Filing # 204545629 E-Filed 08/12/2024 04:21:51 PM

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JERRY GIRLEY,

Respondent.

_____/

Supreme Court Case No. SC22-0860

The Florida Bar File No. 2021-30,853(9B)

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Complainant is referred to as "The Florida Bar" or "the bar," and the Respondent as Mr. Girley.

The record is referred to by "R:**." The transcript of the final hearing as to guilt conducted on January 8-9, 2024 and the sanction hearing conducted on January 11, 2024 will be cited as "T1:", "T2", and "T3:". For brevity's sake, the two-day 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 recommends a 30-day, non-rehabilitative suspension. The conduct at issue involves Mr. Girley's statements in two interviews impugning members of the judiciary and a juror.[1] He made these statements shortly after receiving an adverse, post-verdict order granting a directed verdict when the jury had awarded his client $2,750,000.00.

[1] His daughter, Brooke Girley, is of counsel with his law firm, and she also published social-media statements impugning the presiding judge. Her related disciplinary proceeding is pending in *The Florida Bar v. Brooke Girley*, SC22-0859 (Fla. 2022).

Instead of challenging the adverse ruling in a motion for rehearing, Mr. Girley publicly accused the presiding judge of a race-based motive for his ruling and claimed it "makes financial sense" for decision-makers to rule against his client and other plaintiffs raising civil rights claims. The appellate court later affirmed the adverse ruling.

In this review, Mr. Girley argues that: (1) his right to free speech protects him from this discipline, (2) the referee violated his procedural due process rights, and (3) the bar violated his equal protection rights by engaging in selective prosecution for violations also committed by other bar members.

The bar maintains neither the referee nor the bar violated Mr. Girley's constitutional rights. It recognizes that a lawyer whose conduct is constitutionally regulated by this Court has broad free speech rights, but those rights do not include public statements impugning judges in the absence of an objectively reasonable factual basis to do so.

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). This Court should clearly explain that, when a lawyer represents a party in pending litigation, the lawyer is not free to represent to the public

that the presiding judge is a racist who abuses his authority merely because the judge has issued an adverse order in the case. Adverse orders alone do not provide a factual basis for such inflammatory statements.

STATEMENT OF THE CASE AND FACTS

I. Mr. Girley obtained a large jury verdict on a race discrimination claim, and then the trial judge granted a reserved directed verdict.

The misconduct at issue involves Mr. Girley's public statements impugning the integrity of the judiciary following a final order issued by Circuit Judge Kevin B. Weiss in *Baiywo Rop v. Adventist Health System*, Case No. 2017-CA-9484-O (Fla. 9th Cir. Ct. 2017). Mr. Girley represented the plaintiff in the case, which involved allegations of employment discrimination by the plaintiff's former employer. The May 28, 2021, final order by Judge Weiss—which became the subject of Mr. Girley's ire—explains the underlying litigation. (See R:462). The case was tried before a jury in May 2021, and following the close of the plaintiff's case, the court granted a directed verdict for the defendant on two of the four claims (national origin and disability discrimination). *Id*. The court did not deny the motion for directed verdict on the remaining two claims (retaliation and race discrimination), but instead reserved ruling on those counts. *Id*. The jury returned a verdict in favor of 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, ruling that the employer established a non-discriminatory basis for the adverse employment action which was not shown to be pretextual. *Id*. The order was entered without a post-trial hearing. Judge Weiss's ruling was later 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).

II. Immediately following Judge Weiss's directed verdict, Mr. Girley made public statements asserting that Judge Weiss abused his authority to deprive a black plaintiff of justice; he accused both the trial judge and the appellate court of corruption.

Mr. Girley's public statements in response to the circuit court order were made in two interviews conducted days after entry of the directed verdict. Although the referee's report quotes statements by Mr. Girley from both interviews, (see ROR:12-13), this statement of facts will mostly focus on the first interview. Specifically, Mr. Girley's statements during this interview contained accusations of racism and corruption, and therefore were the primary focus of the bar's formal complaint. Conversely, the formal complaint only asserted that Mr. Girley mischaracterized the civil

rules of procedure and fairness of the judicial process in the second interview. (See R:8-15).

Mr. Girley was interviewed on Black Love United three days after entry of the directed verdict. (See R:620). He described Black Love United as a "church-based Facebook program that discussed different community concerns." (T1:20). This church-based group was comprised of black Christian couples who collaborate with one another to strengthen their marriages through a shared biblical perspective. (T1:142). Mr. Girley and his wife served as mentors to younger couples through this group. (T1:143). Both moderators of the interview have been employed by Mr. Girley in the past and have been in the courtroom with Mr. Girley during trials. (R:627-28).

Mr. Girley is also an ordained minister, and he stated that he spoke to every person in that group in his capacity as Pastor Girley. (T1:152). He has appeared on the program multiple times before the interview in his capacity as a pastor to give guidance to couples. (T1:170). However, the topic of the May 31, 2021, interview had nothing to do with strengthening marriages; according to one of the moderators, Mr. Girley appeared on the program to discuss voter registration, becoming involved in the process,

serving on jury duty, the verdict being overturned, and, "If the judge could do that, how could – how could he do that?" (T1:171).

