

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BROOKE GIRLEY,

Respondent.

Supreme Court Case No.
SC22-0859

The Florida Bar File No.
2021-30,854(9B)

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Complainant is referred to as The Florida Bar or the bar. The Respondent is referred to as Ms. Girley.

The electronic record is referred to by "R:". The transcript of the final hearing as to guilt conducted on January 10, 2024 and the sanction hearing conducted on January 11, 2024 will be cited as "T1:" and "T2:". For brevity's sake, the final hearing as to guilt is referenced throughout this brief as the "trial" in this disciplinary proceeding.

The report of referee is referred to as "ROR:", and the initial brief is referred to as "IB:".

NATURE OF THE CASE

This is a lawyer disciplinary case in which the referee filed a report recommending the respondent's suspension from the practice of law for thirty days, completion of a professionalism workshop, and payment of the bar's costs. The matter at issue involves Ms. Girley's statements on social media impugning a member of the judiciary in response to an order granting a directed verdict, which vacated a multi-million-dollar jury verdict awarded to the plaintiff. Her father, Jerry Girley, represented the plaintiff, and his statements impugning the judiciary are at issue in *The Florida Bar*

v. Jerry Girley, SC22-0860 (Fla. 2022), which is also currently pending appeal in this Court.

Ms. Girley was a lawyer associated with her father's law firm when she published statements on social media concerning a pending case that had not even gone to appeal. She claimed that the judge abused his authority in granting a directed verdict and suggested a race-based motive for the judge's ruling. On appeal, Ms. Girley argues that her right to free speech immunizes her from licensure action based on the content of her statements regarding her father's case, the referee violated her procedural due process rights, and the bar engaged in selective prosecution for violations also committed by other members of the bar.

This brief maintains that these arguments lack merit, and this Court should approve the referee's findings of guilt and recommendation of discipline. The bar asks this Court to reconfirm its decisions in *The Florida Bar v. Ray*, 797 So. 2d 556 (Fla. 2001), *The Florida Bar v. Patterson*, 257 So. 3d 56 (Fla. 2018), and *The Florida Bar v. Jacobs*, 370 So. 3d 876 (Fla. 2023), all of which establish that a lawyer's statements impugning a member of the judiciary must have an objectively reasonable factual basis.

The bar asks that this Court's ruling confirm that when a lawyer is a member of a law firm representing a party in pending litigation, the lawyer

is not free to baselessly label the presiding judge a racist who abused his authority merely because the judge issued an adverse order on a dispositive motion. Adverse orders alone do not provide a factual basis for such derogatory statements, and legal advocates for parties are instead limited to making good faith factual assertions and appropriate legal arguments when challenging the factual or legal basis of an adverse order.

STATEMENT OF THE CASE AND FACTS

I. After Ms. Girley's father obtained a large jury verdict on a race discrimination claim, the trial judge overruled the verdict by granting a directed verdict.

The misconduct at issue involves Ms. Girley's public statements impugning the integrity of the judiciary following a final order issued by Circuit Judge Kevin B. Weiss in *Baiwo Rop v. Adventist Health System*, Case No. 2017-CA-9484-O (Fla. 9th Cir. Ct. 2017). (See R:581). Her father, Jerry Girley, represented the plaintiff in the case, which involved allegations of employment discrimination by the plaintiff's former employer. (R:720). Ms. Girley did not have any role in this litigation, as she testified that during the trial she was entertaining a friend in town. (T1:40).

Ms. Girley testified that she was unaware of what occurred at trial, because she was not an active employee of Mr. Girley's firm, despite being listed as "Of Counsel" on The Girley Law Firm's website. (T1:41; R:710).

She defined her limited role as “Of Counsel” by explaining that she only retained this role with her father’s firm in case she needed to do pro bono work as a guardian ad litem. (T1:34). However, Ms. Girley currently lives in New Jersey (T1:31) and is an assistant professor who teaches a civil rights course and legal research and writing course at Widener University’s Delaware Law School (T1:37-38).

The May 28, 2021, final order by Judge Weiss—which became the subject of Ms. Girley’s attack—explains the underlying litigation. The case was tried before a jury in May 2021, and following the close of the plaintiff’s case in chief, the court granted a directed verdict for the defendant on two of the four claims (national origin and disability discrimination). (R:581). The court did not deny the motion for directed verdicts on the remaining two claims (retaliation and race discrimination), but instead reserved ruling on those counts. (R:582). The jury returned a verdict for the defendant on the retaliation claim, which mooted the reservation of ruling on that count. *Id.* However, on the race discrimination claim, the jury concluded that race was a motivating factor in the adverse employment action and awarded the plaintiff \$2,750,000.00 in compensatory damages. *Id.*

Following the jury verdict, Judge Weiss granted the defendant’s motion for directed verdict on the race discrimination claim without a post-

trial hearing, holding that the employer established a non-discriminatory basis for the adverse employment action which was not shown to be pretextual. (R:582). Judge Weiss's ruling was upheld in a per curiam affirmance by the Fifth District Court of Appeal. *Rop v. Adventist Health System*, 2022 WL 3590976 at *1 (Fla. 5th DCA 2022).

Ms. Girley's brief claims the matter is pending before the Sixth District Court of Appeal. (See IB:4, 20). This is not true. Mr. Girley separately appealed a non-final order denying a motion to reconsider prior adverse rulings, which asked a successor judge to review Judge Weiss's prior orders. The Sixth DCA dismissed the appeal for lack of jurisdiction on May 22, 2024, and the mandate was issued eleven days before Ms. Girley filed her amended initial brief. See *Rop v. Adventist Health System*, Case No. 6D23-3179 (Fla. 6th DCA 2023).

II. In a coordinated effort with her father to gain national attention, Ms. Girley used social media to assert that a judge was racially biased and overturned a jury verdict on his own.

A. The stated legal basis for the trial court order:

Ms. Girley's public statements in response to the circuit court order were made immediately following the directed verdict and before the unsuccessful appeal. At trial in the disciplinary proceeding—and as a partial justification for her statements impugning the integrity of Judge

Weiss—Ms. Girley testified that in her 14 years of practice, she had never heard of a judge entering a directed verdict a week after a jury verdict. (T1:66). She presented another witness who is a lawyer, though not a member of The Florida Bar, who similarly stated that he was not familiar with this practice. (T1:115-16). Therefore, before addressing Ms. Girley's public statements claiming that: (1) Judge Weiss abused his authority, (2) single-handedly overturned a jury verdict, and (3) issued a ruling without any good faith basis in its validity, it is important to explain the stated legal basis for Judge Weiss's order.

The order cited case law from this Court as precedent for a trial court reserving ruling on a motion for directed verdict until after a jury's verdict finds in favor of the non-moving party. (R:582) (citing *Ricks v. Loyola*, 822 So. 2d 502, 506 (Fla. 2002)). In *Ricks*, the trial court reserved ruling on a motion for a mistrial based on an inappropriate comment by defendant's counsel during an opening statement. The jury later returned a verdict for the defendant, and the judge then granted the plaintiff's motion for mistrial. The Fourth District Court of Appeal held that the trial court abused its discretion in reserving ruling on the motion until after trial. This Court disagreed and held that the trial court acted within its authority. In holding that a reserved ruling on such a motion was within the authority of the trial

court, the *Ricks* opinion quoted language from the Third District Court of Appeal stating as follows:

We have repeatedly instructed that trial judges who are inclined to grant a directed verdict at the conclusion of the case should instead reserve ruling thereon, allow the jury to return a verdict, and thereafter rule on the motion. Had this approved practice been followed in the present case, our reversal of the trial court's ruling would have resulted in a reinstatement of a jury verdict rather than a remand for a costly, time-consuming, and wholly unnecessary new trial.

Id. at 506 (quoting *Gutierrez v. L. Plumbing, Inc.*, 516 So. 2d 87, 88 n.2 (Fla. 3d DCA 1987) (citations omitted)).

