IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CHARLIE EASA FARAH JR.,

Respondent.

_____/

Supreme Court Case No. SC22-472

The Florida Bar File No. 2018-00,181 (02A)

THE FLORIDA BAR'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Rules Regulating the Florida Bar

Constitutional Provisions

Florida's Standards for Imposing Lawyer Sanctions

PRELIMINARY STATEMENT

Complainant is referred to as The Florida Bar or the bar. Respondent Charlie Easa Farah Jr. is referred to as Mr. Farah.

Bar exhibits are referred to by TFB-Ex. followed by the exhibit number. Respondent's exhibits are referred to as R-Ex. followed by the exhibit number.

The bar has previously filed two transcripts consisting of the final hearing conducted October 2 & 3, 2023. This brief cites the final hearing transcript as "T:" followed by the applicable page number(s).

Citations to the index of record are referred to by "Tab#" followed by the applicable tab number corresponding to the index. The report of referee is referred to as "ROR:" followed by the applicable page number.

NATURE OF THE CASE

This disciplinary proceeding originated as a judicial referral from the United States District Court, Middle District of Florida. Specifically, a 298-page Special Master's Report and Recommendation entered in *In re: Engle Cases*, Case No. 3:09-cv-10000 (M.D. Fla. Aug. 3, 2016) found that respondent's firm, Farah & Farah, P.A., as well as co-counsel, The Wilner Firm, P.A., engaged in misconduct regarding their joint pursuit of a litany of claims in federal court as plaintiffs' counsel. (TFB-Ex.1, pg.275-77). The

federal court order entered following this report adopted many of the special master's findings and referred the matter to The Florida Bar. (See generally TFB-Ex.2).

In the disciplinary proceeding, the bar entered into evidence the special master's report, the federal court order, as well as motions, responses, and a hearing transcript filed in the federal case as a result of the report. (See generally TFB-Ex.1-7). These filings formed the basis for the bar's complaint charging Mr. Farah with violating Rules 4-1.3, 4-1.4(a), and 4-1.16. (See Tab#1). The bar also argued at trial that the facts pled in the complaint warranted additional findings that Mr. Farah violated Rules 4-1.5(f)(2), and 4-1.5(f)(4)(D)(iii). The referee found that the bar failed to prove any of the violations at issue, and on appeal, the bar seeks findings of guilt on the above rules and imposition of a 30-day suspension.

STATEMENT OF THE CASE AND FACTS

I. After appearing as co-counsel in 4,432 federal lawsuits without valid contingency fee agreements in most cases, Mr. Farah abdicated his legal duties to his co-counsel, resulting in a 148-page federal order sanctioning plaintiffs' counsel for filing 1,250 frivolous lawsuits.

A. Background:

Mr. Farah became involved as co-counsel in over 4,000 lawsuits filed in federal court following this Court's opinion in *Engle v. Liggett Group, Inc.*,

945 So. 2d 1246 (Fla. 2006). Specifically, in 1994 the Circuit Court in and for Miami-Dade County, Florida certified a nationwide class action by a group of smokers and their survivors against major domestic cigarette companies and two industry organizations for injuries allegedly caused by smoking. *Id*. at 1256. The defendants filed an interlocutory appeal of the order certifying the class, and in 1996 the Third District Court of Appeal reduced the class to include only Florida smokers. *Id*. (citing *R.J. Reynolds Tobacco Co v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996)).

On remand, the jury awarded $12.7 million in compensatory damages to the three individual class representatives and $145 billion in punitive damages to the entire class. *Id*. at 1257. Though the trial court granted in part certain post-verdict motions filed by the defendants, the court directed the defendants to pay $145 billion in punitive damages into the court's registry for the benefit of the entire class. *Id.*

Before the trial court could resolve the individual liability and compensatory damages of each class member (estimated to number approximately 700,000 individuals), the defendants successfully appealed the final judgment to the Third District, which resulted in decertification of the class. *Id*. at 1258 (citing *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. 3d DCA 2003)). This Court agreed with the Third District in holding

that “continued class action treatment is not feasible and that upon remand the class must be decertified.” *Id*. at 1277. The opinion authorized class members to initiate individual actions within one year of the Court’s mandate. *Id*.

B. Pre-suit investigation:

The deadline to file such individual actions was January 11, 2008. (TFB-Ex.1, pg.7). The federal court collectively referred to the thousands of lawsuits that followed as the Federal *Engle* Actions. (See TFB-Ex.2, pg.5). By 2009, attorney Norwood Wilner represented 4,432 plaintiffs in these individual cases. (TFB-Ex.1, pg.8). Mr. Farah also appeared as counsel of record in all 4,432 cases. (TFB-Ex.1, pg.30-31). His appearance as co-counsel was the result of his firm associating with Mr. Wilner’s firm in either late 2006 or early 2007, which was around the same time of this Court’s decertification of the class in *Engle*. (TFB-Ex.7, pg.16). The two firms agreed to evenly split recovery of attorney’s fees. *Id*. This agreement was not reduced to writing. (T1:136). Mr. Farah received inquiries from over one thousand interested parties, and he initially screened each individual through the use of questionnaires and surveys. (TFB-Ex.7, pg.16). Through this process, Mr. Farah stated that he ultimately contributed 163 clients to the Federal *Engle* Actions. (TFB-Ex.1,

pg.30-31). *Id*. He further claimed that he maintained regular communication with most of the 163 clients between January 11, 2007 and January 11, 2008. *Id*. The latter date was the deadline to file an individual action established by this Court in *Engle*.

According to Mr. Farah, once the Federal *Engle* Actions were filed, he and Mr. Wilner divided their labor. In an interrogatory answer, he stated that Mr. Wilner's firm took responsibility for trials and court hearings and took sole custody of client records. (TFB-Ex.7, pg.16). Mr. Farah's firm provided clerical and financial backing for the litigation, which included sending its own employees to Mr. Wilner's firm to assist with the litigation. *Id*. The interrogatory answer was silent on which firm was responsible for client communication, and Mr. Farah's testimony on the issue was similarly unclear. (*Id*.; see also T1:49-50). Regarding the other cases originating from Mr. Wilner's office, only a tiny fraction of those clients had signed contingency fee agreements when the complaints were filed. (TFB-Ex.2, pg.127).

The special master was unable to verify the alleged "comprehensive review" conducted by Mr. Farah before the filing of lawsuits in federal court, because "[t]he client files produced by Mr. Farah [to the special master] contain[ed] no copies of surveys or questionnaires or the client responses."

(TFB-Ex.1, pg.32). Instead, Mr. Farah only produced communication logs indicating he sent and received questionnaires in 2006, and some correspondence to medical providers seeking records. *Id*. Discovery received from other law firms additionally demonstrated that Mr. Farah's firm obtained some medical records and death certificates, though most of this occurred after January 11, 2008. This was after Mr. Farah ceased maintaining regular communication with clients. *Id*. Based on the lack of information and evidence, the special master determined that Mr. Farah did not demonstrate that his pre-suit investigation of the 163 claims satisfied his obligation to reasonably inquire into the circumstances prior to the filing of a pleading under Fed. R. Civ. P. Rule 11. (TFB-Ex.1, pg.33).

The special master next addressed Mr. Farah's actions in "temporarily drop[ping]" 154 of the 163 clients based on the initial investigation. (TFB-Ex.1, pg.34). Specifically, the files produced by Mr. Farah contained "decline letters" for approximately 146 clients dated between February 2007 and October 2007. *Id*. These letters stated that Mr. Farah could not assist and would not continue representation of the client's potential tobacco claim. (TFB-Ex.1, pg.35). The letters advised clients of the January 11, 2008 filing deadline and to consult another attorney. *Id*. Mr. Farah explained that after he sent these letters, he

resumed representation of all 163 clients after he "reassess[ed] the viability" of these cases. *Id*. The special master noted that nothing in the client files explained the change in circumstances prompting Mr. Farah's decision. (TFB-Ex.1, pg.36). The report and recommendation incorporated a table listing all Farah clients and summarizing whether the client relationship was terminated before the Federal *Engle* actions commenced and whether there is any evidence of revival of the lawyer client relationship. (See TFB-Ex.1, pg.38-64). Mr. Farah confirmed at a sanction hearing in federal court this process of reopening closed cases with notations in the file rather than a signed document reviving the contingency fee agreement. (TFB-Ex.7, pg.159).

