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. 2018-70,053 (11D)

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Complainant is referred to as The Florida Bar or the bar. The respondent, Alexa Martinez, is referred to as Ms. Martinez.

The electronic record in this case contains all filings referenced in the Index of Record filed in this Court on November 30, 2023. Citations to the electronic record are referred to by "R:" followed by the applicable page number(s) of the 2,578-page electronic record.

Contemporaneously with this brief, the bar is filing transcripts of (1) the final hearing conducted September 22, 2023; (2) the sanction hearing conducted September 26, 2023; and (3) the costs hearing conducted November 9, 2023. This brief cites these transcripts as "T1:", "T2:", and "T3:" respectively, followed by the applicable page number(s). The report of referee is referred to as "ROR:" followed by the applicable page number(s).

NATURE OF THE CASE

This case involves a referee's report recommending Ms. Martinez's 10-day suspension from the practice of law. After Ms. Martinez was fired by her employer, the law firm of Silverberg Brito, PLLC, she engaged in a pattern of misconduct involving her refusal to return firm property (a USB drive); soliciting clients of the firm and filing notices of appearance on their

behalf, some of which were not authorized by the client; and engaging in dilatory tactics in a lawsuit seeking injunctive relief filed by her former employer. Based on the misconduct at issue, the bar seeks review of the referee's findings of guilt, the recommended sanction, and the referee's declination to award the full costs incurred by the bar.

STATEMENT OF THE CASE AND FACTS

I. Ms. Martinez retained a USB drive with client files on it following termination of her employment with Silverberg Brito, refused to return the drive, and deleted all files from it before complying with a court order mandating turnover of the drive.

Ms. Martinez became a member of the bar in December 2016. (R:1124-1143). She was employed by the firm of Silverberg Brito PLLC ("Silverberg Brito") on February 27, 2017. *Id*. The firm handled property insurance claims and commercial and real estate litigation. (T1:20). Ms. Martinez's employment at the firm lasted 113 days, at which point the firm terminated her employment on June 19, 2017. (R:1124-1143). There was a dispute regarding the reason for her termination, which is not directly relevant to any issue on appeal. (Compare T1:23-24 & T1:258-67).

One of the partners of the firm, Steven Silverberg, testified that he knew from prior conversations with Ms. Martinez that she copied client files onto a USB drive and told him that she would work on client matters from

home. (T1:179-80). The termination letter signed by Ms. Martinez contained an acknowledgement stating, "I will return all company property and material in my possession and are [sic] not to retain copies of such materials on **6/19/17**." (R:1304) (emphasis in original). Due to some communications sent by Ms. Martinez to other partner—Gisel Brito—and Mr. Silverberg after her termination, the firm retained attorney Christopher Spuches as counsel to negotiate matters with Ms. Martinez, which is addressed in more detail *infra*. On June 27, 2017, Mr. Spuches sent an e-mail to Ms. Martinez stating in pertinent part:

> In addition, we will need you to immediately return all firm property in your possession, including client files, USBs, and other items and documents. Please confirm these items will be returned before your surgery.

(R:1634).

Ms. Martinez did not address this demand and instead limited her response to the disputed content of a letter to be sent to clients regarding her departure from the firm. See *id*. Her lack of response led to five more written demands from Mr. Spuches, spanning from the first request on June 27, 2017 until the sixth and final written demand on June 30, 2017. (R:1598, 1601-1602, 1619, 1631-1634). Ms. Martinez never provided a meaningful response to these demands. Instead, following the fourth demand for return of the USB drive, Ms. Martinez responded as follows:

> Talk to your clients who seem to have amnesia about our conversation regarding the USB and stop trying to change the subject to an unrelated matter.

(R:1631). When Mr. Spuches continued to demand a response regarding the return of the USB drive, Ms. Martinez claimed the above e-mail sufficiently addressed the matter. (R:1601). She later stated that she and the firm previously reached an agreement and Mr. Spuches should ask his clients instead. (R:1600).

On July 19, 2017, Mr. Spuches sent a cease-and-desist letter demanding, in part, return of the USB drive within two days. (R:1705-1712). Ms. Martinez responded by stating she "[had] not done anything inappropriate" and to file suit to save her the trouble of incurring filing fees to pursue her counterclaims. (R:1707). On July 24, 2017, Mr. Spuches filed a complaint for injunctive and other relief on behalf of Silverberg Brito against Ms. Martinez. (R:1101). A portion of the complaint alleged that Ms. Martinez failed to return the USB drive. (R:1105). Mr. Spuches filed an emergency motion for preliminary injunction. (R:1145). On August 7, 2017, Ms. Brito executed an affidavit stating that she still had not received the USB drive despite the firm's repeated demands. (R:1849).

This affidavit was executed in support of the emergency motion, which was initially set for a brief hearing on August 8, 2017. (See R:1869-

1888). At that hearing, Ms. Martinez did not appear and the judge contacted her via telephone. She represented to the judge that she had told Mr. Spuches that the firm could pick up the USB "for a long time." (R:1877). She admitted that the USB had some content in it, noting that it had a draft motion on it, but she denied that it contained entire files on it. *Id*. She then offered to send it by mail. *Id*. After Mr. Spuches noted Ms. Martinez's obstinance in her e-mails contradicted her assertions at hearing, Ms. Martinez stated, "I know that I was going to return it in the mail." (R:1878). She later represented to the bar that she did not want to return it by mail and instead wanted the firm to send a courier because she was concerned she would be wrongfully accused of damaging or destroying the thumb drive. (R:1125-1126).

At hearing, Mr. Spuches offered to send a courier to retrieve the USB so that this matter could be resolved quickly. (R:1878). A preliminary order required Ms. Martinez to immediately turn over the USB drive to Mr. Spuches. (R:2020-2022). On August 10, 2017, Mr. Spuches sent a letter to Ms. Martinez explaining that the order required her to return the USB drive "immediately," but she had not contacted him regarding a mutually agreeable time for a courier to retrieve the drive. (R:1711-1712). Ms. Martinez returned the drive, but it was returned empty, despite her

admission at hearing that the drive contained at least some files. (T1:180-82). The referee concluded that Ms. Martinez's removal of the files from the USB drive constituted spoliation of evidence and a significant breach of Ms. Martinez's ethical obligations. (ROR:3). Specifically, the referee found that Ms. Martinez's actions regarding her return of the USB drive violated Rules 4-8.4(c) (dishonest conduct), 4-3.4 (fairness to opposing party and counsel), and 4-8.4(d) (conduct prejudicial to the administration of justice). (ROR:3, 7).

II. Ms. Martinez unilaterally contacted firm clients following her termination, filed notices of appearance on behalf of several of them, engaged in dilatory conduct in some of these cases and in the injunction action by Silverberg Brito.

The lawsuit filed by Silverberg Brito also addressed various notices of appearances filed by Ms. Martinez on some of the firm's cases. (R:1101). Specifically, on June 22, 2017—three days after Ms. Martinez's termination—she sent an e-mail to Ms. Brito and Mr. Silverberg requesting they send a joint letter to clients informing them that she was no longer with the firm. (R:1667-68). Ms. Martinez did not identify the specific clients she believed should be informed, and instead only stated that "clients I was representing while at the firm" should receive the letter. *Id*.

Ms. Martinez then sent a follow-up e-mail the next day, asking Ms. Brito and Mr. Silverberg to contact her by the end of the business day to discuss. *Id*. Ms. Brito responded they needed more than 24 hours to review the demand and that she and her law partner had been busy in meetings and an all-day deposition. (R:1583). Ms. Brito requested until next week to respond to Ms. Martinez's request and advised her not to contact firm clients in the meantime. *Id*. Later the same day, attorney Christopher Spuches sent an e-mail to Ms. Martinez stating that his firm had been retained by Silverberg Brito. (R:1596). He advised her not to unilaterally contact firm clients and assured her that he would prepare a compliant form letter and work with Ms. Martinez in good faith to finalize it for transmission. *Id*. To that end, he requested a list of firm clients for whom Ms. Martinez performed significant legal services. *Id*.

Ms. Martinez did not provide the requested list of firm clients she believed were entitled to notice, instead only stating in an e-mail response to Mr. Spuches that the firm had that information already. (R:1595). Ms. Martinez further stated that she had a right to contact clients directly if the firm did not participate in good faith negotiations. She stated that the firm already had a week and she had sent several e-mails with zero feedback—even though she had only sent two prior e-mails on the issue, with the first

e-mail having been sent one day earlier. See *id*. She requested that Mr. Spuches send her a draft letter for her review to move the matter along as soon as possible. *Id*.

