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 REPLY AND ANSWER BRIEF ON CROSS APPEAL

Jennifer R. Falcone
Florida Bar No. 624284
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445
jfalcone@floridabar.org
Attorney for The Florida Bar

Joshua E. Doyle, Esq.
Executive Director
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
(850) 561-5600
jdoyle@floridabar.org
Attorney for The Florida Bar

Patricia Ann Toro Savitz
Mark Lugo Mason
651 E. Jefferson St.
Tallahassee, FL 32399
psavitz@floridabar.org
mmason@floridabar.org
Attorneys for The Florida Bar

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I. The Florida Bar's Reply to Ms. Martinez's Answer Brief:

A. The answer brief's statement of facts attempts to divert focus to alleged misconduct by others, and it 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.

Ms. Martinez's statement of facts mostly consists of shifting to alleged misconduct by her former employer. She asserts that Ms. Brito and Mr. Silverberg fired her due to her health problems, did not properly train her, unreasonably refused to sign stipulations for substitutions of counsel, and acted maliciously in their successful lawsuit against her. Neither Ms. Brito nor Mr. Silverberg are parties to this action. They filed a bar complaint against Ms. Martinez, and the complaint had at least some merit given the referee's report recommending Ms. Martinez's suspension from the practice of law. The bar is not tasked with defending the conduct of these two witnesses, no matter how many times the answer brief attempts to divert focus from Ms. Martinez's misconduct. Ms. Martinez had the same duty as Mr. Silverberg and Ms. Brito to report misconduct of other lawyers under Rule 4-8.3(a). Ms. Martinez cannot refrain from reporting misconduct by others and then disingenuously claim that the bar should have

prosecuted other lawyers for unreported misconduct. As noted by the referee, “they’re [referring to Ms. Brito and Mr. Silverberg] not on trial here for their misstatements or misrepresentations, it’s Ms. Martinez.” (T1:335).

More troubling, the answer brief’s statement of the case and facts heavily relies on deposition testimony which was never offered into evidence by either party before the close of evidence. Some of the deposition testimony is from the civil action initiated by Silverberg Brito against Ms. Martinez. (See R:194-341; R:374-559). The bar was not a party to that proceeding. At trial, Ms. Martinez only offered into evidence five trial exhibits consisting of a total of ten pages. (R:2568-78).

The only reason these additional documents referenced throughout the answer brief are included in the record on appeal is due to Ms. Martinez’s unsuccessful efforts to supplement the record *four days after* the final hearing had concluded. Specifically, the referee made findings of guilt at the conclusion of the final hearing on September 22, 2023. (See T1:345-48). Four days later, Ms. Martinez filed two documents in the disciplinary proceeding: (1) a motion for reconsideration and a motion to reopen the evidence and/or supplement the record; and (2) a notice of filing in support of the motion. (R:192; R:616). The notice of filing attached seven

documents, which included four lengthy deposition transcripts. (See generally R:192-615). The motion to supplement the record attached three exhibits. (R:616-37). Together, the motion and notice attempted to inject over 400-pages of new documents into evidence *after* the final hearing, spanning from page 192 to page 637 of the electronic record.

The referee never granted a motion to reopen the evidence and supplement the record with these documents. Ms. Martinez's counsel referenced the filing of the motion and notice during the sanction hearing. (T2:5-6). The bar objected to Ms. Martinez's effort to supplement the record with new evidence offered to reargue the referee's findings of guilt. (T2:7). The only relief granted by the referee involved a very limited matter regarding his finding that Ms. Martinez had missed a hearing in one case after she filed her notice of appearance. (T2:12-13). The referee did not provide any other relief sought in the motion. But throughout the answer brief, Ms. Martinez cites to documents attached to either the notice of filing or the motion to supplement the record to make assertions of fact. Given the referee's ruling, this is clearly improper.

Ms. Martinez was free to argue on cross-appeal that the referee violated her due process rights by failing to allow her to supplement the

record after trial. But she did not do so, and instead simply cites to these documents in making assertions of fact throughout her answer brief as though they were trial exhibits properly before the referee. (See AB:5-7, 9-13, 16-17, 19-22, 24-25, 27-28, 32-33, 37-42, 44, 46-47, 50-52, 61, 63, 71). Her brief only tangentially references the motion for reconsideration and motion to reopen the evidence without disclosing the judge's ruling on the motion and without argument regarding why the motion should have been granted. (See AB:52). Any assertion in the answer brief that solely cites to the electronic record at pages 192 to 637 is not based on testimony heard by the referee, trial exhibits, or filings offered before the close of evidence. These documents were not entered into evidence during the disciplinary proceeding. This Court should disregard assertions of fact in Ms. Martinez's answer brief that are solely supported by her citation to either the September 26, 2023 notice of filing or her motion to supplement the record.

B. <u>The answer brief's argument that the bar improperly gave deference to a civil complaint filed against her is without merit.</u>

The answer brief argues that the bar "gave inordinate deference to a civil complaint filed with malicious intent against Ms. Martinez by her former employers." (AB:34). The bar's initial brief only cited the civil complaint when referencing the civil litigation itself. The bar does not rely on the

allegations in the civil complaint as though they were uncontested and can be accepted at face value. The answer brief asserts that the bar's witnesses were biased and lacked credibility, as though this is some novel allegation that should have stymied the bar from proceeding with the filing of a formal complaint. (AB:34). The formal complaint was based on a probable cause finding by the grievance committee. Ms. Martinez was subject to sanctions multiple times, her e-mail correspondence demonstrates that she did not negotiate in good faith with her former employer, and it was uncontested—until after the final hearing—that she deleted files from a USB drive before turning it over to her former employer, who had accused her of stealing files. None of this is undermined by the fact that certain witnesses are either biased or not credible.

