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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ALEXA MARTINEZ,

Respondent.

_______________________________________/

Supreme Court Case No.

SC23-0421

The Florida Bar File No.
2018-70,056 (11D)

RESPONDENT'S REPLY ON CROSS-APPEAL

Alexa Martinez, Esquire
Florida Bar No. 126341
11945 SW 81st Street
Miami, Florida 33183
786-606-6991
alexamartinezlaw@gmail.com
Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS ii

ARGUMENT 1

Ms. Martinez's Reply on Cross Appeal

A. There is no evidence that Ms. Martinez spoliated evidence or deleted files from the USB. 1

B. There is not clear and convincing evidence that Ms. Martinez lacked authorization to file a notice of appearance on behalf of Luckner Morelus.. 11

C. Case Law 13

CONCLUSION 17

CERTIFICATE OF SERVICE 19

CERTIFICATE OF TYPE SIZE & STYLE 20

TABLE OF CITATIONS

Cases

In re Ruffalo, 390 U.S. 544 (1968). 9
Morgan v. Pake, 611 So. 2d 1315, 1316 (Fla. 1st DCA 1993)……………….6
The Florida Bar v. Behm, 41 So. 3d 136 (Fla. 2010)…………………..…18, 19
The Florida Bar v. Bischoff, 212 So. 3d 312 (Fla. 2017)..................... 16, 17
The Florida Bar v. Davis, Supreme Court Case No. 2019-1447................20
The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989).....................16
The Florida Bar v. Fredericks, 731 So. 2d 1249, 1253 (Fla. 1999)......8,9,10
The Florida Bar v. Gibson, Supreme Court Case No. 2021-1716..............20
The Florida Bar v. Marcellus, 249 So. 3d 538 (Fla. 2018) 17
The Florida Bar v. Nowacki, 697 So.2d 828, 832 (Fla.1997)……………..8, 9
The Florida Bar v. Vernell, 721 So.2d 705 (Fla. 1998)………………………9

Rules Regulating The Florida Bar

Rule 3-4.3 5
Rule 4-3.4 19
Rule 4-8.4 19

Other Rules

Fla. R. App. P. 9.200……………..…………………………………………6,7

A. <u>There is no evidence that Ms. Martinez spoliated evidence or deleted files from the USB</u>

The Florida Bar's ("the Bar") claim that "The Bar presented uncontroverted evidence showing that Ms. Martinez…represented…at a hearing that the drive contained at least one motion" is patently untrue. The Bar never presented the theory that Respondent, ("Martinez" or "Ms. Martinez") spoliated evidence before the close of evidence. The Bar admitted their unrelated USB allegations lacked evidence when they withdrew the charges (R:946, 624). Both SilverbergBrito partners testified they had no personal knowledge of what was on the USB. (R:352, 353, 567). Although there was no "uncontroverted" USB evidence to dispute, Martinez did dispute the USB contents numerous times throughout the civil case and the Bar proceedings. (R:1882, 23, 25, 31, 38, 44, 46, 599, 602, 607, 608, 79).

Addressing the Bar's claim that Martinez improperly argues the USB contents were unknown, the issue is the contents were unknown due to the Bar's failure to investigate and prosecute the claim. Because the contents were never known, the Bar has not shown clear and convincing evidence that anything was deleted. One cannot assume files were deleted just because an empty drive given to Ms. Martinez was later returned empty, and the Bar provided no evidence to the contrary at the final hearing.

Because no one presented any evidence about the USB's contents at the final hearing, and the Bar did not accuse Ms. Martinez of deleting content at the final hearing or at any time prior, Ms. Martinez had no reason to disprove an allegation that was never made. The Bar had the burden of proving the violation by clear and convincing evidence and did not introduce evidence that Ms. Martinez deleted anything, nor did they ask any witnesses about the USB. It is entirely possible that the drive never contained any files or that they were deleted before Ms. Martinez left the Firm. The Firm's partners, who the referee acknowledged lacked integrity, could have deleted files themselves, as Steven Silverberg testified, "anything is possible." (R:471). The only appropriate conclusion is that the Bar failed to meet its burden of proof, as numerous theories remain plausible based on the available record evidence, as pointed out by the referee himself. (R:945, 946, 987).