Mr. Farah claimed he was authorized to represent these clients because he conferred with them by phone or written correspondence. (TFB-Ex.1, pg.35). The special master found that only 26% of the client files contained written evidence of the client consenting to revival of Mr. Farah's legal representation, and most of these agreements were undated. (TFB-Ex.1, pg.36). Some of the case files contained a note stating "re-open per CEF [Charlie Easa Farah]." *Id*. Mr. Farah explained that this note in a client file indicated the client agreed to revival of representation via oral consent. *Id*. He also testified in federal court that if the notes in his file

were insufficient but he was unable to reach a "client," he would still file the lawsuit to preserve the "client's" rights. (TFB-Ex.6, pg.165-66). Mr. Farah later filed a motion for reconsideration in federal court following a 148-page sanction order stating that his firm's "reactivation efforts were imperfect and could have been better documented," but he still disputed the court's finding that he reactivated cases *en masse* without proper grounds. (TFB-Ex.8A). Then in the disciplinary proceeding, Mr. Farah blanketly asserted that he had fee agreements for all 163 clients. (T1:90).

The special master rejected Mr. Farah's claims that all 163 clients consented to the revival of Mr. Farah's legal representation, because (1) several lawsuits subsequently filed were dismissed; (2) eight clients died before January 11, 2008 and personal injury claims were later filed on their behalf anyway; and (3) one client died before the class period, but Mr. Farah filed a time-barred wrongful death claim on her behalf. (TFB-Ex.1, pg.37). If Mr. Farah did confer with all 163 clients or the clients' survivors as he claimed, the special master found that he "either knew or should have known whether a particular claim was viable before signing the complaint." *Id*. Mr. Farah nevertheless claimed that his firm took action on cases "always with the clients' permission" and that his firm did not *ever* "determine that any claim made by them was not viable." (TFB-Ex.7, pg.3,

11). His response letter to the bar instead deflects all blame to Mr. Wilner, stating that the dismissed cases originating from his office in which the plaintiffs were already dead "were filed mistakenly by Mr. Wilner as personal injury claims." (TFB-Ex.8, pg.10-11). As co-counsel, Mr. Farah did not review the complaints, notify lead counsel or the court of the errors, nor timely seek to amend the filings.

Some client files conclusively established that Mr. Farah did *not* have proper authorization to file suit. The special master described four such cases as an exemplar of Mr. Farah's overall failure to communicate with clients before filing suit on their behalf. For instance, the special master noted that in one case, a note in a communication log indicated that after Mr. Farah sent a termination letter to a client's survivor, he received oral consent to reopen the file on September 20, 2007. (TFB-Ex.1, pg.64). But three months later, Mr. Farah sent the client's survivor a second letter again terminating the client relationship. *Id*. He nevertheless filed a personal injury claim on behalf of the client on January 11, 2008. (TFB-Ex.1, pg.64-65).

Another client file indicated that Mr. Farah received oral consent to reopen a closed file on September 20, 2007, which was the date of the client's death. (TFB-Ex.1, pg.65). Mr. Farah then sent another letter

terminating the client's case to the client's daughter dated December 4, 2007, which was 38 days before the deadline to file suit. Mr. Wilner and Mr. Farah filed a personal injury claim on behalf of the client, which was later dismissed. *Id*.

Mr. Farah reopened another client file only to again close the file three months later on December 6, 2007, which was 36 days before the deadline to file suit. *Id*. The client died one month later, and despite the absence of any record of communication with survivors, Mr. Farah filed a personal injury claim on behalf of the client four days after the client's death. (TFB-Ex.1, pg.65-66). The claim was later dismissed. *Id*.

In the fourth and final example, Mr. Farah closed a file, reopened it, reclosed it, and again reopened it. (TFB-Ex.1, pg.66). After these events, the file contained an October 23, 2007 note saying simply "drop." *Id*. Mr. Farah then sent another letter declining the representation on November 16, 2007. *Id*. He nevertheless filed a claim on the client's behalf, which was later dismissed for failure to return a court-ordered questionnaire. *Id*.

The special master concluded that Mr. Farah reopened files en masse without consulting all clients, and he did not re-engage those clients after terminating the relationship. (TFB-Ex.1, pg.66). Further, the majority of the files contain no written evidence that the client consented to Mr.

Farah's agreement to co-counsel the cases to Mr. Wilner. *Id*. The special master held in the alternative that even if he accepted as true Mr. Farah's claim that he contacted all 163 clients and re-established an attorney-client relationship before the filing deadline, he knew or should have known the viability of certain claims either before or shortly after filing those claims. (TFB-Ex.1, pg.67). The federal court later relied on some of these examples to conclude that "both Wilner and Farah must have known that some of the personal injury plaintiffs were dead." (TFB-Ex.2, pg.72).

The special master found that of the 163 clients originating from Mr. Farah's firm, Mr. Farah and Mr. Wilner could only produce 122 of those agreements. (TFB-Ex.1, pg.68). There were no written fee agreements for 27 clients, and 14 fee agreements were signed by clients after suit was filed. *Id*. Most of these after-the-fact agreements were signed between 2009 and 2015. *Id*. Mr. Farah had obtained written fee agreements for nearly 75% of the 163 clients before filing suit, but he terminated the attorney/client relationship in 95% of the cases between February and October 2007. *Id*. Therefore, the special master found that Mr. Farah needed a written agreement establishing revival of terminated written contingency fee agreements. *Id*. However, Mr. Farah could only produce an undated, one-paragraph addendum reviving the attorney/client

relationship in 26% of the 163 cases. *Id*. In all other cases, Mr. Farah's files only showed that the client orally revived the terminated fee agreement, or Mr. Farah did not obtain a signed, written fee agreement until more than a year after litigation began. (TFB-Ex.1, pg.69). Further, "Farah did not reduce to writing the client's informed consent to Farah's transfer of the client's cases to Wilner." (TFB-Ex.1, pg.70).

The special master determined that, Mr. Farah "had no attorney-client relationship with any of Wilner's clients," despite appearing as co-counsel in all cases originating from Mr. Wilner's firm. (TFB-Ex.1, pg.73). He also lacked any personal knowledge regarding any of these other cases. *Id*.

C. <u>The litigation:</u>

The salient facts regarding the litigation are detailed in a 148-page sanction order signed by four federal court judges after the Federal *Engle* Actions were dismissed, tried, or settled. (See TFB-Ex.2). Though Mr. Farah did not personally file pleadings or attend hearings (other than a hearing on sanctions), given his role as co-counsel in all cases, this brief next discusses the conduct leading to the sanction order against Mr. Wilner and Mr. Farah.

After the filing of the Federal *Engle* Actions, the court stayed proceedings on October 29, 2008 to aid the administration of these actions.

(TFB-Ex.2, pg.14). The court created both individual dockets for the 4,432 plaintiffs and a master docket to handle case management issues and other matters common to all cases. *Id*. In July 2009, during the stay period, Mr. Wilner sent clients a questionnaire, a representation agreement, and an authorization for the release of medical records. *Id*. The federal court held that these actions, taken after the filing of thousands of lawsuits, suggest that no such effort was taken beforehand. (TFB-Ex.2, pg.14-15).

After the stay ended in October 2010, Mr. Wilner voluntary dismissed 499 cases, and he informed the court that some of these cases were not viable, but this was "totally unclear" in 2008 when the lawsuits were filed. (TFB-Ex.2, pg.14-15). As a result of the bulk dismissal and Mr. Wilner's admission that many claims were not viable, on December 22, 2010, the court ordered the parties to conduct individual review of the remaining cases (numbering roughly 3,800 cases) to determine which of those cases should be dismissed. (TFB-Ex.2, pg.16). Mr. Farah performed no labor on this issue, as he stated in an interrogatory answer that he had "no record of communications with *Engle* clients between December 6, 2010 and June 6, 2011," he did not attend status hearings in the litigation, and Mr. Wilner assumed responsibility for complying with the court order. (TFB-Ex.7, pg.10). Mr. Farah's response letter to the bar also stated that he "played

no role in this case review process, certification or recommendation of disposition." (TFB-Ex.8, pg.4). Confusingly, Mr. Farah also testified in the disciplinary proceeding that he communicated with clients, including those originating from Mr. Wilner's firm, after filing suit. (T1:49-50, 78).

Mr. Wilner responded to the December 22, 2010 court order by recommending (1) dismissal of another 136 cases because duplicate state actions had been filed; (2) dismissal of another 118 cases filed as the result of a clerical error; (3) consolidation of 500 loss-of-consortium cases with their associated smokers' cases; and (4) his withdrawal from 332 cases because either he had not been in contact with the clients or they had claims Mr. Wilner could not prosecute. (TFB-Ex.2, pg.17).