C. Ms. Martinez's refusal to cooperate in negotiations with her former employer upon termination was in violation of Rule 4-5.8.

Ms. Martinez argues that Silverberg Brito refused to negotiate in good faith regarding the content of a joint letter to be sent to certain clients. This argument is premised on the referee's statement at the final hearing that the firm delayed negotiations initiated by Ms. Martinez, and that a one week-delay was a "grossly excessive period of time to work something that simple out." (AB:55 (citing T1:331)). It is error to rely on this statement by

the referee, who was mistaken regarding the number and timing of e-mails exchanged between Ms. Martinez, her former employer, and Mr. Spuches. Bar counsel corrected the referee on his statement shortly later, explaining that there were several e-mails between Ms. Martinez's initial request on June 22, 2017 and Mr. Spuches' e-mail on June 29, 2017. (T1:342-43). The referee then stated, "That's all that had been presented to me, so that's the assumption I made. But in any event, it's not material to my ruling." (T1:343). The bar's initial brief argued that these additional e-mails were material and demonstrated that only Silverberg Brito negotiated in good faith.

Even though the referee was mistaken in stating that the firm delayed responding substantively for a full week, Ms. Martinez's answer brief repeats the mistaken statement by the referee as an assertion of fact. (See AB:14-15, 55). The bar summarized the e-mail communications regarding Ms. Martinez's request for a joint letter to be sent to clients in its initial brief. (IB:6-10). The e-mail communications included four e-mails sent by Mr. Spuches to Ms. Martinez *before* he sent the June 29, 2017 e-mail. See *id*. One such communication included a draft joint letter, which he sent on June 27, 2017. (R:1634). The answer brief is attempting to portray

Silverberg Brito as negotiating in bad faith by simply ignoring these earlier e-mails and falsely asserting that the firm failed to substantively respond for a full week. The referee's finding that these earlier e-mail communications were immaterial was clearly erroneous, because the e-mails between Silverberg Brito and Ms. Martinez constitute all evidence of the negotiations between these parties. It is apparent from a review of the transcript of the final hearing that the referee did not base his ruling on a review of the documentary evidence, and in particular the e-mails entered as the bar's exhibit 12. (See T1:342-43).

Ms. Martinez's brief claims that these communications instead demonstrate that her efforts to negotiate were futile because the firm would only address the USB drive. (AB:56). This Court should review these e-mail communications, because many of Ms. Martinez's claims in her brief, including this claim, are untrue. (See R:1580-92, 1595-1673). The brief further claims that the firm unreasonably refused to include Ms. Martinez's contact information or bilingual content. (AB:56). Mr. Spuches stated, "we are happy to send in English and Spanish." (R:1598). Regarding the inclusion of Ms. Martinez's contact information in the joint letter, Mr. Spuches responded to this request as follows, "Its [sic] really not

complicated. If a client selects you, we will send you their file and contact information, and send them your contact information. (R:1591).

The answer brief also falsely claims that "Ms. Martinez's attempts to negotiate were futile as the Firm directed all communication to the USB issue." (AB:56). A cursory review of the e-mails immediately disproves this assertion; Mr. Spuches kept re-raising the issue of Ms. Martinez's refusal to return the USB drive because she refused to address the matter, but this was one of several issues substantively addressed in his e-mail correspondence on behalf of Silverberg Brito. Ms. Martinez's so-called "attempts to negotiate" mostly consist of belittling comments, bad faith complaints of delay leveled before the firm had a reasonable opportunity to respond, and refusals to answer basic questions. She also made unreasonable demands, such as (1) refusing to agree to the inclusion of a paragraph that informed the client that Silverberg Brito may seek a charging lien for the legal services already rendered by the firm; and (2) demanding the firm provide her case law establishing that it meets the elements for a charging lien. (R:1633-34). She simultaneously demanded immediate responses to her claimed concerns while also demanding the firm provide her legal analysis of matters she unilaterally raised. These

communications predictably led to impasse, which Ms. Martinez then relied upon to assert that she was authorized to engage in unilateral contact with clients.

Ms. Martinez additionally argues that the matter was urgent because there were upcoming depositions and hearings. (AB:55). As noted in the initial brief, she did not even attend these depositions and hearings. (See IB:18-19). She also did not reference these upcoming depositions and hearings when Mr. Spuches asked her why she was not allowing a reasonable amount of time for the firm to respond. (R:1638-39). Instead, she only offered broad concerns about legal malpractice in neglected cases and her claimed inability to contact clients. *Id*. The upcoming matters were not a concern for Ms. Martinez when she was negotiating the content of a joint letter.

Ms. Martinez argues that her unilateral contact with clients via telephone was appropriate because Silverberg Brito also engaged in unilateral contact with these same clients. (AB:58). First, the firm did not commit misconduct in contacting their own clients. The firm reasonably contacted its own clients via telephone in response to Ms. Martinez's filing of notices of appearance—which did not terminate the pre-existing

lawyer/client relationship between Silverberg Brito and its clients. Second, whether Silverberg Brito also engaged in misconduct is not at issue. See *The Florida Bar v. Jacobs*, 370 So. 3d 876 (Fla. 2023) ("Jacobs argues that the Bar failed to prosecute bank attorneys who purportedly committed various Bar Rule violations, but even assuming those bank attorneys did violate Bar Rules, their conduct does not excuse misconduct by Jacobs). Third, the firm could not accept Ms. Martinez's word that these clients had retained her and terminated Silverberg Brito given her bad faith actions, which prompted a court order requiring her to submit written proof that clients had retained her. (R:2020). Fourth, the bar did not assert that telephone contact is prohibited under Rule 4-5.8; the bar only asserted that Ms. Martinez never intended to send a joint letter and instead negotiated in bad faith so that she could then claim impasse and unilaterally contact clients of Silverberg Brito without leaving a paper trail. (See IB:35-36).

