assisted Mr. Johnson, and led to the severance of their cases." (AB-59). He further claims that his "lawyering was directed toward a reasoned and skillful defense that was of benefit to both Mr. Maloy and Mr. Johnson, did not cause harm to the interests of justice, was consistent with the best interests of both defendants, and enabled the case to be reasonably resolved." (AB:59).

The preceding section of this brief rather clearly demonstrates that the actions of Judge Multack protected Mr. Johnson from Mr. Schwartz's misconduct. Despite Mr. Schwartz's persistence in attempting to use Mr. Johnson's "confession" from the severance hearing at his client's trial, the judicial process prevented Mr. Johnson from being deemed to have waived his Fifth Amendment right – not Mr. Mr. Schwartz. The claim that his conduct in seeking to win for Mr. Maloy by risking a second criminal proceeding

against Mr. Johnson was in the "best interests" of Mr. Johnson is simply false.

Although the record is full of conduct that would appear to violate this rule, the Referee actually focused on Mr. Schwartz's impermissible communications with Mr. Johnson and his failure to communicate with Mr. Johnson's attorney. (ROR2, p.11-12)(A. 13-14). The Referee found that the public defender never gave permission for Mr. Schwartz to speak with Mr. Johnson. That is an undisputed fact.

Moreover, Mr. Schwartz suggests that he served the public defender with his motion and the affidavit by stating he filed the affidavit "on the public record pursuant to the E-filing Portal." (AB:2, 20). He testified that e-service, because of how the secretaries do it, is "oftentimes" served on codefendants. (T2:174). He did not introduce into evidence any e-service information for his motion to sever.

But the Referee correctly found that the affidavit was filed only in Mr. Maloy's case and not in Mr. Johnson's case. (ROR2, ¶ 19)(A. 9). The certificate of service on his motion to sever claims it was filed with the Clerk and delivered to the State Attorney's Office. It does not claim it was served on Mr. Johnson's public defender. (R-Ex. 9). At the hearing on the motion to sever, the public defender told the judge that the "only reason I even

learned about the *Byrd* affidavit in the first place was because ASA Walsh told me what was going on, because I was not put on notice, no one contacted my office, I had no idea that my client was in his office at all, and I do not (sic) how these statements were obtained." (TFB-Ex. 2, p. 8)(R.A. p. 10).

The public defender knew that the scheme to have Mr. Johnson's trial first – so he could take the stand and testify under oath that the drugs in the kitchen were his – was not in Mr. Johnson's best interests. Frankly, Mr. Schwartz had to know that any lawyer representing Mr. Johnson that was providing effective assistance of counsel would know the scheme was not in Mr. Johnson's best interests. All but the most inexperienced of public defenders would have realized that double jeopardy would be no protection for Mr. Johnson when he did not take the Fifth Amendment at the second trial.

There was ample evidence to support the Referee's findings of fact and her recommendation that this Court find Mr. Schwartz guilty of a violation of Rule 4-8.4(d).

REPLY ARGUMENT

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

Mr. Schwartz does not respond directly to this point. Indeed, his brief does not discuss the fact that this Court overrode the decision of the referee in his seventh disciplinary proceeding and imposed a three-year suspension. Much of his argument to the Referee in this case was based on his suggestion that the Referee should run a 90-day suspension current with the suspension in the seventh disciplinary proceeding. That is the sanction the Referee is recommending. (ROR3, p. 5)(A. 19).

Thus, although Mr. Schwartz argues that the Referee carefully considered the Standards and the case law, he does not address what the Referee would have done if the case law had included Mr. Schwartz's most recent three-year suspension. This Court will have to decide that question on its own.

II. 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.

Mr. Schwartz claims that Standards 5.1 and 6.1 do not support disbarment because "Respondent's purpose in obtaining and submitting the affidavit was not to deceive, but instead was intended to further the interests of justice and a fair case resolution for his client and the codefendant." (AB:20). There is little or nothing in this record to support that statement. Mr. Schwartz was trying to shift responsibility for the drugs that supported the charges against his client to Mr. Johnson. He intentionally withheld material information from Mr. Johnson and his attorney of record that had the potential to cause serious harm to Mr. Johnson. He did this to benefit his client at the possible expense of Mr. Johnson. This intentional conduct had the potential to adversely affect the legal proceedings and to harm the legal system. But for the efforts of Judge Multack, he might have succeeded. Both of these Standards support disbarment.

