

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Supreme Court Case
No. SC22-1055

IN RE:

PETITION FOR REINSTATEMENT OF
NORWOOD SHERMAN WILNER,

The Florida Bar File
No. 2023-00,072 (2A) NRE

Petitioner.

_____ /

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Complainant is referred to as The Florida Bar or as the Bar.

Respondent Norwood Sherman Wilner is referred to as Mr. Wilner.

Bar exhibits are referred to by TFB-Ex. followed by the exhibit number.

The documents comprising the Index of Record are referred to by the applicable tab number (e.g., Tab#1). The Report of Referee is referred to as (ROR:).

There is a hearing transcript that has been filed with this Court contemporaneously with this Initial Brief. It contains all testimony and argument during the reinstatement hearing conducted February 13, 2023, and is cited as T: followed by the applicable page number(s).

NATURE OF THE CASE

The Bar seeks review of a Report of Referee that recommends reinstatement of Norwood Sherman Wilner to membership in good standing with The Florida Bar. Mr. Wilner was previously suspended from the practice of law for 91 days by order of this court in *The Florida Bar v. Wilner*, 2022 WL 619933, SC21-373 (Fla. Mar. 3, 2022). A lawyer suspended from the practice of law for more than 90 days must file a petition for reinstatement to membership in good standing under Rule 3-

7.10. The lawyer must produce clear and convincing evidence of all elements of rehabilitation, including strict compliance with this Court's order of suspension. See Rule 3-7.10(f)(3)(A).

The Bar opposed Mr. Wilner's petition on two grounds. First, the Bar asserted that Mr. Wilner failed to strictly comply with Rule 3-6.1 in his capacity as an employee of a law firm during his suspension period. This rule required him to remain under the supervision of a qualified supervising lawyer actively engaged in all aspects of Mr. Wilner's employment. Second, the Bar asserted that after this Court entered its order of suspension, Mr. Wilner's firm disseminated a misleading closeout letter to clients that contained misleading statements regarding the underlying misconduct leading to his suspension. The referee found that Mr. Wilner's compliance during his suspension "wasn't perfect," but did not warrant denial of his petition for reinstatement. This brief challenges the referee's legal conclusions on both issues.

STATEMENT OF THE CASE AND FACTS

- I. Mr. Wilner was suspended from the practice of law for 91 days for filing thousands of lawsuits in state and federal court without adequately informing himself of the facts of his clients' cases.**

Mr. Wilner's 91-day suspension from the practice of law was the result of a report of referee accepting a consent judgment. (Tab#1, Ex.C). Specifically, Mr. Wilner was the subject of a judicial referral from the Middle District of Florida regarding his conduct during lengthy tobacco litigation. *Id.* In earlier litigation, he had unsuccessfully pursued a class action lawsuit, but this Court ordered the class be decertified in December 2006. *Id.*; see generally *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). This Court's ruling afforded the former members of the class action one year from the issuance of its mandate to file individual complaints. *Id.* Just before this deadline lapsed, Mr. Wilner filed approximately 3,700 lawsuits in state and federal courts alleging personal injury, wrongful death, and loss of consortium claims related to tobacco use. *Id.* To put this into perspective, if Mr. Wilner worked 12-hour days for a full year without a day off, he would be able to spend roughly 71 minutes on each case for the year.

The judicial referral included findings that Mr. Wilner was not authorized to file suits on behalf of many of the plaintiffs. (Tab#1, Ex.C). Some did not meet the basic requirements to file suit based on this Court's ruling in *Engle*, some were either non-smokers or never lived in Florida, and over 500 plaintiffs died before their complaints were filed. *Id.*

Hundreds of federal cases were eventually dismissed by stipulation of the parties because the filing of such actions was the result of either clerical errors by Mr. Wilner's firm or due to his filing of duplicate state actions. *Id.*