The defendants filed a separate response to the court order providing their own list of cases to dismiss, including (1) 30 previously adjudicated cases; (2) 250 cases that had duplicate state actions; (3) 125 actions that were duplicates of another federal court case; and (4) 25 actions in which plaintiffs had opted out of the *Engle* class action. (TFB-Ex.2, pg.18). The defendants later filed a supplemental response explaining some of the discrepancies between the two responses filed by the parties in compliance with the court order, alleging that Mr. Wilner's list of cases omitted certain matters he should have known were subject to dismissal. *Id*. As an

example, one plaintiff already tried the matter to a defense verdict over 14 years ago and was represented by Mr. Wilner. *Id*. In fact, Mr. Wilner represented the plaintiffs in 11 out of the 30 previously adjudicated cases. (TFB-Ex.2, pg.86). In another example, the personal representative of the client stated under oath in another lawsuit that she decided to drop the case, and the defendants notified Mr. Wilner of this deposition testimony in February 2011. (TFB-Ex.2, pg.19). The defendants notified plaintiffs' counsel of these cases to comply with an order requiring the parties to confer on proposed dismissals so that the federal court did not have to reconcile inconsistent responses by the parties unless necessary. (TFB-Ex.2, pg.87-88). The court had to do so anyway, because Mr. Farah and Mr. Wilner's response did not reference these matters as ripe for dismissal. *Id*.

The court entered an order in April 2011 dismissing several cases, which left roughly 2,900 Federal *Engle* Actions pending. (TFB-Ex.2, pg.19-20). However, a temporary special master tasked with assisting the court in managing cases—distinct from the special master later appointed to investigate potential sanctions—issued a report that same month. The report found that "neither side has any real grasp of the composition of the universe of cases" and "know next to nothing about more than 90% of this

action." (TFB-Ex.2, pg.20). Due to this uncertainty, the temporary special master determined that "it is apparent that additional winnowing opportunities are both available and appropriate." *Id*. The special master recommended sending questionnaires to each plaintiff, and plaintiff's counsel objected to this recommendation, asserting their own "data" obviated the need to do so and previous culling efforts were substantial enough that "there is no longer any sizable group of cases ripe for dismissal." (TFB-Ex.2, pg.20-21). At the time, hundreds of pending cases were fatally defective. (TFB-Ex.2, pg.21).

At a June 2011 hearing, Mr. Wilner falsely represented that his firm had been in contact with every plaintiff "within the past group of months" who were "alive, present and willing," except for the 332 cases in which he sought to withdraw as counsel. (TFB-Ex.2, pg.21-22). Mr. Farah did not attend the hearing. (TFB-Ex.8, pg.5). The court found that, at best, Mr. Wilner's records indicated he contacted 2,231 out of roughly 2,900 remaining plaintiffs in the six months before the June 2011 hearing, and at worst, the special master determined that Mr. Wilner's records only confirmed contact with 1,320 plaintiffs during that time. (TFB-Ex.2, pg.23, n.12). The court dismissed the 332 cases in which Mr. Wilner sought to withdraw as counsel, leaving approximately 2,600 Federal *Engle* Actions.

(TFB-Ex.2, pg.25). In each of these remaining cases, the court ordered counsel to send questionnaires asking whether the plaintiffs wished to participate in the litigation and set a November 2011 deadline for their return. *Id*. Mr. Farah testified he was aware of the order when it was entered and did not have any role in complying with the order. (T1:55-56).

The plaintiffs returned 1,724 completed questionnaires by the deadline. (TFB-Ex.2, pg.26). Counsel sought an extension to submit outstanding questionnaires, stating that of the 753 plaintiffs who had not returned questionnaires, counsel had been in contact with approximately 500 of those plaintiffs in the previous year. The court thus found that counsel admitted he had not been in contact with the over 200 other plaintiffs who did not return questionnaires, which was at odds with Mr. Wilner's representations at the June 2011 hearing. *Id*. The court denied the motion for extension but advised that additional questionnaires may be submitted upon a showing of good cause. *Id*.

After reviewing the questionnaires, the temporary special master determined that (1) 521 plaintiffs were already deceased when counsel filed personal injury actions on their behalf; (2) 66 plaintiffs were living when counsel filed wrongful death actions on their behalf; (3) 64 deceased plaintiffs had no survivors when counsel filed wrongful death actions on

their behalf; and (4) 39 wrongful death cases were barred by the statute of limitations. (TFB-Ex.2, pg.27).

This prompted a motion to dismiss by the defendants, and Mr. Wilner responded to the motion by claiming that prior contractual agreements gave his firm "latitude as to the appropriate method to preserve and advance their claim against the cigarette companies." (TFB-Ex.2, pg.28-29). Again, neither his firm nor Mr. Farah's firm had written agreements for the vast majority of these "clients." Mr. Wilner's response further admitted that he filed suit on behalf of over 500 plaintiffs without knowing their status. *Id*. The response claimed that survivors of these plaintiffs ratified the filings "nunc pro tunc," though Mr. Wilner never moved to amend any complaints nor did he otherwise notify the court or anyone else that more than 500 personal injury complaints named a dead plaintiff. (TFB-Ex.2, pg.29). Likewise, Mr. Farah took no such action.

At a June 2012 hearing on the motion to dismiss, the court stated that it was counsel's responsibility to engage in the winnowing process, not the court's responsibility. (TFB-Ex.2, pg.31-33). One month later, in one of the Federal *Engle* Actions, a sitting juror discovered that, unbeknownst to her, she was also a plaintiff in a suit filed by Mr. Wilner and Mr. Farah. (TFB-Ex.2, pg.34-35; see also TFB-Ex.1, pg.152-53). This revelation occurred

during the middle of trial after it was uncovered by defense counsel. (TFB-Ex.2, pg.89). Both Mr. Farah's and Mr. Wilner's signature blocks were on the unauthorized complaint. (TFB-Ex.1, pg.153).

The federal court found that Mr. Wilner's and Mr. Farah's firms later sought dismissal of 189 cases for myriad reasons: either plaintiffs were not Florida residents, did not want to pursue litigation, were non-smokers, or their claims were time barred. (TFB-Ex.2, pg.36). The court dismissed these cases and another 644 cases because no questionnaire had ever been returned. (TFB-Ex.2, pg.37). By September 2012, 1,800 Federal *Engle* Actions remained pending. *Id*. As a result of subsequent culling efforts, this number dropped to 1,200 remaining actions by January 2013. (TFB-Ex.2, pg.38).

As cases were tried, settled, or dismissed, only 415 plaintiffs remained by February 2015. (TFB-Ex.2, pg.39). At that time, the parties reached a tentative global settlement valued at $100,000,000.00. *Id*. This resulted in the court approved creation of the Federal *Engle* Settlement Fund to disburse the settlement proceeds and attorneys' fees. *Id*. Due to the lack of competence exhibited by plaintiffs' counsel, the court froze funds set aside to pay attorney's fees and costs until it adjudicated the issue of monetary sanctions. (TFB-Ex.2, pg.39-40). The court appointed

the U.S. Attorney to serve as Special Master. *Id*. This resulted in the 298-page report and recommendation included in the disciplinary proceeding as TFB-Ex.1. It also prompted a sanction hearing on December 16, 2016, which is the first and only time Mr. Farah appeared in court on any of the Federal *Engle* Actions. (TFB-Ex.8, pg.6).

This report and hearing led to the federal court's conclusion that Mr. Wilner and Mr. Farah filed a total of 1,250 frivolous cases, which the court deemed a conservative estimate. (TFB-Ex.2, pg.130). During his testimony at the disciplinary proceeding, Mr. Farah did not dispute the extensive findings by the federal court regarding these frivolous claims. (T1:56-58). In calculating the monetary sanction, the court valued the total waste of court resources caused by Mr. Wilner's and Mr. Farah's conduct at $8,729,275.00. (TFB-Ex.2, pg.138). It then added the costs of the special master's labor, which was valued at $435,129.12. (TFB-Ex.2, pg.140-41). Consequently, the court initially imposed a $9,164,404.12 monetary sanction on both lawyers. *Id*. This amount was later reduced in an order modifying the sanctions, in which "Mr. Farah and his firm forfeited its 50% share of $4,329,668.43." (TFB-Ex.8, pg.7-8). The court also issued a public reprimand by publishing its 148-page opinion. (See TFB-Ex.2, pg.146).

II. The referee's report found that the bar did not demonstrate that Mr. Farah committed any rule violations charged in the formal complaint.