The Bar further argues that Martinez "repeatedly cites to over 400 pages of documents submitted by Ms. Martinez after the close of evidence in a motion to supplement the record, which was never granted." First, Martinez's Motion was partially granted and the referee reversed his finding of violation of rule 3-4.3 because Martinez did not in fact miss the hearing the Bar claimed she missed in the Morelus case where the dated docket entries prove the hearing took place before Ms. Martinez was counsel. The Bar's

implication that Ms. Martinez's arguments improperly rely on the record because the record included documents "not entered into evidence" is equally unfounded, where the Bar itself is the party that compiled the record and said transcripts were properly included as exhibits to a motion. Fla. R. App. P. 9.200(a)(1)("the record shall consist of all documents filed in the lower tribunal, all exhibits…"). Furthermore, it was the Bar's responsibility as appellant to ensure the record is accurate and complete. Fla.R.App.P. 9.200(e); *Morgan v. Pake*, 611 So. 2d 1315, 1316 (Fla. 1st DCA 1993). The Bar itself produced Gisel Brito and Steven Silverberg's deposition transcripts, and now implies the testimony showing their lack of credibility should be ignored, without legal basis. Notwithstanding, the referee agreed the Firm partners lacked credibility after spending just a few hours with them. (R:1055). Furthermore, there is a letter dated September 11, 2023, which the Bar included in the record despite not entering it into evidence or attaching it to any filing. (R: 2570). This is the only document in the record on SilverbergBrito letterhead that Martinez had not "left" SilverbergBrito but "was terminated." However, it was clearly never sent to clients as it is dated just days before the final hearing. The Bar makes no mention of this document they inexplicably included in the record, where it stands to benefit the Bar's argument that Ms. Martinez "improperly" used the Bar's form

departure letter language indicating she left the Firm voluntarily. The Bar's implication the Court should disregard the elements of their own record which contradict their position, supports Ms. Martinez's argument that the Bar did not competently investigate and prosecute the alleged violations. It also demonstrates the Bar's inability to argue that the evidence meets their burden, instead asking the Court to ignore sworn testimony central to the case, which was properly made part of the record per Fla. R. App. P. 9.200(a)(1).

The Bar argues that Ms. Martinez's assertion that the Bar conceded it would not pursue any violation relating to the USB is an overstatement because the Bar only conceded it would not pursue the criminal violation. The Bar made no such clarification and is trying to argue they didn't intend to concede, to avoid losing a due process appeal; however, the Bar's actions at the final hearing in failing to elicit evidence relating to the USB in any context, show that they did in fact intentionally abandon the USB related violations entirely. Whether the Bar withdrew its violations related to the USB entirely, or the Bar simply failed to prosecute the violations related to the USB entirely, the Bar undeniably failed to meet its burden of proof regardless.

Although it is undisputed that no accusation was ever made that Martinez deleted documents or spoliated evidence before the close of

evidence, the Bar argued the withdrawn unrelated USB allegations sufficiently put Martinez on notice of the violation for spoliation of evidence. While it is true that the referee may find additional violations not asserted by the Bar, those violations must arise from the specific conduct alleged in the complaint in order to properly put the attorney on notice of the issue, and that was not done in this case. *Florida Bar v. Fredericks,* 731 So. 2d 1249, 1253 (Fla. 1999). The complaint alleged Ms. Martinez downloaded proprietary Firm files in a scheme to steal clients. Notwithstanding that this "scheme" was disproven by the partners' own testimony, the conduct of downloading files and using them is entirely different conduct than the act of deleting files from the USB in a later lawsuit. Assuming the truth of every factual allegation related to the USB, the referee could still not properly find there was spoliation based on the conduct alleged. This evidences quite clearly that there was no proper notice of the violations which Ms. Martinez was later found guilty.