Even after these dismissals, roughly 2,900 federal actions remained pending, and Mr. Wilner falsely represented to the court that within the last six months, these remaining plaintiffs had expressed their willingness to proceed with their claims. *Id.* Later, many of these remaining cases were dismissed because a special master found that hundreds of plaintiffs were deceased, some deceased plaintiffs had no survivors, other plaintiffs were living when wrongful death actions were filed on their behalf, and some wrongful death actions were time barred. *Id.* Eventually, the tobacco companies and remaining 415 plaintiffs reached a settlement, but the special master recommended disgorgement of attorney's fees and costs due to Mr. Wilner's and his co-counsel's failure to inform themselves of the facts of their clients' cases. *Id.* In December 2016, the court held a sanction hearing and required disgorgement of over \$9,000,000.00 in attorney's fees. *Id.* Following a motion for reconsideration, the court reduced this amount to \$4,329,668.43 and Mr. Wilner paid a 50% share of the sanction. *Id.*

This Court adopted the referee's findings that the above misconduct by Mr. Wilner in his litigation of tobacco cases following this Court's decision in *Engle* violated Rules 4-1.1 (competence), 4-1.3 (diligence), 4-1.4 (communication), 4-3.1 (meritorious claims and contentions), 4-3.3 (candor toward the tribunal), and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). *Id.*; see also *The Florida Bar v. Wilner*, 2022 WL 619933, SC21-373 (Fla. Mar. 3, 2022).

II. During his suspension, Mr. Wilner was not adequately supervised as a non-lawyer employee of a law firm, and his firm sent a misleading closeout letter to clients downplaying the misconduct leading to his suspension.

After the end of the suspension period, Mr. Wilner filed a Petition for Reinstatement to Membership in Good Standing in this Court in August 2022. The matter was referred to the same referee who recommended Mr. Wilner's 91-day suspension based on the consent judgment. Mr. Wilner testified at the final hearing, explaining that following this Court's ruling in *Engle*, the federal court found fault with the way Mr. Wilner handled cases. (T:17). He disagreed with the finding at the time, but he "hope[s] there are ways to avoid that" in the future. *Id.* He continued to express his claimed remorse in the same manner, stating as follows:

I'm sorry that this whole thing happened, and if the court was over -- was overstressed or felt we didn't do it right, then I accept that.

(T:17-18). He characterized the court's role in making this determination "just like the baseball and football, they call them like they see them."

(T:18). He stated that the problems in federal court occurred because his firm filed the cases with a different algorithm. (T:26). His August 15, 2022 Petition for Reinstatement also states that "if he erred, he erred on the side of the client, to protect the client's interests." He believed this is an accurate statement, because his "misfilings" protected clients, but he believes the federal court stated that Mr. Wilner had a greater duty to protect the court from the "misfilings." (T:47). When asked if he was minimizing his misconduct—particularly his false statement to the court that the remaining plaintiffs had recently expressed their willingness to proceed with their claims—he only stated that he protected clients and "I don't think I ever misrepresented anything." (T:48-50).

Mr. Wilner explained that following his suspension, he sold his law firm to Howard Acosta, an experienced tobacco lawyer he has known since the early 1980s. (T:21-22). The firm was renamed Jax Litigation Group, P.A. (T:21-22; TFB-Ex.1, 3). Mr. Acosta paid \$100.00 for the purchase of the firm, there were no tangible changes to the firm since he became

owner, and he classified his role as “kind of a silent owner.” (T:84). Specifically, since Mr. Wilner’s suspension period was 91 days, Mr. Acosta explained that he did not believe his role was very important, and the only real purpose behind the ownership change was to put his name on the letterhead. (T:84-85). Mr. Acosta’s name was not included on the letterhead. (TFB-Ex.1). Mr. Wilner stated that he intends to purchase the firm back from Mr. Acosta if he is reinstated, and the purchase agreement contains a repurchase option allowing him to buy the firm from Mr. Acosta for \$200.00. (T:33, 85; TFB-Ex.2). Two lawyers worked for this new firm during Mr. Wilner’s suspension, and Mr. Acosta’s supervisory role was remotely conducted by speaking on the phone with Mr. Wilner and the firm’s office manager, Tracy Thompson, once every week or two. (T:67).

When Mr. Wilner notified his clients of his upcoming suspension in a closeout letter, he portrayed the events as a disagreement with the Bar that he chose to settle. (T:39-41). Two samples of this form letter were entered into evidence, and they state in pertinent part as follows:

Mr. Wilner has recently agreed to settle a long-running disagreement with the Florida Bar regarding his handling of thousands of tobacco cases dating from 1995. The enclosed order requires Mr. Wilner refrain from practicing law for 91 days and until reinstated. Mr. Wilner accepted this restriction in place of continuing to spend time and money to argue the issue. The Bar contended that Mr. Wilner should not have filed

the many tobacco cases when he did, and he has said he was honor-bound to protect his clients through timely filing.