The bar's formal complaint charged Mr. Farah with violating Rules 4-1.3 (diligence), 4-1.4(a) (informing client of status of representation), and 4-1.16 (declining or terminating representation). Additionally, during the hearing, the bar also argued that Mr. Farah's conduct at issue in the formal complaint violated Rules 4-1.5(f)(2) because he did not obtain written contingency fee agreements within a reasonable time, and it violated Rule 4-1.5(f)(4)(D)(iii), because Mr. Farah never applied to the court for approval of the fee splitting arrangement between Mr. Wilner's firm and Mr. Farah's firm. (See T1:75-76; T2:160).

The referee's report recommends that Mr. Farah be found not guilty of any violation of the Rules Regulating The Florida Bar. This was based on a determination that Mr. Farah played no role in the case review process, certification, or recommendation of disposition in any of the Federal *Engle* Actions. (ROR:9). In fact, the referee found that Mr. Farah's conduct "involve[d] no willful action or inaction." (ROR:23). Instead, the referee concluded that the entire basis for the federal court's sanctioning of Mr. Farah was based on Mr. Farah's signature block on the pleadings, which was added by Mr. Wilner. (ROR:12-13). On this basis, the referee

limited review of Mr. Farah's conduct to the 163 cases that originated from his firm, as opposed to the 4,432 lawsuits in which he appeared as co-counsel. Regarding these cases, the referee found that 141 of the cases led to compensation from the *Engle* trust fund, 10 were dismissed because clients failed to return court ordered questionnaires, and the bar did not demonstrate that Mr. Farah was less than diligent regarding the remaining 12 cases. (ROR:19-20).

SUMMARY OF ARGUMENT

The referee's report errs in declining to find rule violations because no client complained, the alleged violations derived from conduct that occurred a decade ago, Mr. Farah was already sanctioned in federal court, and he has not faced other discipline in his legal career. None of these issues impact a finding of guilt, though some, not all, may be relevant in determining an appropriate sanction. The referee also erred in (1) limiting his analysis to the 163 cases originating from Mr. Farah's firm, as Mr. Farah knowingly became co-counsel of record on all 4,432 lawsuits; and (2) concluding that the federal court order was insufficient evidence to establish Mr. Farah's guilt.

Mr. Farah unjustifiably relied on contingency fee agreements that he previously terminated as authorization to file suit. He had no knowledge of

whether Mr. Wilner had obtained fee agreements in every other case in which Mr. Farah appeared as co-counsel, nor did he inform clients in writing that he and Mr. Wilner would work as co-counsel, share files, and evenly split any earned attorney's fees. In the overwhelming majority of the lawsuits, the federal court found that Mr. Farah's and Mr. Wilner's firms did not have written contingency fee agreements before filing suit nor did they obtain such agreements within a reasonable time after commencing the representation. Further, the fee splitting arrangement between The Wilner Firm and Farah & Farah was not reduced to writing or approved by the court. This conduct violated Rules 4-1.5(f)(2) and 4-1.5(f)(4)(D)(iii).

Mr. Farah and Mr. Wilner then had difficulties managing a large caseload after filing suit. Though this difficulty is understandable, the solution was to either take on fewer cases or partner with larger firms experienced in mass litigation. Instead, Mr. Farah deferred to Mr. Wilner's plainly deficient efforts to singlehandedly litigate more than 4,000 cases. Neither attorney sought additional counsel until 2011—three years after filing suit—presumably because they did not want to dilute their respective 50% shares of attorney's fees. Since Mr. Farah knew or should have known that the two firms could not competently represent plaintiffs in 4,432 lawsuits—especially given Mr. Farah's total lack of involvement—he

violated Rule 4-1.16 by undertaking representation that would result in violation of the Rules of Professional Conduct. By appearing as counsel on 1,250 lawsuits later deemed frivolous filings by the federal court, Mr. Farah also violated Rules 4-1.3 (diligence) and 4-1.4(a) (communication).

Regarding the appropriate sanction to be imposed based on the above rule violations, Mr. Farah's lack of diligence and failure to communicate with clients resulted in potential injury to clients. Mr. Farah's lack of diligence also resulted in actual injury to both the public and the legal system. Based on the Standards and case law, this conduct warrants a 30-day suspension from the practice of law.

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 regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const. Standards of review used to evaluate a trial court's final judgment do not apply here.

1. Findings of Fact

As this Court explained in *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016): "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. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019); *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). In reaching findings of fact, the referee has a heightened role in determining issues of credibility, which are important in this particular review. This Court has long held, "The referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." *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)).

2. Recommendation of Discipline

The referee's recommendation of discipline is subjected to greater review by this Court because of this Court's ultimate responsibility to make that decision:

> In reviewing a referee's recommended discipline, this 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. *See The Florida Bar v. Picon*, 205 So. 3d 759, 765 (Fla. 2016) (citing *The Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989)). 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).

This Court has given notice to the members of the bar that it is moving toward stronger sanctions than in the past. *See The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015). As a result, case law prior to 2015 needs to be examined carefully to make certain that the application of sanctions in these earlier cases comports with current standards.

3. Consideration of Mitigating and Aggravating Factors

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).

Once the factors of mitigation and aggravation are found to exist, they are applied to "justify" an increase or a reduction 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.

ARGUMENT

I. The referee erred in confining review of the Federal *Engle* Actions to 163 cases, because Mr. Farah appeared as co-counsel and became jointly responsible with Mr. Wilner for all 4,432 cases at issue in the bar's complaint.

The referee found that "Mr. Farah testified he did not know his name would appear on the complaints, and The Florida Bar did not refute that testimony." (ROR:8). Based on this finding, the referee's report limited its

review to the 163 cases that originated from Farah & Farah and found that Mr. Wilner was solely responsible for all other cases. A self-serving claim by Mr. Farah at trial does not prove he did not knowingly appear as co-counsel in all 4,432 cases, nor does it allow him to escape attendant findings of guilt based on his status as co-counsel on 1,250 lawsuits determined to be frivolous.

"[A] lawyer's responsibilities to the court are not diluted even by an ocean of claims." (TFB-Ex.2, pg.8) (quoting *In re Engle Cases*, 767 F.3d 1082, 1087 (11th Cir. 2014)). Perhaps recognizing that he could not plea for leniency because he voluntarily took on far more cases than he and Mr. Wilner could possibly handle, Mr. Farah successfully argued before the referee that he was not responsible for the 'ocean of claims' filed by Mr. Wilner. But Mr. Farah cannot be categorically excused of his complete inaction as co-counsel on 4,432 lawsuits. He knew he was co-counsel on these cases; he assumed joint responsibility for these cases and believed he was entitled to a 50% share of attorney's fees based on his contributions. In fact, one of Mr. Farah's letters to the bar asserted that the frivolous filings "were unintentional and should be seen in the context of the thousands of claims at issue and the pressing timeline." (TFB-Ex.10, pg.6). Mr. Farah cannot have it both ways: he sought to limit his involvement in

the Federal *Engle* Actions to a mere 163 cases when it suited him, but he simultaneously claimed that he should not be punished for "errors" in the context of thousands of claims. He claimed that he performed substantial work gathering information on the Federal *Engle* Actions after the suits were filed, while also claiming that this work did not reveal the filing of *any* frivolous complaints.

Mr. Farah's testimony that he did not know his name would appear on pleadings as co-counsel is refuted by his own prior sworn statements. One of the interrogatories by the special master asked if Mr. Farah ever became counsel of record for the client. Mr. Farah's response included the following statement:

> As the Special Master is aware, the *Engle* cases were originally filed in groupings of roughly 220 clients per action. ***The Farah Firm was listed as counsel of record***, subordinate to The Wilner Firm, which was listed as lead counsel, in each bundled action. Thereafter, the Court severed the actions into discrete cases for individual clients. The Farah Firm then appeared as counsel of record in each individual action in the aforementioned manner. In answering the Interrogatory, The Farah Firm uses ***the date of the original filing or removal in federal court of the complaints*** that included roughly 220 clients per action.

(TFB-Ex.7, pg.8 (emphasis added)). Mr. Farah's next interrogatory answer further stated in pertinent part, "The Farah Firm appeared as co-counsel of record for additional clients secured by The Wilner Firm." *Id*. Mr. Farah

knowingly authorized his 4,432 appearances as co-counsel. He did not assert to the federal court that Mr. Wilner mistakenly placed Mr. Farah's name on a case, because both attorneys shared an equal responsibility and an equal share of the fee. Whether Mr. Wilner failed to provide draft complaints to Mr. Farah before filing is a matter that should have been addressed by the two lawyers or raised in the federal court years ago. It is not a basis for Mr. Farah to avoid all responsibility in over 4,000 lawsuits in which Mr. Farah knew and understood he served as co-counsel for several years.