In describing his audience, Mr. Girley stated that he explained matters to a lay population. (T1:153). He described the members of the group as "blue collar people" and "not highly educated." (T1:161-62). Therefore, Mr. Girley asserted that he had to speak in metaphors to explain opaque legal concepts. *Id*. Mr. Girley's brief, his testimony during trial, and his sworn statement claim that the bar is taking his statements during interviews out of context. This Court should read the 66-page transcript of the interview with the above context in mind. (See generally R:620-685).[2]

During the program, Mr. Girley discussed Judge Weiss's order as the most recent example of a "sham" court system and a "shell game" that routinely discriminates against African Americans, because biased judges find ways to deprive African-American plaintiffs of justice. (ROR:8-9). He began the interview by referencing Dr. Martin Luther King, Jr.'s "I Have a Dream" speech, and in particular the portion of the speech stating that African Americans have come to the nation's capital to "cash a check," because the country has defaulted on its promissory note by providing a

[2] Contemporaneously with this brief, the bar is filing an appendix containing this transcript.

bad check that came back marked "insufficient funds." (R:629-30). Before referencing this portion of the speech, Mr. Girley stated that this quote "kind of goes to the core of what happened with this – with this particular judge and – and others." *Id*. He described civil rights laws passed, in part due to Dr. King's efforts, as another check to be taken and cashed in court, and his role in this process as a civil rights litigator as follows:

> Litigating civil rights for black people and for brown people in a majority white culture is like climbing up a hundred-foot cliff with a hundred-pound boulder on your back. . . . People at the top of the cliff rolling hundred-pound boulders down at you, that you've got to try to avoid as you try to climb.
>
> But in that environment, we have gotten juries to agree with us that discrimination has occurred. But ***consistently we have had judges cut the money, find ways to ensure that our clients at the end of the day did not get paid. Now that's what happened last Friday***.

(R:630-31) (emphasis added).

Similarly, Mr. Girley claimed that "most consistently the judges will permit them [opposing counsel] to whiten the jury." (R:632). He claimed that this occurred with Advent Health/Florida Hospital, and in other cases he litigated. *Id*.[3] He described the judicial process as the last indignity a black man will suffer when he seeks redress for discrimination. *Id*.

[3] Notably, Judge Weiss did not preside over jury selection in the civil litigation at issue, which was handled by another judge standing in for Judge Weiss. (T1:158-59). Mr. Girley did not explain this to his audience

After providing this backdrop of the judicial system, Mr. Girley then provided the plaintiff's version of events leading to the adverse employment action. (R:632-34). He reiterated that the defendant tried to whiten the jury, and the only reason an African American became a juror on the case is because a white juror called in sick, but "[s]he wasn't sick. She just didn't want to be there. Called in, and that caused the black person, who was the alternate . . . to be able to serve on the jury." (R:635). He later backtracked on this claim and disclaimed personal knowledge. (R:655-56). At trial in the disciplinary proceeding, Mr. Girley then claimed that his statement was a reasonable inference. (T1:159-61).

A listener named Brook asked Mr. Girley to explain how the judge was able to reverse the verdict. (R:637). In response, Mr. Girley never explained that the judge reserved ruling on a motion for directed verdict, which is an authorized practice encouraged by appellate courts as a means of avoiding remand for a new trial. See *Ricks v. Loyola*, 822 So. 2d 502, 506 (Fla. 2002). Instead, he only explained that directed verdicts are generally granted before the matter goes to a jury, and they should only be

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when leveling accusations of racism against Judge Weiss. In fact, he stated in the disciplinary proceeding that he never identified Judge Weiss by name during the interview because he was not talking about one judge. (T1:167-68). His brief repeats that same assertion. (See IB:10). The argument section of this brief addresses this false assertion.

granted when no reasonable juror could conclude there was discrimination. (R:637-38). After explaining his viewpoint that the offered basis for his client's termination was pretextual, Mr. Girley stated as follows:

> We tout ourselves in this country on being a nation that permits people to have a jury of their peers. . . . And that is what we stress right in our government classes, in our civics classes. But in the end, there's a back door that is – that exists in the system, and that back door is often used to undermine black people and their cases. That's the – that's the much larger message.

(R:640-41).

Mr. Girley stated that "**we need to let the world know that there's a sham going on or there's a shell game going on here**." *Id*. Mr. Girley further explained that in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the U.S. Supreme Court stated that "[a] black man has no rights that a white man is bound by law to respect," and "that case has never been overturned." (R:644). He never explained that it was "overturned" by constitutional amendments following a civil war. Instead, he stated that this case from 1857 "answers and it speaks to everything that we're talking about right now. At the end of the day, our rights are contingent upon whether or not white people choose to respect." *Id*.[4] Mr. Girley urged

[4] During his sworn statement, Mr. Girley refused to concede that the case had been superseded by constitutional amendment. (R:536-38).

listeners not to "put our trust in these false systems that have been put in place to window-dress but deliver us at the end of the day nothing but grief and frustration." *Id*.

While stating that he would appeal Judge Weiss's order, Mr. Girley stated that the entire Fifth District was biased:

> But at the end of the day, this is something that God will have to address, because ***it's not in the hearts of those in*** – in the – ***in power, and that includes the appellate court***, I would say, to right the wrongs that have been committed against us, because it – ***it makes financial sense to them to keep us in a place where we are beholden to them***.

(R:647) (emphasis added). During his sworn statement, Mr. Girley denied impugning the integrity of Judge Weiss and judges on the Fifth District, claiming that "this is not to ascribe to these decision-makers a malignant intent," and he was instead referring to statistical outcomes of cases when "there are not people of color at these different decision-making levels." (R:541).

During the Black Love United interview, Mr. Girley stated his belief that the court would not reinstate the jury's verdict because "now everybody that is being discriminated against is gonna step forward and file a claim, and the courts don't want to hear it" because courts treat civil rights cases as a waste of resources and energy. (R:647-48). Continuing with this sentiment, Mr. Girley stated that the solution did not lie in passing new

laws, “Because if we come up with a new law and it’s the same people enforcing and interpreting the law, we’re gonna have the same outcome.” (R:665). He also called the directed verdict a “theft” of $2,750,000.00 “taken by the stroke of a judge’s pen.” (R:667; R:670).

III. The report of referee found that Mr. Girley’s statements violated four Rules Regulating The Florida Bar, as well as the Oath of Admission to The Florida Bar.