Ms. Martinez next argues that she performed significant legal services for every client she contacted after her termination. (AB:59). The referee's report did not make specific findings regarding which client cases involved significant services with direct client contact. Instead, the report only found that Ms. Martinez provided significant services and had client

contact “with respect to most of the matters referenced by the Bar.” (ROR:4). The lack of specificity renders it difficult to determine the referee’s findings regarding which cases involved significant services and direct client contact by Ms. Martinez, and which cases did not. Ms. Martinez’s brief asserts that the referee found that the billing records evidenced substantial legal services. (AB:59). This is an exaggeration of the referee’s finding, which did not make such an unqualified holding that Ms. Martinez provided substantial legal services in every case.

In arguing that Ms. Martinez performed significant services for Luis Llerena, the answer brief asserts that she had a 1.6-hour strategy conference with the client. (AB:59). This contradicts Mr. Llerena’s affidavit, which states that he had never spoken to Ms. Martinez until she called him on July 17, 2017. (R:1751). This assertion is also not established by the billing records, which only indicate that she billed 1.6 hours for a strategy conference on May 17, 2017. (R:1512). It does not state that this strategy conference included the client. Mr. Silverberg testified that he and Ms. Brito decided the strategy and directed Ms. Martinez’s work in cases, while Ms. Martinez handled some discovery and pretrial hearing matters. (T1:165).

In arguing that Ms. Martinez performed significant services for Luckner Morelus, the answer brief asserts that the bar ignored dozens of billing entries regarding hearings and depositions, the preparation and filing of documents, and communications with opposing counsel. (AB:59-60). The bar's initial brief stated that Ms. Martinez's work on Mr. Morelus's two cases consisted of correspondence, a court hearing, and a short deposition. (IB:37). This is an accurate summary of the billing records. (See R:1511). The bar did not ignore "dozens of billing entries." (See AB:59). This is more exaggeration by Ms. Martinez, who now accuses the bar of "gross mischaracterization of the billing entries." (AB:60). She did not attend "several hearings and depositions" in the case. (See AB:59). According to the billing records, she attended one hearing on April 3, 2017, and one deposition on May 10, 2017. (See R:1511). There are duplicate entries on the billing records for the single hearing and deposition.

Ms. Martinez also claims that her billing records for Yelena Gershfeld indicate that she attended a hearing. Her billing records do not reference any court hearing. (See R:1510-11). Ms. Martinez claims she billed for "*several* motions" for Firmin and Annerose Jacques. (AB:60 (emphasis in original)). She billed for drafting a motion on May 31, 2017 for the client's

bath claim totaling 1.1 hours, and billed for drafting a motion on the same day for the client's kitchen claim totaling .7 hours. (R:1510-11). Her work on both cases for the Jacques totaled 16.5 hours out of a total of 81.8 hours billed on both cases. (R:1490).

In an apparent effort to supplement her billing records, Ms. Martinez argues in her answer brief that the billing records were incomplete. (AB:61). The answer brief again cites to deposition testimony never entered into evidence. Further, Ms. Martinez's brief mischaracterizes Mr. Silverberg's testimony. (See R:453-54). He did not state that "he was certain" Ms. Martinez's billing entries were incomplete; he was asked if this was possible and he stated that "[a]nything is possible." *Id*. Ms. Martinez's answer brief not only relies on a document never entered into evidence, she also mischaracterized the document.

The answer brief does not specifically address the bar's argument that Ms. Martinez had no direct client contact with Noel Perez. (See IB:38). Her billing records do not reference any communication with the client. (R:1505-06). Mr. Perez's affidavit also stated that he had never spoken with Ms. Martinez before she called him on July 17, 2017. (R:2106). Ms. Martinez never claimed at trial that she directly contacted Mr. Perez at any

point while employed at Silverberg Brito. The referee nevertheless found that some clients might have been confused, or it was attributable to a "general lack of communication amongst the clients, the Firm and Respondent." (ROR:4). This is conjecture that the billing records were incomplete and Mr. Perez could have been confused. The record lacks any evidentiary support to find that Ms. Martinez had direct client contact with Mr. Perez. She was not authorized to unilaterally contact him under Rule 4-5.8.

D. Ms. Martinez made false statements of material fact in violation of Rule 4-4.1.

Ms. Martinez argues that the bar did not establish by clear and convincing evidence that she violated Rule 4-4.1, which prohibits a lawyer from making a false statement of material fact or law. (AB:61-62). She claims that in her testimony, she refuted all allegations in detail regarding her client contact via telephone. *Id*. The answer brief additionally argues that the referee found Ms. Martinez's testimony to be credible. (AB:62). But Ms. Martinez did not refute all allegations in detail, and the referee made no such finding that Ms. Martinez's testimony was credible. In fact, the answer brief later states "the referee did not make any findings regarding Ms. Martinez's credibility, other than stating that she should have known

erasing the USB drive constituted the potential destruction of evidence." (AB:86). The brief cites to pages five and six of the report of referee in support of its contrary claim that the referee found Ms. Martinez's testimony credible. (AB:62). This portion of the report was critical of the bar's decision not to call former clients of Silverberg Brito as witnesses and only addresses Ms. Martinez's conduct as follows:

> While evidence presented does indicate that Respondent may have tried to spin the nature of her departure (i.e., voluntary vs. involuntary) and/or embellish the importance of her work on certain matters, these alleged statements – even if they had been proven by clear and convincing evidence, which they were not – would be more akin to the sort of "legal puffery" often employed by attorneys trying to win a client's business rather than misconduct subject to discipline.