Again, Judge Weiss cited to this binding case law with a pin cite to the exact page containing the above quoted language in his May 28, 2021 order. (R:582). It is a matter of established *fact* that Ms. Girley was placed on notice of this binding case law when she read the order. It is a matter of established *law* that Judge Weiss's actions in this case constituted an "approved practice" by which the plaintiff would have obtained a reinstated \$2,750,000.00 judgment if the appeal was successful, rather than the added delay, stress, expense, and uncertainty caused by a remand for a new trial.

B. Ms. Girley’s portrayal of the trial court order and her statements regarding the trial judge on social media:

Mr. Girley’s and Ms. Girley’s public statements portrayed Judge Weiss’s actions in an entirely different light. This brief will largely limit itself to Ms. Girley’s social media activity and separately address Mr. Girley’s statements in his disciplinary proceeding. On May 29, 2021—one day after the final order—Ms. Girley shared a news article and posted the following on Facebook:

The Dres [sic] Scott rule still applies in 2021: “A black man has no rights which a white man is bound to respect.”

Y’all, we can’t let this stand!
#RemoveJudgeWeiss

(R:683).

The same day, while sharing her opinion that the judge’s ruling was an injustice, Ms. Girley again concluded her opinion statement with the same hashtag calling for Judge Weiss’s removal. (R:678).¹ Her postings led others to respond, either to share their own story, comment, or ask for a legal explanation for the judge’s ruling. Ms. Girley frequently responded to these postings with the same hashtag calling for the judge’s removal from

¹ In her sworn statement, Ms. Girley explained that she used hashtags to either join into a conversation or in trying to start a conversation. (R:605-06).

office and suggestions that “he needs to be investigated.” (R:680, 685-86). When asked by one commenter, attorney Jonathan Barry-Blocker, for the legal basis for the judge’s order, Ms. Girley initially clarified that the judge reserved ruling on the directed verdict for the two counts. (R:728). After offering this clarification, Ms. Girley concluded by stating, “And the judge did this own his on [sic] too. No one filed any post-trial motions.” *Id.*

On May 31, 2021, Ms. Girley advertised an upcoming interview with Mr. Girley, stating that he “discusses how one judge single handed oh [sic] reversed the jury verdict awarding his client \$2.75M in discrimination case against AdventHealth. And what we can do about it.” (R:674). Less than an hour later, she shared a Facebook live video of her father discussing the reversal of the verdict, and she reposted a Black Love United posting stating, “The jury awards 2.75 million but the Judge reverses on his own a week later.” (R:672). Ms. Girley retweeted a post written by her brother stating in pertinent part, “The Girley Law Firm won a case against @AdventHealth where a jury found that they had discriminated against a black doctor and awarded him \$2.75 Million. Today a white judge stole justice from him. This needs attention.” (R:722). On Twitter, Ms. Girley also referenced the judge’s race in her own posting, stating as follows:

Even when we win, it only takes one white judge to reverse our victory...

This is an injustice and cannot stand.

(R:729).

Ms. Girley organized a rally at city hall for the stated purposes of educating the public “on how little known rules are used on a consistent basis to overrule our constitutional and civil rights.” (R:702). She later commented on Facebook, “The court system is a sham !” (R:704).

III. In the disciplinary proceeding, the referee found that Ms. Girley’s statements suggesting that the trial judge was a racist who abused his authority lacked an objective factual basis.

The referee found that “[t]hese comments impugned the integrity of Judge Weiss by implying he did something improper and unlawful, and exceeded his authority. Respondent also injected race into the posts, implying that Judge Weiss was biased and racist.” (ROR:8). In the disciplinary proceeding, Ms. Girley’s defense was two-fold: she asserted that (1) her postings on social media were opinion statements and therefore could not be considered false statements of fact; and (2) based on her study of disparate treatment in the court system, she had an objective factual basis for her beliefs.

The bar argued that Ms. Girley’s defenses did not demonstrate an objective factual basis to imply that Judge Weiss was a racist who intentionally abused his authority to strip justice from a black plaintiff. The

referee found that Ms. Girley's statements violated Rule 4-8.2, because she did not present an objective factual basis for her statements impugning the integrity of Judge Weiss.

At the sanction hearing, Judge Weiss testified that he was threatened on social media, he and his judicial assistant received threatening and harassing phone calls, and officers from the Winter Park Police Department were stationed outside his house while he was away due to the safety concerns. (T2:18-19). Ms. Girley then presented two favorable character witnesses who testified to her good character and reputation. Based on the aggravating and mitigating circumstances, the referee recommends a 30-day suspension from the practice of law.

SUMMARY OF THE ARGUMENT

A license to practice law is a privilege afforded to those who swear an Oath of Admission to The Florida Bar which provides, in part, that the lawyer must maintain the respect due to courts of justice and judicial officers. Ms. Girley violated this oath and multiple Rules Regulating The Florida Bar, not because she believes there is inequality in the court system, but because she baselessly labeled a judge a racist who abused his authority.

The bar is not attempting to limit a Florida lawyer's free speech right to publicly advocate for change to address perceived injustices. It is not trying to limit Ms. Girley's freedom as an academic in Delaware to advocate for a change in the law. Such advocacy has historically led to great, albeit slow and incremental, strides in addressing inequality in the judicial system. Lawyers who advocated for the addition of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution helped bring an end to *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Lawyers who spoke out against *Plessy v. Ferguson*, 163 U.S. 537 (1896) eventually convinced the highest court in the land that the doctrine of 'separate but equal' has no place in the field of public education. See *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).

History records that, following *Brown*, this Court initially refused to recognize an African American's right to attend law school at the University of Florida, writing opinions that no justice on this Court today would ever consider signing. See *State ex rel. Hawkins v. Board of Control*, 83 So. 2d 20 (Fla. 1955); *State ex rel. Hawkins v. Board of Control*, 93 So. 2d 354 (Fla. 1957). Due to the advocacy of a Florida lawyer, this Court eventually revisited its decision 19 years later, granting Mr. Hawkins' petition for admission to The Florida Bar. *In re Hawkins*, 339 So. 2d 637 (Fla. 1976).

The bar recognizes that civil rights lawyers will always need to be diligent, not only in overturning binding case law causing disparate treatment, but also in ensuring lower courts correctly follow the law in subsequent rulings.

Ms. Girley did not become the subject of disciplinary proceedings for identifying injustices and advocating change. The specific action at issue that became the target of Ms. Girley's attack was the authorized practice of a judge reserving ruling on a directed verdict until after the jury's verdict. She expressed this ire regarding a pending case in which a member of her law firm represented the plaintiff. Ms. Girley is free to express her disagreement with the practice, generally, or its use in the specific civil litigation. She can publish scholarly articles on the issue or encourage her father to preserve the issue for appeal.

This disciplinary proceeding and the proceeding against Mr. Girley are about a separate issue. This case involves misleading statements on social media by a lawyer associated with the firm representing the plaintiff. These statements falsely suggested that Judge Weiss vacated a jury verdict on his own initiative with no motion pending and leveled baseless accusations of racism. Ms. Girley's statements do not constitute valid criticism with an objective factual basis. Judge Weiss ruled on a motion he

had previously reserved, and his order cited to the binding case law that authorized this very action. His final order was upheld on appeal.

Ms. Girley falsely implied her personal involvement in the litigation, and she launched this extra judicial campaign to label Judge Weiss a racist who abused his authority before the appeal. She was not merely commenting on a matter of public interest as a disinterested person who happened to be a lawyer; she leveled accusations against the judge on social media while her father had a direct financial interest in the outcome of the upcoming appeal. Binding case law has repeatedly established that misleading statements impugning a member of the judiciary may subject a lawyer to sanctions, and the First Amendment is not a shield allowing lawyers to baselessly attack the judiciary with impunity because they are unhappy with an adverse order.