For purposes of Standard 8.1, Mr. Schwartz claims that his conduct here is not the "same or similar misconduct" as the conduct in the earlier proceedings. It is not the same; the question is whether it is similar. In 2012, Mr. Schwartz believed that his client in the paternity action needed his help

so he repeatedly filed defective financial affidavits. He notarized the signature on the final affidavit that his client had not signed, using his own expired notary license. Each time, when he decides it is more important for his client to win, he engages in deceptive conduct to mislead the court or opposing parties. The Bar leaves it to this Court to decide whether that pattern of conduct is "similar misconduct."

The Bar continues to maintain that these Standards, prior to the application of the aggravating factors support a long suspension, if not disbarment with leave to reapply in five years.

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

Mr. Schwartz points out that the Referee in balancing the factors took into consideration that fact that his conduct caused little or no injury or potential injury to a "client." (AB-26). It is true that the Supplemental Report of Referee on Sanctions makes that statement. But the Referee does not seem to appreciate that it was not Mr. Schwartz's "client" who faced the risk of injury or potential injury. In this case, as was the case in his seventh disciplinary proceeding, Mr. Schwartz was trying to benefit his client by harming someone else. His misconduct did not ultimately harm Mr. Johnson because of the conduct of Judge Multack and the other lawyers in this

criminal case. Mr. Schwartz had nothing to do with preventing the potential harm in this scheme.

a. Aggravating factors.

Standard 3.2(b)(9) Substantial experience in the law. Mr. Schwartz does not deny this factor weighs against him. Instead, he tries to distract the Court by claiming that Dr. Weinstein said he was "remorseful and had taken meaningful steps to learn from his improper decisions." (AB-29-30). Actually, a word search of his testimony reflects that Dr. Weinstein never used the word "remorse" or "remorseful." The best that Dr. Weinstein can say is that Mr. Schwartz has come to understand that "he perhaps stepped over the line many times." After all of these proceedings, one would think that such an experienced lawyer would understand something more than "perhaps." Mr. Schwartz does not deny that the August 20, 2020, letter he introduced from Dr. Weinstein is the same letter he used in the seventh disciplinary proceeding. It is unclear whether this most recent case was part of the discussion that resulted in the letter.

Standard 3.2 (b)(3) Pattern of Misconduct. Mr. Schwartz responds to this portion of the Bar's brief by stating that the Referee considered the prior cases. (AB-29). He does not deny that the pattern involves nine prior

violations of Rule 4-8.4. Admittedly, not all of those violations are violations of Rule 4-8.4(d). But, as discussed in the Bar's initial brief, the case involving his misuse of his notary license included a violation of Rule 4-8.4(b) for conduct that involved a criminal act. Other cases involved violations of Rule 4-8.4(c) for dishonest conduct. It is likely that the Referee did not give greater weight to this prior record because she was assuming Mr. Schwartz would receive a 90-day sanction in the seventh disciplinary proceeding.

Standard 3.2(b)(1) Prior Disciplinary Offenses. The Bar argued in its initial brief that the Referee erroneously omitted two prior cases, the 1997 and 2002 cases, because they were not "minor misconduct" cases subject to the seven-year rule. Mr. Schwartz argues that these cases fell within a seven-year period permitting them to be excluded from consideration, but he does not deny that these cases did not involve "minor misconduct." Thus, by his silence, he is admitting that the Referee failed to consider the two additional cases when evaluating this factor because she thought they either did not involve minor misconduct or that minor misconduct was not a limitation on the seven-year rule.

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

The Referee made a finding of remorse. (ROR3: 21). In the end, this issue boils down to what this Court understands to be necessary to "acknowledge the wrongful nature of the conduct." There is no dispute that Mr. Schwartz never says he is "remorseful." He apparently told Dr. Weinstein that he "perhaps" crossed the line. But he never says that he is "sorry" for trying to move Mr. Johnson's trial in front of his client's trial, so that Mr. Johnson could confess to the crimes that were charged against his client. Crimes that the State had never charged Mr. Johnson of committing.

Robert Fulghum claims that one of the things we were supposed to have learned in kindergarten is to say you are sorry when you hurt somebody. Robert Fulghum, *All I Really Need to Know I Learned in Kindergarten* (1986). The Bar simply maintains that it is disturbing that Mr. Schwartz needs to have his lawyer ask him whether he "accepts responsibility," when he ought to be able to answer the simple question: "Are you sorry for what you did to Mr. Johnson in this case?

b. Mitigating Factors.

The Bar's reply addresses only a few of the mitigating factors. It stands on its initial brief and does not wish to merely repeat those arguments.

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

Mr. Schwartz does not really respond to the argument in this section. He merely continues to claim that the length of this proceeding has "extracted a considerable toll" on him. (AB. 37). The Bar cited many cases explaining what can be considered an "other sanction." Mr. Schwartz does not respond to that case law or claim that his facts fit within that case law. He does not respond to the Bar's argument that the timeline in this case does not actually demonstrate an unreasonable delay.