(ROR:6). This is not a finding that Ms. Martinez's testimony was credible; it is a finding that the evidence indicated she engaged in exaggeration to win a client's business. The answer brief also relies on the referee's statement that Ms. Martinez tried to negotiate a joint letter to be sent to clients and the firm stonewalled her for a full week. This finding does not refute the client affidavits, and the bar already addressed this incorrect finding of fact *supra* and in its initial brief.

Further, although the referee was critical of the bar's declination to call former clients as witnesses, most of the content of the client affidavits

was uncontested. Mr. Llerena's affidavit stated that Ms. Martinez told him that she left the firm voluntarily and she had been the attorney handling his case from the beginning. (R:1751). Ms. Martinez did not claim she stated otherwise. Ms. Martinez's answer brief broadly asserts that she refuted the client affidavits in detail. (AB:62 (citing T1:279, 285)). The portion of the trial transcript cited in support of this claim contains no refutation of the claims in Mr. Llerena's affidavit. Ms. Martinez argues that the bar is claiming it is a misstatement for her to state that she "left the firm." (AB:63). This is a mischaracterization of the bar's argument, which specifically asserted that her claim that she left the firm "voluntarily" was untrue. (See IB:39-40). The client affidavit was admissible in the disciplinary proceeding and admitted into evidence, unlike the litany of deposition transcripts Ms. Martinez now relies upon in her answer brief in making assertions of fact. See *The Florida Bar v. Tobkin*, 944 So. 2d 219, 224 (Fla. 2006) (holding that hearsay is admissible in bar disciplinary proceedings). The two misrepresentations by Ms. Martinez referenced in the affidavit were not disputed.

In Mr. Perez's affidavit, he similarly alleged that Ms. Martinez claimed that she had handled everything in his case, and that she was uncertain

whether Ms. Brito would personally handle the case because she was pregnant. (R:2106). The former was a misstatement, and the latter was pure conjecture designed to sow doubt that Silverberg Brito would be able to continue representing Mr. Perez. The answer brief does not assert that these allegations in the client affidavit were untrue, and instead only argues that since Ms. Brito was pregnant, Ms. Martinez's conjecture was not a material misrepresentation. (AB:63). Ms. Brito had to assure Mr. Perez that she was not taking a leave of absence from the firm. (T1:82-83).

The referee erred in finding that the affidavits did not establish rule violations merely because the bar did not "bring a single disgruntled client to the court" and that none of the affidavits say that "they [the clients] were not happy with her [Ms. Martinez's] representation or that she filed a notice of appearance and prejudiced [their] case." (AB:62). A client's failure to complain is not an aggravating or mitigating factor in determining the appropriate sanction. See Standard 3.4(a). Likewise, a client's failure to complain about Ms. Martinez's conduct should not have impacted a finding of guilt.

E. Ms. Martinez's conduct in the lawsuit filed against her by Silverberg Brito and in filing certain notices of appearance violated Rules 4-3.1, 4-3.3, and 4-3.4.

1. Ms. Martinez's conduct in the lawsuit that was filed against her by Silverberg Brito:

Ms. Martinez argues that she did not engage in misconduct in the filing of any notices of appearance or notices of unavailability. To be clear, her violations of Rules 4-3.1, 4-3.3, and 4-3.4 were not limited to the filing of these notices. The bar asserted in its initial brief that Ms. Martinez's overall conduct in the lawsuit filed against her by Silverberg Brito violated the aforementioned rules, along with her filings of notices of appearances on behalf of certain clients. (See IB:41-48).

Her misconduct in the litigation against her former employer was not limited to the filing of a notice of unavailability or wiping the contents of the USB drive before returning it to the law firm pursuant to a court order. After she filed the notice of unavailability and returned the USB drive, she was later sanctioned and ordered to appear for a deposition with documents identified in the plaintiff's notice of taking deposition duces tecum. (R:2122). She did not comply with the order, because when she appeared for deposition, she did not produce a single document identified in the notice

and instead claimed that she was on medication and in no condition to answer questions. (See generally R:2123-2209).

This led to a second motion to compel. (R:2210-19). Ms. Martinez initially agreed to a continued date for her deposition only to then file an unsuccessful motion for a protective order nine days before the scheduled deposition. (R:2329). She was sanctioned again for this conduct and ordered to appear at the deposition. (R:2346-47). She failed to appear for this deposition in violation of the court order, prompting Silverberg Brito to file a motion to strike and for entry of default. (R:2348). The motion was denied, but the court ordered Ms. Martinez to appear for a deposition within 15 days of a hearing date. (R:2537). One month thereafter, the court ordered Ms. Martinez to pay attorney's fees and costs of $1,875.00 and attend 15 hours of a professional responsibility course. (R:2540). Silverberg Brito and Ms. Martinez then entered into a settlement agreement, the court entered a permanent injunction on Ms. Martinez, and the case was dismissed. (R:2555).

All of the above was addressed by the bar in its initial brief. (See IB:45-48). But the answer brief only argues that her filing of a notice of unavailability before a scheduled emergency hearing was necessary

because she was recovering from surgery, her attorney requested the rescheduling of her deposition, the law firm questioned her about her medical condition at a deposition, and she filed a motion for protective order because Mr. Silverberg filed a notice of appearance and she thought she would be harassed at her deposition. (AB:70-71). None of these excuses justify her bad faith stall tactics and failures to comply with court orders.