(TFB-Ex.1, pg.1, 4).

He believed he was entitled to portray events in this manner because one disciplinary case against him was closed with no sanction. (T:41-42, 61). The closeout letter also stated that Mr. Acosta would be the new owner of the firm, but it did not advise clients of their option to seek new counsel. (T:44-45). Mr. Wilner believed there was no need to do so, because clients always have the right to obtain new representation, and there was no change in who was representing the client, only a change in ownership. *Id.* Regarding this letter, Mr. Wilner explained that he complied with his duty not to mislead the client. (T:59). He also stated that client retention was not a concern at all, but he did not want clients to panic because the same lawyers were handling their cases. (T:60-61).

During his suspension, he characterized his role in this new firm as very limited; he stated that he would come into the office twice a week and discuss broad strategy rather than individual cases. (T:23-24). Ms. Thompson similarly testified that Mr. Wilner visits the office once or twice a week for about an hour to check on how everybody is doing. (T:67). Mr. Wilner has no specific job title and—based on his limited contributions to the firm—characterized his suspension period as “kind of a sabbatical in a

way.” (T:23-24). Mr. Acosta stated that Mr. Wilner would only visit the office occasionally but was available to serve as an advisor to the two lawyers working for Jax Litigation Group. (T:82).

Mr. Acosta is responsible for supervising Mr. Wilner under Rule 3-6.1. (T:24-25, 79). But Mr. Acosta primarily works in St. Petersburg and does not want to work in Jacksonville. (T:33). In fact, Mr. Wilner stated that Mr. Acosta’s role “was not to engage in case litigation in Jacksonville,” and this is the reason Mr. Acosta was not listed on the letterhead of the Jax Litigation Group, on the firm’s website, or in the firm’s telephone directory. (T:51). Mr. Wilner also stated that he was not aware that the firm’s telephone directory still listed him as an employee for the entire duration of his suspension, claiming that “it was an error that my otherwise error-free staff had created.” (T:52). Mr. Wilner would chat with Mr. Acosta, but noted that the firm’s staff “run the firm very well and the rest of my staff, the Jax Litigation Group staff is excellent.” (T:25). The lax supervision by Mr. Acosta was further described by Mr. Wilner in an earlier deposition as follows:

Well, he knows me for many years, and he knows, you know, what I contribute and understands, as we’ve talked since the last spring, since the beginning of this, my role is to advise and consult. And so he understands that. And we talk about that same group of subjects.

(TFB-Ex.6, pg.20).

Therefore, since Mr. Wilner stated that he did not do much work, Mr. Acosta did not have much to supervise. (T:52). Their contact was limited to about once a week and consisted of brief updates. (T:52, 81). Ms. Thompson similarly testified that “[n]obody has to supervise anybody,” because everyone knows their job. (T:73). Mr. Acosta explained that in his practice, it is rare for clients to come to the office, and “I think it’s the same with his firm, or my firm now.” (T:80). When asked whether this was speculation on his part or personal knowledge, Mr. Acosta explained that he based the assumption on his understanding that there is little reason for clients to come to the firm, and because he has visited Mr. Wilner at his office many times over the years. (T:85-86).

Mr. Wilner stated that as a suspended lawyer working for a law firm, he submitted quarterly reports to the Bar pursuant to Rule 3-6.1 which included affidavits that seemed to overstate his limited contribution to the law firm. (T:28-29). He drafted the affidavit with Mr. Acosta, and the office manager, Tracy Thompson, filed a late submission of the most recent quarterly report. (T:29-30). Specifically, Mr. Wilner did not timely submit a quarterly report for December 31, 2022; the report was not submitted until February 6, 2023. (T:94-95). When he discovered the report was not

timely submitted, Mr. Wilner explained that he fixed the issue within the day. (T:30). He was not aware the report had not been filed because, “I delegated that to my good and faithful staff,” particularly Ms. Thompson. (T:53-54). Ms. Thompson similarly stated that the late filing was an error on her part. (T:71). Mr. Wilner’s signature was not on the quarterly report. (T:74). Ms. Thompson stated, “I feel personally like it’s my fault, but obviously it’s not, it’s the person supervising me.” (T:75).

