

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.

_____ /

REPLY BRIEF

Mark Lugo Mason, Bar Counsel
The Florida Bar
651 E Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5839
Florida Bar No. 98013
mmason@floridabar.org

Patricia Ann Toro Savitz, Staff Counsel
The Florida Bar
651 E Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 559547
psavitz@floridabar.org

Joshua E. Doyle, Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 25902
jdoyle@floridabar.org

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF CITATIONS	iii
REPLY ARGUMENT.....	iii
I. No material facts are subject to dispute on appeal.	1
II. All issues raised in the bar’s initial brief were placed at issue during the final hearing.	2
III. The uncontested facts of this case establish that Mr. Wilner did not strictly comply with the terms of his suspension order, and the referee erred as a matter of law by instead holding that Mr. Wilner’s “substantial compliance with the disciplinary order” was sufficient.	5
IV. Mr. Wilner’s closeout letter sent to his clients prior to the effective date of his suspension was misleading, and it constitutes an additional basis to deny the petition for reinstatement.	12
CONCLUSION.....	16
CERTIFICATE OF SERVICE.....	17
CERTIFICATE OF TYPE SIZE & STYLE.....	17

TABLE OF CITATIONS

Cases

<i>Rollins v. Pizzarelli</i> , 761 So. 2d 294 (Fla. 2000).....	8
<i>The Florida Bar v. Elster</i> , 770 So. 2d 1184 (Fla. 2000)	7
<i>The Florida Bar v. Forrester</i> , 818 So. 2d 477 (Fla. 2002),	15, 16
<i>The Florida Bar v. Kane</i> , 202 So. 3d 11 (Fla. 2016).....	6
<i>The Florida Bar v. Petersen</i> , 248 So. 3d 1069 (Fla. 2018)	15, 16
<i>The Florida Bar v. Rakusin</i> , 2023 WL 3300043 (Fla. May 8, 2023).....	14

Other Authorities

<i>Black’s Law Dictionary</i> (11th ed. 2019).....	8
--	---

Rules

Rule 3-4.3	15
Rule 3-6.1	passim
Rule 3-7.10	3, 6, 16
Rule 4-8.6	9

REPLY ARGUMENT

The answer brief argues that this Court should adopt the referee's recommendation of Mr. Wilner's reinstatement to the practice of law, because the referee correctly concluded that Mr. Wilner sufficiently complied with his suspension order during his suspension. In doing so, the answer brief stipulates to the bar's statement of the case and facts, with one exception. This reply will first address this lone contested fact, then address various due process arguments raised in the answer brief, and finally will address the two substantive issues raised in the argument section of the bar's initial brief.

I. No material facts are subject to dispute on appeal.

The answer brief explicitly accepts the bar's statement of the case and facts, with one exception. (AB:3). Specifically, the only contention of fact in the answer brief is that the bar baselessly asserted that Mr. Wilner's quarterly reports submitted pursuant to Rule 3-6.1 "seemed to overstate his limited contribution to the law firm." (AB:3 (citing IB:10)). The answer brief asserts that this is not based on anything in the record, it is instead argument, and the argument is also misplaced because the bar should not be complaining that Mr. Wilner's report was over-inclusive rather than under-inclusive. (AB:3-4, 13).

To be clear, the statement at issue was not the bar’s personal characterization of Mr. Wilner’s part-time employment during his suspension; it was Mr. Wilner’s own characterization of such. At trial, he repeatedly testified that he was “over-inclusive” in describing his job duties in his Rule 3-6.1 quarterly reports, and he “ended up doing little, and the affidavit would seem to indicate that I did more than I did.” (T:29). The lone sentence from the initial brief placed at issue was not legal argument, but an accurate summary of this testimony. The bar only offers clarification on this preliminary issue to stress—as an initial matter—that the bar’s entire statement of the case and facts is uncontroverted. (See IB:2-11).