In *Nowacki* this Court ruled it was proper for the referee to find violations not specifically charged in the complaint where the underlying conduct was "clearly within the scope of the Bar's accusations" and the attorney was made aware of the rules she was alleged to have violated and "the nature and extent of the charges pending against her." *Florida Bar v.*

Nowacki, 697 So.2d 828, 832 (Fla. 1997). "Conversely, we have held that a finding of an uncharged rule violation based on conduct that is not within the scope of the specific allegations of the complaint is a violation of due process." *Florida Bar v. Fredericks,* 731 So. 2d 1249, 1253 (Fla. 1999) citing to *Florida Bar v. Vernell*, 721 So.2d 705 (Fla. 1998). "The United States Supreme Court, upon review of the circuit court's decision, held that the 'absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges *deprived petitioner of procedural due process*.'" *Florida Bar v. Fredericks,* 731 So. 2d 1249, 1253 (Fla. 1999) citing to *In re Ruffalo*, 390 U.S. 544 (1968)(emphasis added)(The court found a due process violation because the attorney was not given fair notice of the new charge added during the proceedings, depriving him of the opportunity to prepare a defense). In the instant case, the violation of spoliation of evidence against Martinez was not added until after the close of evidence, which is a far more egregious deprivation of notice and opportunity to defend than In *Ruffalo*, where the violation added *during* the proceedings was found to be a violation of due process. *In re Ruffalo*, 390 U.S. 544 (1968). Moreover, although this Court upheld the finding of guilt in *Fredricks*, the attorney was charged with affirmative misrepresentations of a nonexistent lawsuit, which inherently included related failures to act diligently and keep

the client informed of the filing of said lawsuit and because the *same alleged conduct* formed the basis for the violation, he was made aware of the conduct at issue and had the opportunity to defend himself. *Florida Bar v. Fredericks,* 731 So. 2d 1249, 1253 (Fla. 1999). This is in contrast to the instance case, where no one ever made any accusation that Ms. Martinez destroyed evidence or deleted files, which is the conduct at the heart of the factual finding and ruling of guilt at issue. The issue was not framed in the pleadings nor was it addressed at the hearing prior to the close of evidence. The allegations in the complaint of theft of client files are distinct and separate conduct from the act of destruction of evidence. Furthermore, because that violation allegation was specifically intentionally withdrawn by the Bar, no evidence was elicited for *that* charge either. Although the Bar argues "the content of the USB drive" was within the scope of the formal complaint, the *conduct* of deleting files plainly was not, especially where the USB related charges were withdrawn. The Bar's argument that Ms. Martinez's alleged refusal to promptly return the physical USB was at issue in the complaint and this deletion conduct was therefore at issue, is also without merit, because the physical return of the drive is also distinct conduct from deleting digital contents of the drive. Again, had there been a factual finding Ms. Martinez

failed to return the USB promptly, that conduct alone would not constitute spoliation either.

The Bar's argument that Ms. Martinez's counsel knew the USB was at issue and was on notice of the spoliation exposure because counsel "solicited extensive testimony" from Mr. Silverberg relating to the USB is also illogical, where the record reflects, she only solicited testimony relating to the accusation that Martinez schemed to steal clients. (R:819). Mr. Silverberg used the word USB a total of five (5) times during his entire lengthy testimony spanning forty-one (41) pages of the transcript, which hardly qualifies as "extensive" testimony relevant to the yet-to-be charged spoliation. (R:797-838). Bar counsel even objected to Mr. Silverberg's testimony when he brought up the USB, stating "the question went to was there a plan hatched and your input on that. You need to clarify this. And now you're turning the question around." (R:819, 820). Bar counsel actively objected to Mr. Silverberg's testimony about the USB when it veered from the specific context of the alleged plan to steal clients, evidencing their intention to abandon the USB allegations and furthering due process concerns.