Mr. Spuches' first e-mail communication with Ms. Martinez promising to work with her in good faith was sent on Friday, June 23, 2017 at 7:41 p.m, which was one day after Ms. Martinez's first e-mail requesting a joint letter. (R:1596). The next business day after Mr. Spuches' first e-mail was Monday, June 26, 2017. At 7:51 a.m. on that date, Ms. Martinez sent an e-mail stating "I'm trying to negotiate but it seems like you're just delaying." (R:1640). She complained that Silverberg Brito could not compile a letter within a week despite its resources and she requested feedback that day. *Id*. Mr. Spuches responded by explaining the actual timeline of the retention of his firm and Ms. Martinez's immediate claims of delay. (R:1639). Mr. Spuches stated that he would respond in a reasonable amount of time unless Ms. Martinez could explain the urgency of the matter. *Id*.

Ms. Martinez responded by again accusing Silverberg Brito of delay, though this time her accusation was based on the firm's retention of counsel. (R:1638). She asserted that the firm should have prepared the joint letter before her termination and the partners were "simply delaying

and I don't appreciate the run around." *Id*. In explaining the need for urgency, Ms. Martinez only stated that she was concerned about legal malpractice caused by neglected cases. *Id*. She further stated that her clients "have no way of contacting me if they wanted to." *Id*. She stated that unless Mr. Spuches explained why no one had attempted to discuss the matter with her, she "will assume you are not attempting to facilitate any real negotiation." (R:1638-1639). In a later e-mail sent that morning, she supplemented her claim of urgency by stating that she had an upcoming medical procedure scheduled that week. (R:1635).

On June 27, 2017, Ms. Martinez told Mr. Spuches that she would be going into surgery and would be unavailable for two weeks, so she needed to resolve the matter immediately and was "not obligated to sit around waiting." *Id*. Less than 20 minutes later, Mr. Spuches sent a draft letter for Ms. Martinez's review. (R:1634). Ms. Martinez stated she was "not in agreement" with a sentence in the letter stating that Silverberg Brito could file a charging lien, based on her belief that the firm did not meet the elements for a charging lien. *Id*. She also maintained that the paragraph was misleading because she believed the firm had a policy of never pursuing any costs or fees directly from the client. *Id*. She concluded her e-mail by asking if Mr. Spuches was amenable to her suggested edits. *Id*.

The next day, June 28, 2017, Ms. Martinez again accused Mr. Spuches of negotiating in bad faith. (R:1631).

Mr. Spuches requested that Ms. Martinez provide him a revised version of the letter based on her suggested edits. (R:1630). She did not do so, and Mr. Spuches provided a new draft letter to Ms. Martinez the following day. (R:1627-1628). Ms. Martinez requested additional edits to the draft language, but Mr. Spuches refused. (R:1612-1614). No agreement on the language of the draft letter was reached, and Ms. Martinez sent a final e-mail to Mr. Spuches stating that she would be unilaterally notifying the clients herself. (R:1592).

The referee's report found that negotiations had broken down, and that there was a dispute as to whether both sides participated in these negotiations in good faith. (ROR:3). The report does not resolve the dispute of fact and only notes the existence of the dispute itself.

In the weeks that followed, Ms. Martinez filed notices of appearance in the following matters:

- *Leonel Garcia v. Universal Property & Casualty Ins. Co.*, Case No. 2017-CA-4084 (Fla. 15th Cir. Ct. 2017);
- *Luckner Morelus v. Citizens Property Ins. Co.*, Case No. 2016-019139-CA (Fla. 11th Cir. Ct. 2016) and *Luckner Morelus v.*

Citizens Property Ins. Co., Case No. 2016-019144-VA-01 (Fla. 11th Cir. Ct. 2016);

- *Yelena Gershfeld, et al. v. Citizens Property Ins. Co.*, Case No. 2016-015439-CC-05 (Fla. 11th Cir. Ct. 2016);
- *Noel Perez, et al. v. Universal Property & Casualty Ins. Co.*, Case No. 2017-CC-3638 (Fla. 9th Cir. Ct. 2017) and *Noel Perez, et al. v. Universal Property & Casualty Ins. Co.*, Case No. 2017-CC-4078 (Fla. 9th Cir. Ct. 2017);
- *Firmin Jacques, et al. v. Citizens Property Ins. Co.*, Case No. 2017-CA-114 (Fla. 15th Cir. Ct. 2017) and *Firmin Jacques, et al. v. Citizens Property Ins. Co.*, Case No. 2017-CA-289 (Fla. 15th Cir. Ct. 2017); and
- *Bartolome Frias, et al. v. Universal Ins. Co. of North America*, Case No. 2017-10426 (Fla. 7th Cir. Ct. 2017) and *Bartolome Frias, et al. v. Universal Ins. Co. of North America*, Case No. 2017-10426 (Fla. 7th Cir. Ct. 2017).

(See generally R:1674-1704). Except for the notice filed on behalf of Leonel Garcia—which is dated June 30, 2017—all other notices were filed on July 18, 2017. See *id*. None of the notices of appearance were accompanied by motions to substitute counsel. Consequently, the filings

only suggested that Ms. Martinez was co-counsel with Silverberg Brito rather than substitute counsel. On July 19, 2017, Ms. Martinez informed Mr. Spuches that she had filed notices for all clients who chose to have Ms. Martinez represent them, she stated she would be forwarding the paperwork to the firm, and she accused Silverberg Brito of improperly contacting her clients—even though the firm was still counsel of record on these cases and no paperwork had yet been provided. (*See* R:1868).

The filing of these notices prompted Mr. Spuches to send a cease-and-desist letter to Ms. Martinez. (R:1705-1712). The letter demanded Ms. Martinez cease contacting firm clients, file stipulations for substitution of counsel on cases in which a firm client retained Ms. Martinez, and to pay Silverberg Brito $830.00 in legal fees. *Id*.

Ms. Martinez responded to this letter by accusing Silverberg Brito of threatening and harassing "her" clients, attempting to poach her clientele by defaming her, and stated that the firm—not Ms. Martinez—was the party making "wild false accusations." (R:1707-1708). On July 22, 2017, she sent a follow up e-mail providing a list of "her" clients and advising Silverberg Brito to forward the client files and cease all work. (R:1709).

Silverberg Brito then filed the civil action against Ms. Martinez and the emergency motion for preliminary injunction. (R:1101, 1145). Ms.

Martinez's availability or willingness to participate in this litigation initiated against her by Silverberg Brito quickly became a significant issue. Her conduct in this proceeding resulted in substantial delay, multiple motions to compel her deposition, and multiple sanction orders entered against her, which will be discussed in more detail *infra*.

The first alleged effort by Ms. Martinez to delay this litigation related to a preliminary hearing on Silverberg Brito's emergency motion. At the outset of the hearing, the presiding judge stated that he received an e-mail from Ms. Martinez stating that she was recovering from surgery. (R:1871; see also R:2008-2019). Mr. Spuches explained that Ms. Martinez had filed a notice of unavailability for July 1, 2017 through July 17, 2017, and she did not file another notice of unavailability until after receiving notice of the August 8, 2017 hearing. (R:1873). In fact, Ms. Martinez had previously sent an e-mail to Mr. Spuches explicitly stating that "[a]s soon as I had notice of this hearing I filed my notice [of unavailability]." (R:2010, 2019). Ms. Martinez told the court that the recovery period following her surgery is two to three months, and she must take pain medication, which affects her mental faculties. (R:1874-1875).

More importantly, Mr. Spuches asserted at the August 8, 2017 hearing that in most of the cases in which Ms. Martinez filed an

appearance, the firm had no written proof that the client retained her. (R:1878). Ms. Martinez confirmed the absence of this written proof when she explained at the hearing that she filed notices of appearance based on conversations with the clients and her expectation that she would soon receive written retainer agreements from all of them. (R:1879). At the conclusion of the hearing, Ms. Martinez stipulated to entry of an order requiring her to provide written confirmation that the plaintiffs had elected to retain her and not Silverberg Brito. (R:1882, 2020-2022).

The documentation submitted by Ms. Martinez pursuant to the court order confirmed that she had not obtained written contingency fee agreements before filing notices. Her notice of appearance on behalf of Leonel Garcia was filed ten days before the client signed a letter authorizing the transfer of his client file from Silverberg Brito to Ms. Martinez. (Compare R:1697 & R:1713). Luckner Morelus never signed a contingency fee agreement and elected to remain a client of Silverberg Brito. (R:1754). Despite sending a letter to Silverberg Brito directing the firm to cease all work on Mr. Morelus's case and send her the client file, Ms. Martinez eventually filed a motion to withdraw due to the absence of a written agreement. (R:1753, 1758).