Instead, he now suggests that the Referee could instead have found "unreasonable delay" under Standard 3.3(b)(9). That Standard does not appear to have been raised before the Referee, but more importantly it requires the respondent to prove that "the respondent did not substantially contribute to the delay and the respondent demonstrates specific prejudice resulting from that delay." Under either Standard, there was no competent substantial evidence for the Referee to make this finding of specific prejudice.

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

Mr. Schwartz continues to claim that he made "a full and complete disclosure of the circumstances surrounding the preparation of the *Byrd* affidavit and his reason for doing so." (AB-33). He does not respond to the fact that he stonewalled Judge Multack at the hearing, and that he made the consequences of his misconduct worse by trying to claim that Mr. Johnson's confession at that hearing should be admissible at Mr. Maloy's trial. Frankly, Mr. Schwartz's efforts at that hearing were the exact opposite of what it takes to establish this mitigating factor. There is no competent substantial evidence to support this mitigating factor.

IV. 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.

The Bar submits that the Standards authorize disbarment in this case and that the balance of the aggravating and mitigating circumstances does not support a lesser sanction; it supports a greater sanction. The primary function of the case law is to determine whether the sanction that appears appropriate under these Standards is nevertheless too harsh or too lenient.

Has the case law in the past given this lawyer fair notice that his conduct could result in the sanction that appears appropriate following the application of the Standards and the balance of the aggravating and mitigating circumstances?

As the Bar explained in its initial brief, there is no case that is squarely on point. Mr. Schwartz's brief points out the differences between this case and the earlier cases. But he too can cite to no case that really governs this situation.

Mr. Schwartz has had more disciplinary proceedings in his 30-year career than the cumulative total of cases for the lawyers in most law firms. And over and over again, the cases involve violations of Rule 4-8.4. The conduct is knowing and intentional conduct. Each time he "acknowledges" the misconduct and promises not to do that specific act of misconduct again. But different acts of intentional misconduct have followed.

In arguing against disbarment, Mr. Schwartz never addresses the fact that he is already suspended for a three-year period. He cannot deny that imposing a second three-year suspension concurrent with the existing suspension would effectively be no sanction or that imposing a second three-year suspension consecutively would be an unconventional approach not

justified by these circumstances. Disbarment with leave to reapply in five years is the appropriate sanction.

The cumulative conduct demonstrates a mindset that causes Mr. Schwartz to disobey the rules if it helps his client win. As long as he is being "zealous," the ends justify the means. The warning years ago to all members of the Bar that this Court intends to sanction members of the Bar more harshly for this type of intentional conduct has not deterred Mr. Schwartz.

The Bar submits that the case law cited in its initial brief has given Mr. Schwartz ample notice that he can be disbarred for cumulative intentional misconduct. It submits that the time for that sanction has arrived in this ninth disciplinary proceeding. The case law simply does not provide a justification to reduce the sanction that the Standards support.

Mr. Schwartz claims he should receive a lesser sanction because:

> Respondent here owned up to his conduct, did not cause any actual or potential harm to any person, party, or court, and did not disrupt any judicial proceeding. He recognized he should not have communicated with the witness who had received an appointment of the Public Defender's Office as counsel, despite Mr. Johnson's insistence that he was unrepresented.

(A.B-44).

But as the Bar has demonstrated Mr. Schwartz never could bring himself to say he was sorry to Mr. Johnson for what he did or that he had remorse for the conduct that he still claims was brought on by "Mr. Johnson's insistence that he was unrepresented." He did cause potential harm to Mr. Johnson. He did not yell or scream at Judge Multack, but his strategy to win for Mr. Maloy by preparing and filing a *Bryd* affidavit resulted in a hearing on July 19, 2012, where he claimed Mr. Johnson waived his constitutional rights and confessed.

Mr. Schwartz still believes that his long-standing pattern of knowing and intentional violations of the Florida Rules of Professional Conduct is merely a problem of over-zealousness because, after all, his clients benefitted by the conduct. He does not truly accept that the Rules of Professional Conduct exist to protect the legitimacy of the judicial system and the public's faith in the rule of law. They are not rules that yield when the client's ends might seem to benefit from means that are contrary to the rule of law and to the Rules of Professional Conduct.

Both as a sanction for Mr. Schwartz and as a deterrent for other lawyers who may believe that Rule 4-8.4 can be violated repeatedly without the risk of disbarment, the Court should disbar Mr. Schwartz.

CONCLUSION

The Bar asks this Court to accept the Referee's recommendations of guilt, but 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 17th day of October, 2022, to:

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