Ms. Girley argues that the referee's ruling violated her due process rights for several reasons, none of which have merit. First, the formal complaint sufficiently placed Ms. Girley on notice of the statements at issue, all of which involved her attacks of the judge's final order in *Baiwyo Rop v. Adventist Health System*, Case No. 2017-CA-009484-O (Fla. 9th Cir. Ct. 2017); her own brief notes her statements spanned a period of roughly two weeks, and it is disingenuous for her to claim ignorance.

Second, the expert witness testimony she offered was immaterial; testimony regarding disparate treatment in the court system generally cannot establish an objective factual basis supporting specific statements impugning the integrity of Judge Weiss. Third, the initial brief's arguments do not support Ms. Girley's claims that two of the charged violations are unconstitutionally vague.

The initial brief asserts that this disciplinary proceeding violates Ms. Girley's equal protection rights, because other members of the bar have not been disciplined for similar statements impugning a judge. This argument was never asserted in the trial court and therefore not preserved for appeal. Moreover, the examples she uses are not lawyers representing clients in pending litigation.

Finally, the initial brief asserts that Judge Weiss should have been compelled to testify during the trial phase of the disciplinary proceeding. But Judge Weiss's final order spoke for itself, and his internal thought processes were immaterial. The referee did not abuse her discretion in entering a protective order on this issue.

Regarding the discipline to be imposed, the applicable Standard for Imposing Lawyer Sanctions and the aggravating and mitigating factors justify the referee's recommendation of a 30-day suspension from the

practice of law. In asserting otherwise, Ms. Girley relies upon older case law in which this Court issued public reprimands when attorneys impugned the integrity of a member of the judiciary. Her reliance on this line of cases is misplaced, because this Court has more recently announced its intent to impose stronger sanctions for lawyer misconduct. More recent case law involving similar facts supports the referee's recommendation. Given that Ms. Girley is not actively practicing law in Florida, the purpose of a suspension is to send a message to others that lawyers in law firms who receive an adverse ruling cannot impugn the judge entering the order or the judiciary as a whole without risking more than a public reprimand.

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.

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); see also *Altman* at 847. 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 First Amendment does not shield Ms. Girley from discipline because she made misleading statements impugning the integrity of a judge without an objective factual basis.

A. Ms. Girley violated Rules 3-4.3 and 4-8.2 because she made misleading statements of fact—not opinion—baselessly suggesting that Judge Weiss’s order constituted an abuse of authority by a white judge who did not respect the constitutional rights of a black plaintiff.

Ms. Girley’s professional association with the Girley Law Firm implied a connection to the civil litigation which made her privy to facts not known

to the general public. She did nothing to dispel that notion by answering questions and commenting on social media regarding Judge Weiss's ruling. Many of Ms. Girley's statements falsely implied her direct involvement in the litigation and first-hand knowledge of facts that would substantiate her claims:

- “[Judge Weiss] made a ruling on the directed verdict (at 4:30pm on Friday before a holiday weekend no less) saying there wasn't sufficient evidence of discrimination and that Advent gave a legitimate reason for terminating **our client.**”;
- “Y'all, **we can't let this stand.**”;
- “[W]e **need** to hold him accountable.”; and
- “**Even when we win**, it only takes one white judge to reverse **our victory.**”

(ROR:4-6) (emphasis added).

Ms. Girley's use of the phrase “our client” falsely implied her personal involvement in the litigation, which was further compounded by her use of the phrase “our victory” and her constant use of the word “we”. While she is of counsel and, thus, a part of the law firm (R:710), Ms. Girley never clarified that she did not have personal knowledge of the case or that she served no role in the litigation. Her entire base of knowledge was limited to

conversations with her father and the plaintiff and her reading of a single order. (See R:617-18; T1:40).

Ms. Girley never clarified that her understanding of state law was similarly limited. Specifically, she was no longer practicing in Florida, and her prior experience practicing civil law in the state only spanned a period of approximately two years, from September 2010 (when she obtained her law license) until 2012 (when she left her father's firm and started working in media). (See IB:2).

Ms. Girley argues that her statements were opinion which can only be subject to discipline if they are capable of being proved true or false, citing to *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995), *State Bar v. Seeman*, 508 S.W.2d 429, 431-332 (Tex. Civ. App. 1974), and *In re Erdmann*, 301 N.E.2d 426, 427 (N.Y.1973). (See IB:24-25). Even if this out of state case law is applicable, her statements were not purely opinion; she referred to the plaintiff as "our client," answered questions regarding the litigation to falsely imply her personal knowledge of facts upon which she based her legal opinion, and leveled baseless accusations of racism based on the sole fact that a judge issued an adverse order.

The referee recommends Ms. Girley's suspension from the practice of law because she made misleading assertions of fact to lead the reader to the conclusion that Judge Weiss was a racist who stripped justice from a black plaintiff. Courts have long recognized that false statements of fact can be offered as opinion, but this does not cloak these "opinion statements" with constitutional protection:

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications.

Milkovich v. Lorain J. Co., 497 U.S. 1, 18-19 (1990). This legal precedent recognized a distinction between a statement of pure opinion and an opinion that implies knowledge of facts. Other courts have recognized this distinction in the context of disciplinary proceedings involving a lawyer's statements impugning the judiciary. See *Idaho State Bar v. Topp*, 925 P.2d 1113, 1115 (Idaho 1996) ("Thus, even statements which appear to be opinion will nonetheless be treated, for constitutional purposes, as assertions of fact if the speaker implies that he is privy to undisclosed facts and that he has private, first-hand knowledge which substantiate[s] the assertions made.") (internal quotation omitted); *In re Disciplinary Action*

Against MacDonald, 962 N.W.2d 451, 462 (Minn. 2021) (“When determining whether a statement is an opinion, we consider the statement’s specificity and verifiability, as well as [its] literary and public context. Merely cloaking an assertion of fact as an opinion does not give that assertion constitutional protection.”) (internal quotations omitted).

Ms. Girley’s statements regarding Judge Weiss’s order are not political opinions on a matter of public interest. She falsely implied her personal involvement in the litigation, which could only amplify the weight of her statements. With this platform, she perpetuated a narrative that a biased white judge had unilaterally stolen justice from a black plaintiff.

Despite claiming that Ms. Girley was merely voicing her opinion, the initial brief recognizes that these opinions were interspersed with statements of fact. Ms. Girley asserts that “some of” her statements are verifiably true, and as an example she references her statement that Judge Weiss issued an order setting aside the verdict without any post-trial motions pending. (IB:26). Though technically true, her statement was intended to mislead. It is uncontested that the defendant filed a motion for directed verdict at the close of the plaintiff’s case, the trial court reserved ruling on two claims, and after the jury verdict, the trial court ruled on the remaining claim that was not rendered moot. (ROR:2-3). The judge ruled

on a pending motion he had reserved ruling on; he did not *sua sponte* set aside a jury verdict.

But Ms. Girley intended to convey that Judge Weiss *sua sponte* overturned a jury verdict. She shared a Black Love United² post stating, “The jury awards 2.75 million but the Judge reverses **on his own** a week later.” (R:672) (emphasis added). She also posted the following:

TONIGHT at 7pm join my dad Attorney Jerry Girley on Black Love United as he discusses how **one judge single handed** oh [sic] **reversed** the jury verdict awarding his client \$2.75M in discrimination case against AdventHealth.

(R:674) (emphasis added).