The same is true of Fermin Jacques and Annerose Jacques, as Ms. Martinez also filed motions to withdraw as counsel in both of their cases due to the absence of a written agreement. (R:1769-1770). The Jacques' son gave Ms. Martinez verbal authorization to continue representing his parents in the case, though he had no legal authority to make this decision on behalf of his parents. (T1:87). Notably, she filed an appearance on behalf of the Jacques on July 18, 2017, but she did not file the motion to withdraw until August 14, 2017. During the nearly one-month period of unauthorized representation, Ms. Martinez failed to appear at a hearing on July 20, 2017. (T1:90-91; see also R:2257-2260). Instead, Ms. Brito testified that she appeared and represented the Jacques at the hearing. *Id*. Ms. Martinez testified that she did not appear at hearing because either Silverberg Brito was adamant they were counsel for the plaintiffs, or she thought that her notice of appearance was not filed until after the hearing. (T1:293-94). In the *Morelus* case, a motion to dismiss hearing occurred on July 18, 2017, which was the same day Ms. Martinez filed her notice of appearance. (R:2272). She did not appear at that hearing either.

The two notices of appearance filed by Ms. Martinez on behalf of Noel Perez and Luz Perez are the only notices filed *after* all the clients had signed a written retainer agreement. (Compare R:1685-1688 & R:1761-

1768). But after signing the retainer agreements on July 17, 2017, the clients notified Ms. Martinez the next day that they elected to remain with Silverberg Brito. (R:1766). The circumstances regarding the short-lived period of representation are detailed in an affidavit executed by Mr. Perez. (R:1767). The affidavit is in Spanish, but the bar entered an English translation into evidence. (See R:2106). It states that Ms. Martinez called Mr. Perez on July 17, 2017, which is the first time they had ever spoken regarding the litigation. *Id*. Ms. Martinez told him that she did not know if Ms. Brito would continue handling the matter because Ms. Brito was pregnant. *Id*. This was not true, as Ms. Brito did not at any point intend to discontinue representation of clients due to her pregnancy. (T1:82-83). But based on this misrepresentation, Mr. Perez signed a contract with Ms. Martinez. (R:2106). He then spoke with Ms. Brito and learned that she was not leaving the law firm, so he and his wife sent Ms. Martinez a letter cancelling the contract they had signed the day before. *Id*.

Perhaps the most significant misconduct regarding a client matter involved the notice of appearance filed by Ms. Martinez in *Yelena Gershfeld, et al. v. Citizens Property Ins. Co.*, Case No. 2016-015439-CC-05 (Fla. 11th Cir. Ct. 2016). On July 18, 2017, Ms. Martinez filed this notice on behalf of all three plaintiffs. (R:1682). But at that time, only two of the

three plaintiffs had signed a document indicating they wished to be represented by Ms. Martinez. (R:1771-1847). Neither Ms. Brito nor Mr. Silverberg were aware of this retainer agreement when the notice was filed. (T1:47-48). Therefore, approximately an hour and a half after its filing, Ms. Brito sent an email to one of the clients, Yelena Gershfeld, asking to discuss her case. (R:1779). On July 19, 2017, Ms. Gershfeld informed Ms. Brito that she retained Ms. Martinez, though she refused to provide the written documentation. (T1:53; R:1786). Silverberg Brito was unsure of whether Ms. Martinez represented all three plaintiffs—as stated in the notice of appearance—or if she only represented Ms. Gershfeld. (See R:1802). Mr. Spuches later asked for documentation from Ms. Martinez to clarify the matter, and she provided him the signed document indicating that only two of the three plaintiffs retained Ms. Martinez. (R:1801).

The initial confusion regarding which of the three plaintiffs had retained Ms. Martinez became further complicated by the acceptance of a settlement offer previously made by Silverberg Brito on July 17, 2017. Specifically, on July 20, 2017, the attorney for Citizens Property Insurance Corporation ("Citizens") accepted Silverberg Brito's $30,000.00 global settlement offer. (R:1790, 1816). Silverberg Brito made the settlement offer before Ms. Martinez filed her notice of appearance, but Citizens

accepted the settlement offer after the filing. (Compare R:1813 & R:1816). Ms. Martinez claimed in a letter to the bar that "Ms. Brito engaged in settlement negotiations after this client hired me as counsel to substitute for the firm." (R:1125). But all written settlement negotiations occurred before the Gershfelds retained Ms. Martinez as counsel. Only the acceptance of the settlement by Citizens occurred after.

Mr. Spuches asked Ms. Martinez how she wished to handle the settlement. (R:1790). She then accused Silverberg Brito of settling without client authority or her consult, because she had been representing the plaintiffs since June 30, 2017. *Id*. Mr. Spuches stated that if her claimed timeline was accurate, then Ms. Martinez failed to appear at a July 10, 2017 deposition in the case, which she had personally noticed when she was still an associate of Silverberg Brito. (R:1774-1775, 1792). Ms. Martinez responded that she was recovering from surgery, one of the partners of Silverberg Brito had previously assured her that the firm would reschedule the deposition, and she relied on this assurance—allegedly offered before her termination—in assuming the deposition had been cancelled. (R:1799-1801). Nevertheless, in her response to the grievance filed against her, Ms. Martinez claimed that "since my departure [from Silverberg Brito] I have not failed to attend hearings, depositions or any

other related matter on behalf of the Clients for which I represent." (R:1125). She stated the same at trial, claiming that she did not attend the deposition because she was not yet the attorney of record, and "I assumed that they [Silverberg Brito] were going to these hearings and going to these things because I wasn't their attorney, according to them." (T1:292). Ms. Martinez asserted during the disciplinary proceeding:

> I guess they were the attorneys of record and I believe at the very least that they were responsible to show up to these things and I believe they did.

(T1:293).

In any case, after Citizens' acceptance of the $30,000.00 settlement offer, Ms. Martinez contacted the attorney representing Citizens and stated that Silverberg Brito had been discharged as counsel before the firm extended the settlement offer and before the July 10, 2017 deposition. (R:1822). Ms. Martinez stated that "her" clients would accept the $30,000.00 global settlement, provided that $15,000.00 was made payable to Ms. Martinez's firm. (R:1824). Notably, Ms. Martinez offered a contrary assertion in a letter to the bar, in which she claimed that "the Client involved in this case has expressed that the settlement negotiated by SB [Silverberg Brito] is not agreeable." (R:1125).

Counsel for Citizens sent an e-mail to Ms. Brito and Ms. Martinez advising them both to spend the next few days resolving their dispute. (R:1825). The dispute was not resolved, prompting Citizens to file a motion to enforce the settlement agreement. (R:1803-1807). The motion explains the efforts by Ms. Martinez to frustrate the settlement reached by Silverberg Brito while simultaneously attempting to settle the case with Citizens on the exact same terms. See *id*. The motion further notes a misrepresentation by Ms. Martinez to counsel for Citizens in which she denied the existence of any charging lien filed by Silverberg Brito. *Id*. The firm had filed its charging lien on August 8, 2017. (*Id*.; see also R:1839).

On October 6, 2017, which was one day after a hearing on Citizen's motion, Mr. Silverberg informed Ms. Martinez that the firm stipulated to providing the Gershfelds the $15,000.00 they requested at hearing. (R:1842). Ms. Martinez asked Mr. Silverberg the amount of fees sought by Silverberg Brito, and he responded that the firm expected all of the earned fees. *Id*. Ms. Martinez told Mr. Silverberg, "Don't be ridiculous Steven. You're obviously not getting all of it. Give me a reasonable number." *Id*. She claimed in a subsequent e-mail that Silverberg Brito's "unauthorized settlement negotiations incurred substantial legal fees and delayed my clients' case significantly." (R:1841). Ms. Martinez again attempted to

negotiate an apportionment of the attorney's fees by contacting Mr. Spuches, stating that she was being "generous" in doing so despite Silverberg Brito's allegedly improper settlement negotiations. (R:1847). Consistent with Mr. Silverberg's earlier correspondence, Mr. Spuches responded that Silverberg Brito was entitled to all reasonable fees and costs and Ms. Martinez was entitled to none because she "did no work." (R:1846).

The court eventually entered an order on Silverberg Brito's motion to enforce charging lien, which awarded all $15,000.00 previously paid into the court's registry to Silverberg Brito. (R:2220-2221).