The referee found that Mr. Girley’s interviews, which reached a nationwide platform, conveyed the overall message that “the Judge presiding over the *Rop* case was unfair, racist, and exceeded his authority.” (ROR:16). Further, the referee stated at hearing that “there is no proof that Judge Weiss was unethical, did anything improper, or abused his power in any way or acted outside the scope of his authority” and there was no reasonably objective factual basis for making the statements. (T2:6; ROR:19). Therefore, the referee recommends that Mr. Girley be found guilty of violating Rule 3-4.3 (misconduct that is unlawful or contrary to honesty and justice), Rule 4-4.1 (making a false statement of material fact or law to a third person), Rule 4-8.2(a) (impugning the integrity of judges or other officers based on statements either known to be false or with reckless disregard as to its truth or falsity), Rule 4-8.4(d) (conduct prejudicial to the administration of justice), as well as his Oath. (ROR:13-16). The referee’s

report recommends Mr. Girley's thirty-day suspension from the practice of law as the appropriate sanction in this matter (ROR:20).

SUMMARY OF THE ARGUMENT

The narrow issues in this case involve statements made by Mr. Girley regarding a single order issued in *Baiwyo Rop v. Adventist Health System*, Case No. 2017-CA-009484-O (Fla. 9th Cir. Ct. 2017). But rather than address this narrow issue, the initial brief attempts to redirect all focus to his statements that there is racial bias in the court system. To be clear, Mr. Girley did level broader criticisms regarding implicit bias in the court system, which are not referenced in the formal complaint. But he also baselessly accused a judge and an appellate court of racial bias and corruption, which is not protected by the First Amendment absent an objectively reasonable factual basis.

The bar is not attempting to limit a lawyer's free speech right to publicly advocate for change to address perceived injustices. Such advocacy has historically led to great, albeit slow and incremental, strides in addressing inequality in the judicial system. Lawyers who advocated for 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 decisions and granted 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 then correctly follow the law in subsequent rulings.

The primary legal issue in this case is whether Mr. Girley had an objectively reasonable factual basis for his statements impugning the integrity of Judge Weiss and the Fifth District. The initial brief never addresses the specific issue, and instead continues the same tactic of

expanding the limited scope of this case into an indictment of the entire judiciary.

Mr. Girley's claims of selective prosecution which violate his Equal Protection rights are without merit. Mr. Girley quotes statements on social media by politicians who are also members of the bar to assert that the bar is selectively prosecuting him. He never presented this argument to the referee. It cannot be raised for the first time on appeal. Moreover, the examples he uses are not lawyers representing clients in pending litigation.

Mr. Girley also raises several due process issues, none of which have merit. First, the formal complaint sufficiently placed Mr. Girley on notice of the statements at issue, all of which involved his 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). Second, the scholarly articles Mr. Girley sought to introduce into evidence were immaterial, because none of them were offered to establish an objective factual basis supporting Mr. Girley's specific statements impugning the integrity of Judge Weiss, the Fifth District, and a juror. Third, the referee did not abuse her discretion in entering a protective order preventing Mr. Girley from calling Judge Weiss as a witness at trial. The judge lacked personal knowledge of Mr. Girley's misconduct, which did not occur in court or in legal filings.

Mr. Girley also argues that this disciplinary proceeding violates his religious freedom, because he made the statements during an interview before a church group. The argument should not be considered because it is raised for the first time on appeal. Further, the argument lacks any merit even if it had been raised. Mr. Girley is not the subject of disciplinary proceedings for his faith-based statements during the interview. Mr. Girley appeared on the program as a lawyer discussing litigation, not as an ordained minister discussing his faith. He is the subject of disciplinary proceedings for his statements regarding the litigation.

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, Mr. Girley relies on older case law in which this Court issued public reprimands when attorneys impugned the integrity of a member of the judiciary. His 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, because a lesser sanction that does not include a brief period of suspension is an insufficient deterrent. A short suspension will better deter other lawyers

who may be tempted to immediately resort to social media to level baseless allegations of bias or corruption in response to an adverse order.

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. Mr. Girley presented no objectively reasonable basis for his statements impugning the integrity of the judiciary and a juror.

A. Mr. Girley impugned the integrity of Judge Weiss, the judges on the Fifth District Court of Appeal, and a juror.

"The public attribution of honest error to the judiciary" is not cause for professional discipline. *In re Sawyer*, 360 U.S. 622, 635 (1959). Mr. Girley did not attribute honest error to an adverse order. He characterized the presiding judge who entered the order (1) a thief looking for a way to 'cut the money' after a jury verdict; (2) a racist who allows lawyers to exclude African Americans from serving as jurors; and (3) a biased judicial officer who issues rulings because 'it makes financial sense' for those in power to maintain the status quo. Mr. Girley also suggested that the judges on the Fifth District had the same financial incentive to rule against black plaintiffs like his client. These accusations of racial bias and corruption impugned the integrity of Judge Weiss and the appellate court. Mr. Girley also

impugned the integrity of a juror by claiming that she feigned illness to escape jury duty.

Mr. Girley voiced these statements as part of a broader message that African Americans should not put their trust in a "sham" court system. To be clear, Mr. Girley's allegations were not limited to Judge Weiss or the three appellate judges later assigned to the appeal. But Mr. Girley's intent was to use Judge Weiss's ruling as the latest example of this "sham" court system. This Court has stated that the purpose of disciplining attorneys for bad faith statements directed at the judiciary 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. A plain reading of the Black Love United interview readily demonstrates that Mr. Girley sought to undermine public confidence in the judicial system, and his offered example of a corrupt judiciary was Judge Weiss's directed verdict.

Rule 4-8.2(a) prohibits a lawyer from making statements concerning the qualifications or integrity of a judge that the lawyer knows to be false or with reckless disregard as to its truth or falsity. In asserting that Mr. Girley

did not impugn the integrity of Judge Weiss and was speaking more broadly about the court system's treatment of minorities, the initial brief asserts that Mr. Girley "exercised great care not to mention Judge Weiss's name" during both interviews. (See IB:10). Case law establishes that once the bar provides proof that the lawyer made a statement impugning the integrity of a judge, the burden shifts to the respondent to provide an objectively reasonable basis for the statements. *The Florida Bar v. Jacobs*, 370 So. 3d 876, 883 (Fla. 2023). Therefore, before addressing the offered factual basis for Mr. Girley's statements, this brief will first address the initial brief's assertion that Mr. Girley did not specifically impugn the integrity of Judge Weiss. Resolution of this issue is necessary before addressing the offered factual basis for Mr. Girley's statements.