III. The Report of Referee found that Mr. Wilner’s compliance with this Court’s order of suspension “was not perfect,” but nevertheless recommends Mr. Wilner’s reinstatement to membership in good standing with The Florida Bar.

At hearing, the referee found that Mr. Wilner met the burden for reinstatement, “although his compliance wasn’t perfect” and although she did not think his decision to downplay his misconduct as mere disagreement with the Bar was a good idea. (T:103). The referee further noted that “Mr. Wilner has a little bit of a problem admitting what he did was wrong in the Federal court.” *Id.* The referee relied on case law stating in part that a referee’s determination of a petition for reinstatement requires consideration of “petitioner’s strict compliance with the disciplinary order.” (ROR:5) (quoting *The Florida Bar re Grusmark*, 662 So. 2d 1235 (Fla. 1995)). Despite reiterating in the Report of Referee that Mr. Wilner’s

“compliance with the disciplinary order was not perfect,” the referee found that it was sufficient to recommend reinstatement. (ROR:3).

SUMMARY OF ARGUMENT

Mr. Wilner failed to strictly comply with this Court’s order of suspension in multiple respects. First, he engaged in part-time employment with Jax Litigation Group while purportedly under the supervision of the new owner of the firm, Mr. Acosta. But the extent of this supervision did not comply with Rule 3-6.1(f) for two reasons: (1) Mr. Acosta was unqualified to serve as supervising lawyer because he was not employed full-time by Jax Litigation Group; and (2) Mr. Acosta did not actively engage in all aspects of Mr. Wilner’s employment. Additionally, Mr. Wilner did not timely submit all quarterly reports required by the rule.

Second, in addition to Mr. Wilner’s noncompliance with Rule 3-6.1, he also sent a misleading closeout letter to clients following this Court’s order of suspension. Though the letter contained no patently false statements, it wrongly implied that the misconduct that resulted in his 91-day suspension was a long-standing disagreement with the Bar dating back to 1995, and the suspension order was the result of his desire to end the matter.

This skewed summary of the nature of his suspension was patently misleading. When coupled with his ongoing noncompliance with Rule 3-

6.1, this misconduct occurring after this Court's order of suspension warrants denial of his petition for reinstatement.

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

This is an original proceeding filed under this Court's exclusive jurisdiction to "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const.

A lawyer who is ineligible to practice law due to a court-ordered disciplinary suspension of 91 days or more may petition for reinstatement. Rule 3-7.10(a). When the petition is filed in this Court, the matter is usually referred to a referee who makes a "determination of fitness," considering factors, including (1) disqualifying conduct, (2) character and fitness of the petitioner, and (3) whether the petitioner has been rehabilitated. Rule 3-7.10(f).

"A petitioner seeking reinstatement to The Florida Bar must establish by clear and convincing evidence that [she] has met the criteria set forth in Rule Regulating the Florida Bar 3-7.10, [the] 'Reinstatement and Readmission Procedures,' and the decisions of this Court. *See The Florida Bar v. McGraw*, 903 So. 2d 905, 909 (Fla. 2005)". *The Florida Bar v. Wolf*, 21 So. 3d 15, 17 (Fla. 2009).

The referee's determination is memorialized in findings of fact and a

recommendation, which are filed with this Court as the Report of Referee. Rule. 3-7.10(h) & (j).

This Court reviews the report under Rule 3-7.7. “[I]n connection with a reinstatement proceeding, ‘the party seeking review of the referee's recommendation has the burden to demonstrate that the report is erroneous, unlawful, or unjustified.’ *The Florida Bar v. Dunagan*, 775 So. 2d 959, 961 (Fla. 2000) (quoting *The Florida Bar v. Grusmark*, 662 So. 2d 1235, 1236 (Fla. 1995)).” *The Florida Bar v. McGraw*, 903 So. 2d 905, 910 (Fla. 2005).