Admittedly, Ms. Girley partially clarified the matter in response to a question posed to her on social media, which asked her what justification the court used for rejecting the verdict award. (R:669). But after explaining that the judge reserved ruling on a directed verdict, she nevertheless maintained, “And the judge did this own his on [sic] too. No one filed any post-trial motions.” (R:728). By asserting no post-trial motions were filed, Ms. Girley falsely suggested that the trial court set aside a multi-million-dollar jury verdict on its own initiative without any pending motion. There is

² Black Love United is a religious program streaming on Facebook and is hosted by Ms. Girley’s aunt and uncle. (R:599; T1:19). Some of Mr. Girley’s statements made during an interview on this program are further discussed in his disciplinary proceeding.

no purpose in stating that no post-trial motions were filed except to invite that misunderstanding. Ms. Girley's statements would lead any reader to the false conclusion that the judge "single handedly" reversed a jury verdict "on his own" even though "no one filed any post-trial motions." Viewed in their totality, these posts falsely imply Judge Weiss simply did not like a jury verdict and *sua sponte* entered a directed verdict.

Ms. Girley cannot escape discipline by asserting that her misleading statements were either technically true or too vague to establish an objective falsehood. (See IB:17). A lawyer's artful "truths" designed to mislead are not a defense shielding the lawyer from disciplinary action. In *The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002), this Court suspended a lawyer for 60 days based on a "technical truth." During a deposition, the respondent in *Forrester* concealed a contract entered as a deposition exhibit by placing it near her briefcase. The court reporter observed the removal of the contract, and during a break, she informed opposing counsel's staff. After the break, opposing counsel referenced the contract, stated that he could not locate it, and asked the respondent if she had it. The respondent stated, "I'm not seeing it. I had a copy but I know when you filed the complaint didn't you attach it? That would be the easiest way." The respondent later admitted that she had the contract.

The referee in *Forrester* rejected argument that the respondent's claim that she was "not seeing it" was truthful, finding that her answer "was intended to mislead because she in fact knew where the document was located and failed to disclose that information to Berry." *Id.* at 481. This Court held that the referee's finding on this issue was supported by the record evidence and established a violation of Rule 4-8.4(c). *Id.* at 483.

Even if Ms. Girley's statements were either technically true (i.e. "no one filed any post-trial motions") or open to multiple interpretations such that the statements might not be deemed explicitly untrue (i.e. the judge "single-handedly" overturned a verdict "on his own"), a party's technical truths intended to mislead nevertheless violate bar rules. See also *The Florida Bar v. Petersen*, 248 So. 3d 1069, 1080 (Fla. 2018) (holding that a lawyer who never conferred with opposing counsel but stated that opposing counsel "interposed no objection to the motion" violated Rules 4-3.3(a)(1), 4-8.4(c), and 3-4.3); *The Florida Bar v. Grieco*, Case No. SC2020-1118 at *19-20 (Fla. June 27, 2024) ("[Respondent's] reliance on the technically accurate nature of statements that were clearly intended to mislead the public, indicate a troubling character flaw....").

Ms. Girley shared a post by her brother stating, "a jury found that they had discriminated against a black doctor and awarded him \$2.75 Million.

Today a white judge stole justice from him. This needs attention.” (R:722). The initial brief asserts that this statement was not made by Ms. Girley and it is the “only evidence of the insertion of race referenced in the Referee’s findings.” (IB:14). To the extent this offered distinction is deemed material, it is important to note that it is untrue. The referee’s report also quotes Ms. Girley’s own statement on Twitter, which stated, “Even when we win, it only takes one white judge to reverse our victory...” (ROR:6). She also likened Judge Weiss’s ruling to *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (superseded by constitutional amendment), which infamously denied citizenship to an enslaved black man shortly before the Civil War. Ms. Girley wrote, “The Dres [sic] Scott rule still applies in 2021: ‘A black man has no rights which a white man is bound to respect.’ Y’all, we can’t let this stand. #RemoveJudgeWeiss.” (ROR:5).³

Collectively, these three statements—two of which were authored by Ms. Girley—were offered to assign a race-based motive behind Judge Weiss’s ruling. There was no other reason to refer to Judge Weiss as a

³ Despite the plain fact that *Dred Scott* was superseded by the passage of the Fourteenth Amendment at the end of the Civil War, Ms. Girley maintained that since the U.S. Supreme Court has not overturned the ruling in a subsequent decision, she believed it was “just arguable” to assert that *Dred Scott* still applied and she felt no need to clarify or explain her statement. (R:616).

“white judge” and to liken his ruling to *Dred Scott* except to label him a racist. Admittedly, she did not explicitly call Judge Weiss a racist, and she did not explicitly state that he issued an adverse final order on his own initiative with no pending motion before him. The former statement would be baseless, and the latter statement would be patently false. But she and her father used misleading language and implications on social media to perpetuate that false narrative. Ms. Girley’s statements were intended to foster the public’s distrust in the legal system, which is perhaps best demonstrated by her posting, “The court system is a sham!” (R:704).

Ms. Girley offered up Judge Weiss’s actions as the latest example in a longstanding history of disparate treatment in the judicial system. In her sworn statement, she explained one of the purposes of protesting at city hall as follows:

No. It was – it wasn’t about protesting the verdict. It was really about saying there is an issue with the court system. And the Dr. Rop case is sort of illustrative of that.

(R:625).

After invoking *Dred Scott* when criticizing Judge Weiss’s order, she followed up her statements with calls to action: remove Judge Weiss from office, protest outside city hall, “break every chain,” “[t]his is an injustice and cannot stand.” (R:702; R:704; R:729; R:746). Although Ms. Girley had

a character witness testify to her belief in peaceful protest (T2:45), as a lawyer and someone who works in the media, she should readily understand that she cannot control the actions of others receiving her message that Judge Weiss needed to face repercussions for his ruling. Her misleading statements were made in reckless disregard of the truth and resulted in legitimate safety concerns. During Judge Weiss's testimony at the sanction hearing regarding the death threats he received, "Respondent and co-counsel, Jerry Girley, were laughing and appeared to be mocking Judge Weiss." (ROR:16).

Though Ms. Girley can argue that she stated the truth when she referred to Judge Weiss as a "white judge," or that she was merely quoting language from *Dred Scott*, her deliberately vague or technically truthful statements were misleading and impugned the judiciary. The initial brief's assertions that she was only speaking on "racial inequality of the whole system and not Judge Weiss in particular" should be rejected. (See IB:14). She was speaking about Judge Weiss in particular and making calls to action regarding his ruling.

B. A license to practice law is a privilege—not a right—and lawyers who have attained the privilege are not afforded the same First Amendment protections as a non-lawyer.

A member of the bar cannot claim First Amendment protection from licensure action when accusing a judge of a racist act—based on the sole fact that the judge issued an adverse order. Though a non-lawyer is free to disparage the judiciary in this manner without fear of repercussion—regardless of the factual basis or lack thereof—attorneys are officers of the court bound to use restraint by not offering statements that are imprudent, rash, irresponsible, and without foundation. *In re Shimek*, 284 So. 2d 686, 689 (Fla. 1973).

A license to practice law confers no vested right to the holder; it is a conditional privilege that is revocable for cause. Rule 3-1.1. The right to free speech under the United States and Florida Constitutions does not preclude disciplining an attorney for speech directed at the judiciary. *The Florida Bar v. Wasserman*, 675 So. 2d 103, 105 (Fla. 1996). The purpose of this rule is neither to shield the judiciary from unpleasant or unsavory criticism nor to right a private wrong committed against a judge. *The Florida Bar v. Ray*, 797 So. 2d 556, 558 (Fla. 2001). “Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice.” *Id.* at 558-59.

The need to preserve public confidence in the judiciary supports applying a different standard than defamation cases, since members of the bar are viewed by the public as having unique insights into the judicial system. *Id.* at 559. In *Ray*, this Court rejected application of a subjective “actual malice” standard, because applying this standard in lawyer disciplinary proceedings “would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth.” *Id.* (quoting *In re Holtzman*, 78 N.Y.2d 184 (N.Y. 1991)).