As stated by one federal court, "to conclude that [co-]counsel has no responsibility, because [co-]counsel did not physically sign any of the pertinent pleadings would be a hypertechnical and nonsensical reading of Rule 11." *Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 243 F.R.D. 322, 348 n.6 (N.D. Iowa 2007). Even when a lawyer does not sign a complaint, by continuing the suit, the lawyer unquestionably later advocated it. See *Vehicle Operation Techs. LLC v. Am. Honda Motor Co. Inc.*, 67 F. Supp. 3d 637, 653 (D. Del. 2014).

Mr. Farah's attempt to limit the disciplinary proceeding to only 163 cases ignores his verbal fee splitting arrangement with Mr. Wilner's firm. The two firms had a "gentlemen's agreement" entitling each firm to a 50%

share of attorney's fees. (T1:136). When lawyers in different firms enter a fee splitting arrangement, the division must be "in proportion to the services performed by each lawyer." Rule 4-1.5(g)(1). Mr. Farah cannot now claim that the services he performed were *de minimis* as a means of escaping a finding of guilt. In fact, he swore in an interrogatory answer that "The Wilner Firm directed The Farah Firm how to participate, but The Farah Firm's role was not *de minimus* [sic]." (TFB-Ex.7, pg.16).

The referee's report found as a mitigating factor that some of Mr. Farah's 163 cases were dismissed simply because the plaintiffs failed to return questionnaires. This is not exonerating. The purpose of the questionnaire was to provide the federal court direct evidence of the plaintiffs' awareness of the lawsuits and desire to pursue them, because Mr. Wilner could not be trusted to tell the truth. Mr. Farah was aware of the court order when it was entered. (T1:55). The federal court explicitly found that in all of the cases in which a plaintiff failed to return a questionnaire, this was because "Wilner and Farah filed lawsuits on behalf of plaintiffs who did not authorize them, continued to maintain suits . . . failed to keep in touch with their so-called "clients". . . and made misleading statements to the Court regarding the level of contact they had with their clients." (TFB-Ex.2, pg.112). The failure to return a questionnaire was not some small

error. Nearly one third of the plaintiffs failed to return the questionnaire despite the extensive efforts to contact them, which left the court with "the definite and firm conviction that these 572 plaintiffs did not authorize Wilner and Farah to file or maintain lawsuits." (TFB-Ex.2, pg.113).

The referee's finding that most of the 163 claims originating from Mr. Farah's office received settlement funds misses the point. This was Mr. Wilner's defense at a hearing in federal court, during which he stated, "it was extremely hard to find a client who was not more than delighted that we had protected him." (TFB-Ex.6, pg.107). Mr. Farah's response letter to the bar similarly asserted that the frivolous filings asserting personal injury claims on behalf of deceased plaintiffs were problematic, but in most of these cases the estates later recovered from a settlement fund. (TFB-Ex.8, pg.11, n.5). This response is dated May 8, 2020, after Mr. Farah had years to reflect on the plain fact that the ends do not justify the means. Otherwise, lawyers can file suit without client authority or with unsupportable factual allegations, then escape a meaningful sanction so long as the "client" ultimately receives compensation. The referee erred in confining his review to 163 cases, and he further erred in concluding that Mr. Farah was diligent in these cases.

II. The referee erred in finding the records from the federal court leading to its sanction order insufficient to establish that Mr. Farah committed rule violations.

The referee found, without explanation, that the burden of proof differed between this proceeding and the federal court's order sanctioning Mr. Wilner and Mr. Farah. (ROR:16). Based on this legal conclusion, the referee found that the bar failed to conduct a proper investigation and presented insufficient evidence to establish Mr. Farah's guilt. On this issue, the federal court applied a clear and convincing evidence standard when determining whether lawsuits filed by Mr. Wilner and Mr. Farah violated 28 U.S.C. § 1927, which prohibits vexatious and frivolous litigation. Though finding a litany of violations of the statute warranting sanctions, the federal court repeatedly declined to find additional violations when the burden was not met:

- "[A]bsent clear and convincing evidence, the Court does not impose sanctions for these cases." (TFB-Ex.2, pg.97);
- "considering the clear and convincing evidence requirement, the Court imposes sanctions only with respect to those cases identified in this Order." (TFB-Ex.2, pg.100, n.48);
- "the Court does not have enough information to determine, by clear and convincing evidence, whether Counsel maintained any such cases in bad faith." (TFB-Ex.2, pg.109).

The bar's burden in the disciplinary proceeding required it to prove ethical violations by clear and convincing evidence. *The Florida Bar v. Simring*, 612 So. 2d 561, 565 (Fla. 1993). The burdens of proof between the disciplinary proceeding and the federal court's order imposing sanctions were the same. The referee erred as a matter of law in finding otherwise.

The referee took issue with the bar's failure to conduct an independent investigation above and beyond the investigation already conducted by the federal court. (ROR:16). Notably, this investigation by the U.S. District Attorney's Office was valued by the federal court at $435,129.12. (TFB-Ex.2, pg.140-41). The referee nevertheless criticized the scope of both the special master's investigation and the bar's investigation, because neither deposed Mr. Farah or anyone else in his firm. (ROR:16-17). However, the referee's report does not make any finding that a prior deposition—as opposed to Mr. Farah's testimony, sworn interrogatory answers, and responses to bar inquiries—would have impacted either outcome.

Specifically, Mr. Farah claimed he turned over his files to Mr. Wilner without retaining copies. He had no idea 1,250 lawsuits were frivolous despite his claimed extensive work in gathering client information. He contributed no work to the litigation in which he appeared as co-counsel, as

he attended no hearings other than the sanction hearing and he drafted no pleadings or other filings. In his response to discovery requests by the special master, he claimed that "[a]fter more than eight years, the Farah Firm cannot recall in great detail its mental impressions regarding each client's pre-filing review, when more than one thousand potential clients were being screened as the one-year deadline approached." (TFB-Ex.1, pg.32). Notwithstanding these assertions that Mr. Farah performed no work in the litigation, did not retain documents, and failed to recall specifics, the bar had the benefit of three written responses Mr. Farah provided to the bar, which comprised 36-pages. (See TFB-Ex.8-10).

Mr. Farah's entire defense of the case was based on his complete ignorance, if not willful blindness to the litigation. It is difficult to imagine what useful information Mr. Farah or anyone in his firm would have provided in a deposition, and a plain reading of his trial testimony only confirms this fact. This is not a case in which the special master erred in concluding that Mr. Farah contributed nothing to the federal court's effort to cull the Federal *Engle* Actions by dismissing frivolous filings. Mr. Farah repeatedly admitted he did nothing because he deferred to Mr. Wilner. Whether he was legally obligated to communicate with clients, obtain fee

agreements, and act with reasonable diligence were issues of law, not issues of fact clarified by a deposition.

The Florida Bar's formal complaint is properly based on the 148-page federal court order adopting most of the factual findings from the special master's report, though rejecting some of the recommendations as to disgorgement of attorney's fees. The referee erred in rejecting the extensive findings of the federal court and substituting his own judgment based on Mr. Farah's testimony. In *The Florida Bar v. Committe*, 136 So. 3d 1111, 1115 (Fla. 2014), a circuit court found that a complaint filed by the respondent was frivolous. The referee rejected this finding and instead determined that the complaint stated valid causes of action for tortious interference with a business relationship and defamation. On appeal, this Court found that the referee's contrary finding was unsupported, because the circuit court held a hearing, entered summary judgment, entered an award of attorney's fees and costs based on the frivolous finding, and these orders were upheld on appeal. Here, the special master's report prepared by the U.S. District Attorney was largely adopted by a panel of four federal judges in a detailed order, and neither Mr. Wilner nor Mr. Farah appealed the order.

The referee made insufficient factual findings to depart from the well-reasoned, 168-page federal court order. The referee even made light of the fact that he was being tasked with deciding ethical rule violations stemming from complex litigation in federal court that had already been investigated:

> This is an odd case in its complexity of the underlying litigation. In that's own procedural history, it would take someone to diagram it. I had to diagram it myself. I think you'd have to be a board-certified appellate attorney at the federal level to be able to figure it out.

(T2:183). The solution to this difficulty was not to reject the federal court's findings based on Mr. Farah's constant assertions that all four federal judges and the district attorney misinterpreted the breadth and depth of Mr. Farah's involvement. Mr. Farah's individual involvement was fully addressed in both the special master's report and in the federal order.

Further, at a hearing on the issue of sanctions in federal court, Mr. Farah's counsel stated as follows:

> We think it's important for the court to keep in mind that when you have two bodies reviewing the same facts, some form of consistency is important.