Regarding the assertion that Ms. Martinez's lawyer requested the rescheduling of her deposition, the record is replete with efforts by Silverberg Brito's counsel to set a date for deposition and Ms. Martinez's obstinance in the face of these efforts. (R:2435-44, 2521-22). In fact, Mr. Spuches had to resort to texting Ms. Martinez from the phone of another attorney because she would not respond to e-mails or phone calls. (R:2475-76). The answer brief's reference to Ms. Martinez's request for the rescheduling of a deposition falsely implies that these depositions were scheduled unilaterally without her consult. This implication ignores the good faith efforts by the plaintiff's counsel to schedule Ms. Martinez's deposition at a mutually agreeable time. It also ignores the fact that Ms. Martinez's

bad faith stall tactics resulted in multiple court orders compelling her attendance at deposition and sanctions against her.

Regarding the claim that Silverberg Brito's counsel interrogated Ms. Martinez about her medical condition at a deposition, Ms. Martinez made her medical condition a material issue. Ms. Martinez showed up for a deposition without documents she was required to produce pursuant to a court order and claimed that she was limited in her ability to testify due to her medical condition and prescription medication. Ms. Martinez cannot reasonably complain that the opposing party questioned her on this matter. The court also specifically authorized the plaintiff to inquire into Ms. Martinez's medical history at a continued deposition after this conduct. (R:1472).

Regarding the claimed concern that Mr. Silverberg intended to harass Ms. Martinez at deposition, this was nothing but pure conjecture on her part. Her motion for a protective order only alleged that Mr. Silverberg was not experienced in the field of law at issue, as though this somehow should preclude him from taking her deposition to engage in fact finding regarding her communications with Silverberg Brito clients following her termination. (R:2460-62). The rest of the motion was nothing more than conjecture that

she might be harassed at the deposition. *Id*. Her motion for protective order failed and she was sanctioned by the court for her misconduct. The answer brief attempts to supplement the plainly deficient content of the motion with claims that Mr. Silverberg engaged in unprofessional conduct during his own deposition, which justified Ms. Martinez's fear of dilatory conduct at her deposition. (AB:71). In support, Ms. Martinez again cites to documents never entered into evidence before the referee. *Id*. This alleged misconduct by Mr. Silverberg was not a stated basis for the motion for protective order and should be disregarded as one of the many post hoc justifications offered by Ms. Martinez to excuse her blatant misconduct in the civil litigation resulting in sanctions.

Ms. Martinez asserts that she did not fail to appear for a deposition because she filed a motion for extension of time due to the firm's refusal to schedule a hearing on motions related to the deposition. (AB:72). This is a significantly misleading—if not outright false—assertion of fact. The record citation in support of this assertion is a single page of the docket of the civil case. (See R:2564). None of the docket entries on this page reference a motion for extension of time. Another page of the docket references a motion for extension of time filed May 25, 2018, which was one day before

the scheduled deposition. (R:2563). But a court order entered earlier that same day compelled her attendance at the deposition and denied motions she filed related to the deposition. (R:2346). Ms. Martinez's motion for extension of time filed immediately after this adverse order did not excuse her attendance at the court ordered deposition scheduled the following day. Further, a motion for extension of time is not the same as a motion to continue a court-ordered deposition; it is not apparent from a reading of the docket how a motion for extension of time—which does not appear to be a part of the record—has any bearing on the matter.

Ms. Martinez argues that the firm neglected to prosecute the case for a year, resulting in dismissal of the case. (AB:72-73). This statement is also significantly misleading, and it is immaterial. Mr. Spuches testified that the dismissal was in error because the parties were not properly noticed of a case management conference, which is the reason Ms. Martinez's own counsel stipulated to a motion to vacate the order of dismissal. (T1:229-30). It is unclear why the brief references a vacated order as though this excuses Ms. Martinez's ongoing misconduct in the civil litigation, most of which occurred before the order was entered.

Finally, the answer brief argues that Ms. Martinez did not engage in dishonesty regarding her shifting reasons for failing to return the USB drive, and Silverberg Brito wasted judicial resources in pursuing litigation on the matter. (AB:73). This argument is willful blindness to the firm's efforts to secure the return of the drive prior to filing suit through six written demands seeking its return. (See IB:28-30). Ms. Martinez's answer brief simultaneously complains that the firm's negotiations regarding the content of a joint letter repeatedly shifted all focus to the return of the USB drive, and she complains that the firm did not adequately coordinate with her regarding the return of the USB drive. These two complaints are inconsistent with each other. It is disingenuous of Ms. Martinez to claim Silverberg Brito wasted judicial resources by scheduling a hearing seeking return of the drive and a temporary injunction "in lieu of simply facilitating delivery of the USB." (AB:73).

The answer brief also explains Ms. Martinez's delay in returning the drive; it asserts that Ms. Martinez initially intended to mail the USB drive, but based on advice of counsel that the firm might level false accusations regarding its return, she requested the firm send a courier to personally retrieve the drive. (AB:73). Ms. Martinez's claimed change of mind is

disproven by the record evidence cited in her own brief on the issue. The answer brief cites to Mr. Spuches' testimony, in which he stated that he offered to send somebody to retrieve the drive and her response e-mail "was diverting to something different. It didn't actually answer the question." (T1:182-83). The brief also cites to the transcript of the emergency hearing in the civil case, in which Ms. Martinez stated in court, "I know that I was going to return it in the mail." (R:1878). Mr. Spuches then offered to send a courier following this statement by Ms. Martinez. (R:1878-89). None of this record evidence supports the brief's assertion that Ms. Martinez requested a courier to retrieve the drive; it only demonstrates that Mr. Spuches offered this accommodation multiple times on his own initiative. The record evidence proves the bar's allegation in its formal complaint that Ms. Martinez misrepresented to the bar that she requested a courier to pick up the USB, but the firm did not do so. (See R:10; R:1125-26). Her answer brief is a reiteration of the same misrepresentation.