Instead, this Court adopted an objective test. *Id.* (citing *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990)). Under this test, once the bar presents evidence establishing that a lawyer made statements concerning the qualifications or integrity of a judge, the burden shifts to the respondent to provide an objectively reasonable factual basis for making the statements. *Id.* at 558 n.3; see also *The Florida Bar v. Jacobs*, 370 So. 3d 876, 883 (Fla. 2023).

This is the majority view of most state supreme courts throughout the country that have addressed the issue and adopted (with some variations) an objective test as opposed to the actual malice standard established in *New York Times Co. v. Sullivan*, 376 U.S.254 (1964). See *Matter of Abbott*,

308 A.3d 1139, 1177 (Del. 2023); *Idaho State Bar v. Topp*, 925 P.2d 1113, 1115 (Idaho 1996); *Matter of Terry*, 394 N.E.2d 94 (Ind. 1979); *Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver*, 750 N.W.2d 71, 82 (Iowa 2008); *In re Arnold*, 56 P.3d 259, 267 (Kan. 2002); *Louisiana State Bar Ass'n v. Karst*, 428 So. 2d 406, 409 (La. 1983); *Attorney Grievance Com'n of Maryland v. Frost*, 85 A.3d 264, 267-68 (Md. 2014); *In re Cobb*, 838 N.E.2d 1197, 1213-14 (Mass. 2005); *In re Disciplinary Action Against MacDonald*, 962 N.W.2d 451, 462 (Minn. 2021); *Matter of Westfall*, 808 S.W.2d 829, 837-38 (Miss. 1991); *State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Gast*, 896 N.W.2d 583, 597 (Neb. 2017); *Matter of Marshall*, 528 P.3d 653, 663 (N.M. 2023); *Matter of Holtzman*, 577 N.E.2d 30, 34 (N.Y. 1991); *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 431 (Ohio 2003); *Anthony v. Virginia State Bar ex rel. Ninth Dist. Committee*, 621 S.E.2d 121 (Va. 2005); *Lawyer Disciplinary Bd. v. Hall*, 765 S.E.2d 187, 198 (W.V. 2014); *In re Disciplinary Proceedings Against Riordan*, 824 N.W.2d 441, 448 (Wis. 2012); *Board of Professional Responsibility, Wyoming State Bar v. Davidson*, 205 P.3d 1008, 1015 (Wy. 2009).

Conversely, Ms. Girley's brief argues case law from states that follow the minority view. Specifically, the brief cites *Okla. Bar Ass'n v. Porter*, 766

P.2d 958 (Okla. 1988) and *In re Green*, 11 P.3d 1078 (Colo. 2000). (IB:23-24). These cases applied the actual malice standard for defamation claims established in *Sullivan*, 376 U.S.254 (1964). In *Ray*, this Court declined to use the *Sullivan* standard and adopted what is now the majority view. One court noted that the *Porter* and *Green* decisions were the minority view and declined to follow their holdings. *Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 431 (Ohio 2003).

C. Ms. Girley is not subject to discipline based on her broader criticisms of disparate treatment in the court system.

Despite the initial brief's claims, this is not a case about whether Ms. Girley has a constitutional right in general to engage in out-of-court political speech. She does. This is not a case about whether lawyers can dispute the legal and factual basis of a judge's ruling. Appellate courts could not properly function and appellate practitioners could not competently litigate in an adversarial system of justice if such a prohibition existed.

Ms. Girley impugned the integrity of the judge. She carried the burden of providing an objectively reasonable factual basis for making her statements. *Jacobs*, 370 So. 3d at 883 (Fla. 2023). But she did not do so, and instead argues on appeal that the bar did not show that her statements

were objectively false or made with reckless disregard for their truthfulness. (IB:25-26). This is an improper attempt to shift her burden to the bar.

Ms. Girley's arguments regarding her personal experience as a practicing lawyer and her research regarding disparate treatment of historically marginalized groups in the justice system misses the point. She can share her viewpoint that equal justice in the court system may exist on paper but not in actual practice. (See R:614). She can share her research on the issue, along with her study of legal history to help demonstrate the factual basis for her viewpoint. But she used Judge Weiss' ruling as the latest example of a "sham" court system that allows white judges to strip away the rights of marginalized groups. She offered misleading statements to gain national attention immediately after rendition of the adverse order, not because she studied the matter and came to a good faith conclusion that objective evidence suggested a race-based motive behind the judge's actions.

She had no objective factual basis to support her claims, and she cannot in good faith claim otherwise by changing the subject to the disparate treatment of historically marginalized groups in the court system more generally. Though this subject may be one that she has researched, it is not material to the specific case at issue. Ms. Girley performed no such

research in this case before offering up her baseless allegations against a judge to the court of public opinion. Though her initial brief claims that she had knowledge of the litigation even though she was not directly involved (IB:12-13), Ms. Girley's testimony during her sworn statement summarized her knowledge of the case as follows:

Q And your knowledge of that trial, where does it come from?

A Primarily talking to my dad. I read the – the directed verdict order. But yeah, primarily talking to my dad, speaking to Dr. Rop briefly, yeah.

Q But it was not televised in some way where you were able to view it?

A No, it wasn't. Well, I think it may have been televised, but I didn't view it. Let me put it that way. My friend was in town, and I was at the beach, painting pottery, doing different things. So I didn't observe it at all.

(R:617). When asked how she could conclude that Judge Weiss's order constituted an injustice with so little knowledge of the case, Ms. Girley responded as follows:

Yeah. It's my opinion just – and also based on my exper- -- ***I just have never in my 11 years of practicing law heard of or even knew it was a possibility that a judge could, a week later, do a directed verdict after the jury has ruled.*** So it – it just struck me as so odd.

'Cause it's – it's beyond – ***I haven't experienced it and never recall reading a case about it.*** Talked to other people. No one

has heard about – you know, no one said, “Oh. Yeah. That happens.”

(R:617-18) (emphasis added).

Ms. Girley has a knowledge gap regarding this Court’s ruling in *Ricks*, 822 So. 2d 502, 506 (Fla. 2002), and the litany of case law that has addressed this exact issue. See *Gutierrez*, 516 So. 2d 87, 88 n.2 (Fla. 3d DCA 1987) (instructing trial judges inclined to grant a directed verdict to reserve ruling, allow the jury to return a verdict, and thereafter rule on the motion); *Mabrey v. Carnival Cruise Lines, Inc.*, 438 So. 2d 937 (Fla. 3d DCA 1983) (approving of the trial judge’s decision to reserve ruling, finding that the judge erred in granting a directed verdict, and ordering entry of an \$80,000.00 judgment awarded by the jury); *Freeman v. Rubin*, 318 So. 2d 540, 543 (Fla. 3d DCA 1975) (holding that the better practice is to submit the case to the jury even if the trial judge has decided that a directed verdict should be entered); *Ditlow v. Kaplan*, 181 So. 2d 226, 227 (Fla. 3d DCA 1965) (commending the delayed entry of a directed verdict until after the matter is submitted to a jury as a proper means of avoiding retrial in the event of a successful appeal); *Ed Ricke and Sons, Inc. v. Green*, 468 So. 2d 908, 910 (Fla. 1985) (holding that the judge’s reserved ruling on a motion for mistrial based on an improper statement during closing argument was an approved practice that conserved judicial resources and

avoided the risk of a lawyer intentionally making prejudicial remarks near the conclusion of a case to obtain a mistrial); *Dysart v. Hunt*, 383 So. 2d 259, 260 (Fla. 3d DCA 1980) (commending and encouraging the practice of deferring entry of a directed judgment in favor of a defendant).

The *Ricks* opinion cited in Judge Weiss's order quoted language from a footnote in *Gutierrez*, and this footnote contains a string cite to every other piece of case law cited *supra* apart from *Dysart*. This is not a matter that required extensive legal research. A careful reading of the directed verdict would have informed Ms. Girley of the litany of case law authorizing Judge Weiss's delayed ruling.