In this review, findings of fact and resolving conflicts in the evidence are the responsibility of the referee. See *The Florida Bar v. Hooper*, 509 So. 2d 289, 290–91 (Fla. 1987). To successfully challenge a referee's findings before this Court, a party must demonstrate that there is no evidence in the record to support the referee's findings or that the record evidence clearly contradicts the conclusions. See, e.g., *The Florida Bar v. Elster*, 770 So. 2d 1184, 1185 (Fla. 2000); *The Florida Bar v. Carricarte*, 733 So. 2d 975, 977 (Fla. 1999). The Court defers to the referee's assessment and resolution of conflicting evidence because the referee is in the best position to judge the credibility of the witnesses. See *The Florida*

Bar v. Batista, 846 So. 2d 479 (Fla. 2003). See *The Florida Bar v. O'Connor*, 945 So. 2d 1113, 1117 (Fla. 2006).

Issues of law, as in typical appellate review, are reviewed de novo. See *The Florida Bar v. Kane*, 202 So. 3d 11, 19 (Fla. 2016). The recommendation for or against reinstatement is ultimately the responsibility of this Court. It is reviewed with a broader standard. *The Florida Bar v. Hochman*, 944 So. 2d 198, 200–01 (Fla. 2006). If the recommendation of reinstatement has a basis in existing case law, the Court will not second-guess the referee. See *The Florida Bar v. Hernandez–Yanks*, 690 So. 2d 1270, 1272 (Fla. 1997).

ARGUMENT

- I. **Mr. Wilner’s part-time employment with Jax Litigation Group during his suspension violated Rule 3-6.1, because Mr. Acosta was not a full-time employee of the firm, he did not actively engage in all aspects of Mr. Wilner’s employment as a supervising lawyer, and not all quarterly reports were submitted timely.**

Mr. Wilner did not strictly comply with Rule 3-6.1 during his suspension from the practice of law. He stated that his employment at Jax Litigation Group consisted of visits to the office a few times a week for a few hours. During this part-time employment, he was not properly supervised by Mr. Acosta. Specifically, Rule 3-6.1(f) states as follows:

(f) Supervising Lawyer. An individual subject to this rule must be supervised by a member of The Florida Bar in good standing and eligible to practice law in Florida who is employed full-time by the entity that employs the individual subject to this rule and is actively engaged in the supervision of the individual subject to this rule in all aspects of the individual's employment.

Mr. Acosta was not employed full-time by Jax Litigation Group; in fact, he was not involved in any of the firm's cases. He was a silent owner living in St. Petersburg. This was his testimony, which the referee found to be credible, and there is no contrary evidence in the record suggesting otherwise. In fact, Mr. Wilner's own testimony corroborated the uncontested fact that Mr. Acosta was not involved in the day-to-day business of Jax Litigation Group. This alone demonstrates noncompliance with Rule 3-6.1(f), because Mr. Acosta was not qualified to serve as his supervising lawyer.

If Mr. Wilner wished to retain employment with a law firm during his suspension from the practice of law—even on a part time basis—he was required to be under the supervision of a member of the Bar who was also a full-time employee of Jax Litigation Group. But the lawyers working full-time for the law firm could not serve in this role, because they are former subordinates of Mr. Wilner. See Rule 3-6.1(b) (prohibiting former subordinates of a suspended lawyer from serving as the supervising lawyer). Mr. Acosta's temporary ownership of the firm did not result in his

full-time employment with the law firm, so he also could not serve in this role. Therefore, the Affidavit of Compliance with Rule 3-6.1, which was signed by both Mr. Wilner and Mr. Acosta, contained the following false statement:

Individual is being supervised by a member of The Florida Bar in good standing and eligible to practice law in Florida who is employed full-time by the entity that employs the individual subject to this rule and is actively engaged in the supervision of the individual subject to this rule in all aspects of the individual's employment.

(TFB-Ex.4).

The above language is also false for another reason. Mr. Acosta was not “actively engaged in the supervision” of “all aspects of” Mr. Wilner’s employment. He spoke on the telephone with Mr. Wilner once or twice a week and he was not involved in any of the firm’s cases. Although constant face-to-face supervision of the employee is not required, these remote, infrequent, and—given Mr. Acosta’s lack of involvement—presumably brief conversations between long-time friends do not, under any reasonable interpretation of the term, constitute active engagement. A review of Mr. Acosta’s testimony demonstrates that he lacked personal knowledge of any specific client matter of the Jax Litigation Group, and he was entirely reliant on Mr. Wilner’s assurances that he abided by Rule 3-6.1. It is not even clear how Mr. Acosta could have verified these

assurances if he had any inclination to do so. The other employees of Jax Litigation Group were former subordinates of Mr. Wilner—as well as presumably future subordinates once Mr. Wilner exercises the repurchase option—who could not be delegated the role of acting supervising lawyer in Mr. Acosta’s ongoing absence. Further, Mr. Wilner also did not timely submit a quarterly report containing the false statement. While he asserted at hearing that there is no explicit deadline in Rule 3-6.1, he admitted at hearing that he was required to submit reports on a quarterly basis and did not do so. For the last quarter of 2022, Mr. Wilner submitted a report on February 6, 2023.