II. All issues raised in the bar’s initial brief were placed at issue during the final hearing.

Before addressing the substantive issue of whether Mr. Wilner strictly complied with bar rules during his suspension, the bar will address a due process argument raised in the answer brief. Specifically, the answer brief repeatedly asserts that the bar’s initial brief raises new issues on appeal. The initial brief asserted that when notifying clients of his suspension as required by rule, Mr. Wilner included a cover letter containing misleading statements regarding the basis for Mr. Wilner’s suspension. Mr. Wilner asserts that “[a]t no time during the proceedings before the Referee did the

Bar raise this issue [regarding the misleading closeout letter] as a ground to deny Mr. Wilner's petition for reinstatement." (AB:2). The answer brief repeatedly asserts this argument has been raised for the first time on appeal. (AB:3, 5, 16).

On this issue, the content of Mr. Wilner's closeout letter was a significant focus of the bar's examination of Mr. Wilner during the final hearing. (See T:38-45). Given that the bar is not acting as prosecutor before the referee tasked with proving rule violations, nothing further was required to properly raise this matter before the referee or this Court, which has original jurisdiction in this case. Specifically, this case is not a more typical disciplinary proceeding in which the bar filed a formal complaint against a member. Mr. Wilner is a suspended lawyer who filed a petition for reinstatement, and in this capacity, it was his burden before the referee to demonstrate eligibility for reinstatement. Rule 3-7.10. The bar's role in this process is not prosecutorial in nature. Instead, the bar's duty is to appropriately vet the assertions in the petition that the suspended or disbarred lawyer is eligible for reinstatement.

A reinstatement proceeding under Rule 3-7.10 does not involve the charging of a rule violation, and therefore the bar is neither required to provide a bill of particulars nor does it carry the burden of proof. Given that

the bar was not required to do anything more than present evidence showing the petitioner failed to meet his burden, Mr. Wilner's due process arguments on this issue are misplaced. The instances in which the misleading closeout letter was the subject of questioning—and Mr. Wilner offered testimony explaining why he believed the letter was accurate—was sufficient to raise this issue both to the referee and this Court. The answer brief's reliance on bar counsel's opening statement—before Mr. Wilner had even offered testimony—that Mr. Wilner's conduct fell in a "gray area" is not some waiver that results in an uncontested report of referee. (See AB:2).

The answer brief additionally asserts that the initial brief raised for the very first time the claim that the affidavits submitted by Mr. Wilner and Mr. Acosta as required by Rule 3-6.1(e) contain a false statement. (AB:13). The answer brief is splitting hairs on this issue. One such affidavit signed by both Mr. Wilner and Mr. Acosta states that Mr. Wilner "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." (TFB-Ex.4). This sworn statement mirrors the language of Rule 3-6.1(f), and Mr. Wilner's strict compliance with this portion of the rule has remained the primary issue before the referee and on appeal.

III. The uncontested facts of this case establish that Mr. Wilner did not strictly comply with the terms of his suspension order, and the referee erred as a matter of law by instead holding that Mr. Wilner’s “substantial compliance with the disciplinary order” was sufficient.

As explained *supra*, the answer brief stipulates to the initial brief’s statement of facts, including every salient fact detailing Mr. Acosta’s status as an absentee owner of Jax Litigation Group and his perfunctory supervision of Mr. Wilner during the period of suspension. (See IB:6-10). Collectively, these facts establish that Mr. Acosta—despite being the silent owner of Jax Litigation Group—was not a full-time employee of the firm. *Id.* No tangible changes were made as a result of the sale of Mr. Wilner’s law firm, Mr. Acosta practiced law in an entirely different city and was uninvolved in *any* of the cases handled by Jax Litigation Group, and the extent of Mr. Acosta’s “supervision” was more akin to weekly telephone calls between longtime friends and colleagues.

In asserting that these uncontested facts should result in an order denying the petition for reinstatement, the initial brief argued that (1) Mr. Acosta was not eligible to serve as supervising lawyer because he was not a full-time employee of Jax Litigation Group; and (2) Mr. Acosta did not

adequately supervise Mr. Wilner's employment.¹ See Rule 3-6.1(f). The answer brief counters that these facts are sufficient to comply with the rule, because (1) both Mr. Wilner and Mr. Acosta testified that Mr. Wilner "did very little during his suspension," and (2) the two are long time colleagues who spoke to each other regularly. (AB:7). The answer brief then asserts that this was an issue of fact resolved by the referee, Mr. Acosta's status as the firm owner allowed him to serve as supervising lawyer, and there was no evidence that Mr. Wilner engaged in any prohibited conduct while working for Jax Litigation Group. (AB:7-9).