The bar is not faulting Ms. Girley for her knowledge gap regarding this court approved practice when the judge issued the order. But Ms. Girley continues to claim ignorance of any case law on this issue, even though she stated that she read the directed verdict immediately after it was issued. (See R:617). Specifically, Ms. Girley claimed ignorance during her sworn statement on October 27, 2021—nearly five months after Judge Weiss's order provided the relevant, binding case law. (R:617-18). Ms. Girley claimed ignorance at trial in the disciplinary proceeding in January 2024. (T1:53). She also solicited the testimony of another attorney, Jonathan Barry-Blocker, who stated that he was unfamiliar with the

practice.⁴ (T1:115). Her initial brief again asserts that there is no case law supporting the judge's reservation of ruling on a directed verdict. (IB:17-18).

Though Ms. Girley's reply brief may seek to distinguish some or all of the above case law, it is important to note that these will all be post hoc justifications for her disparaging statements offered in 2021. Ms. Girley (1) impugned the integrity of the judge based on her knowledge gap, and without researching the matter; (2) called for the judge's removal from office and stated that he abused his authority; and (3) organized a rally to educate the public on a matter with which she was unfamiliar, by her own admission. Ms. Girley's testimony reflects a careful and reflective study of the history of civil rights law, but in this specific instance, she did not perform this kind of careful study of the legal and factual basis for the judge's order. Mr. Girley and Ms. Girley instead allowed their emotions to dictate their imprudent actions.

To be clear, it is understandable that the plaintiff and his counsel would be frustrated and upset by the judge's ruling overturning a multi-million-dollar jury verdict without holding a post-trial hearing regarding the

⁴ Mr. Barry-Blocker is not a current member of The Florida Bar because his membership lapsed. (T1:116). The referee also held that this witness was not qualified to answer questions as an expert regarding whether a judge is able to vacate a jury verdict. (T1:113-14).

directed verdict. It was going to cost both of them substantial amounts of money. Neither the plaintiff, Mr. Girley, nor Ms. Girley were required to approve of the judge's ruling, which resulted in a fleeting victory for the plaintiff vacated one week later. But this deferred action on a dispositive motion the judge was inclined to grant was an approved practice encouraged by courts to avoid the risk of remand for a new trial. In response to Judge Weiss's order, the plaintiff stated to the media that he was "exhausted and drained from the three-year case." (R:668). The delayed ruling ensured the plaintiff would not be further "exhausted and drained" by the delay, stress, and uncertainty caused by a second trial.

Mr. Girley and Ms. Girley may express their dissatisfaction with the ruling to the media and announce their intention to appeal. These are everyday occurrences in cases with substantial media coverage. But Ms. Girley did not merely express her discontent in either the specific ruling or—more generally—the approved practice of reserving ruling on a motion for directed verdict. She offered misleading statements and then exacerbated the matter by referencing the judge's race to provide an ulterior motive for the judge's ruling.

One of Ms. Girley's motives in offering public statements baselessly impugning Judge Weiss's integrity is readily apparent. She explained that

“media is a more powerful tool to fight civil injustice” than litigation and that she left the practice of law to work in media because she “believe[s] in the power of narratives and storytelling.” (T1:36). She freely admitted that her goal was to “get national attention and to raise awareness” regarding the directed verdict. (T1:44). The law firm she was associated with had a direct financial interest in the outcome of the litigation. The referee’s report noted that Ms. Girley was very familiar with social media when she launched her campaign against Judge Weiss, as she has her own podcast and substantial experience in the media industry. (ROR:7).

Ms. Girley was not merely a member of the bar offering commentary on a matter of public interest nor was she acting as a journalist when she made these statements regarding Judge Weiss. She had an apparent connection to the case, both as a lawyer with the firm representing the plaintiff and the daughter of the lawyer who personally litigated the case. She referred to the plaintiff as “our client.” She and her father, as members of the law firm representing the plaintiff on a case pending appeal, were bound to use restraint by not offering statements that are imprudent, rash, irresponsible, and without foundation. *In re Shimek*, 284 So. 2d 686, 689 (Fla. 1973). In this instance, Ms. Girley did not exercise such restraint, and offered multiple statements that violated Rules 4-8.2 (impugning the

integrity of the judiciary) and 3-4.3 (misconduct contrary to honesty and justice).

D. Ms. Girley never presented any argument to the referee that the disciplinary proceeding violates her religious freedom.

The initial brief asserts that Ms. Girley is being unlawfully penalized for engaging in the free exercise of religion, because some of her comments were made during a “religious service,” and she engaged in both political and religious speech. (IB:29-33). But the Black Love United interview was not a religious service; it was an interview of her father by members of a church group, and the topic of discussion was the civil litigation and the adverse order. Mr. Girley’s interview on the program was advertised as a discussion regarding the litigation. (R:674). Nothing in the advertisement suggested a religious component, even if the program’s primary focus was as a couple’s ministry organization discussing relationships. (See R:607). Ms. Girley’s comments were not made on the program, but on social media. She cannot simply recharacterize her mixed statements of opinion and fact on social media as religious speech merely because her father was interviewed by a religious program about the litigation.

The initial brief additionally asserts that “the pursuit of social justice and racial equality are main tenants [sic] of Ms. Girley’s faith tradition.” (IB:32). There is no record citation in support of this assertion, and this logic would allow every civil rights lawyer to violate Rule 4-8.2 with impunity. Further, Ms. Girley never argued at trial that this disciplinary proceeding violated the Florida Religious Freedom Restoration Act. She cannot argue this matter for the first time on appeal. See *Trushin v. State*, 425 So. 2d 1126, 1129-30 (Fla. 1982) (“The constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level.”).

II. Ms. Girley was afforded due process in this matter and she cannot raise an equal protection argument for the first time on appeal.

A. Ms. Girley was afforded procedural due process in the disciplinary proceeding.

The initial brief asserts that the bar did not provide fair notice of the charges, the referee improperly restricted her witness's testimony, and the Oath of Admission to The Florida Bar is unconstitutionally vague. (IB:34-42). Regarding the first argument, the initial brief objects to the bar's presentation of a composite exhibit with over 100 pages of documents at trial, but the formal complaint only references six statements made by Ms. Girley and statements made by someone else.⁵ (IB:35).

A review of the formal complaint demonstrates that Ms. Girley was placed on notice that she was being charged with violations of Rules 3-4.3 and 4-8.2 and the Oath of Admission based on her statements on social media in response to Judge Weiss's directed verdict. (See R:9-15). The formal complaint either summarizes or quotes the social media activity at issue. The referee's findings of fact that Ms. Girley violated the rules charged in the complaint were based on these same posts. But the initial

⁵ The "someone else" referenced in the brief is Ms. Girley's brother, and she shared her brother's statements regarding the litigation on social media. Further, her brother oversees the Girley Law Firm's social media. (R:593-94). Ms. Girley is listed as "of counsel" with this firm.

brief nevertheless argues that the referee erred in sustaining the bar's objection to an interrogatory asking the bar to identify the specific statements made by Ms. Girley that the bar intended to present to the referee as false, misleading, or reckless. (IB:35-36). This interrogatory was already answered by the content of the formal complaint. It is immaterial to any issue on appeal whether the referee correctly found that the interrogatory called for a legal conclusion. Ms. Girley was plainly aware of the statements at issue; contrary to the assertions in the initial brief, the bar did not hide the "proverbial ball until closing arguments." (IB:36). This argument is belied by a plain reading of the formal complaint.