Mr. Girley appeared for two interviews specifically to discuss the jury's verdict in the civil litigation presided over by Judge Weiss and the judge's directed verdict. When he compared the judge's ruling to *Dred Scott* and accused the presiding judge of racial bias and corruption, it was very clear he was referring to Judge Weiss. He did not need to specifically reference the judge by name; he provided more than enough detail to clarify which judge he was referencing.

Further, even though Mr. Girley did not refer to Judge Weiss by name, several people close to him—all of whom were either currently or previously associated with his firm—filled in that missing detail repeatedly. Brooke Girley is Mr. Girley's daughter and of counsel with Mr. Girley's firm. She impugned the integrity of Judge Weiss on social media and repeatedly called for Judge Weiss's removal based on her characterization of the directed verdict. (R:714-22). Mr. Girley's son, who maintained the Facebook page of Mr. Girley's law firm, (R:475-76) posted on Twitter that "a white Judge stole justice from a black doctor," and included a photo of Judge Weiss. (R:734). The Girley Law Firm's Facebook page also shared a video of the Black Love United interview with a caption reading, "2.75 Million Reversed by Judge Weiss." (R:704). The moderators of the Black Love United interview, who were both former coworkers of Mr. Girley and close family members, referenced Judge Weiss by name and called for his removal from office during the interview. (See R:652). The Black Love United Twitter account also called for Judge Weiss's removal. (R:722).

It is disingenuous for Mr. Girley to claim that he was not impugning the integrity of Judge Weiss specifically, but instead speaking of the court system generally. It is true that Mr. Girley leveled broader criticisms against the court system; his manner of speaking repeatedly blurred the lines of

whether he was criticizing Judge Weiss specifically or offering a broader criticism of racial bias in the court system untied to any specific judge. But he made certain statements that unambiguously impugned the integrity of Judge Weiss, the Fifth District, and a juror, as part of a coordinated effort to label the judge racially biased and corrupt and to sow public distrust in the judiciary. The fact that his interviews also included references to statistics, trends, and legal studies does not allow Mr. Girley to redirect all focus to the broader topic of disparate treatment of minorities on a national scale. Because Mr. Girley impugned the integrity of Judge Weiss, the Fifth District, and a juror, the burden shifted to Mr. Girley to provide an objectively reasonable factual basis for his statements. *Jacobs*, 370 So. 3d 876, 883 (Fla. 2023).

B. Mr. Girley provided no objective factual basis for his statements accusing Judge Weiss and the Fifth District of racial bias and corruption, and he presented an insufficient factual basis for his statements impugning the integrity of a juror.

Mr. Girley provided no factual basis for his assertions that Judge Weiss and the Fifth District were racially biased or corrupt. Adverse rulings do not establish that a court is biased or has an improper motive. See *Thompson v. State*, 759 So. 2d 650, 659 (Fla. 2000); *Clark v. Clark*, 159

So. 3d 1015 (Fla. 1st DCA 2015). Therefore, Judge Weiss's directed verdict by itself does not establish bias or an improper motive.

Mr. Girley also took issue with the timing of the order, as it was entered after the jury awarded his client $2,750,000.00. This did not constitute either an abuse of authority or a basis to accuse the judge of racial bias and corruption. Judge Weiss previously reserved ruling on the defendant's motion for directed verdict regarding the race discrimination claim and the retaliation claim. This Court approved of this very practice of reserving ruling on a directed verdict the trial judge is inclined to grant:

> 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.

Ricks, 822 So. 2d 502, 506 (Fla. 2002) (quoting *Gutierrez v. L. Plumbing, Inc.*, 516 So. 2d 87, 88 n.2 (Fla. 3d DCA 1987) (citations omitted)).

The *Ricks* opinion is cited in Judge Weiss's directed verdict as support for his legal authority to grant the defendant's motion for directed verdict. (R:462). Even if Mr. Girley was unfamiliar with the binding case law authorizing and encouraging the practice, he was placed on notice of it when Judge Weiss issued the directed verdict. This authorized practice

ensures that an appeal either results in an affirmance—which it did in this case—or in reversal with directions to reinstate a jury verdict. Appellate court rulings have repeatedly encouraged this practice to promote judicial economy. 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).

To be clear, Mr. Girley could criticize the process in which the judge granted the motion without setting the matter for hearing post-trial or asking for further briefing by the parties. He could have more generally criticized the authorized practice of trial judges reserving ruling on motions for directed verdict. But Mr. Girley did not make these assertions; he instead accused the presiding judge and the Fifth District of bias and corruption. Mr. Girley could disagree with the judge's decision, state his intent to appeal, and explain the material evidence he presented at trial that should have precluded a directed verdict. He did all those things during the Black Love United interview. But he also violated bar rules by adding in accusations of racial bias and corruption, based on the sole fact that Judge Weiss reserved ruling on a directed verdict and entered an adverse final order post-trial.

Though Mr. Girley and his client were understandably upset that the large verdict had been taken away one week after trial, the timing of the order is not an objectively reasonable factual basis to accuse a judge of racial bias and corruption. A delayed ruling on a potentially meritorious

directed verdict prevents the added stress, delay, and expense caused by remand in the event of a successful appeal. Notwithstanding Mr. Girley's understandable frustration, he has no more license to baselessly attribute such ill intent to a judge's ruling than any other member of the bar who receives an adverse ruling.

Members of the bar are viewed by the public as having unique insights into the judicial system. *Ray*, 797 So. 2d at 559 (Fla. 2001). Mr. Girley represented the plaintiff in the civil litigation; his audience, who also knew him as a pastor, would reasonably rely on his representations regarding what took place in the litigation and how the court system works. Whether Mr. Girley is stating an assertion of fact or a mixed statement of fact and opinion, he is not given First Amendment protection for baseless statements impugning the integrity of the presiding judge and the appellate court. 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).