First, the answer brief mischaracterizes this dispute on appeal as an issue of fact. It is not. The salient facts are stipulated on appeal. The dispute is whether the uncontested facts demonstrate strict compliance with this Court's suspension order as required by Rule 3-7.10(f)(3)(A). The referee applied the wrong standard in finding clear and convincing evidence of Mr. Wilner's "substantial compliance with the disciplinary order." (ROR:4). This is a legal determination subject to de novo review. See *The Florida Bar v. Kane*, 202 So. 3d 11, 19 (Fla. 2016). The bar intentionally offers no argument that the referee's findings of fact should be

¹ The bar also argued that a quarterly report was not submitted timely under Rule 3-6.1. This reply defers to the initial brief on this issue without further argument.

reversed, because de novo review does not apply to findings of fact, and the bar would be tasked with demonstrating that the record either lacks support for or clearly contradicts the referee's findings of fact. See *The Florida Bar v. Elster*, 770 So. 2d 1184, 1185 (Fla. 2000). The answer brief's assertion that the bar's failure to contest the referee's findings of fact should result in Mr. Wilner's reinstatement is incorrect. (See AB:15).

Appeals are not limited to disputes of fact.

Second, Mr. Acosta's status as an absentee owner of a law firm does not automatically entitle him to serve as supervising lawyer to an employee with the firm under Rule 3-6.1(f). The answer brief's argument is entirely predicated on the false equivalence that an owner—even if an uninvolved strawman—is necessarily “employed full-time” within the meaning of Rule 3-6.1(f). Specifically, the rule required Mr. Acosta, as the supervising lawyer, to be “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.” Despite this plain language, the answer brief nevertheless states that the rule *does not* require “Mr. Wilner to be under the supervision of a member of the bar who was also a full-time employee of Jax Litigation Group.” (AB:11 (internal quotations omitted)). This argument is based on the

absence of a definition of the term “full-time employment” in the rule.

(AB:12).

But when a term is undefined, one of the most fundamental tenets of statutory construction requires a definition according to the term’s plain and ordinary meaning. *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000).

This can be resolved with a dictionary. *Id.* Black’s Law Dictionary defines a “full-time employee” as “[o]ne who is hired to work at least the normal number of hours in a workweek as defined by an employer or a statute, usu. 35 to 40 hours.” *Black’s Law Dictionary* (11th ed. 2019). The answer brief’s argument similarly asserts that Rule 3-6.1(f) also does not define what constitutes adequate supervision. (AB:7). But the rule does not use that term, and instead provides much more specific guidance. The rule requires the eligible supervising lawyer to be “actively engaged in the supervision of the individual subject to this rule in all aspect’s of the individual’s employment.” Rule 3-6.1(f).

Mr. Acosta’s negligible contributions to Jax Litigation Group do not meet the standard of either full-time employment—under any reasonable interpretation of the term—or active engagement in all aspects of Mr. Wilner’s employment. Mr. Acosta’s temporary ownership interest in the firm entailed occasional telephone conversations with a part-time employee

and colleague. There is no exception to the rule’s “employed full time” requirement when the supervising lawyer is an owner of the entity, or when the person subject to the rule is not working full-time. The answer brief’s argument that Rule 4-8.6(b) requires a member of the bar to be an owner of a law firm has nothing to do with this issue. (See AB:7-8). The language of Rule 3-6.1(f) requires the supervising lawyer to actively engage in all aspects of Mr. Wilner’s employment. Mr. Acosta could not do so, because his lack of meaningful involvement in any of the firm’s work both rendered him ineligible from serving as supervising lawyer and—more pragmatically—precluded him from active engagement in all aspects of Mr. Wilner’s employment.