(TFB-Ex.6, pg.72). The bar agrees with this statement, and therefore prosecuted its formal complaint on the 148-page federal order following its own investigation into the matter.

III. Neither Mr. Farah nor Mr. Wilner obtained valid written contingency fee agreements in the vast majority of cases in violation of Rule 4-1.5(f)(2), nor did they seek court approval of their fee splitting arrangement in violation of Rule 4-1.5(f)(4)(D)(iii).

Though not charged in the formal complaint, Mr. Farah violated Rules 4-1.5(f)(2) and 4-1.5(f)(4)(D)(iii). The former rule requires a lawyer to reduce a contingency fee agreement to a written contract, and it mandates that each participating lawyer assume joint responsibility to the client for the performance of services. The latter rule prohibits a lawyer from accepting a portion of a contingency fee exceeding 25% unless the participating lawyers "accept substantially equal active participation in the providing of legal services." This Court has held that an attorney could be found guilty of violating a rule not specifically charged in the formal complaint when the complaint alleges the actual conduct which formed the basis of the violation. *The Florida Bar v. Fredericks*, 731 So. 2d 1249, 1253 (Fla. 1999). The bar's complaint alleged that Mr. Farah and Mr. Wilner did not obtain written contingency fee agreements for many clients, and that their two firms agreed to share the significant labor and expense, but Mr. Farah transferred his physical files to Mr. Wilner, assumed a supporting role, and impermissibly delegated his legal duty to the court to Mr. Wilner. (See Tab#1). As argued by the bar during trial, these factual allegations form

the basis of the two rule violations and therefore may be considered by this Court. (T1:160).

The federal court noted at the sanction hearing that the first order of business for Mr. Wilner and Mr. Farah should have been to obtain written contingency fee agreements. (TFB-Ex.6, pg.127). This would have served multiple purposes. First, the lawyers would obtain client authorization to file suit—albeit after the fact. Second, the lawyers would have partially complied with Rule 4-1.5 by obtaining written contingency fee agreements—though not within a reasonable time after commencing the representation required by Rule 4-1.5(e)(1). Third, the lawyers would have learned many of the claims were not viable.

Though the lack of diligence and lack of client communication addressed *infra* spanned several years into the litigation, it originated from Mr. Wilner's and Mr. Farah's initial failures to obtain valid, written contingency fee agreements or seek court approval of their fee splitting arrangement. Mr. Farah obtained some contingency fee agreements before filing suit in the 163 cases originating from his office, but he terminated most of those agreements, and he did not revive all of them through a writing signed by a client. His termination of the contingency fee agreements also violated Rule 4-1.16(b)(1), because he gave the clients

insufficient time to obtain new counsel before the January 11, 2008 deadline to file suit. Some of the termination letters were sent the month before this deadline.

Further, Mr. Farah appeared as co-counsel on the more than 4,000 cases originating from Mr. Wilner's firm. He had no contingency fee agreements with these clients, no written consent from the client authorizing this joint representation, and no written disclosure to the client of the verbal fee splitting arrangement between the two firms. Mr. Wilner likewise did not have contingency fee agreements for most of these clients. In fact, Mr. Wilner testified at a sanction hearing in federal court that he relied on one of the new firms he and Mr. Farah retained in 2011 and 2012 to obtain the contingency fee agreements that neither he nor Mr. Farah tried to obtain on their own. (TFB-Ex.6, pg.132-33).

In *The Florida Bar v. Rood*, 633 So. 2d 7 (Fla. 1994), a referee found that an attorney's failure to reduce a fee agreement in writing was due to negligence by another attorney. On this basis, the referee recommended that the respondent be found not guilty of violating Rule 4-1.5(f)(2). This Court rejected this finding and determined that the respondent violated the rule. *Id*. at 9. The purpose of reducing an agreement to writing is to ensure that (1) the public is informed about the fees for which they will be

financially obligated; (2) disputes regarding fees are minimized; and (3) lawyers are paid in proportion to the services they render. *Id*. Mr. Farah's and Mr. Wilner's collective conduct is a prime example of the legal quagmire created when attorneys do not abide by the strictures of Rule 4-1.5. It led to a substantial waste of limited judicial resources, a separate circuit court lawsuit regarding the respective attorney's fees owed to Mr. Wilner's firm, Mr. Farah's firm, Lieff Cabraser, and Motley Rice, and the federal court's disgorgement of a portion of the attorney's fees.

Mr. Farah also violated Rule 4-1.5(f)(4)(D)(iii) by failing to seek court approval of the fee splitting arrangement with Mr. Wilner's firm. Mr. Farah's firm was not simply a referring law firm that transferred 163 cases to Mr. Wilner in exchange for a referral fee. Mr. Farah fully expected to receive a 50% share of the attorney's fee.[1] Under the rule, this required his substantially equal active participation for each of the 4,432 claims, because Mr. Farah's 50% share was double the amount he could have lawfully received as a lawyer assuming secondary responsibility for legal services. See Rule 4-1.5(f)(4)(D)(iii). But he did not even reduce his fee splitting agreement to a written contract, much less seek court approval of

[1] However, both Mr. Farah's and Mr. Wilner's share of attorneys' fees became diluted by their later retention of co-counsel in 2011 and 2012. (T1:122).

the arrangement. Had he done so, Mr. Farah would have to file a sworn petition disclosing in detail the services performed. In *Harmon Parker, P.A. v. Santek Mgmt., LLC*, 311 So. 3d 213, 217 (Fla. 2d DCA 2020), the court found that a law firm failed to comply with this rule by not seeking court approval. Specifically, the court stated:

> Furthermore, rule 4-1.5(f)(4)(D)(iii) required Gerber and Harmon to accept substantially equally active participation in the providing of legal services. Given that the Agreement was silent on this matter and given that Gerber failed to sign the petition, the record establishes that Gerber also failed to properly comply with this requirement.

Similarly, Mr. Farah repeatedly argued that he took on a subordinate role and deferred to Mr. Wilner, *and* he alleged for the first time at trial that he did not authorize his signature block on pleadings. According to his own theory of defense, Mr. Farah violated Rule 4-1.5(f)(4)(D)(iii).

IV. As co-counsel jointly responsible for 4,432 Federal *Engle* Actions, Mr. Farah violated Rules 4-1.3 (diligence), 4-1.4(a) (communication), and 4-1.16 (declining or terminating representation).

The mere fact that litigating 4,432 claims is time consuming and complex does not diminish a lawyer's duties as counsel. "The solution to managing these types of mass actions is surely not that the standard of care diminishes as the number of cases grows." *In re Engle Cases*, 767 F.3d at 1114 (11th Cir. 2014). To accept such a proposition "yields the

perverse implication that a lawyer could overwhelm defendants and the court with a tidal wave of lawsuits, and at the same time bear diminished responsibility for filing claims that lack factual support." (TFB-Ex.2, pg.76).

As noted by the special master, "Farah was not compelled to sign every pleading on behalf of more than 4000 people." (TFB-Ex.1, pg.276). It does not matter whether Mr. Farah physically signed the pleadings or whether Mr. Wilner simply included Mr. Farah's signature block on the pleadings. It was not a surprise to Mr. Farah that he was co-counsel on every case; it was the primary reason he expected to receive a 50% share of any recovery of attorney's fees. His expected share of millions of dollars in attorney's fees from these thousands of cases is likely the reason he never raised this issue in federal court, though he raises it now to avoid further discipline.

To be clear, Mr. Farah is less culpable than Mr. Wilner, which is the reason the bar seeks a 30-day suspension from the practice of law as opposed to the 91-day suspension imposed on Mr. Wilner in *The Florida Bar v. Wilner*, Case No. SC21-373, 2022 WL 619933 (Fla. Mar. 3, 2022). However, as noted by the federal court, since Mr. Farah was a cosigner in each Federal *Engle* Action, apportionment of fault may not be appropriate. (See TFB-Ex.2, pg.144, n.78). Mr. Farah received the litany of filings

demonstrating that client contact by Mr. Wilner's firm was deeply lacking. He cannot in good faith claim that he was not aware of the mass dismissals of hundreds of cases at a time in which he was co-counsel. The presiding judges lost all faith in Mr. Wilner's false assurances to the point that the court required the plaintiffs to submit thousands of questionnaires confirming they authorized the lawsuits. Armed with this information, Mr. Farah did nothing.

The referee found that when Mr. Farah and his co-counsel engaged in en masse filings of complaints without knowledge of the status of the clients, they were authorized to do so pursuant to a 36-year-old Florida Ethics Opinion. (ROR:8 (citing Florida Ethics Opinion 72-36 (Revised) (1987)). Neither this ethics opinion nor any other law authorized the lawyers to falsely represent that they had been retained to file suit in over 4,000 cases. Mr. Farah knew—either before the lawsuits were filed or immediately thereafter after having been served the thousands of pleadings filed by Mr. Wilner—that neither he nor anyone in his firm had personal knowledge regarding most of the plaintiffs he now purported to represent.