Mr. Girley's role as plaintiff's counsel would naturally give him first-hand knowledge of the litigation, and he used that vantage point to make baseless accusations against Judge Weiss. He does not escape discipline by labeling his accusations of racial bias and corruption as his personal opinion. This Court rejected application of a subjective "actual malice"

standard in evaluating a lawyer's statements impugning a member of the judiciary. Applying this standard in 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." *Ray*, 797 So. 2d at 559 (Fla. 2001) (quoting *In re Holtzman*, 78 N.Y.2d 184 (N.Y. 1991)).

Further, baseless allegations leveled against Judge Weiss and the Fifth District do not transform into legitimate criticism simply because Mr. Girley contends that empirical studies show that racial bias in the court system exists. It is also immaterial that Mr. Girley testified that he witnessed this racial bias during his 14 years as a lawyer. No one is disputing that. But none of this supports the assertions that Judge Weiss and the Fifth District are racially biased or corrupt. The referee tried to explain the limited scope of the issue to Mr. Girley during trial when she sustained an objection to testimony regarding racial profiling Mr. Girley observed as a public defender. The referee clarified, "I think you are – you're going way in depth when you are here and now with this case and what's going on in this case." (T1:135). The initial brief continues this tactic of going in depth on a broad scope issue and avoiding any discussion of the narrow issues regarding Dr. Rop's case and Judge Weiss's ruling. Mr.

Girley may voice his broad criticisms regarding racial bias in the court system and he did so. But it is no defense to identify his perspective regarding broad scope opinion statements as though they justify the disparaging statements impugning the integrity of a specific judge and a specific court.

Mr. Girley did not inform his audience that the judge's order was an authorized practice—even though it is not a practice he believes was appropriate based on the strength of his client's case. Such nuance would likely diminish the more inflammatory narrative Mr. Girley and Ms. Girley propagated in efforts to gain national attention. They alleged that a judge unjustly overturned a jury verdict on his own and thereby stripped away justice from a black plaintiff simply because the white judge did not approve of a jury vindicating the plaintiff's rights. Mr. Girley told an audience he personally classified as "unsophisticated" that motions in limine, motions for summary judgment, and motions for directed verdicts are "land mines" to unfairly and unjustly strip away a civil rights lawyer's ability to present his client's case in a jury trial. (See R:615-16). He told them that *Dred Scott* has never been overturned, which is pedantry justified by the meaningless distinction that this case was "superseded" by constitutional amendment as opposed to "overturned" by subsequent case law. These misleading,

inflammatory statements were not offered based on an objectively reasonable factual basis, but to propagate a false narrative to attract media attention. Because Mr. Girley did not have an objective factual basis for his statements impugning the integrity of Judge Weiss, he violated Rule 4-8.2(a).

Regarding his claim that the Fifth District has a financial incentive to rule against the large jury verdict, Mr. Girley similarly offered no factual basis. Instead, he only stated that there are no black judges on the Fifth District. (T1:146). But Mr. Girley's perceptions regarding the races of appellate judges do not support a claim that the court has a financial incentive to rule against his client because of his race. The initial brief offers no factual basis supporting this statement, which again violated Rule 4-8.2(a).

Mr. Girley also impugned a member of the jury by stating that she feigned sickness to escape jury duty. (See R:635). Unlike his statements regarding the judge and the appellate court, Mr. Girley offered a basis for his statement, though it amounts to nothing more than conjecture on his part. Specifically, after he asserted as fact that the juror was not sick and simply did not want to be there, he later backtracked on the statement during the interview. Mr. Girley clarified that he should have prefaced his

statement with “I think,” because he did not actually know. (R:655-56). He only recalled that during the jury selection, she had childcare issues. *Id*. Therefore, when she called in and claimed sickness, he suspected it was more about the childcare issues than sickness. *Id*. At trial in the disciplinary proceeding, Mr. Girley stated that based on the juror’s statement during the jury selection process, he made a “reasonable inference” that the juror was lying, though he did not know for sure. (T1:159-61).

Mr. Girley’s factual basis for calling this juror a liar was plainly insufficient. He stated that he recalled the juror referenced that her husband would have to “call in sick” if she was to serve on the jury. (T1:159-60). Mr. Girley then made the inference that the juror was lying when she called in sick. But his suspicions do not allow him to level these statements against a juror as conclusive fact. Notably, when Mr. Girley is accused of making misrepresentations of fact, he recognizes the reputational damage this could cause him:

> I have no credibility with my congregants, with my brothers and sisters in the faith, if they genuinely believe that I’m a liar. And essentially, I stand accused in this community right now of being a liar, and that’s the thing that has damaged me, hurt me, confused me, perplexed me, and concerned me the most.

(T1:166-67).

Unfortunately, in this case, Mr. Girley did not appreciate the potential harm he would inflict on others by calling a juror a liar and calling a judge and a court racially biased and corrupt. Further, notwithstanding Mr. Girley's arguments to the contrary, he has been given due process to explain the factual basis for his statements. But the juror, the judge, and the court have no ability to defend themselves against Mr. Girley's accusations during interviews. He violated Rule 4-8.2(a) when impugning the integrity of a juror. The plain language of the rule is not limited to statements concerning the qualifications and integrity of a judge, but also includes statements concerning a "mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office."

Further, the referee found that Mr. Girley violated the Oath of Admission to The Florida Bar, particularly the portion of the oath in which he solemnly swore to "maintain the respect due to courts of justice and judicial officers." Mr. Girley's repeated violations of Rule 4-8.2(a) establish that he violated this portion of the Oath.

C. Mr. Girley's statements during the two interviews also violated Rules 3-4.3, 4-4.1(a), and 4-8.4(d).

Though Mr. Girley's repeated violations of Rule 4-8.2(a) constitute the most egregious misconduct at issue, the referee found that Mr. Girley's conduct also violated several other bar rules. Under Rule 4-4.1(a), a lawyer must not knowingly make a false statement of material fact or law to a third person in the course of representing a client. Mr. Girley represented Dr. Rop in the civil litigation, and he continued to represent Dr. Rop at the time of the interviews, as he had announced his intent to appeal. Therefore, the statements he made during the two interviews were in his capacity as a lawyer representing a client.