Regarding this latter issue, the answer brief asserts that there is no way to specify what constitutes active engagement under Rule 3-6.1(f) “in a one-size-fits-all manner.” (AB:8). The answer brief asserts that Mr. Wilner’s part-time contributions did not require the same supervision as a suspended lawyer working full-time. *Id.* But this part-time work was still subject to oversight by an eligible supervising lawyer actively engaged in all aspects of Mr. Wilner’s employment. Mr. Wilner was not “on sabbatical” (AB:9); he was working for Jax Litigation Group. Mr. Wilner’s testimony coupled with his submission of quarterly reports regarding his part-time

employment precludes him from characterizing his part-time employment as the equivalent of a leave of absence.

In its initial brief, the bar explicitly stated that constant face-to-face supervision of an employee is not necessarily required. (IB:17). The bar is also aware of the increasing prevalence of remote work across the workforce as a result of the pandemic. Despite the initial brief acknowledging such, the answer brief engages in gross exaggeration by claiming the bar's position "would require that any supervising lawyer be required to observe a suspended lawyer 24/7 to be in a position to confirm the suspended lawyer's testimony." (AB:10). But the bar's position simply applies the plain language of the rule to the facts of this case.

This is not a situation in which a supervising lawyer is remotely working on cases with a part-time member of his staff who was subject to Rule 3-6.1. Mr. Acosta had no independent knowledge of *any* of the work performed by the firm he "owned," and therefore no independent knowledge of all aspects of Mr. Wilner's employment. The issue is not the mere fact that Mr. Acosta was in St. Petersburg while Mr. Wilner was in Jacksonville. The issue is that the supervising lawyer was entirely reliant on the veracity of the suspended lawyer's assurances that he complied with Rule 3-6.1, because the supervising lawyer lacked any personal knowledge

enabling him to verify these assurances. Mr. Acosta believed that his reliance on Mr. Wilner was justified, but Mr. Wilner's trustworthiness does not excuse his obligation to strictly comply with the rule. He is not entitled to laxer supervision than another suspended or disbarred lawyer simply because he owned a law firm and temporarily transferred ownership to a friend who has implicit faith in his ability to comply with the rule.

The answer brief also dedicates a significant focus to the fact that the bar has not asserted that Mr. Wilner engaged in the practice of law or committed any other similar rule violation during his suspension. (AB:11-15). The bar's initial brief noted that the absence of such evidence should bear no relevance to this reinstatement proceeding given the absence of an eligible supervising lawyer to verify Mr. Wilner's compliance with his suspension order. (IB:21). Mr. Wilner is essentially asking this Court to accept his word that he engaged in no misconduct while he worked at a law firm without proper oversight, in the same way he asked Mr. Acosta to take him at his word. The purpose of Rule 3-6.1(f) is to task a member in good standing with verifying such claims based on personal knowledge of the work performed. This allows the bar, the referee, and this Court to rely on something other than self-serving testimony of a petitioner in deciding whether a petition for reinstatement should be granted or denied.

Mr. Wilner's failure to strictly comply has deprived this Court and the bar of the ability to rely on such independent verification by a member in good standing *with personal knowledge* of all aspects of Mr. Wilner's part-time employment. The bar noted that the case law cited in its initial brief interpreting Rule 3-6.1 was distinguishable in some ways, because they involved lawyer disciplinary proceedings due to either improper contact between a non-lawyer and a client, or the unauthorized practice of law. (IB:19-20). Despite the bar expressly explaining this distinction in its brief, the answer brief nevertheless characterizes the bar's reliance on such case law as "unfair and disingenuous," a "red herring," and "particularly egregious" absent an assertion that Mr. Wilner engaged in similar misconduct. (AB:14). But due to the deficient nature of Mr. Acosta's supervision, the bar was essentially deprived of its ability to learn of such an issue, which would have been subject to disclosure in a quarterly report by the employer submitted pursuant to Rule 3-6.1(e).

IV. Mr. Wilner's closeout letter sent to his clients prior to the effective date of his suspension was misleading, and it constitutes an additional basis to deny the petition for reinstatement.