The bar raised an additional issue regarding another client Ms. Martinez contacted, but who did not agree, either on the telephone or in writing, to retain her as substitute counsel. Specifically, Ms. Martinez explained in a letter to the bar that she contacted 13 clients, and of those clients, 11 agreed on the telephone to retain her and discharge Silverberg Brito. (R:1124-43). One of the two clients who did not agree to Ms. Martinez's representation was Luis Llerena. According to an affidavit signed by him, he received a telephone call from Ms. Martinez on July 17, 2017. (R:1751). He stated that he retained Silverberg Brito to represent him regarding a suit against an insurance company on May 31, 2016, and

Ms. Martinez informed him that she had been the attorney handling his case, including depositions, from the beginning. *Id*. But Ms. Martinez was not even licensed to practice law until December 2016, and she was not hired by Silverberg Brito until February 2017. (R:1124-43). Since this was the first time he had spoken to Ms. Martinez, Mr. Llerena contacted Ms. Brito regarding the matter, and he later elected for his file to remain with Silverberg Brito. (R:1751).

The referee determined that Ms. Martinez provided significant legal services with direct client contact on most of the client matters at issue, which warranted notification to those clients after her termination from Silverberg Brito. (ROR:4). Though the referee found that some of the client communications initiated by Ms. Martinez following her termination were not in accordance with applicable rules, the referee determined that Ms. Martinez's violations of Rule 3-4.3 only constituted minor misconduct.[1] (ROR:5).

The referee's report next addressed the bar's argument that Ms. Martinez disparaged and defamed Silverberg Brito, or otherwise interfered with its client relationships. In finding that the bar produced insufficient

[1] The report of referee mistakenly references Rule 4-4.3, though the trial transcript clarifies that the referee found Ms. Martinez guilty of violating Rule 3-4.3. (See T1:345).

evidence to establish this allegation, the referee noted that the bar did not call any of the impacted clients as witnesses, and the referee had credibility concerns with one of the two Silverberg Brito employees who did testify due to "personal animus and deep-rooted biases." (ROR:6). The report does not state whether this refers to Ms. Brito or Mr. Silverberg. The referee concluded that Ms. Martinez only engaged in "legal puffery" to win a client's business by inflating the importance of her work. *Id*.

The referee also found that Ms. Martinez did not act dishonestly or deceitfully in filing most of the notices of appearance without a signed retainer agreement. (ROR:6). Specifically, the referee concluded that Ms. Martinez had either direct or apparent authority to file the notices in several of the cases. (ROR:6-7). However, in the *Morelus* case, the referee found that Ms. Martinez both filed a notice without proper client authorization and she unreasonably delayed her withdrawal for approximately one month, which violated Rule 4-8.4(d) (conduct prejudicial to the administration of justice). *Id*.

Finally, the referee found that Ms. Martinez's notice of unavailability filings—presumably in the civil litigation initiated against her by Silverberg Brito—did not constitute dishonest conduct given her lack of experience and confusion regarding the proper use of such notices. (ROR:7).

The referee recommends that Ms. Martinez be found guilty of violating Rules 4-3.4 (fairness to opposing party and counsel) and 4-8.4(c) conduct involving dishonesty, fraud, deceit, or misrepresentation) without explanation. (ROR:7). Based on the misconduct found in the report, the referee recommends a ten-day suspension from the practice of law, a public reprimand, and payment of the bar's costs. (ROR:11). On appeal, the bar seeks a one-year suspension from the practice of law.

SUMMARY OF THE ARGUMENT

This Court has consistently stated that a pattern of dishonest conduct warrants a lengthy suspension period. Ms. Martinez unquestionably engaged in such a pattern of dishonest conduct. After her termination, she sought to contact clients to inquire into whether they wished to retain her as counsel or remain clients of Silverberg Brito. Before she could engage in such contact, she was required to engage in bona fide negotiations with the firm regarding the joint letter to be sent to affected clients. She did not engage in good faith negotiations and then solicited clients of the firm, even though she did not perform significant legal services with direct client contact for all of the clients she contacted. She then filed notices of appearance in their cases, even though she had not received written contingency fee agreements. Despite the fact that Silverberg Brito

remained counsel of record, she threatened a counterclaim against the firm and baselessly asserted that the firm had violated the Rules of Professional Conduct by reaching out to their clients.

She then engaged in dilatory conduct. First, she failed to promptly withdraw from cases in which clients had not retained her. Second, she attempted to collect $15,000.00 in attorney's fees belonging to Silverberg Brito by falsely claiming that the firm had made an offer of settlement the client found unacceptable. Third, she engaged in stall tactics in the litigation initiated against her by Silverberg Brito, which included violating court orders requiring her to appear for deposition.

This misconduct is not properly redressed by a 10-day suspension. The referee should have found that Ms. Martinez violated all rules charged in the bar's complaint, except for Rules 4-4.2 and 4-8.4(b). Based on the pattern of dishonest conduct, the bar seeks Ms. Martinez's suspension from the practice of law for a period of one year.

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. Standards of review used to evaluate a trial court's final judgment do not apply here.

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)." 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 that it is moving toward stronger sanctions than in the past. *See The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015). 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 on the party challenging those findings).

Once the factors of mitigation and aggravation are found to exist, they are applied to "justify" an increase or a reduction in the "degree of discipline to be imposed." *Florida Standards 3.2(a), 3.3(a)*. This process of balancing the positive and negative factors is a mixed question of fact and law. It is part of the ultimate decision to impose a sanction.

ARGUMENT

I. The referee correctly found that Ms. Martinez's actions in withholding return of the USB drive and then deleting all files from the drive violated Rules 4-3.4(a), 4-8.4(c), and 4-8.4(d).

Ms. Martinez repeatedly refused to meaningfully address Silverberg Brito's demands that she return the USB drive containing client files following her termination. She was given ample opportunity to turn over the drive before the filing of a lawsuit seeking injunctive relief. Counsel for the

firm, Mr. Spuches, issued six demands for return of the drive in an unsuccessful effort to obviate the need for litigation on the issue. Her reasons for failing to return the drive before the filing of a lawsuit have not been consistent. At a preliminary hearing on an emergency motion for injunctive relief, Ms. Martinez represented to the court, "I know that I was going to return it in the mail." (R:1878). This claim was consistent with the bar grievance filed by counsel for Silverberg Brito, which alleged that "Ms. Martinez said she would mail the USB drive to SB [Silverberg Brito]." (R:1096-1123). But Ms. Martinez nevertheless disputed this allegation in her response letter to the bar, which instead claimed that she asked that someone retrieve the drive from her to avoid accusations that she damaged or destroyed it. (R:1125-26). This was not Ms. Martinez changing her mind upon further reflection. Her response to the bar grievance was dated August 5, 2017. *Id*. This was three days *before* the hearing on Silverberg Brito's emergency motion. (R:1869-1888). She made one representation to the bar, then made a contrary representation to the court three days later.

Ms. Martinez's false promise to mail the drive back to the firm coupled with her prior failures to meaningfully address six demands seeking its return was the apparent basis for the firm's stated belief that

she had stolen client files. (See R:1096-1123). The bar originally charged Ms. Martinez with violating Rule 4-8.4(b) (commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer) on this basis. The bar dismissed this charge prior to trial. (See T1:5). But importantly, neither the bar nor Silverberg Brito could determine whether Ms. Martinez stole client files due to her spoliation of evidence.

Specifically, at the August 8, 2017 hearing, Ms. Martinez represented to the court that the drive only had "a motion that I was working on at the time." (R:1877). Her own stated understanding of Silverberg Brito's claims in its suit against her was that the drive had "entire files on it," which she claimed was untrue, and that this "seems to be, like, the biggest concern for them is the USB." *Id*. She clearly understood and expressed the firm's "biggest concern." The court entered an order requiring Ms. Martinez to "immediately hand over the USB drive." (R:2020-2022). She did not immediately return it, prompting Mr. Spuches to send a letter threatening sanctions against her two days later. (R:1711-12). Ms. Martinez then returned the drive empty, despite her representation to the court that the drive had—at the very least—one file on it at the time of the hearing held days earlier.

Though this spoliation of evidence precluded the bar from establishing a violation of Rule 4-8.4(b) by clear and convincing evidence, Ms. Martinez's conduct violated Rules 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and 4-8.4(d) (conduct prejudicial to the administration of justice). It also violated Rule 4-3.4(a), which prohibits a lawyer from unlawfully obstructing another party's access to evidence or altering, destroying, or concealing a document or other material the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding. This Court should approve the referee's findings of guilt on all three rule violations related to Ms. Martinez's handling of the USB drive.