It is clear from the record that Mr. Wilner’s ill-defined, part-time employment with Jax Litigation Group was essentially unsupervised. The quarterly reports were not merely late; they contained a material misrepresentation falsely stating that Mr. Wilner was under the active supervision of a supervising lawyer who was employed full time by the same law firm. He was not. Mr. Wilner is not entitled to a laxer standard of supervision under the rule merely because he specializes in tobacco litigation, or because the law firm is mostly self-sufficient, or because of Mr. Acosta’s implicit trust in his friend’s ability to comply with the rule. Rule 3-6.1(f) requires active supervision by a member of the Bar working full time

for the same firm as the person subject to the rule, and this plainly did not occur at any point during Mr. Wilner's part-time employment with Jax Litigation Group.

This Court has sanctioned supervising lawyers who allowed an employee subject to Rule 3-6.1 to have direct client contact, and this Court has denied reinstatement to lawyers subject to the rule due to their noncompliance. See *The Florida Bar v. Goldstein*, 38 So. 2d 771, Case No. SC10-17 (Fla. June 8, 2010) (extending respondent's disbarment for a period of one year based on a consent judgment stating that he engaged in direct client contact); *The Florida Bar v. Frederick*, 756 So. 2d 79 (Fla. 2000) (suspending a supervising lawyer who allowed an employee subject to Rule 3-6.1 to have direct client contact). While there is no evidence of Mr. Wilner engaging in direct client contact, it is abundantly clear from the record that he was not properly supervised.

Case law on this issue is limited, because most cases with similar facts involve a disciplinary proceeding against a supervising lawyer who either (a) allowed improper contact between a non-lawyer and a client in violation of Rule 3-6.1; or (b) allowed a non-lawyer to engage in the unlicensed practice of law. The procedural posture of Mr. Wilner's case and the underlying facts are distinct from case law addressing adequacy of

supervision in the context of a disciplinary proceeding. Nevertheless, this case law is relevant in addressing the adequacy of supervision by a lawyer over a non-lawyer employee. In *The Florida Bar v. Abrams*, 919 So. 2d 425 (Fla. 2006), this Court found that a “paralegal” was in fact the employer and using the respondent’s license to engage in the practice of law in immigration matters. This Court relied on the referee’s findings that the respondent never established an attorney-client relationship in the absence of any lawyer file on the case, and his role as “managing attorney” to the paralegal performing all work was a misrepresentation. In *The Florida Bar v. Beach*, 675 So. 2d 106 (Fla. 1996); this Court found that a non-lawyer utilized a licensed lawyer as a mere conduit for providing legal advice without supervision. In *The Florida Bar v. Buck*, 2011 WL 6852200, SC11-696 (Fla. Nov. 16, 2011); this Court accepted a consent judgment in which the respondent stipulated to a 30-day suspension for delegating the filing of all documents in an estate matter to a nonlawyer employee, which constituted a failure to properly supervise the nonlawyer.

Mr. Wilner was not properly supervised during his part-time employment with Jax Litigation Group, and he should not be given a pass on his failure to comply with Rule 3-6.1(f) simply because there is no accompanying assertion that he practiced law or spoke with a client during

that time. Because the lack of any meaningful oversight by Mr. Acosta precluded him from submitting an affidavit of compliance with Rule 3-6.1 based on personal knowledge, the absence of evidence of misconduct by Mr. Wilner during his suspension should be afforded little weight.