Ms. Martinez's misconduct in the civil litigation was not meaningfully addressed in the report of referee, which was limited to addressing the filing of a notice of unavailability and the return of the USB drive. (ROR:7). Her refusal to comply with court orders was in keeping with her refusal to

return the USB drive or negotiate in good faith with Silverberg Brito regarding the content of a joint letter. Her conduct in the civil litigation involved frivolous filings intended to block the plaintiff from taking her deposition, which violated Rule 4-3.1 (meritorious claims and contentions). More importantly, she repeatedly violated Rule 4-3.4 (fairness to opposing party and counsel). By deleting content from the USB drive before complying with a court order requiring the drive's return to Silverberg Brito, Ms. Martinez unlawfully obstructed the plaintiff's access to evidence in violation of Rule 4-3.4(a). By failing to appear for a court ordered deposition, Ms. Martinez knowingly disobeyed an obligation under the rules of a tribunal in violation of Rule 4-3.4(c).

2. Ms. Martinez's filing of certain notices of appearance:

Ms. Martinez also violated Rules 4-3.1, 4-3.3, and 4-3.4 by either filing certain notices of appearance on behalf of clients of Silverberg Brito, or in failing to timely withdraw as counsel after learning that certain clients had not agreed to her legal representation. Since the referee found that one such notice of appearance—on behalf of client Luckner Morelus—was unauthorized, the answer brief's argument regarding Mr. Morelus's case will be addressed in the bar's answer brief on cross-appeal *infra*.

Ms. Martinez asserts that the referee correctly found that her notices of appearance on behalf of Firmin and Annerose Jacques and Noel Perez were authorized verbally. (AB:64). Regarding the Jacques, Ms. Brito testified that the clients spoke very little English, and the main point of contact was their son. (T1:85-86). Ms. Brito also testified that the son did not have any power of attorney. *Id*. Ms. Martinez did not claim otherwise. The referee erred in holding that Ms. Martinez "got consent from the son, who everybody agreed was an authorized representative of the client." (T1:349). There was no record evidence that the Jacques' son was an authorized representative; the only evidence was that he was the main point of contact for the purposes of translation, because the clients did not speak English fluently. But the clients were present with their son during the initial meeting when the Jacques originally retained Silverberg Brito. (T1:85-86). Without a power of attorney or consent from the actual clients communicated to her by the son, Ms. Martinez could not have held a good faith belief that she was authorized to file a notice of appearance.

Her claim of client consent by the Jacques is entirely predicated on a phone call she had with the Jacques' son without the clients present. In fact, Ms. Martinez's own answer brief argues that she could not have

misrepresented matters to the Jacques because she only spoke to their son. (AB:68-69). The referee lacked any record evidence supporting the finding that the son was an authorized representative, as it appears both the bar and Ms. Martinez now agree in their respective briefs that communications with the son of the clients was not the same as communications with the clients. Regardless of whether the son agreed to Ms. Martinez's legal representation, she still lacked authority from the actual clients.

In arguing that Ms. Martinez committed no misconduct in filing a notice of appearance on behalf of Noel and Evelyn Perez, the answer brief asserts, "It is impossible for the Bar to assess the client's wishes because the Bar chose not to call any former clients to testify." (AB:65). But the bar did not argue in its initial brief that Ms. Martinez never solicited the clients' consent. Instead, the initial brief states that "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." (IB:44). Specifically, she filed the notices of appearance on July 18, 2017. (R:1685-88). On that same day, the Perezes sent Ms. Martinez a letter canceling the contract they had signed with her firm. (R:1766; 2106). Upon her receipt of the letter, she

should have filed a motion to withdraw as counsel; instead, Mr. Spuches sent Ms. Martinez a letter on August 10, 2017 demanding her withdrawal from these cases. (R:1711). She delayed her withdrawal in the matter, which created the false appearance that she was a representative of the clients long after they terminated the short-lived attorney client relationship. This violated Rule 4-3.3(a), which prohibits a lawyer from failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

F. Ms. Martinez violated Rules 4-3.1, 4-8.4(c), and 4-8.4(d) in her representation of Yelena Gershfeld.

The answer brief's argument that Ms. Martinez did not violate bar rules in representing Ms. Gershfeld is mostly a deflection to alleged misconduct by Ms. Brito in her prior representation of Ms. Gershfeld. (See AB:74-77). The brief asserts that Ms. Brito failed to obtain client consent to make a settlement offer on behalf of the client and refused to withdraw after being discharged. (AB:74). Regarding the first issue, the referee made no finding that Ms. Brito lacked settlement authority to extend the offer. The answer brief only asserts that Ms. Brito contacted the client and "told her that she had been trying for some time to reach Ms. Gershfeld and made no mention the [sic] pending offer." (AB:75). The e-mail sent by Ms. Brito to

Ms. Gershfeld does not demonstrate that Ms. Brito lacked settlement authority simply because it does not mention the topic. (See R:1779).