Conversely, the ethics opinion involved a lawyer who had a contingency fee contract with a client who he lost contact with through no fault of his own. It cannot be reasonably interpreted to permit the mass

filing of at least 1,250 frivolous lawsuits. Here, neither lawyer had representation agreements for the vast majority of plaintiffs at the time of filing. Further, Mr. Farah's and Mr. Wilner's inaction caused them to lose contact with hundreds of plaintiffs. The federal court's order explicitly rejected argument that this ethics opinion authorized the bulk filing of these lawsuits. (TFB-Ex.2, pg.74, n.39). The 11th Circuit Court of Appeal also rejected argument by Mr. Wilner that a lawyer could file placeholder actions to keep limitations periods open while tracking down parties and investigating claims after the fact. *In re Engle*, 767 F.3d at 1110 (11th Cir. 2014). The referee erred as a matter of law in finding otherwise.

The initial filing of Federal *Engle* Actions violated Rules 4-1.3 and 4-1.4(a), because Mr. Farah did not act with reasonable diligence and did not reasonably consult with the client. The federal court found that overwhelming evidence would have informed Mr. Wilner and Mr. Farah that many claims were not viable, yet they "chose not to conduct any meaningful investigation before recklessly filing thousands of complaints." (TFB-Ex.2, pg.118). Further, both Mr. Farah and Mr. Wilner had the subsequent benefit of multiple years to vet these cases. The court stayed all matters from October 2008 to October 2010 while the parties appealed the federal court's decision in *Brown v. R.J. Reynolds Tobacco Co.*, 576 F.

Supp. 2d 1328 (M.D. Fla. 2008), *rev'd*, 611 F.3d 1324 (11th Cir. 2010). (TFB-Ex.2, pg.14). Counsel had one year following this Court's mandate in *Engle* to vet cases before filing suit *and* an additional two years after filing suit to further vet these cases during the stay period.

Neither Mr. Wilner nor Mr. Farah took reasonable efforts to cull these cases during the three-year period spanning from this Court's mandate in *Engle* to the end of the stay period in federal court. Even after the stay period, the federal court "gave Wilner and Farah numerous opportunities to voluntarily purge meritless cases from the *Engle* docket, as well as several warnings about potential Rule 11 ramifications. Nevertheless, they failed to comply with the Court's orders or to heed these warnings." (TFB-Ex.2, pg.59, n.28).

During the disciplinary investigation, Mr. Farah asserted that he and Mr. Wilner did not dismiss or amend cases because "Mr. Wilner and Mr. Farah assumed no action could be taken during the stay." (TFB-Ex.9, pg.2). Much like Mr. Farah's argument that a Florida Ethics Opinion authorized the filing of over 4,000 lawsuits without client authorization, this is a rehash of another meritless argument rejected in federal court. In finding this argument "has no currency with this Court or the Eleventh Circuit," the federal court noted that counsel regularly amended complaints

during the stay period "when they had something to gain from it." (TFB-Ex.2, pg.71, n.37 (citing *In re Engle*, 767 F.3d at 1116 (11th Cir. 2014)).

Mr. Farah abdicated his responsibility as counsel to Mr. Wilner entirely, which was made immediately clear when he testified in the disciplinary proceeding:

> Q And other than what Mr. Wilner told you, did you take any proactive steps to determine or to ensure that things were being handled appropriately?
>
> A You know, at the time -- I go back to his experience as the preeminent tobacco lawyer -- you know, I deferred to him when it came to the legal procedure of the cases.

(T1:55). Obtaining client authorization to file suit is not a specialized area of law; Mr. Farah had no basis to defer to Mr. Wilner on this issue merely because he was "the preeminent tobacco lawyer."

Even if Mr. Farah's initial deference to Mr. Wilner's expertise was appropriate, it became glaringly obvious that continued deference to Mr. Wilner was unwarranted. A cursory review of the bar's first two trial exhibits (the 298-page special master's report and the 148-page order and opinion that followed) demonstrates that the panel of federal judges presiding over the Federal *Engle* Actions plainly did not believe Mr. Wilner's constant assurances that all pending claims were viable. These suspicions were then confirmed by the culling process that followed as more and more

frivolous claims came to light—and only because of court orders mandating counsel to contact their own "clients." Mr. Farah nevertheless agreed with a question posed by his counsel at trial that "Mr. Wilner never really gave you a sense that the litigation was going in a bad direction until it was a little too late." (T1:95).

In fact, Mr. Farah's brother—the owner of Farah & Farah, Eddie Farah—testified that the firm had not learned of any problems in the litigation until appointment of the special master. (T1:145-46). This could only be true if the firm willfully blinded itself to the litigation. Mr. Farah testified that he was served orders and notices of hearings. (T1:53-54). Mr. Farah was not some first-year associate shadowing Mr. Wilner. He has been a member of the bar since 1990. (TFB-Ex.8, pg.1). He had substantial experience in the practice of law. He initially agreed to 50% of any attorney's fees recovery from the Federal *Engle* Actions, and later agreed to split a 40% share with Mr. Wilner after they brought on additional counsel. (TFB-Ex. 7, pg.16; TFB-Ex.2, pg.142, n.76). Mr. Farah claimed he hired over one hundred people to aid in the litigation. (TFB-Ex.6, pg.162). He claimed that his firm contributed nearly $800,000.00 in expenses, plus approximately $1,000,000.00 in labor costs. (TFB-Ex. 7, pg.16). He claimed he incurred these costs "after the Court began

reviewing the inclusion of certain plaintiffs." *Id*. Yet somehow, none of this staff and none of these expenditures revealed a single frivolous filing in the Federal *Engle* Actions. (T1:139-40).

Mr. Farah's defense to the bar proceeding was to repeatedly downplay his role in the Federal *Engle* Actions as though he were merely supporting Mr. Wilner from behind the scenes. One of his response letters to the bar asserted that "his actions must be judged after considering his limited role." (TFB-Ex.10, pg.8). He asserted to the bar that he did not violate any ethical rules because he "never made any representations to the Court because he was not in court." (TFB-Ex.8, pg.12). In fact, he did not even maintain files on the litigation, as his firm "even transferred its client files to The Wilner Firm" which constituted "the vast majority of its physical files . . . shortly after the commencement of this litigation." (TFB-Ex.7, pg.3, 5-6).

For reasons unexplained in the report, the referee found that Mr. Wilner's sole possession of the physical files and assumption of primary responsibility was "both reasonable and necessary." (ROR:21). It was not. It is not a sufficient excuse that Mr. Farah entirely abdicated his legal duties as co-counsel to Mr. Wilner; his decision to do so was neither reasonable nor necessary. Mr. Farah's complete inaction despite his legal obligations

as counsel for the plaintiffs was a partial reason the collective misconduct by the two lawyers cost $9,164,404.12 in judicial and other public resources. (See TFB-Ex.2, pg.141). The argument that Mr. Farah was a bit player in the litigation, which was incorporated into the referee's report, should be rejected given Mr. Farah's claimed 50% entitlement to a fee award and his numerous claims regarding his substantial contributions to the litigation as co-counsel.

These cases were far too numerous for Mr. Wilner and Mr. Farah to handle on their own, especially given Mr. Farah's "hands-off" approach. Consequently, Mr. Farah had two options. He could provide additional aid to Mr. Wilner's prosecution of these cases to ensure competent representation, which would include properly retaining additional co-counsel and support staff either before or immediately after the filing of over 4,000 lawsuits in January 2008. Alternatively, he could seek withdrawal from all or most of the Federal *Engle* Actions. Two federal courts—the district court and the 11th Circuit—noted that Mr. Wilner had similar options. (See TFB-Ex.2, pg.76). Instead, Mr. Farah and Mr. Wilner continued to litigate frivolous lawsuits, and did not enlist the services of other firms until three and four years after filing suit. (*Id*.; see also TFB-Ex.7, pg.17).

Mr. Farah may have taken a passive role, but this passive role was detrimental to the litigation, not a partially exonerating circumstance allowing him to escape all discipline. Nevertheless, the report of referee found that the federal court recognized "clear and crucial distinctions between the actions of the two attorneys." (ROR:14). Though some of these distinctions might impact the sanction to be imposed, they should not impact a finding of guilt. Mr. Farah's failure to obtain client authorization to file suit or investigate the basis for pleadings in which he was designated as co-counsel violated Rules 4-1.3 and 4-1.4(a). His representation of 4,432 plaintiffs also violated Rule 4-1.16(a)(1), as the number of cases prevented him from complying with the Rules of Professional Conduct in all matters.