II. The referee should have found Ms. Martinez guilty of violating Rule 4-5.8 by unilaterally contacting certain clients of Silverberg Brito following her termination.

Ms. Martinez was an associate of Silverberg Brito for 113 days, beginning on February 27, 2017 and ending on June 19, 2017. She was a new member of the bar at the time of hire. Ms. Brito testified that Ms. Martinez did not have ultimate responsibility for any case, and she was instead assigned to perform pretrial work, such as the filing of motions and attendance at pretrial hearings. (T1:21). The referee nevertheless found that Ms. Martinez performed significant legal services with direct client

contact, which entitled her to unilaterally contact these clients after her termination. (ROR:4).

As an initial matter, Rule 4-5.8(c)(1) requires the lawyer leaving a firm to attempt to negotiate a joint communication to the clients concerning the lawyer leaving the firm. It further states that unilateral contact with the clients is only authorized if "bona fide negotiations have been unsuccessful." The referee therefore needed to determine whether there were "bona fide negotiations" between Ms. Martinez and Silverberg Brito before she unilaterally contacted clients. But the referee did not render a specific finding on this issue, and instead only noted that "[t]here is a dispute as to whether both sides participated in these negotiations in good faith." A review of the relevant e-mails between Ms. Martinez and Mr. Spuches from June 22, 2017 through June 30, 2017 demonstrates that Ms. Martinez did not act in good faith in these negotiations. (See generally R:1580-1673). Ms. Martinez almost immediately accused Silverberg Brito of delay without any basis in fact.

In his very first communication to Ms. Martinez, Mr. Spuches requested a list of clients "for whom you performed significant legal services." *Id*. This was a reasonable and necessary request. Ms. Martinez's first e-mail on the matter broadly stated that she wished to

"notify[] the other clients I was representing while at the firm." (R:1580). However, a comment to Rule 4-5.8 clarifies that joint notice regarding a change in firm composition should be provided to "current clients for whom the departing lawyer has provided significant legal services with direct client contact." Mr. Spuches sought these names to negotiate in good faith, according to the plain language of his e-mail.

But much like her refusal to meaningfully address repeated demands for return of the thumb drive, Ms. Martinez refused to provide a list of clients. She later broadly claimed that "[t]here is a list of all my clients at every desk in the office." (R:1587). This was a non-responsive answer; she claimed at trial she was assigned 150 cases in her first week working at the firm. (T1:258). But even if this number is accurate, it does not demonstrate she performed significant legal services with direct client contact on all these cases. In fact, her decision to contact a small portion of those clients suggests she understood she was not authorized to send notice in every case she was assigned. By refusing to answer the question, Ms. Martinez essentially tasked the firm with deciphering which of these cases involved significant services with direct client contact, even though she could have immediately provided a list as requested. If the parties reached an agreement on the content of a joint letter, they would

still need to agree on the intended recipients of the letter. Ms. Martinez's refusal to meaningfully answer a necessary question was in bad faith.

Ms. Martinez also disagreed with the language of draft letters provided by Mr. Spuches without suggesting amended language that would resolve her claimed concerns. She also complained that the clients had no way to contact her. (See generally R:1580-1673).[2] To the extent this was a concern, it was her own intransigence that caused this issue. The comment to Rule 4-5.8 states that both the departing lawyer and the law firm should be given access to the names and contact information of all clients entitled to notice of a lawyer's departure from a firm. Since Ms. Martinez never provided the list of clients she wished to contact, relevant contact information could not be shared. Had she simply provided a list of names, this would have triggered the law firm's duty to share client contact information.

Yet while refusing to contribute to resolving these fundamental matters necessary to reach agreement on the content and intended recipients of a joint letter, Ms. Martinez repeatedly accused the firm of unreasonable delay. She claimed Ms. Brito and Mr. Silverberg had

[2] She made a contrary assertion at trial, stating that some clients had her personal cell phone number and called her after she was terminated. (T1:271-72).

amnesia, and she offered similar belittling remarks to Mr. Spuches, such as "[c]learly simple things are difficult for you then." (See generally R:1580-1673).

The referee concluded that Ms. Martinez negotiated extensively with the firm, but the record evidence does not support the referee's finding that her intent was to "mutually agree on a client outreach process." (See ROR:5). This was the pretext for her communications but not her intent, as further reflected by Ms. Martinez's subsequent actions after the negotiations were unsuccessful. She unilaterally contacted firm clients via telephone rather than sending the draft letter she had originally proposed be sent to clients in her June 22, 2017 e-mail.

She also did not notify the firm when she contacted clients. Instead, Ms. Martinez apparently expected the firm to draw that inference on its own—and further conclude that the client had discharged the firm—based on her filing of notices of appearance. But a notice of appearance filed on behalf of a party already represented by counsel does not discharge the prior attorney. *See* Fla. R. Gen. Prac. & Jud. Admin. 2.505(f). The firm attempted to directly contact its clients, which was not only permissible, but necessary, because the clients had not yet advised the firm of their intention to retain Ms. Martinez. Therefore, they remained clients of

Silverberg Brito. *See* Rule 4-5.8(e)(1). Nevertheless, Ms. Martinez accused Silverberg Brito of violating the Rules of Professional Conduct by doing so. (R:1707-08).

These are not the words or actions of a lawyer negotiating in good faith. Good faith bargaining requires a sincere effort to resolve differences and come to an agreement. *Duval Cty. School Bd. v. Florida PERC*, 353 So. 2d 1244, 1248 (Fla. 1st DCA 1978). Ms. Martinez did not intend to reach a joint agreement on the content of the letter and the clients entitled to notice. Since Ms. Martinez did not negotiate in good faith, she lacked the authority to unilaterally contact clients under Rule 4-5.8, regardless of whether she performed significant legal services with direct client contact.

Further, although competent substantial evidence supports the referee's findings that Ms. Martinez performed significant legal services with direct client contact in *some* cases, this was not true of every client contacted. In fact, the referee's report makes this implicit finding; it states that Ms. Martinez performed significant services and had direct client contact in "most of the matters." (ROR:4). Therefore, at least *some* of the unilateral client contact violated Rule 4-5.8.

One of the firm clients, Luis Llerena, signed an affidavit stating that he had never spoken to Ms. Martinez before she called him on July 17,

2017. (R:1751). She also had not performed significant legal services for him. Specifically, although she billed 16.7 hours in Mr. Llerena's case, this was confined to a one-week period, and most of those hours were spent preparing for a three-hour deposition. (R:1512). Though it may have taken her more hours to prepare for a deposition than it would take a more experienced lawyer, the mere fact that she billed 16.7 hours does not demonstrate, by itself, that the legal services provided were significant. Her contribution to Mr. Llerena's case was limited to a one-week period and involved a single deposition.

The referee's determination that Ms. Martinez provided significant legal services with direct client contact on most of the matters is largely predicated on a summary of the billing records showing that she spent several hours on each case. (See R:1490-1491). But review of the significant legal services provided cannot be reduced to looking at total hours billed, given Ms. Martinez's lack of experience at the time of hire. The underlying time entries demonstrate she was not performing significant legal services for some of the clients.

In the *Morelus* matter, Ms. Martinez billed for correspondence, a court hearing, and a short deposition. (R:1511). This work accounted for 7.9 hours billed on a water heater claim out of 32.5 total hours, and 11.9 hours

billed on a roof claim out of 42.1 total hours. (R:1490). In the *Jacques* matter, Ms. Martinez billed for correspondence, preparation for a hearing, discovery, and drafting one motion. (R:1509-1510). This work accounted for 3.6 hours billed on a kitchen claim out of 29.5 total hours, and 13.9 hours billed on a bath claim out of 52.3 total hours. (R:1490). Ms. Martinez billed for correspondence, preparation of a document, and a deposition in *Gershfeld*. (R:1510-1511). This work accounted for 18.9 hours billed out of 71.3 total hours. (R:1491).

Further, although the amount billed by Ms. Martinez in the *Perez* matters involved significant legal work, Mr. Perez filed an affidavit stating he "had never spoken with Alexa Martinez in relation to my cases against Universal." (R:2106). Therefore, Ms. Martinez did not have direct client contact.