The Bar also argues Martinez misrepresented the instructions of the Cease-and-Desist letter because the language requesting "destruction of ***any copies*** of files whether digital or hard copy," the Bar says, "clearly

requests the return of client files-not their destruction." This argument is unintelligible. Then the Bar proffers a common-sense argument that "the firm did not hire a lawyer and file suit to retrieve an empty USB drive it could have replaced at a fraction of the cost." Martinez does not contest that the Firm's actions were unreasonable in spending over $50,000.00 in attorney's fees to retrieve an empty USB drive. Accordingly, the Firm likely did not pay said an attorney about $700.00 an hour to interrogate Ms. Martinez in deposition about her medical prescriptions in a business tort case because it was a rational and financially sound decision. Following the common-sense theme, if the Firm intended Ms. Martinez to preserve files, it makes no sense that they would send such a letter in lieu of a preservation letter, of which an attorney with decades of experience would presumably be familiar. The overwhelming evidence suggests the lawsuit was filed for the purpose of harassment. The Firm was not concerned with protecting clients, where it refused to withdraw from cases, prejudiced clients' interests, and filed a bar complaint only *after* initiating the lawsuit. Accordingly, when the Bar piggybacked their prosecution on the Firm's lawsuit, they too failed to protect the clients and the integrity of the practice by allowing the Firm to use the Bar as their personal attorneys, by their own words "[o]ur focus was primarily on [Martinez's] actions vis-a-vis the law firm. That's it." (R:648).

The Bar argues Ms. Martinez is asking the Court to accept her representation at the August 8, 2017 hearing regarding the contents of the USB as true and that the Referee never made such a finding that the USB contained a motion, but instead found that there were “some documents on the USB.” However, the referee’s findings were based entirely on the statement that Martinez had draft motion on the USB. A finding that there were any other documents on the USB is unsupported by any evidence because not a single witness testified as to the contents of the USB at the final hearing, nor did either party submit evidence establishing the contents of the USB, presumably because the USB was not an issue at the final hearing. Moreover, Ms. Martinez is not arguing inconsistently or asking the Court to accept that factual finding, but making the argument based on possibility that the Court accepts this factual finding, that the document does not qualify as material evidence per the elements of spoliation. Martinez’s stated position that the factual finding is erroneous does not preclude her from making an alternative argument based on the factual findings the Court may accept.

Moreover, the Bar’s argument that “Ms. Martinez destroyed evidence after a lawsuit had been filed against her” is also unsupported by the evidence where there is not a single piece of evidence throughout the civil case or the

Bar proceedings that establishes that anything was deleted, let alone that establishes *when* anything was deleted. Ms. Martinez was not asked to testify about the USB's contents, about her convalescence at the August 8, 2017 hearing or any relevant circumstances because she was not asked a single question about the USB and the Bar's conclusion about *when* the alleged documents were deleted is pure speculation that is wholly unsupported by the record evidence.

B. There is not clear and convincing evidence that Ms. Martinez lacked authorization to file a notice of appearance on behalf of Luckner Morelus.

Not a single piece of evidence or testimony establishes what Mr. Morelus said, did, or thought because the Bar did not call Mr. Morelus as a witness. Despite the Bar's improper burden shifting argument in its contention that Ms. Martinez should have subpoenaed clients and forced them to testify, it was not Ms. Martinez's burden to prove or disprove violations. At all times, the Bar maintained the burden of proof by clear and convincing evidence, which it did not meet. Because the Bar did not call Mr. Morelus as a witness, the documents did not sufficiently establish that Mr. Morelus did not verbally authorize Ms. Martinez to represent him. Ms. Martinez gave uncontroverted testimony that Morelus verbally hired her. The only thing that was shown by clear and convincing evidence is that Mr. Morelus was confused by the

process. Moreover, the entirety of this documentation comes from the Firm, who has been known to draft statements and have the clients sign them without explaining their meaning to clients who do not speak English well, like Mr. Morelus. Because the Firm partners lacked credibility, it is unclear whether this form can even be authenticated as neither partner testified regarding the documents and the client was not called to testify.