The answer brief then claims that Ms. Brito had not spoken to the client in over a month. (AB:75). This is also unsupported by the e-mail, which only states "I [Ms. Brito] have called you a couple of times this week to discuss a couple of things in the case." (R:1779). In asserting that the lawyer and client had not communicated for a month, the answer brief appears to be relying upon the dates of the last two e-mails in the e-mail string, which are dated June 13, 2017 and July 18, 2017. *Id*. An e-mail string alone is not proof there were no other communications between lawyer and client. Further, a one-month gap in communication is not proof that the lawyer lacked settlement authority. The only direct testimony on the issue by Ms. Brito was as follows:

> Q. So when you were pursuing the settlement negotiations with the opposing counsel, were you operating within the confines of what Ms. Gershfeld had approved?
>
> A. Yes.

(T1:50). Even though the answer brief cites this very testimony (see AB:77), it later asserts that the bar conceded at trial that Ms. Brito lacked authority. (AB:78) (citing T1:61)). The bar did not concede this issue; bar

counsel stated that Ms. Martinez "claimed the client didn't agree with the settlement." (T1:61). Then the bar asserted that the evidence showed Ms. Martinez was later "willing to settle for the same amount, even if she was the one with authority to settle the case on behalf of her client." (T1:61). The answer brief simply cherry-picks portions of the bar's argument at trial to falsely assert a non-existent concession, when the bar instead argued that Ms. Martinez attempted to frustrate an acceptable settlement offer for her own selfish interests.

The brief then claims that "[i]t is undisputed that Ms. Brito did not get actual authority to solicit a $30,000.00 offer." (AB:78). This assertion was disputed by Ms. Brito in her testimony. (T1:50). The answer brief claims that "[t]he referee found Ms. Brito's conduct in the Gershfeld case improper because she did not get express authority to make the offer." (AB:80). In support of this assertion, the answer brief cites to three pages of the trial transcript, none of which contain *any* statement by the referee. *Id*. (citing T1:49-51). Since the referee did not resolve the issue of fact, Ms. Martinez cannot claim the issue was undisputed and she therefore had authority to undo an acceptance of an allegedly unauthorized settlement offer.

Ms. Martinez additionally argues that Ms. Brito delayed her withdrawal as counsel when Ms. Gershfeld terminated the representation. This argument is irrelevant; wrongdoing by another attorney does not excuse Ms. Martinez's misconduct. *Jacobs*, 370 So. 3d 876 (Fla. 2023). Ms. Brito is a witness in this proceeding, not a party. Argument that a witness acted with unclean hands or asserted violations of bar rules that the witness likewise committed is immaterial.

Further, the answer brief draws a false equivalence between Ms. Martinez's misconduct and Ms. Brito's failure to immediately withdraw as counsel from the *Gershfeld* litigation. Ms. Martinez's notices of appearance did not, by themselves, terminate the legal representation by Silverberg Brito. (See IB:35-36). Silverberg Brito also represented three plaintiffs in that case, and the notice of appearance filed by Ms. Martinez only stated that she represented Ms. Gershfeld. (R:1802). This contradicted Ms. Martinez's e-mail to Mr. Spuches demanding the firm's withdrawal, which claimed that she represented all plaintiffs since June 30, 2017. (R:1797). Further, this latter claim would mean that Ms. Martinez failed to attend a deposition scheduled on behalf of "her" clients, which Ms. Martinez immediately blamed on Silverberg Brito. (R:1773-75, 1792, 1801). On July

31, 2017, Mr. Spuches, as counsel for the firm, offered to sign a stipulation for substitution of counsel with respect to Ms. Gershfeld only. (R:1801).

The answer brief cites some of the referee's statements in which he was initially critical of Ms. Brito's failure to withdraw, but Ms. Brito then clarified the issue regarding the three plaintiffs to explain her hesitation to immediately withdraw from the case. (T1:59-60). The referee then stated, "I think that's a very valid point, and I would probably have those same debates with myself if I were in that situation." *Id*. Given Ms. Martinez's contradictory assertions, her filing of a notice of appearance rather than a motion for substitution of counsel, and her failure to attend a deposition, Silverberg Brito did not untimely fail to withdraw as counsel. Instead, the firm properly offered to sign a stipulation with respect to the only plaintiff the firm knew had retained Ms. Martinez. Again, this issue is not material because it is not a defense to misconduct by Ms. Martinez.

The answer brief next disputes the bar's assertion that Ms. Martinez attempted to frustrate an accepted settlement offer only to then offer the same settlement to secure attorney's fees for herself. Specifically, the brief asserts that "Ms. Martinez successfully negotiated additional money

proportioned to the clients." (AB:78). In support of this claim, the brief only cites to argument of bar counsel stating as follows:

> Respondent claimed the client didn't agree with the settlement and that's why she was opposing it and not cooperating. Respondent herself then communicates with the opposing counsel and says, the 30,000 is perfectly fine. We'll accept it as long as you give me half for fees.

(T1:61). The bar's argument at trial is diametrically opposed to the brief's factual assertion. It is unclear why Ms. Martinez believes the bar's argument supports her claim that she negotiated additional money.

The answer brief then asserts that Ms. Gershfeld wanted Silverberg Brito to receive minimal fees due to the firm's failure to keep her informed. (AB:78-79). In arguing that Ms. Martinez successfully negotiated a larger amount of money for the client, the answer brief relies on Silverberg Brito's own agreement to split the $30,000.00 settlement so that lawyer and client each received $15,000.00. (R:1842). In asserting that she netted the client an additional $4,512.58, Ms. Martinez only relies on an e-mail from Mr. Spuches stating that the plaintiff's damages are $10,487.42, and that the firm needed to know from the client whether this was acceptable and whether Ms. Martinez claimed attorney's fees and costs. (R:1388). Ms. Martinez performed no work in negotiating the claim with the insurance

company except to reiterate the same demand for a $30,000.00 settlement. (R:1824). Though she claims her legal services secured the client an additional $4,512.58, Ms. Martinez demanded that the insurance company pay her firm $15,000.00 for its costs and fees. *Id*. To secure this payment to her firm, Ms. Martinez falsely claimed to counsel for the defendant that Silverberg Brito had no charging lien. (R:1839). The court later awarded the full $15,000.00 in attorney's fees to Silverberg Brito and nothing to Ms. Martinez. (R:2220-21). Confusingly, the answer brief continues to assert that Ms. Martinez was entitled to the full amount of her contingency contract, as though this matter has not already been resolved against her in the civil litigation. (AB:79-81). The only reason the client ultimately netted more funds was *despite* Ms. Martinez's failed efforts to collect the entire $15,000.00 attorney's fee for herself and ignore a charging lien, not because of them.