He made false statements of fact, as noted *supra*, regarding his baseless statements regarding judges and a juror. Further, he misrepresented the law. He told an audience that *Dred Scott* has never been overturned. (R:644). At his sworn statement, Mr. Girley refused to acknowledge that *Dred Scott* is no longer valid law because it was superseded by the 13th, 14th, and 15th Amendments to the Constitution. (R:536-38). But Mr. Girley's refusal to acknowledge this incontrovertible fact does not make his false statement of law any more truthful.

Mr. Girley stated that his audience was unsophisticated when justifying the reason he did not offer more complete answers regarding

applicable facts and law. Anyone hearing a lawyer state that a piece of case law has "never been overturned" would naturally assume that the case law was still valid. Mr. Girley clearly intended to convey that message. He referenced language from the opinion stating that historically, black people were considered an inferior race with "no rights which the white man was bound to respect." *Dred Scott*, 60 U.S. at 407 (1857). After referencing this language, Mr. Girley stated that this portion of the opinion "answers and it speaks to everything that we're talking about right now. At the end of the day, our rights are contingent upon whether or not white people choose to respect." (R:644).

Mr. Girley knows or should know that the *Dred Scott* opinion has not been valid law since 1868. The bar is not suggesting that Mr. Girley cannot argue that constitutional amendments, the Civil Rights Act, and other laws have not sufficiently redressed disparate treatment of minorities in the court system. But he cannot suggest to an audience—in his capacity as the lawyer for Dr. Rop—that *Dred Scott* is still valid law that applied in the litigation, as though there is some established legal tenet from the U.S. Supreme Court that Judge Weiss relied on to blatantly discriminate against a black plaintiff. Though Mr. Girley may have offered a technically accurate statement that the case has never been "overturned," because it was

superseded instead, his statement violated Rule 4-4.1(a). This Court held that "[p]artially true but misleading statements as well as omissions can constitute a misrepresentation, in violation of Bar Rule 4-4.1." *The Florida Bar v. Arugu*, 350 So.3d 1229, 1234 (Fla. 2022).

Mr. Girley committed another violation of Rule 4-4.1 during his second interview, when he referred to motions for summary judgment and motions in limine as "land mines" used by defendants to prevent a plaintiff from presenting his or her case at trial. (ROR:12-13). Again, he was not presenting an opinion that facially neutral rules of civil procedure have a larger impact on African Americans; he asserted that the rules themselves are "land mines." His statements repeatedly convey that the way rules of law are written were "back door" mechanisms to discriminate, so that he could portray the judicial system as a "false system" put in place to "undermine black people and their cases" and "window-dress." (ROR:4). The referee correctly found that Mr. Girley "mischaracterized the civil process and the rules of procedure." (See ROR:6). His misstatements of fact and law also violated Rule 3-4.3 (misconduct and minor misconduct), which prohibits a lawyer from committing any act "that is unlawful or contrary to honesty and justice," regardless of whether the act is committed in the course of the lawyer's relations as a lawyer or otherwise.

Further, Mr. Girley's conduct was prejudicial to the administration of justice in violation of Rule 4-8.4(d). The purpose of his misleading statements of law and fact was to sow distrust in the legal system. He labeled the legal system a "sham" and a "shell game" as he told his listeners that "[w]e cannot put our trust in these false systems." (ROR:9). Mr. Girley leveled allegations of racism and corruption to inflame the passions of his audience and encourage them to view the court system with mistrust and disdain. This was prejudicial to the administration of justice.

II. The First Amendment does not shield Mr. Girley from discipline for his violations of four bar rules and the Oath of Admission.

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.

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)). As explained *supra*, since Mr. Girley made disparaging statements regarding judges and a juror, it was his burden 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). He did not meet this burden.

Most state supreme courts throughout the country that have addressed the issue have 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, Mr. 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:22-23). 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).

The initial brief also argues that the referee's report runs afoul of *In re Sawyer*, 360 U.S. 622 (1959). But the *Sawyer* opinion made a clear factual distinction that "Petitioner did not say Judge Wiig was corrupt or venal or stupid or incompetent." *Id*. at 635. Instead, that case involved "[t]he public attribution of honest error to the judiciary," which the court found was no cause for professional discipline. *Id*. There is no reasonable reading of Mr. Girley's statements suggesting that he considered the directed verdict "honest error," to put it mildly.

III. Mr. Girley never raised an equal protection argument before the referee, and cannot now argue that the bar failed to address an issue never raised. Further, the examples offered in the initial brief do not involve statements by counsel in a pending case attacking the integrity of a presiding judge.

The equal protection argument in the initial brief was not presented to the referee. Mr. Girley did not argue as an affirmative defense that the disciplinary proceeding violated the 14th Amendment. (R:36-39). He did not assert at any point during trial a "factual, as-applied challenge" which his own brief stipulates "necessarily requires the development of a factual record for the court to consider." (IB:25 (quoting *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009)). Despite the complete absence of this issue in the record on appeal, the initial brief nevertheless asserts that "[t]he Bar's failure to address them [i.e. statements by other members of the bar] like the Respondent is evidence of an equal protection violation, and thus is unconstitutional." (IB:28).

The bar was never placed on notice that Mr. Girley intended to argue that certain politicians, who are also members of the bar, leveled similar disparaging statements regarding a trial in New York but were not disciplined by the bar. (See IB:26-27). The argument was not raised and 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 Mr. 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 Mr. 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 amicus brief filed by the American Civil Liberties Union (ACLU) on June 24, 2024 raises the same equal protection argument in support of Mr. Girley. 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). The bar cannot be tasked with distinguishing comments by others for the very first time on appeal.