Moreover, the bar argues the time of the delay in withdrawing is irrelevant whether “14 days or 27 days” and Ms. Martinez contends it is not. Where the Bar states that Ms. Martinez statement that a one-week delay in negotiating a joint letter was excessive is misplaced, it ignored the fact that the referee himself, not Ms. Martinez, explicitly stated this delay by Silverberg Brito was excessive: “Everything was very important in this case except when Ms. Martinez needed something and suddenly 24 hours wasn't enough, they needed a full week.” (R:971). Moreover, while the Bar now argues 14 days is excessive delay in withdrawing from the case, it ignores that Bar counsel not only condoned the Firm’s conduct, but vehemently defended the Firm, where in the Yelena Gershfeld case the Firm delayed withdrawing for thirty-seven days and the Bar stated it was okay because they wanted to secure fees. (R:2409, 1771). The Firm failed to withdraw from the Seymour Marksman case for approximately four months after the client fired them.

(R:923, 578). In Leonel Garcia, the Firm delayed about 30 days before withdrawing. (R:1713, 1716-1717). The docket does not reflect that the firm ever withdrew from the Bartolome Frias case. (R:2382).

C. <u>Case Law</u>

In *Bischoff*, the judge had dismissed his client's case with prejudice due to the severity of Bischoff's discovery violations, a sanction which the judge in the underlying SilvebergBrito suit denied. *The Florida Bar v. Bischoff*, 212 So. 3d 312 (Fla. 2017). Moreover, they Court found Bischoff knowingly and recklessly pursued frivolous claims and objections, did not research adequately, repeatedly failed to respond to discovery requests, did not attend depositions, intentionally lied about compliance with discovery obligations and concealed documents, and failed to comply with court orders. This case is distinct from the instant matter.

The Bar argues Ms. Martinez's position that the Court should view the findings in a different light where she was the Defendant, not counsel, is unfounded because conduct while not acting as an attorney can subject one to disciplinary proceedings, based on the *Della-Donna* case. *The Florida Bar v. Della-Donna*, 583 So. 2d 307 (Fla. 1989). However, Della Donna's misconduct involved actions taken in a fiduciary capacity for clients and

estates, while Martinez was not representing anyone's interest but her own as a Defendant.

In *Marcellus*, the Court's emphasis on Respondent's pattern of defiance towards court orders, coupled with the severity and cumulative nature of his misconduct, warranted a stricter sanction to maintain the integrity of the legal profession and to serve as a deterrent against similar future behavior. *The Florida Bar v. Marcellus,* 249 So. 3d 538 (Fla. 2018). Martinez has practiced law for nearly a decade at this point without any Bar issues since this 2018 case, and as such a deterrent argument is moot when the conduct has clearly not been repeated. Moreover, the Court took into account the dishonest and selfish motive of Marcellus, while the referee in the present case found that Ms. Martinez "went to the firm and did exactly what she was supposed to do out of the gate" and said "I am not persuaded that Respondent acted dishonestly or deceitfully." (R:971; ROR: 6). Finally, the referee found that Martinez's "lack of experience at the time" played a role in the actions and was a mitigating factor, while *Marcellus* and *Bischoff* were highly experienced attorneys with substantial experience. As the referee stated "[Bischoff and Marcellus] are sophisticated, experienced lawyers that had multiple years of practice in the federal court. This is just a very different set of facts." (R:1019).