To be clear, the Bar is not asserting that the referee erred in making a specific finding of fact. The report of referee concluded that “[a]lthough his compliance with the disciplinary order was not perfect, I believe it is sufficient to recommend reinstatement.” (ROR:3). The Bar only challenges this legal conclusion subject to de novo review because Mr. Wilner plainly did not comply with his duties under Rule 3-6.1 while he was suspended from the practice of law. Mr. Wilner had the burden to produce clear and convincing evidence of rehabilitation, which included “strict compliance with the specific conditions of any disciplinary, judicial, administrative, or other order, where applicable.” Rule 3-7.10(f)(3)(A). The report of referee found that Mr. Wilner’s compliance was not perfect, but reached an erroneous legal conclusion that he nevertheless met this burden of strict compliance.

- II. Mr. Wilner’s misleading closeout letter sent to his clients downplayed the nature of his underlying misconduct that resulted in a rehabilitative suspension, which was both conduct involving dishonesty and conduct prejudicial to the administration.**

Mr. Wilner's closeout letter to his clients should be closely scrutinized by this Court. It does not contain any patently false statement, as it discloses Mr. Wilner's upcoming 91-day suspension from the practice of law, explains that Mr. Acosta will serve as temporary owner of the firm in name only, and it assures clients that Mr. Wilner's staff will continue litigating pending matters. But even though Mr. Wilner had no legal duty to explain the basis of his suspension to his clients, he chose to incorporate his version of events in the closeout letter. If he was going to offer this summary of his misconduct despite having no legal obligation to do so, he had a duty under Rule 4-8.4(c) and (d) not to engage in either conduct involving dishonesty, fraud, deceit, or misrepresentation, or conduct prejudicial to the administration of justice. See also Rule 3-7.10(f)(1)(C) & (E). His description of the basis for his suspension—though not patently false—is significantly misleading in the manner it downplays the nature of the misconduct to the point of dishonesty. Specifically, the letter states as follows:

Mr. Wilner has recently agreed to settle a long-running disagreement with the Florida Bar regarding his handling of thousands of tobacco cases dating from 1995. The Bar contended that Mr. Wilner should not have filed the many tobacco cases when he did, and he has said he was honor-bound to protect his clients through timely filing. The enclosed order requires Mr. Wilner refrain from the practicing law for 91 days and until reinstated. Mr. Wilner accepted this restriction in

place of continuing to spend time and money to argue the issue.

(TFB-Ex.1).

Mr. Wilner did not become the subject of a Bar complaint due to any actions by him dating back to 1995. By inputting that particular year in the same sentence he references a “long-running disagreement with the Florida Bar,” a client would naturally assume that this was some drawn out disciplinary matter that should have been resolved nearly 30 years ago. The significance of the year 1995 is unexplained in the letter, but it likely refers to a relevant year regarding some former members of the class action who were authorized to file suits in their individual capacities following the *Engle* decision decertifying the class. But no recipient of this letter would infer from the above language that Mr. Wilner’s actual misconduct first occurred when he filed thousands of lawsuits in late 2007 and continued during his litigation of those cases until the federal court issued a lengthy order sanctioning Mr. Wilner in 2016. The only time period identified in the closeout letter is 1995.

The only purpose in referencing that year without additional context was to falsely imply that any misconduct by him occurred nearly thirty years ago. The fact that the actual language of the letter comes short of making an explicit statement does not end the matter in Mr. Wilner’s favor. This

Court recently reviewed a lawyer's misleading closeout letter in *The Florida Bar v. Rakusin*, 2023 WL 3300043, SC2021-1182 (Fla. May 8, 2023). In *Rakusin*, the referee found that the respondent's letter downplayed the misconduct leading to his suspension and withheld his ownership interest in a new law firm that would be transferred his firm's existing caseload. Nothing in the closeout letter was patently false, but the referee found that its cumulative effect was nevertheless misleading to the point of dishonesty.

Here, the misleading nature of Mr. Wilner's closeout letter is less egregious than the letter at issue in *Rakusin* because it accurately explains Mr. Acosta's temporary ownership of the new firm. But both letters are similar in the manner they downplay the misconduct leading to suspension. Further, unlike the respondent in *Rakusin*, Mr. Wilner was the subject of a rehabilitative suspension requiring an order granting his petition for reinstatement before he could resume practicing law. Under Rule 3-7.10(f)(3)(A), he was charged with demonstrating strict compliance with this Court's order of suspension as part of his petition for reinstatement. This strict compliance requirement applies to the reinstatement process pursuant to Rule 3-7.10(f)(3)(A), which warrants closer scrutiny of the closeout letter in the context of this proceeding.