Further, Mr. Girley leveled statements of fact and law regarding civil litigation in which he personally represented the plaintiff. His role as counsel could only amplify the weight of his statements, as listeners understood his direct involvement of the civil case from its inception. This

Court has regularly disciplined lawyers representing parties when they impugn the integrity of presiding judges in *Ray*, *Patterson*, and *Jacobs*. Mr. Girley's examples of commentary by elected officials regarding a trial taking place in another state entirely are not comparable. These statements may be more appropriately characterized as opinion statements made in the political arena.

IV. Mr. Girley was afforded due process in the disciplinary proceeding.

A. The formal complaint placed Mr. Girley on notice of the misconduct at issue.

The initial brief asserts that the bar did not provide fair notice of the charges. The argument is mostly based on the bar's objections to interrogatories and Mr. Girley's assertions that the bar waited until closing argument to identify the statements at issue. (See IB:30-31). This Court should review the formal complaint, as it sufficiently apprised Mr. Girley of the conduct at issue. (See R:8-15). The complaint referenced Mr. Girley's claim that Judge Weiss found a way to "cut the money" to ensure that his clients do not get paid. (R:10). It referenced Mr. Girley's statement that decision-makers, including the Fifth District, will not right any wrongs because "it makes financial sense to them to keep us in a place where we are beholden to them." (R:11). It referenced Mr. Girley's repeated

accusations that judges permit his opposing counsel to whiten the jury. *Id*. It referenced his misrepresentation of fact that he personally knew that a juror feigned illness to escape jury duty. *Id*. It referenced Mr. Girley's statement referring to certain motions as "land mines" used by other lawyers to prevent his clients from presenting their case at trial. (R:12).

The allegations in the complaint placed Mr. Girley on sufficient notice of the conduct at issue. See *The Florida Bar v. Committe*, 916 So. 2d 741, 745 (Fla. 2005) ("There is no requirement for the Bar to connect every alleged item of misconduct to a specific rule violation. The Bar's complaint specifically addressed what conduct it relied upon to show Committe violated his professional obligations.").

To the extent Mr. Girley sought the same information in interrogatories, the bar's objections to the interrogatories did not prejudice Mr. Girley in any way. The bar did not conduct a trial by surprise, and Mr. Girley's argument is belied by a plain reading of the formal complaint.

B. The referee's exclusion of scholarly articles from evidence was not a denial of due process.

As stated *supra*, Mr. Girley is not facing discipline for voicing his beliefs that there is disparate treatment in the court system. He is subject to discipline for impugning the integrity of a trial judge, an appellate court, and

a juror. He is subject to discipline for misrepresenting the law to third persons and conduct prejudicial to the administration of justice by urging these third persons not to put their trust in the legal system. Scholarly articles analyzing empirical research on a wide scale do not support Mr. Girley's claims that Judge Weiss and the Fifth District issue rulings based on racial bias and corruption. The issues in this case involved one specific matter, *Baiwyo Rop v. Adventist Health System*, Case No. 2017-CA-009484-O (Fla. 9th Cir. Ct. 2017). The referee correctly limited Mr. Girley's testimony and documentary evidence, because this case has never been about whether Mr. Girley has an educated and informed opinion that racial bias exists. This case is about the objective factual basis for Mr. Girley's out of court statements of facts and law based on his status as plaintiff's counsel. The referee properly restricted Mr. Girley's efforts to expand this disciplinary proceeding into a discussion of equal justice rights throughout the country.

C. The referee correctly held that Judge Weiss's testimony during the guilt phase of the disciplinary proceeding was not material to the bar's case or Mr. Girley's defense.

The referee entered a protective order preventing Mr. Girley from calling Judge Weiss as a witness at the guilt phase of the disciplinary proceeding. (R:457-58). The initial brief asserts that the protective order

violated Mr. Girley's due process right to confront witnesses. (IB:34). But 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 not material to the bar's complaint or to any defense raised by Mr. Girley, who was not privy to the judge's internal thought processes when he made his 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 Mr. Girley after he impugned the integrity of Judge Weiss could not have formed his 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 against Mr. Girley. (IB:36-37). In support, the brief cites to Judge Weiss's deposition testimony, which is not part of the record on appeal. Further, the issue is immaterial. Mr. Girley's remedy for an alleged discrepancy between the judge's deposition testimony and the bar's interrogatory

answer would be a motion before the referee. It was not related to any material issue at trial that would have necessitated Judge Weiss's testimony.

Further, Mr. 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.

V. Mr. Girley did not raise any argument at trial that the disciplinary proceeding violates his religious freedom. Further, Mr. Girley's statements at issue were not faith-based nor were they part of a religious service.

Like the initial brief's argument that other members of the bar have not been disciplined for similar misconduct, the argument that the disciplinary proceeding violates Mr. Girley's religious freedom was not presented to the referee. He 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.").

Even if this Court were to further consider the issue, Mr. Girley's statements do not constitute religious speech merely because he chose to voice these statements before a church group. The purpose of the church group was for black Christian couples to strengthen their marriages through a shared biblical perspective. (T1:142). Mr. Girley is an ordained minister, but his interview with Black Love United had nothing to do with its primary purpose and was solely focused on discussion of the civil litigation. Mr. Girley explained that his appearance for the interview was supposed to be educational and informative, because people want to know how the court system works. (R:489-90). The interview was advertised on social media for the specific purpose of gaining national attention for the civil case. (R:704). Mr. Girley's statements do not become religious expression merely because he occasionally referenced his faith during the interview. Accusing a judge of finding ways to "cut the money" and other judges of having a financial incentive to rule against others are not expressions of faith. Contrary to the assertion in the initial brief, Mr. Girley is not the subject of disciplinary proceedings for stating, "This is something that only God will have to resolve." (IB:39).

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

Mr. Girley is more than 60 years of age and has practiced law without prior discipline since 2007. The bar is not contending that he should receive a rehabilitative suspension or be required to do more than attend the usual workshop on professionalism.

The bar maintains that, in this age of worldwide access on the internet to statements that impugn judges and the judiciary, the conduct in this case warrants more than a public reprimand. But it maintains a short non-rehabilitative suspension should be sufficient both for Mr. Girley and as a deterrent to others.