Ms. Girley's argument that the referee improperly restricted the testimony of Professor Barry-Blocker should also be rejected. (See IB:37-38). Mr. Barry-Blocker was offered as an expert witness "to present other evidence dealing with inequality in the whole court system." *Id.* But no matter how many times Ms. Girley attempts to shift the argument to her preferred area of expertise, the bar's formal complaint was strictly limited to statements made by Ms. Girley regarding *Baiwyo Rop v. Adventist Health System*, Case No. 2017-CA-009484-O (Fla. 9th Cir. Ct. 2017) and, even more specifically, Judge Weiss's ruling. It is true that Ms. Girley offered broader statements that the court system is a sham and that judges are

allowed to overturn jury verdicts and erode civil rights, but she offered these broad statements as pointed criticisms of one specific ruling. She does not demonstrate an objective factual basis for her statements impugning Judge Weiss by discussing the history of civil rights law and seminal cases decided before the judge was even born. The issue in this case involved this one specific matter, and the referee properly restricted Ms. Girley's efforts to expand this disciplinary proceeding into a discussion of equal justice rights throughout the country.

Ms. Girley's third and final due process argument asserts that the bar's allegation that Ms. Girley "Violated Her Oath of Office is Constitutionally [sic] Vague." (IB:39). Presumably, Ms. Girley intended to refer to the Oath of Admission to The Florida Bar, which is referenced in the formal complaint. (See R:12). But the argument that follows this subheading instead asserts that Rule 3-4.3 "is so vague that it does not fairly put the Respondent on notice about what conduct is punishable." (IB:40). Ms. Girley asserts that the rule's prohibition of acts "contrary to honesty and justice" does not apply to her "valid critique of the systemic injustice." (IB:41). This is not an argument that the rule is unconstitutionally vague; this is an argument that Ms. Girley did not violate the rule.

Regarding the Oath of Admission, the initial brief asserts that the bar did not specify which of the eight clauses Ms. Girley violated. (IB:41). The oath is only 233 words and is not broken up into subsections; therefore, the bar's complaint quoted the oath in full. (R:12-13). One portion of the oath includes a pledge to "maintain the respect due to courts of justice and judicial officers." Given the nature of the misconduct at issue, Ms. Girley was on notice of the portion of the oath she was alleged to have violated.

B. Ms. Girley did not establish that the bar selectively prosecuted her while ignoring similar misconduct by other members of the bar in violation of the 14th Amendment.

Like the initial brief's argument that Ms. Girley's statements on social media constituted religious speech, the equal protection argument in the initial brief was not presented to the referee. Ms. Girley did not argue as an affirmative defense that this disciplinary proceeding violated the 14th Amendment. (R:31-33). She did not assert at any point during trial that "The Bar's application of its rule violates the Equal Protection of the law" as applied. (IB:44). The argument should not be considered on the merits for the first time on appeal. *State Farm Mut. Auto. Ins. Co. v. Kujawa*, 782 So. 2d 1003, 1005 (Fla. 4th DCA 2001) ("We further reject the claim that the statutory scheme involved violates the equal protection guarantee of the Florida Constitution, as it is raised for the first time on appeal."). To the

extent Ms. Girley’s reply brief asserts that the argument constitutes fundamental error that can be raised for the first time on appeal, this Court should not allow Ms. Girley to inject new argument on the matter for the first time in a reply brief. See *Caldwell v. Florida Dep’t of Elder Affairs*, 121 So. 3d 1062, 1064 (Fla. 1st DCA 2013) (holding that perfunctory argument in an initial brief cannot be revived by a sufficient argument on the issue in a reply brief).

The initial brief cites no record evidence containing the alleged statements on social media by elected officials. (See IB:45-46). This is because Ms. Girley never referenced any of these statements during trial, she did not introduce these postings into evidence, nor did she ever present an equal protection argument.⁶ The bar cannot be tasked with distinguishing comments by others for the very first time on appeal.

Further, Ms. Girley’s statements falsely implied her personal involvement in the litigation. She was of counsel with the law firm that represented the plaintiff and referred to him as “our client.” The owner of the law firm, her father, had a direct financial interest in the outcome of the

⁶ The amicus brief filed by the American Civil Liberties Union (ACLU) on June 24, 2024 also references these statements on social media, providing hyperlinks to the postings. Amici do not have standing to raise issues not available to the parties or to raise issues not raised below. *Acton v. Ft. Lauderdale Hospital*, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982).

pending litigation. This is different than commentary by elected officials regarding a trial taking place in another state entirely in which they served no actual or apparent role as counsel. Their statements may be more appropriately characterized as opinion statements made in the political arena.

Ms. Girley next argues that a protective order entered by the referee violated her 14th Amendment due process rights. (IB:47-51; see also R:577-78). Specifically, she asserts that the referee's protective order preventing Ms. Girley from calling Judge Weiss as a witness at trial violated her due process right to confront witnesses. The inherent problem with this argument—and many others in the initial brief—is that this case does not hinge on the broader topic of equal rights in the court system. Judge Weiss's personal opinion on the matter is immaterial. Further, Ms. Girley's statements on social media were not based on any interaction she had with the judge. She read one order issued by him and—based on this one order and conversations with her father and the plaintiff—she launched a campaign against the judge to gain national attention on her father's case. Judge Weiss had no personal knowledge of anything material in this matter other than the basis for his order, and the order speaks for itself. See *United States v. Morgan*, 313 U.S. 409, 422 (1941) (a judge's thought

process relevant to judicial decisions is not within the purview of an examination).

Judge Weiss's personal understanding of events was immaterial to this disciplinary proceeding and to the defenses raised by Ms. Girley, who was not privy to the judge's internal thought processes when she made her statements. Other states have held that after-acquired evidence is not material to the determination of whether an attorney made a statement with reckless disregard for its truth or falsity. *Matter of Marshall*, 528 P.3d 653, 665 (N.M. 2023). Any evidence acquired by Ms. Girley after she impugned the integrity of Judge Weiss could not have formed her objective basis for making the statements. See *Gast*, 896 N.W.2d 583, 597 (Neb. 2017).

The initial brief asserts that Judge Weiss's testimony at trial was material because there was an issue regarding who initiated the complaint. (IB:50-51). Though it is true that Ms. Girley's counsel tried to make this an issue, the referee explained at the sanction hearing that the matter was an immaterial semantics issue based on the bar's answer to a vague interrogatory. (See T2:28-38). The initial brief only states that "[s]uch a discrepancy is not insignificant." (IB:51). It is. Whether Judge Weiss or Chief Judge Donald Myer initiated the complaint is not material to any issue or defense in this case.

Further, Ms. Girley is mistaken in asserting that Rule 3-7.6(k) mandated Judge Weiss's testimony in this matter. This rule states that the complaining witness is not a party to the proceeding, but "may be called on to testify." This does not mandate Judge Weiss's testimony. In bar disciplinary cases, the referee's decisions regarding discovery are discretionary and are only reviewed for an abuse of discretion. *The Florida Bar v. Berthiaume*, 78 So. 3d 503, 507 (Fla. 2011). The referee had discretion regarding whether to subpoena Judge Weiss to appear at the trial, and the referee did not abuse this discretion by entering the protective order.

III. A 30-day suspension is appropriate in this case and will serve as an adequate deterrence for other lawyers.

A. The applicable standards:

The Standards for Imposing Lawyer Sanctions ("Standards") provide a baseline for determining the appropriate sanction for a lawyer's misconduct before consideration of aggravating or mitigating circumstances. The referee found that Standard 7.1 (deceptive conduct or statements) supports Ms. Girley's 30-day suspension from the practice of law. (ROR:15). Subsection (b) of this standard provides that "[s]uspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury to a client, the

public, or the legal system.” The initial brief does not offer any argument regarding this standard other than a conclusory assertion that it does not support the referee’s recommendation. (IB:55). Ms. Girley does not actively practice law in this state. Although a lesser sanction may have some impact on Ms. Girley’s academic pursuits, the nature of her misconduct warrants a short suspension to adequately deter other lawyers who practice in this state from engaging in like misconduct.