This Court has previously held that an ethical breach occurs when a lawyer is not forthright in communications and acts dishonestly by failing to disclose material information. In *The Florida Bar re Webster*, 647 So. 2d 816 (Fla. 1994), this Court held that a suspended lawyer failed to disclose to other bars to which he applied for admission that he had been suspended and was no longer a member in good standing of The Florida Bar. This Court even stated that “[a]rguably, Webster made no actual misrepresentation in applying to the bars of Micronesia and Palau given that his suspension was technically over.” *Id.* at 817. Nevertheless, this Court held that since the lawyer was still on probation, by failing to tell those bars that he had been suspended, “he engaged in misrepresentation by omission.” *Id.* In *The Florida Bar v. Glueck*, 985 So. 2d 1052, 1057 (Fla. 2008), this Court held that the respondent omitted facts from letters to the Bar in an attempt to veil respondent’s business relationship with others and minimize his own misconduct. In *The Florida Bar v. Phoenix*, 311 So. 3d 825 (Fla. 2021), this Court found that a lawyer violated Rule 4-8.4(c) by representing a company that was, in fact, a Ponzi scheme. The lawyer admitted that he was not forthcoming with regulators and had minimized his role and knowledge of events to avoid liability. *Id.* at 833. Also, by failing to disclose leaseback payments to lenders, he was deceitful towards

lending institutions. *Id.* Further, in *In re Decker*, 212 So. 3d 291 (Fla. 2017), a judge was suspended from the practice of law for his conduct before taking the bench. Specifically, amongst other violations, Mr. Decker did not disclose a conflict of interest to opposing counsel that the presiding judge in a civil suit was Mr. Decker's client in other litigation. By failing to disclose this information, Mr. Decker violated Rules 4-8.4(c) and (d).

A failure to disclose material information violates both rules even if the incomplete information given is accurate. The referee correctly found that Mr. Wilner's closeout letter "did downplay [his misconduct] to some extent" and noted Mr. Wilner's difficulties in admitting he did anything wrong. (T:103). But she nevertheless recommended reinstatement even though Mr. Wilner's compliance "wasn't perfect." *Id.* Again, the Bar does not challenge any specific finding of fact on this issue, but only seeks de novo review of the referee's legal conclusion that reinstatement is appropriate despite Mr. Wilner's failure to strictly comply with the terms of his order of suspension.

Given both the noncompliance with Rule 3-6.1 and the misleading closeout letter, Mr. Wilner failed to demonstrate his fitness to resume the practice of law. Specifically, his quarterly reports and closeout letter contained false or misleading statements, which constitute disqualifying

conduct under Rule 3-7.10(f)(1)(C) and (f)(1)(E). Further, this Court's order of suspension mandated compliance with Rule 3-6.1, if applicable. See *The Florida Bar v. Wilner*, 2022 WL 619933, SC21-373 (Fla. Mar. 3, 2022). Mr. Wilner's improperly supervised part-time employment with Jax Litigation Group constitutes disqualifying conduct as both misconduct in employment and a violation of an order of a court under Rule 3-7.10(f)(1)(D) and (f)(1)(I), respectively. Further, Mr. Wilner did not establish by clear and convincing evidence all elements of rehabilitation, particularly the element requiring his strict compliance with this Court's order of suspension. See Rule 3-7.10(f)(3)(A).

CONCLUSION

For the foregoing reasons, this Court should reject the referee's recommendation that Mr. Wilner be reinstated to membership in good standing with The Florida Bar. The Bar asks this Court to deny the petition for reinstatement, and that Mr. Wilner be prohibited from filing a successive petition for one year following this Court's entry of an adverse judgment pursuant to Rule 3-7.10(k). The Bar also asks that this Court impose the costs recommended by the referee.

Respectfully submitted,



Mark Lugo Mason, Bar Counsel

CERTIFICATE OF SERVICE

I certify that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, on this 23rd day of May, 2023, and a true and correct copy of the foregoing has been furnished via e-service to Richard Adam Greenberg, Counsel for Petitioner, at rgreenberg@rumberger.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 Rules of Appellate Procedure 9.045 and 9.210(a)(2)(B). The font is 14-point Arial. The word count is 6,099 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