A short suspension is needed to deter lawyers who wish to vent their anger and disappointment in a judicial ruling. Lawyers need to understand that they cannot ethically choose to lash out to the public in this fashion – without objective evidence. It has become too easy today to send impugning allegations to the entire world, and it can be done by the click of a button on the lawyer's computer.

Lawyers are given broad procedural rights to seek rehearing or reconsideration for their clients when they receive an adverse ruling. They often can attend a hearing to present a reasoned argument to the judge. Thereafter, if still aggrieved, the Florida Constitution and the Florida Rules

of Appellate Procedure give lawyers the right to seek redress from all final orders and from a wide array of nonfinal orders. Even at the end of the appeal, they can seek rehearing – and the courts are generally quite understanding if those motions reflect the lawyers' frustration in a loss.

This is not a case where Mr. Girley voiced his unsubstantiated beliefs in relative privacy. He did not—in his frustration upon receiving the order—turn to his law partner or his assistants to suggest that he thought Judge Weiss may have directed a verdict based on racial prejudice. The practice of law is stressful. The bar is not maintaining that this Court needs to police every negative statement that lawyers make when they lose a case they believe they should have won.

But here, rather than take the steps and the time necessary to clear his mind of his initial anger and frustration at the ruling, and then proceed to use all of the avenues the law made available to him to challenge that ruling, Mr. Girley quickly chose to go to a public forum to make unsubstantiated claims about Judge Weiss, a juror, and the appellate court, and to encourage peaceful public protest as the method to change his client's outcome.

That method not only was ineffective for his client; it created some level of risk for the judge. In his capacity as an officer of the court, Mr.

Girley attended a forum that provided him a degree of legitimacy to express his thoughts, and in this forum he argued that this ruling was evidence that the judicial system was a “sham.”

To be clear, the bar recognizes there is ample room for legitimate debate about whether statutes protecting civil rights are currently sufficient to fulfill the goals of the amendments added to the U.S. Constitution at the end of the Civil War. There is also room for legitimate debate about whether binding judicial precedent addressing civil rights issues should be modified or overturned. The rights of the people, including Mr. Girley, to peacefully protest for changes to the current fabric of the rule of law—including protests outside this Court–are rights that all courts should protect.

But when a judge makes a ruling simply seeking to obey the rule of law – a rule the judge may personally believe is not the best rule – it is unacceptable for lawyers regulated by this Court to publicly impugn the integrity of the judge in the absence of objective evidence that he or she intentionally disobeyed the rule of law. Such public statements do not assist the client, and they can harm both the people impugned and, perhaps most important, they can damage the public’s perception of the third branch of

government as a legitimate forum in which to achieve peaceful resolution of disputes.

It is for these reasons that the bar seeks this short suspension in this case. The applicable standards and case law support this sanction.

A. The applicable standards:

The referee found that Standard 7.1 (deceptive conduct or statements) applied to the conduct at issue. Under subsection (b) of this standard, 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 referee found that Mr. Girley's statements undermined public trust in the court system and caused substantial injury to Judge Weiss, who was harassed and received threats. (ROR:20).[5] The evidence supports these findings.

The initial brief offers a conclusory assertion that this standard does not apply, because comments to the rule involve more egregious behavior.

[5] Though Judge Weiss did not testify during the guilt phase, he testified during the sanction phase regarding the death threats he received following Mr. Girley's two interviews, as this testimony was relevant to the appropriate sanction. (See generally T3:9-25).

(IB:40). Simply put, if the facts in this case involved more egregious behavior, the conduct would not warrant a short suspension.

B. The aggravating and mitigating circumstances:

The presence of aggravating and mitigating circumstances probably does not play a major role in this case. All of these factors were supported by evidence, but the aggravating factors are not extreme, and the mitigating factors tend to offset the aggravating factors.

The referee found three aggravating factors applicable:

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

(ROR:20-21).

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

- Absence of a prior disciplinary record under Standard 3.3(b)(1); and
- Character or reputation under Standard 3.3(b)(7).

(ROR:21).

Mr. Girley argues that he did not engage in a pattern of misconduct. The initial brief asserts that Mr. Girley's criticisms of the court system occurred over a little more than two weeks. (IB:43). This may bear relevance as to the weight afforded to this finding, but the fact that Mr. Girley's misconduct spanned a matter of two weeks rather than a period of months or years does not negate the existence of a pattern. This is not a case where Mr. Girley made a single impugning statement and has recognized that it was poor judgment to have done that. 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). Mr. Girley's misconduct was isolated to a brief period of time, but it was not an isolated instance. He made several statements during interviews impugning the integrity of multiple individuals and misrepresenting the civil rules and facts of the case, and he backed away from none of them. The referee's findings are not clearly erroneous.

C. Case Law:

In recommending a 30-day suspension, the referee's report relied on several opinions of this Court. (ROR:16-17). 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.

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 simply bear little resemblance to this case. (See IB:40-41). *The Florida Bar v. Draughon*, 94 So. 3d 566 (Fla. 2012), involved a lawyer who transferred real property to himself without consideration to avoid an obligation to a

vendor and received a greater sanction. *The Florida Bar v. Richardson*, 574 So. 2d 60 (Fla. 1990), involved a lawyer who overbilled clients and received a rehabilitative suspension. These cases do not support a claim that the referee was too harsh in the recommended sanction for this case.

The initial brief cites cases involving public reprimands, but these cases were decided before the policy of stronger sanctions was established, and before the prevalence of social media heightened the risk that a lawyer's imprudent reaction to an adverse ruling could be immediately disseminated to a national audience. See *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). Further, two of these cases (*Cerf* and *Tropp*) contained dissenting opinions stating that the misconduct warranted a stronger sanction.None of this case law establishes that public reprimand is the only appropriate sanction for a case today, or that the referee's recommendation is out of line with what is needed today. 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 Mr. 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 Brooke Girley, Counsel for Respondent, at brooke@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 12,825 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.

Mark Lugo Mason, Bar Counsel