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. Under Standard 3.2(b), the referee found three aggravating factors applicable:

- A pattern of misconduct under Standard 3.2(b)(3);
- Refusal to acknowledge the wrongful nature of the conduct under Standard 3.2(b)(7); and
- Substantial experience in the practice of law under Standard 3.2(b)(9).

(ROR:16).

Ms. Girley asserts that despite her multiple statements on social media, the aggravating factor of a pattern of misconduct should not apply

because she made these statements over a short period of time. (IB:52-53). This bears relevance to the weight afforded this aggravating factor, but the fact that Ms. Girley's misconduct spanned a matter of two weeks does not negate the finding of a pattern. This Court has expressed its view that cumulative misconduct warrants more severe discipline than an "isolated instance of misconduct." *The Florida Bar v. Parrish*, 241 So. 3d 66, 79 (Fla. 2018). Ms. Girley's misconduct was isolated to a brief period of time, but it was not an isolated instance. She made several postings on social media impugning the integrity of Judge Weiss. The referee's ruling on this issue was not clearly erroneous.

The initial brief does not explicitly challenge the referee's findings regarding the other aggravating factors. However, the brief asserts that the referee's report made a mistaken finding that Ms. Girley and her father mocked Judge Weiss during his testimony regarding threats he received. (IB:15-16). This argument might bear relevance to the weight afforded the aggravating factor that Ms. Girley refused to acknowledge wrongdoing. To the extent this Court deems this argument material, an attorney cannot meet their burden on appeal by simply pointing to contradictory evidence when there is substantial evidence in the record to support the referee's findings. *The Florida Bar v. Glueck*, 985 So. 2d 1052, 1056 (Fla. 2008). The

referee was the finder of fact with a far better vantage point than undersigned counsel or this Court to observe Ms. Girley's behavior during the sanction hearing. The referee's finding is based on her personal observations of the conduct of Ms. Girley and her father at the January 11, 2024 sanction hearing, and Ms. Girley has no due process right to be placed on notice of the fact finder's observations so that she can refute them.

In mitigation, the referee found five factors under Standard 3.3(b) applicable:

- Absence of a prior disciplinary record under Standard 3.3(b)(1);
- Absence of a dishonest or selfish motive under Standard 3.3(b)(2);
- Full and free disclosure to the bar or cooperative attitude toward the proceedings under Standard 3.3(b)(5);
- Character or reputation under Standard 3.3(b)(7); and
- Imposition of other penalties and sanctions under Standard 3.3(b)(11).

(ROR:17).

C. Case Law:

In recommending a 30-day suspension, the referee's report relied on three published opinions of this Court. (ROR:12-13). As is often the case, these opinions involve lawyer misconduct that is factually distinguishable from the specific conduct at issue, but they are helpful in determining whether a 30-day suspension is supported by existing case law.

In *The Florida Bar v. Ray*, 797 So. 2d 556, 558-59 (Fla. 2001), this Court ordered a public reprimand for an attorney who wrote three letters to a chief judge questioning the integrity of an immigration judge. The lawyer was writing to another judge, not making statements to a wide public audience. Given this Court's more recent practice of imposing stronger sanctions for lawyer misconduct referenced in *Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015), the conduct in *Ray* supports a short suspension in this case.

The second and third opinions relied on by the referee in determining the appropriate sanction were decided after this Court's decision to impose stronger sanctions for misconduct. *Jacobs*, 30 So. 3d 876, 883 (Fla. 2023), and *Patterson*, 257 So. 3d 56, 62 (Fla. 2018) both involve more severe conduct that resulted in much longer rehabilitative sanctions. They confirm

that a sanction is appropriate, that a long suspension is not appropriate here, and that the referee used them to find the correct balance.

The initial brief does not address these cases but cites to cases that bear little resemblance to this case. (See IB:55-58). In *The Florida Bar v. Draughon*, 94 So. 3d 566 (Fla. 2012), this Court suspended an attorney for one year because he transferred real property to himself without consideration to avoid an obligation to a vendor. In *The Florida Bar v. Richardson*, 574 So. 2d 60 (Fla. 1990), this Court suspended an attorney for 91 days for overbilling clients. In *The Florida Bar v. Graham*, 679 So. 2d 1181 (Fla. 1996), this Court publicly reprimanded a former judge who made demeaning remarks, ignored instructions, and intentionally delayed proceedings during hearings before the Judicial Qualifications Commission. None of these cases involved statements impugning the judiciary. The initial brief is distinguishing case law the referee never relied on in determining the appropriate sanction.

The initial brief also argues that public reprimand is usually the appropriate sanction when a lawyer makes statements against the judiciary, citing to *The Florida Bar v. Tindall*, 550 So. 2d 449 (Fla. 1989), *Cerf v. State*, 458 So. 2d 1071 (Fla. 1984), *The Florida Bar v. Tropp*, 112 So. 3d 101 (Fla. 2013), and *The Florida Bar v. Clark*, 528 So. 2d 369 (Fla.

1998). These cases were decided before this Court began imposing stronger sanctions for misconduct, so the discipline imposed in these matters may not reflect the current view of this Court.

Further, although the facts in *Tindall* bear a similarity to this case, Mr. Tindall acknowledged at a final hearing that he had no evidence to support his assertion that a judge accepted bribes from a defendant. Ms. Girley has expressed no remorse for her misconduct.

The *Cerf* case contains a dissenting opinion stating that the respondent should be suspended for six months, which—in light of this Court’s more recent opinion in *Jacobs*—is likely the more appropriate sanction for the conduct at issue in *Cerf* had it been decided based on current case law. Similarly in *Clark*, the misconduct at issue involved frivolous claims, abuse of the court system, and a false accusation against a judge. A public reprimand is no longer the appropriate sanction for this type of misconduct.

Ms. Girley’s reliance on *Tropp* is misplaced, because the majority’s decision is not supported by a written opinion. A dissenting opinion explained relevant facts, but a decision without a written opinion has no precedential value, even if a written dissent reveals the majority’s unstated rationale. See *St. Fort ex rel. St. Fort v. Post, Buckley, Schuh & Jernigan*,

902 So. 2d 244, 248-49 (Fla. 4th DCA 2005). Further, the dissenting opinion stated that the misconduct, which involved a misrepresentation by omission that falsely accused a judge of ex parte communication with a party, warranted a rehabilitative suspension.

None of the case law relied on in the initial brief establishes that public reprimand is the only appropriate sanction. The argument was valid 30 years ago, but not today. While recognizing that this Court's scope of review is broader when evaluating the referee's recommended discipline, "generally speaking this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions." *The Florida Bar v. Valentine-Miller*, 974 So. 2d 333 (Fla. 2008). This Court should approve the referee's recommendation of discipline, which is sufficient to deter lawyers from the temptation of committing similar violations of the Rules of Professional Conduct under the misplaced justification that they are merely being zealous advocates.

CONCLUSION

For the above stated reasons, The Florida Bar asks this Court to accept the referee's findings of guilt and recommendation that Ms. Girley be suspended from the practice of law for 30-days, be required to attend a professionalism workshop, and impose the costs recommended by the referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, on this 12th day of August, 2024 and a true and correct copy of the foregoing has been furnished via e-service to Jerry Girley, Counsel for respondent, at phyllis@thegirleylawfirm.com.



Mark Lugo Mason, Bar Counsel

CERTIFICATE OF TYPE SIZE & STYLE

I certify that this document complies with the applicable font and word count limit requirements of Florida Rule of Appellate Procedure 9.045 and 9.210(a)(2)(B). The font is 14-point Arial. The word count is 12,663 words. It has been calculated by the word-processing system, and it excludes the content authorized to be excluded under the rule, but it includes any footnote.

A handwritten signature in black ink, appearing to read "Mark Lugo Mason", with a long horizontal flourish extending to the right.

Mark Lugo Mason, Bar Counsel