The work she performed in the above cases is typical pretrial work assigned to a first-year associate with no prior experience aiding a more senior attorney serving as lead counsel on the case. This was Ms. Brito's characterization of the work assigned to Ms. Martinez. (T1:21-22). It is confirmed by the billing records and the two client affidavits. It is further confirmed in the *Gershfeld* matter via additional e-mail correspondence. Specifically, the client raised concerns regarding the scope of discovery to

Ms. Martinez, who stated that she "spoke with Steven [Silverberg]" on the matter and relayed his answer. (R:1779-1783). When the client had more in-depth questions, they were addressed in detail by Ms. Brito, not Ms. Martinez. *Id*.

Ms. Martinez's contributions to the clients in the *Llerena*, *Morelus Jacques*, *Gershfeld*, and *Perez* matters did not constitute significant legal services with direct client contact. By unilaterally contacting these clients, Ms. Martinez violated Rule 4-5.8 (procedures for lawyers leaving law firms).

III. The referee should have found that Ms. Martinez's unilateral client contact violated Rule 4-4.1.

Since Ms. Martinez did not initially send a letter to the clients under Rule 4-5.8, and she instead spoke with them telephonically before sending any such written correspondence, the information she provided to these clients is not recorded. Some clients filed affidavits stating that Ms. Martinez misrepresented matters before asking them whether they would like her to assume their legal representation. The affidavit by Mr. Llerena notes multiple misrepresentations made by Ms. Martinez. She told him that "she had been the attorney handling my case from the beginning." (R:1751). This could not be true, because he retained Silverberg Brito on May 31, 2016. *Id*. Ms. Martinez was not hired by the firm until February

27, 2017. She was not even a lawyer at the time Mr. Llerena retained the firm. His affidavit also states Ms. Martinez told him that she had left the firm "voluntarily." *Id*. This was also not true; Ms. Martinez was fired.

The affidavit by Noel Perez stated that Ms. Martinez "claimed she had done everything in relation to my case against Universal." (R:2106). It additionally states that Ms. Martinez expressed uncertainty whether Ms. Brito would be personally handling his case, because she was pregnant. *Id*. Neither statement was true.

The referee found that Ms. Martinez's statements to clients indicated that she was trying to "spin the nature of her departure (i.e., voluntarily vs. involuntarily) and/or embellish the importance of her work on certain matters." (ROR:6). The referee found that this was not proven to be more than "legal puffery" employed to win a client's business. *Id*. But this is not an accurate characterization. She misrepresented basic facts; she did not merely exaggerate matters in an improper sales pitch. Even if this Court ignores the various other misrepresentations told to clients as explained in Ms. Brito's and Mr. Silverberg's testimony, the client affidavits alone demonstrate clear violations of Rule 4-4.1.

IV. The referee should have found that the filings of notices of appearance and notices of unavailability by Ms. Martinez violated Rules 4-3.1, 4-3.3, and 4-3.4, in addition to the referee's finding that this conduct violated Rules 4-8.4(c) and 4-8.4(d).

Ms. Martinez filed several notices of appearance on July 18, 2017. Though some of the clients signed retainer agreements with her *after* she filed the notice, others did not. The referee's report made an implicit finding that at least *some* of these filings were dishonest or deceitful when it stated as follows:

> I am not persuaded that Respondent acted dishonestly or deceitfully ***with respect to the majority of these NOAs***. In several of the cases, Respondent had either direct or apparent authority to file same and the clients chose to remain with her. However, in at least one instance (i.e., the *Morelus* case), Respondent both filed a NOA without proper client authorization and unreasonably delayed her withdrawal (for approximately one (1) month).

(ROR:6-7) (emphasis added). Despite the implicit finding that Ms. Martinez acted dishonestly or deceitfully in a *minority* of these cases, the referee only specifically found that the conduct violated Rule 4-8.4(d). However, the report recommends that Ms. Martinez be found guilty of violating Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) without explanation. (ROR:7). The referee clarified at trial that he found

both rule violations as a result of Ms. Martinez's "minor misconduct in terms of the transition process." (T1:351).

This Court should approve the referee's implicit finding that Ms. Martinez dishonestly filed a notice of appearance in the *Morelus* case without authorization, then delayed her withdrawal from that case. She never received written authorization to file notices of appearance in the client's two cases. She nevertheless demanded that Mr. Morelus's actual lawyers at Silverberg Brito "cease and desist from performing any further work on this case, and forward my client's files to my office." (R:1753-1760). In fact, this letter also directed Silverberg Brito not to contact Mr. Morelus at all and to "respect my client's wishes." *Id*. This prompted Silverberg Brito to seek a signed writing from Mr. Morelus, and on July 27, 2017, he signed a document clearly indicating that he did not want his case transferred to Ms. Martinez. (R:1754). Mr. Spuches provided this proof to Ms. Martinez and directed her to immediately withdraw. (R:1756). Ms. Martinez nevertheless demanded more proof of the client's intent before withdrawing from the case, and she falsely claimed she had been retained several weeks ago, had already performed work on the case, and she would be disputing fees in the case. *Id*.

The referee's report found that Ms. Martinez's conduct in the *Morelus* matter constituted "at least one instance" of Ms. Martinez filing a notice of appearance without authorization from the client and then unreasonably delaying her withdrawal. The *Morelus* case was not an isolated instance. In the *Jacques* case, Ms. Martinez was guilty of the same misconduct. She filed notices of appearance without client authorization on July 18, 2017. The notice was based on a verbal agreement she obtained from the son of the clients, who had no legal authority to bind his parents when she unilaterally contacted him following her termination. (T1:86-88). Ms. Martinez waited until August 14, 2017 to file motions to withdraw in both of the *Jacques* cases, based on the clients' failure to sign an engagement letter. (R:1769-1770).

Additionally, although Ms. Martinez obtained a signed retainer from the clients in the *Perez* cases (see R:1761-1765), one day later the clients signed a letter sent to Ms. Martinez stating they wished to remain with Silverberg Brito. (R:1766). The letter is dated July 18, 2017, which is the same date Ms. Martinez filed notices of appearance in both *Perez* cases. (Compare *id*. & R:1685-1688). She failed to promptly file motions to withdraw, which caused Mr. Spuches to send an August 10, 2017 letter demanding her to do so immediately. (R:1711).

Every instance of unilateral client contact by Ms. Martinez was inherently dishonest due to her failure to comply with Rule 4-5.8 and its requirement to engage in "bona fide negotiations" with her former employer. She was additionally dishonest in her misrepresentations to certain clients when she contacted them. Additionally, in the *Morelus* and *Jacques* matters, Ms. Martinez dishonestly filed notices of appearance without proper client authorization. Contingency fee agreements must be in writing. *See* Rule 4-1.5(f). The clients entered into such agreements with Silverberg Brito, but Ms. Martinez did not comply with the rule before filing her notices. In the *Perez* matters, the notices may have been authorized at the time, but Ms. Martinez knew the clients changed their mind on the same day she filed the notice. Notwithstanding the lack of written authorization in *Morelus* and *Jacques* and the revocation of written authorization in *Perez*, in all three cases Ms. Martinez unreasonably delayed filing motions to withdraw for nearly one month.

The Third District Court of Appeal held that "[i]t is the notice of appearance of an 'additional attorney' in accordance with [the Rules of Judicial Administration] which grants [an] additional attorney official recognition in the eyes of the court and the other parties." *Tanis v. HSBC Bank USA, N.A.*, 289 So. 3d 517, 520-21 (Fla. 3d DCA 2019) (quoting

Pasco Cty. V. Quail Hollow Props., Inc., 693 So. 2d 82, 84 (Fla. 2d DCA 1997)). Ms. Martinez obtained official recognition in the eyes of the court without proper client authorization, and she took no corrective action until nearly one month later. This constitutes a lack of candor towards a tribunal in violation of Rule 4-3.3. Since these filings falsely asserted that Ms. Martinez was co-counsel for the plaintiffs, they also violated Rule 4-3.1, which prohibits a lawyer from asserting or controverting an issue unless there is a basis in law and fact for doing so that is not frivolous.

Ms. Martinez also improperly filed a notice of unavailability in the litigation initiated against her by Silverberg Brito. She filed the notice the day before a scheduled hearing on Silverberg Brito's emergency motion for a preliminary injunction. (R:2024). It stated that she was unavailable from August 4, 2017 through September 4, 2017. (R:2019). She only filed the notice in this case, but she did not file similar notices of unavailability in other cases in which she appeared on behalf of the firm's clients and performed work on behalf of some of them. (R:2024).