The bar's secondary basis for its appeal involves the misleading closeout letter Mr. Wilner sent to his clients when notifying them of his

upcoming suspension from the practice of law. Again, this is not an issue of fact; the bar is asserting that the black-and-white content of a written letter sent to Mr. Wilner’s clients was misleading. The content of the letter is not in dispute.

The answer brief asserts that the closeout letter’s characterization of the issue leading to his suspension as a “long-running disagreement with the Florida Bar regarding his handling of thousands of tobacco cases dating from 1995” was not misleading, because his misconduct—which dated back to 2016 and was the subject of a lengthy sanction order in 2017—was still a “long-running case” by any definition. (AB:17-18). Despite this 21-year difference between Mr. Wilner’s misconduct and the year referenced in his closeout letter, the answer brief nevertheless asserts that it is the bar—not Mr. Wilner—who is “proceed[ing] to nitpick” and “trying to wordsmith a one-page letter.” (AB:17, 19). Regarding the closeout letter’s reference to 1995, the answer brief merely characterizes the tobacco litigation as a “multi-decades-long saga of the tobacco cases, beginning in or before 1995.” (AB:19). This at least seems to implicitly acknowledge that the closeout letter’s reference to the year 1995 had nothing to do with the “long-running disagreement with The Florida Bar” referenced in the same sentence. The bar asserted that this sentence in

the closeout letter was intended to falsely convey to clients that the misconduct at issue occurred nearly 30 years ago. The bar cited to *The Florida Bar v. Rakusin*, 2023 WL 3300043 (Fla. May 8, 2023), which also involved a misleading closeout letter sent to clients that downplayed the respondent's misconduct leading to his suspension.

The answer brief alleges that the bar's argument regarding Mr. Wilner's intent to mislead clients is "pure speculation." (AB:18-19). The brief also distinguishes *Rakusin* on the sole basis that the referee made adverse findings that the letter was misleading, but the referee in this case did not do so. (AB:20). But the bar is relying on a plain reading of the written sentence in asserting that it is intended to convey a false impression. This is not an issue of fact; the bar, this Court, and the referee have the same ability to read the letter and interpret its meaning. The only reasonable reading of the letter would lead the reader to the false conclusion that the misconduct at issue has been the subject of a dispute with the bar since 1995.

Additionally, the answer brief argues that no cover letter was even required. (See AB:16-17, 21). But the fact that Mr. Wilner did not have to further explain matters to his clients does not authorize him to instead mislead those clients with impunity. The brief further states that the bar is

trying to require a vetting of all client communications to accompany a notice of suspension. (AB:19). The bar is not asserting that it wants to be tasked with reviewing every client communication sent by lawyers subject to suspension. The bar is asserting that lawyers should not mislead their clients. The bar also cited to a litany of case law in which this Court rejected efforts by lawyers to either misrepresent by omission or mislead by downplaying the lawyer's role in a matter under investigation. (IB:25-26).

The answer brief argues that the bar's position that a member of the bar can mislead in the absence of a patently false statement is "unsettling." (AB:16). But this is not merely the bar's position. In *The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002), this Court suspended a lawyer who intended to mislead opposing counsel during a deposition via a "technically true" statement. The respondent hid an original copy of a contract during the deposition, and truthfully responded, "I'm not seeing it" in response to a question about whether she knew the location of the document. *Id.* at 483. This was misleading.

In *The Florida Bar v. Petersen*, 248 So. 3d 1069, 1080 (Fla. 2018), this Court found the respondent violated Rule 3-4.3 by submitting a proposed order stating that the defendant "has interposed no objection to the motion [to withdraw]." This omitted the fact that no such objection could

be interposed because the defendant was never consulted. The statement itself was not an outright lie, but this Court nevertheless found that it was a material misrepresentation. *Id.* Similarly, Mr. Wilner's characterization of his dispute with the bar as dating back to 1995 was misleading, much like the "technical truths" at issue in *Forrester* and *Peterson*. Such conduct resulted in suspensions in those cases, and it should result in an order denying Mr. Wilner's petition for reinstatement.

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 18th day of July, 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 3,570 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