In *Behm*, "there was no testimony by Behm correlating his losses from this traffic accident to his tax behavior." *The Florida Bar v. Behm*, 41 So. 3d 136, 150 (Fla. 2010). In contrast, Ms. Martinez testified that she suffered from anxiety, major depressive disorder, and ADHD. After being unexpectedly fired, she couldn't afford her apartment became homeless, living in her car while recovering from surgery. During the August 8, 2017 hearing, frequently referenced by the Bar and referee, Martinez stated she was heavily medicated and recovering from surgery, which she specifically mentioned as reasons for her inability to attend the hearing meaningfully or prepare adequately. (R:1875). She also testified that she was out of town recovering and could not successfully coordinate the Firm's pickup of the USB. The only evidence regarding the USB contents comes from Martinez's statements and her conduct during the hearing, where she cited her health issues and later requested these be considered as mitigating factors. The correlation between the subject conduct and the mitigating factors is clear. Martinez testified these issues made it very difficult to manage her defense and resulted in financial hardships and job loss. In addition to the fact that there is evidence correlating Martinez's conduct to the mitigating factors, it is irrefutable that being physically and mentally incapacitated and homeless made it difficult to attend hearings and participate in her defense and

certainly affected her behavior during the time of the relevant conduct. To the contrary, it is not obvious in *Behm* that being involved in a car accident caused respondent to commit tax fraud.

The Bar argues Martinez's case law involves isolated incidents and claims Martinez's conduct differs based on the numerous allegations by the Bar in this proceeding, but fails to acknowledge that the referee found the Bar failed to meet its burden of proving nearly all of them. Although the referee found violations of 4-8.4 and 4-3.4 they were relating to the same incident. The violation of 4-8.4 is also related to the same nexus of facts as *all* of the allegations, departure from SilverbergBrito and transition of client cases. Sanctions relating to the various unproven charges should not be considered.

Regarding sanctions, the Bar misconstrues Martinez's argument, where the Bar implies that Martinez contradicted herself by stipulating that the ten-day suspension and public reprimand were fair at the sanctions hearing but then arguing on cross appeal that a public reprimand is more appropriate. Ms. Martinez does agree that ten-day suspension is acceptable if the factual findings are affirmed. However, as Martinez argues, if the Court reverses the factual findings of guilt as to the USB drive, a ten-day suspension is extremely harsh for the remaining alleged violation, which

refers to unreasonable delay in withdrawing in the Lucker Morelus case fourteen days after receiving the confusing notice sent by SilbverbergBrito. (R:1754, 1759, 987). In this case, a public reprimand would be more appropriate for this violation, where there is no case law supporting a harsher sanction. In The *Florida Bar v. Gibson*, Supreme Court Case No. 2021-1716 Respondent received a public reprimand for delaying withdrawing for over 15 days after discharge and withholding reimbursement of the unused retainer, and respondent had a history of previous bar violations from the previous year. This Court also approved an admonishment in *The Florida Bar v. Davis,* Supreme Court Case No. 2019-1447, where Davis was hired to replace counsel of record in a divorce case but did not pursue a hearing on the matter for three months after former counsel refused to sign a joint motion for substitution of counsel.

CONCLUSION

Therefore, for the above stated reasons, Ms. Martinez asks this Court to accept the referee's findings and recommendations, with the exception of the findings related to the contents and deletion of the USB drive. If this Court rejects the referee's findings of spoliation of evidence regarding the USB drive, then Ms. Martinez asks the Court to impose a public reprimand. However, if this Court approves the referee's conclusion regarding spoliation

of evidence, then in light of the mitigating factors, Ms. Martinez asks this Court to approve the referee's recommended ten-day suspension as the appropriate sanction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, and true and correct copies of the foregoing have been furnished by email to Mark Lugo Mason, Bar Counsel, at mmason@floridabgar.org and to Patricia Ann Toro Savitz, Staff Counsel, at psavitz@floridabar.org, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, this 27th day of June 2024.

/s/ ALEXA MARTINEZ____________
ALEXA MARTINEZ, ESQUIRE
Florida Bar No. 126341
Primary: alexamartinezlaw@gmail.com
11945 SW 81 Street
Miami, Florida 33183
786-606-6991
Respondent

CERTIFICATE OF TYPE SIZE & STYLE

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/s/ ALEXA MARTINEZ________