Ms. Martinez's overall conduct in the litigation against Silverberg Brito demonstrates that the filing of the notice of unavailability was part of her effort to delay the litigation. Her deposition was scheduled for December 1, 2017, and her counsel stated that Ms. Martinez was unavailable for the

entire month. (R:2089). Counsel for Silverberg Brito filed a motion to compel the deposition and motion for sanctions. (R:2023-2121). On December 19, 2017, the court granted both motions, ordered Ms. Martinez to appear for deposition on January 5, 2018, and reserved ruling on the amount of attorney's fees and costs to be entered against her. (R:2122). Ms. Martinez appeared for the deposition duces tecum, but she did not produce a single document identified in the notice. (See generally R:2123-2209). She also testified that she began taking medication for back pain a few days earlier, which affected her ability to be deposed. *Id*. After some questioning regarding these claims, her counsel terminated the deposition early. *Id*.

Counsel for Silverberg Brito filed a second motion to compel Ms. Martinez's deposition. (R:2210-2219). Ms. Martinez personally agreed to be deposed on May 26, 2018. (R:2310). She then filed a motion for protective order nine days prior to her deposition. (R:2329). This prompted a third motion to compel her deposition, which was granted by the court, and Silverberg Brito was again awarded its reasonable attorney's fees and costs in bringing the motion. (R:2346-2347). Ms. Martinez failed to appear at the deposition. (R:2348-2538).

A new judge was assigned the case due to a recusal motion filed by Ms. Martinez, and she filed a motion to set aside or vacate prior orders sanctioning her. (R:2539-2542). The newly assigned judge on the matter (1) denied her motion and upheld all prior orders; (2) required Ms. Martinez to pay Silverberg Brito $1,875.00 within ten days; (3) attend 15 hours of a Florida Bar approved course on professional responsibility; and (4) appear for her continued deposition on May 13, 2020. *Id*. The parties later entered into a confidential settlement agreement in October 2020. (R:2543-2553).[3] Ms. Martinez stipulated to an order converting the preliminary injunction previously entered against her into a permanent injunction. (R:2557-2559).

The referee's report did not find that Ms. Martinez's notice of unavailability constituted dishonest conduct "given her lack of experience at the time and the confusion surrounding the proper use of notices of unavailability (even amongst experienced practitioners)." (ROR:7). This finding is not supported by competent substantial evidence. It is disproven by the multiple court orders sanctioning Ms. Martinez for her deliberate failures to abide by court orders in a transparent attempt to delay the

[3] The settlement agreement is in the sealed portion of the record in this case and its content will not be discussed in this brief.

litigation. Her longstanding unavailability was limited to a single case. In that case, she knowingly disobeyed a court order by failing to appear for her deposition, which violated Rule 4-3.4(c). The improper notice of unavailability cannot be attributed to mere inexperience given the deliberate misconduct by Ms. Martinez throughout the litigation. Her conduct was both dishonest and deceitful in violation of Rule 4-8.4(c) and prejudicial to the administration of justice in violation of Rule 4-8.4(d).

V. The referee should have found that Ms. Martinez committed additional violations of Rules 4-3.1, 4-8.4(c), and 4-8.4(d) in her handling of the *Gershfeld* case.

Ms. Martinez lacked any basis in fact or law to claim any portion of the $30,000.00 settlement negotiated between Silverberg Brito and counsel for Citizens in the *Gershfeld* matter. The settlement offer by Silverberg Brito occurred one day before Ms. Martinez had filed her notice of appearance. It was accepted by Citizens two days after her notice. Ms. Martinez may have provided legal services to the client in her capacity as an associate of Silverberg Brito before she was fired, but she was already compensated for this work by her then-employer. In her subsequent capacity as a solo practitioner, Ms. Martinez performed no work on the case justifying an award of any portion of the settlement funds as an earned attorney's fee.

Importantly, the $30,000.00 settlement was deemed acceptable by the client. Ms. Martinez's actions in attempting to undo the settlement was for her own financial benefit, not her client's, and it lacked any basis in law or fact. It resulted in the filing of a motion to enforce the settlement agreement by Citizens. (R:1803-1807). It resulted in the disputed funds being placed in the court's registry. (R:2220-2221). It also resulted in substantial delay before the court entered an order awarding the entire amount to Silverberg Brito on March 2, 2018. *Id*. Since Ms. Martinez had no factual or legal basis to dispute Silverberg Brito's earned attorney's fee, her actions violated Rules 4-3.1 (meritorious claims and contentions), 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and 4-8.4(d) (conduct prejudicial to the administration of justice).

VI. Based on the violations at issue, the Standards for Imposing Lawyer Sanctions, and relevant case law, this Court should reject the referee's recommendation and sanction Ms. Martinez with a one-year suspension.

A. <u>The applicable standards:</u>

The Standards for Imposing Lawyer Sanctions provide a baseline for determining the appropriate sanction for a lawyer's misconduct before consideration of aggravating or mitigating circumstances that may justify an upward or downward departure from the sanction to be imposed.

Six applicable standards uniformly support Ms. Martinez's suspension from the practice of law:

- Standard 4.4(b) (lack of diligence): Suspension is appropriate when a lawyer causes injury or potential injury to a client and knowingly fails to perform services for a client;

- Standard 5.1(b) (failure to maintain personal integrity): Suspension is appropriate when a lawyer knowingly engages in conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice;

- Standard 6.1(b) (false statements, fraud, and misrepresentation): Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court and takes no remedial action;

- Standard 6.2(b) (abuse of the legal process): Suspension is appropriate when a lawyer knowingly violates a court order or rule and causes injury or potential injury to a client or a party or causes interference with a legal proceeding;

- Standard 6.3(b) (improper communications with individuals in the legal system): Suspension is appropriate when a lawyer engages in communication with an individual when the lawyer knows the communication is improper and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding; and

- Standard 7.1(b) (deceptive conduct or statements): 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.

Ms. Martinez's misconduct in improperly contacting firm clients and misrepresenting facts to them resulted in a waste of judicial resources. It necessitated a lawsuit by Silverberg Brito, during which Ms. Martinez exacerbated her misconduct through bad faith stall tactics and destruction of evidence. She jeopardized an acceptable settlement in the *Gershfeld* matter in a blatant effort to obtain a $15,000.00 attorney's fee she did not earn. In fact, she expressly misrepresented to opposing counsel in that case that there was no charging lien by Silverberg Brito in the matter. She baselessly accused Silverberg Brito of violating the Rules of Professional Conduct when the firm attempted to contact its own clients—clients that Ms. Martinez had already unilaterally contacted on her own. Her conduct repeatedly caused actual or potential injury to the clients, to the court, and to Silverberg Brito. This warrants a suspension from the practice of law. Since the Standards for Imposing Lawyer Sanctions do not distinguish among suspensions of differing length, they are helpful only as a starting point. *The Florida Bar v. Dupee*, 160 So. 3d 838, 853 (Fla. 2015). This Court reviews comparable caselaw to determine the appropriate length of suspension. *Id*.

B. The aggravating and mitigating circumstances:

Before addressing the relevant caselaw, it is important to note that the appropriate sanction may be increased or decreased based on the presence of either aggravating or mitigating factors. Under Standard 3.2(b), the referee found the following aggravating factors are present in this case:

- Dishonest or selfish motive under Standard 3.2(b)(2);
- A pattern of misconduct under Standard 3.2(b)(3);
- Submission of false evidence, false statements, or other deceptive practices during the disciplinary process under Standard 3.2(b)(4); and
- Refusal to acknowledge the wrongful nature of the conduct under Standard 3.2(b)(7);

(ROR:12). The record evidence also supports a finding that Ms. Martinez committed multiple offenses under Standard 3.2(b)(4).

Conversely, the referee found the following mitigating factors:

- Absence of a prior disciplinary record under Standard 3.3(b)(1);
- Personal or emotional problems under Standard 3.3(b)(3);
- Inexperience in the practice of law under Standard 3.3(b)(6);
- Character or reputation under Standard 3.3(b)(7);
- Unreasonable delay in the disciplinary proceedings under Standard 3.3(b)(9); and

- Imposition of other penalties or sanctions under Standard 3.3(b)(11).

(ROR:12-13). The bar disputes two of these mitigating factors and the significance of one of the factors. Ms. Martinez testified regarding longstanding personal or emotional problems spanning back to when she was an undergraduate. (T1:252-56; T2:35). Such longstanding issues do not, by themselves, establish this mitigating factor unless the respondent correlates these problems to the misconduct at issue. *The Florida Bar v. Behm*, 41 So. 3d 136, 150 (Fla. 2010). Ms. Martinez did not do so, and therefore did not establish the mitigating factor.