V. Based on the violations at issue, the pattern of misconduct, and the actual or potential injury caused by the violations, a 30-day suspension is the appropriate sanction.

A. The applicable standards:

Under Standard 4.4(b) (lack of diligence), suspension is appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect, which causes injury or potential injury to a client. Under Standard 7.1(b), (deceptive conduct or statements and unreasonable or improper fees), 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.

The rule violations at issue establish that Mr. Farah engaged in a pattern of neglect, if not a knowing failure to perform services as co-counsel, and he knowingly violated a duty owed as a professional. Therefore, suspension is appropriate if the misconduct caused injury or potential injury to a client, the public, or the legal system. The referee found that no client complained of any harm, which was deemed an important consideration. It is not. Under Standard 3.4(f), the failure of an injured client to complain is neither an aggravating nor a mitigating factor. There was also actual and potential injury to clients. The court dismissed some lawsuits because they asserted personal injury claims on behalf of deceased plaintiffs, and other lawsuits because they asserted wrongful death claims on behalf of living plaintiffs. Many of these cases could have survived dismissal if they were filed correctly, but they were dismissed because neither Mr. Wilner nor Mr. Farah timely sought leave to amend the complaints because they undertook no reasonable inquiries into the status of the plaintiffs. Additionally, one plaintiff who never authorized a lawsuit

filed on her behalf served as a juror on a tobacco case until her lawsuit was discovered by defense counsel.

Further, the referee found that the public was not harmed by the misconduct. The referee also erred in this holding. The federal court accurately summarized the harm caused, in part, by Mr. Farah's conduct. The court determined that each frivolous lawsuit cost the judiciary an average of $6,983.42, and since Mr. Wilner and Mr. Farah were jointly responsible for filing and maintaining at least 1,250 frivolous suits, the value of court resources wasted by their collective misconduct totaled $8,729,275.00. (TFB-Ex.2, pg.138). As additional context, the court noted that due the mass filings, it had the ninth heaviest weighted caseload in the country out of 94 district courts. (TFB-Ex.2, pg.131). Once it became apparent that Mr. Wilner and Mr. Farah potentially violated their ethical duties, the court appointed the United States Attorney for the Middle District of Florida to act as special master to investigate possible misconduct. (TFB-Ex.2, pg.140). This diverted substantial time and resources which could have been spent prosecuting other violations of law. *Id*. The special master valued its labor during the sanctions investigation at $435,129.12. (TFB-Ex.2, pg.140-41). Further, the court found that the frivolous litigation "caused delay in access to the courts for other litigants." (TFB-Ex.5, pg.2).

Though the legal system bore the brunt of the injury caused by the collective misconduct of Mr. Wilner and Mr. Farah, the public was also injured by the frivolous litigation, and some of Mr. Farah's clients were, at the very least, potentially injured. Suspension is therefore appropriate due to the injury or potential injury to a client, the public, or the legal system.

B. The aggravating and mitigating circumstances:

The presence of aggravating and mitigating circumstances may warrant either an upward or downward adjustment in the sanction to be imposed. Had this case proceeded to a sanction hearing, the record evidence demonstrated that Mr. Farah engaged in a pattern of misconduct consisting of multiple offenses as co-counsel on 1,250 frivolous lawsuits under Standards 3.2(b)(3) and 3.2(b)(4). He also had substantial experience in the practice of law as a member of the bar since 1990, which is an aggravating factor under Standard 3.2(b)(9).

In mitigation, the record demonstrates the absence of a prior disciplinary record under Standard 3.3(b)(1). The referee afforded too much weight to this mitigating factor given the large number of frivolous filings that Mr. Farah never investigated before or after becoming co-counsel. Mr. Farah also has been subject to the imposition of other sanctions under Standard 3.3(b)(11). He was publicly reprimanded by the

federal court and he paid a 50% share of a $4,329,668.43 sanction. The referee also found that Mr. Farah was remorseful, which is a mitigating factor under Standard 3.3(b)(12). Though importantly, Mr. Farah's very first expression of remorse did not occur until December 16, 2016, which was the date of the sanction hearing on the special master's report and recommendation. (See TFB-Ex.6, pg.157-65). This was nearly nine years after the Federal *Engle* Actions had been filed, and it should impact the weight afforded this mitigating factor.

C. Case Law

Given the unprecedented nature of the Federal *Engle* Actions, no piece of case law will be on all fours in terms of the applicable facts. It is a unique situation for an attorney to serve as co-counsel on over 4,000 cases without contingency fee agreements, entirely abdicate his responsibility to lead counsel, but nevertheless claim entitlement to 50% of any recovery of attorney's fees predicated on his joint responsibility for every case.

This Court accepted an uncontested report of referee in Mr. Wilner's disciplinary proceeding resulting in the imposition of a 91-day suspension. This may somewhat inform the Court of the appropriate sanction here. Mr. Wilner committed additional misconduct by offering false statements during hearings regarding his contact with clients. This difference may warrant a

lesser sanction for Mr. Farah, who did not offer similar false statements at hearing, because he never attended any hearings except to apologize for his inaction. Given the substantial injury caused to the legal system and the public by this inaction, a 30-day suspension is the appropriate sanction. Though the federal court issued a public reprimand, it had broader authority to issue a significant monetary sanction of over $4,000,000.00. A 30-day suspension will accomplish the three purposes of lawyer discipline. See *The Florida Bar v. Pahules*, 233 So. 2d 130, 132 (Fla. 1970). Anything less than a suspension is an insufficient deterrent given the sheer number of frivolous filings and the extensive harm caused to the legal system.

In *The Florida Bar v. Picon*, 205 So. 3d 759 (Fla. 2016), this Court suspended a lawyer for one year for her repeated failures to appear for court proceedings and due to her failure to timely file a pretrial motion as required by a judge. She also presented incorrect information during a hearing regarding her client's compliance with terms and condition of probation. Based on Ms. Picon's pattern of client neglect and mismanagement resulting in a bench warrant and her client's incarceration for several days, and her prior disciplinary history for similar misconduct, this Court imposed a one-year suspension.

In *The Florida Bar v. Maier*, 784 So. 2d 411 (Fla. 2001), this Court suspended a lawyer for 60 days due to her failure to act with diligence or keep a client reasonably informed regarding an application for alien labor certification. She also failed to timely respond to bar inquiries and had prior disciplinary history.

In *The Florida Bar v. Nesmith*, 707 So. 2d 331 (Fla. 1998), the lawyer represented a criminal defendant who filed a bar complaint against him following a disagreement. The lawyer did not timely file a motion to withdraw as counsel in a pending appellate matter, but filed multiple extensions of time. The court entered an order to show cause why the appeal should not be dismissed for failure to file the initial brief, the lawyer failed to file a response, and the case was dismissed. The lawyer also had two prior public reprimands for neglecting client matters. This Court rejected the referee's recommendation of another public reprimand and suspended the lawyer for 30 days.

In *The Florida Bar v. Jordan,* 682 So. 2d 547 (Fla. 1996), the lawyer failed to adequately communicate with clients and failed to act with reasonable diligence and promptness in two client matters. The lawyer also failed to respond to bar inquiries. In aggravation, the lawyer was substantially experienced in the practice of law and prior disciplinary history

(an admonishment and a public reprimand). This Court suspended the lawyer for 30 days.

These cases involved attorneys with prior discipline, whereas Mr. Farah has no prior discipline. But these cases, with the exception of *Picon*, were also decided before this Court's more recent trend of imposing stronger sanctions for attorney misconduct.

CONCLUSION

Given the nature of the violations at issue, the applicable Standards for Imposing Lawyer Sanctions, the harm caused to the legal system and the public, and the relevant case law, this Court should find that Mr. Farah violated Rules 4-1.3, 4-1.4(a), 4-1.16, 4-1.5(f)(2), and 4-1.5(f)(4)(D)(iii). Based on these violations, this Court should impose a 30-day suspension.

Respectfully submitted,

Mark Lugo Mason, Bar Counsel

CERTIFICATE OF SERVICE

I certify that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, on this 8th day of March, 2024, and a true and correct copy of the foregoing has been furnished via e-service to Henry M. Coxe, III, Attorney for Respondent, 101 E Adams St., Jacksonville, FL 32202 at hmc@bedellfirm.com.

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CERTIFICATE OF TYPE SIZE & STYLE

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Mark Lugo Mason, Bar Counsel