Further, the mitigating factor of unreasonable delay in the disciplinary process is unsupported in this case. On December 21, 2017, the bar informed Ms. Martinez that it had suspended the disciplinary investigation based on the pending litigation initiated by Silverberg Brito against her. (R:1163). This was done in accordance with Rule 3-7.4(e) and Standing Board Policy. The litigation ended in October 2020 (see R:2555-2556), and the bar then reopened its investigation, seeking additional documents in an e-mail sent on January 20, 2021. (R:1164). Ms. Martinez's stall tactics and violations of court orders substantially contributed to the delay. This Court has held that when a respondent fails to prove that he or she did not

substantially contribute to the delay, and when the referee makes no finding that the respondent suffered specific prejudice resulting from the delay, the mitigating factor does not apply. *The Florida Bar v. Alters*, 260 So. 3d 72, 83 (Fla. 2018). Ms. Martinez contributed to the delay and she she suffered no prejudice due to the delay. Therefore, the delay in the proceedings is not a mitigating factor.

Finally, although the referee found that Ms. Martinez's inexperience was a substantial mitigating factor, this Court has held that a pattern of dishonest conduct still warrants a lengthy suspension regardless of the lawyer's lack of experience. See *The Florida Bar v. Kinsella*, 260 So. 3d 1046 (Fla. 2018) (suspending an inexperienced lawyer for three years for stealing a total of $760.00 from a till at a department store on three occasions).

C. <u>The case law:</u>

Based on the misconduct at issue, the bar seeks Ms. Martinez's one-year suspension from the practice of law. This Court has repeatedly stated its intent to impose stronger sanctions for lawyer misconduct than it has in the past. In a very recent opinion, this Court rejected a referee's recommended sanction, in part, because "the referee here neither cited nor applied our recent case law imposing more severe sanctions for lawyer

misconduct." *The Florida Bar v. Schwartz*, SC2019-0983 & SC2021-01484 at *25 (Fla. Jan. 18, 2024).

In *The Florida Bar v. Bischoff*, 212 So. 3d 312, 319 (Fla. 2017), the respondent filed a notice falsely indicating he served discovery responses. This Court determined that this constituted a lack of candor toward a tribunal in violation of Rule 4-3.3. The respondent ignored a magistrate's discovery orders and filed frivolous pleadings. *Id*. The conduct contributed to dismissal of the client's case with prejudice. Despite the presence of some mitigation—mainly the fact that the client was challenging and the respondent had already been subject to other sanctions—this Court imposed a one-year suspension. *Id*. at 320.

In *The Florida Bar v. Marcellus*, 249 So. 3d 538 (Fla. 2018), the respondent failed to respond to discovery requests despite orders compelling responses, which violated Rule 4-3.4(c). He also failed to appear at a hearing regarding his intentional noncompliance with court orders despite having been ordered to appear. Based on this repeated misconduct in the respondent's own dissolution of marriage proceedings, this Court imposed an 18-month suspension from the practice of law.

In *The Florida Bar v. James*, 329 So. 3d 108 (Fla. 2021), the respondent engaged in a pattern of dishonest conduct by engaging in

improper communications instructing a deponent on how to answer questions, lying to opposing counsel when asked if the two were texting during the deposition, and falsely stating that he was only texting his daughter. This Court imposed a 91-day suspension from the practice of law.

These three cases establish that such acts of dishonesty warrant a rehabilitative suspension. Given the gross pattern of dishonest conduct by Ms. Martinez spanning multiple cases and multiple years, the appropriate sanction should be one year, particularly given this Court's holdings in *Bischoff* and *James*. Even older caselaw before this Court's more recent move toward imposing stronger sanctions warrant a lengthy suspension period. See *The Florida Bar v. Nicnick*, 963 So. 2d 219 (Fla. 2007) (91-day suspension for obstructing another party's access to evidence and engaging in dishonest conduct); *The Florida Bar v. Head*, 84 So. 3d 292 (Fla. 2012) (91-day suspension for filing false affidavit in an eviction proceeding, testifying untruthfully in the disciplinary hearing, and creating a fraudulent letter); *The Florida Bar v. Gwynn*, 94 So. 3d 425 (Fla. 2012) (91-day suspension for 15 rule violations including making false statements, asserting frivolous claims for the purposes of delay and harassment, failing to provide competent representation, and falsely accusing opposing

counsel in a bankruptcy proceeding of wrongdoing without any basis in fact).

This Court has repeatedly held that "basic fundamental dishonesty… is a serious flaw, which cannot be tolerated." *Head*, 84 So. 3d at 302 (quoting *The Florida Bar v. Rotstein*, 835 So. 2d 241, 246 (Fla. 2002)). Ms. Martinez's dishonesty is not properly redressed by a 10-day suspension. Her conduct is also not substantially mitigated by the mere fact that she is inexperienced. The referee noted that even an inexperienced lawyer knows not to destroy evidence. Ms. Martinez should also know that bona fide negotiations require good faith efforts, and that she is required to abide by court orders. Her misconduct is not strictly limited to competency issues more prevalent in newer attorneys. Given the pattern of dishonest conduct, this Court should suspend Ms. Martinez for one year.

D. Costs:

As the prevailing party in this case, the bar is entitled to its reasonable and necessary costs under Rule 3-7.6(q)(3), unless the respondent shows the costs were unnecessary, excessive, or improperly authenticated. See *The Florida Bar v. Miele*, 605 So. 2d 866, 868 (Fla. 1992), ("[B]ut for the [attorney's] misconduct, there would have been no complaint and, thus, no costs."). The referee only awarded a portion of the

bar's costs in the amount of $3,005.50, while denying the costs of the final hearing transcript and sanction hearing transcript in the amounts of $4,153.50 and $306.00, respectively. (R:1092-1093). The referee held that since he did not order the bar to produce these transcripts, nor did the bar seek such an order, he would not exercise his discretion to award these costs. (R:1094-1095). The referee expressly declined to reach the issue of whether the transcript costs were unnecessary or excessive, stating "I do not reach that issue here." *Id*. But to deny costs, the referee must determine that the costs were either unnecessary, excessive, or improperly authenticated. Due to the referee's explicit failure to make such a finding, the referee abused his discretion in denying the bar's costs. As stated in *The Florida Bar v. Rousso*, 117 So. 3d 756, 768 (Fla. 2013):

> The choice is between imposing the costs of discipline on those who have violated our Rules of Professional Conduct or on the membership of the Bar who have not. In these situations, it is only fair to tax those costs against the member who has violated the rules.

Ms. Martinez did not demonstrate that the costs of transcripts were unnecessary or excessive based on the mere fact that the referee did not direct the bar to order them. The referee immediately announced his lengthy findings of guilt at the conclusion of trial, and the bar was charged with preparing a report reflecting those findings. (T1:345-53). After the

referee announced his rulings and the various exhibits to be incorporated into the record, the referee and bar counsel appeared to share a mutual understanding the bar would order the transcript to ensure the accuracy of the report:

> MS. FALCONE: I'm sorry, can one of you write this down, please?
>
> THE COURT: I thought the court reporter's going to –
>
> MS. FALCONE: That's fine, we'll order it. We'll order it. That's fine.

(T1:353). At a later hearing on the motion to tax costs, bar counsel also referenced several e-mail communications from opposing counsel requesting copies of the transcripts. (T3:14-18).

In *Rousso*, this Court rejected a referee's application of an equitable adjustment resulting in an award of reduced costs, finding that such action was an abuse of discretion. Here, it was an abuse of discretion for the referee to deny these costs when both parties required the transcripts, and the referee indicated an understanding at trial that the bar would order the transcript. This Court should reject the referee's declination to award the full costs reasonably incurred in this matter.

CONCLUSION

For the above stated reasons, The Florida Bar asks this Court to approve the referee's findings of guilt regarding Rules 3-4.3, 4-3.4, 4-8.4(c), and 4-8.4(d). The bar asks this Court to reject the referee's findings that Ms. Martinez was not guilty of violating Rules 4-3.1, 4-3.3, 4-4.1, and 4-5.8, and instead find Ms. Martinez guilty of these rule violations. The bar asks this Court to reject the referee's recommended sanction of a 10-day suspension and instead impose a one-year suspension from the practice of law. Finally, the bar asks this Court to impose the full costs incurred by the bar in the amount of $7,465.00.

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 29th day of February, 2024, and a true and correct copy of the foregoing has been furnished via e-service to Jodi Anderson Thompson, Attorney for Respondent, 3637 S. Hesperides Street, Tampa, FL 33629-8337at jodi@jodithompsonlaw.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 12,979 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