G. <u>The answer brief's argument that the bar unreasonably delayed the prosecution of this case is without merit.</u>

The answer brief asserts that the bar unreasonably delayed the prosecution of this case. (AB:51-53, 87-88). Some of the answer brief's argument on this issue is combined with Ms. Martinez's due process argument regarding the referee's finding that she destroyed evidence. But

this is a distinct issue separate from the due process argument. The referee found, as a mitigating factor, that there was an unreasonable delay in the disciplinary proceedings pursuant to Standard 3.3(b)(9). (ROR:12). The bar argued in its initial brief that this mitigating factor did not apply because Ms. Martinez's stall tactics in the civil litigation contributed to the delay, and she suffered no prejudice. (IB:53-54). Therefore, the bar addresses this argument in its reply brief rather than its answer brief on cross-appeal.

The answer brief does not address the bar's argument that Ms. Martinez's stall tactics in the civil litigation contributed to the delay. Instead, she only asserts that the bar could have prosecuted the case while the civil case was ongoing. (AB:87). This does not meaningfully address the bar's argument.

The answer brief alleges that "several important witnesses who were willing to testify on Martinez's behalf became unavailable" due to the delay. (AB:50). In support of this assertion, the brief only cites a motion to allow remote testimony of two witnesses: Milexys Zamorano and Yelena Gershfeld. *Id*. (citing R:176). It is unclear how this motion supports Ms. Martinez's argument that a delay in the proceedings prejudiced her. The

motion states that Ms. Zamorano is located in Jacksonville, Florida, and it would be too burdensome for the witness to travel to Miami to testify in person. (R:176). Ms. Martinez asserted that the witness's relocation to Jacksonville precluded her from appearing at hearing, but she does not explain the materiality of the expected testimony or identify when the witness relocated. (T2:37). The motion states that Ms. Gershfeld lives in Miami—which is where the trial was held—but is a senior citizen and would also be burdened if required to testify in person. (R:176). Again, it is unclear how a delay in this matter affected the witness's ability to testify. The referee issued subpoenas for both potential witnesses. (R:128-33). Apparently, Ms. Martinez either chose not to serve them or chose not to enforce them. Her failure to seek to compel their attendance does not demonstrate that she was prejudiced by a delay in the disciplinary proceeding.

The brief next argues that Seymour Marksman passed away in 2021. (AB:50). The brief does not cite to anything to support this assertion. Ms. Martinez only identified that a client died in 2021 without ever identifying which client she was referencing. (T2:37-38). Additionally, Mr. Marksman's testimony would have been irrelevant. Ms. Brito testified that Mr.

Marksman's case was referred to Silverberg Brito by Ms. Martinez's father-in-law, a public adjuster, and Mr. Marksman retained Ms. Martinez after she was fired. (T1:37-39). Ms. Martinez testified that the firm told her she could take Mr. Marksman's case with her after she was fired assuming the client agreed. (T1:269-70). Her brief states that Silverberg Brito authorized her to contact Mr. Marksman. (AB:53). The bar did not place Mr. Marksman's case at issue in its brief, and in fact never even referenced it. The referee's report also does not reference Mr. Marksman's case. There is no misconduct at issue in which Mr. Marksman's testimony would have been relevant to any issue on appeal.

Ms. Martinez next alleges that the firm lost the subject USB drive and medical records were destroyed. (AB:50). Regarding the first claim, the answer brief cites no record evidence establishing that the firm lost the drive after Ms. Martinez returned it. Instead, Ms. Martinez claims in her brief that the firm did not preserve the drive for inspection in either the civil case or the bar investigation. (AB:9). She only cites to her request for production to the bar (R:88) and the bar's response to the request for production (R:99) in support. Neither of these documents specifically reference the drive, and even if Ms. Martinez had requested production or

inspection of the drive, the drive was returned empty to Silverberg Brito, not the bar.

Regarding Ms. Martinez's claim that her medical records were destroyed, her counsel stated at a case management conference that she intended to submit a subpoena for medical records, but this might not be necessary because she was promised that some records would be delivered to her. (R:162). The alleged destruction of Ms. Martinez's medical records was not referenced until near the end of the sanction hearing, when Ms. Martinez testified that she "think[s]" her therapist and her doctors destroyed their records before she could obtain them for use in the bar proceeding. (T2:38). Also during the sanction hearing, Ms. Martinez's counsel represented that she provided medical records to the bar documenting that Ms. Martinez had been diagnosed with attention deficit hyperactivity disorder since childhood. (T2:34).

The referee found as a mitigating factor that Ms. Martinez suffered personal or emotional problems under Standard 3.3(b)(3), though he did not find that medical records were unavailable. The bar only argued in its initial brief that the mitigating factor did not apply because the problems at issue spanned back to when Ms. Martinez was an undergraduate, and Ms.

Martinez did not correlate these problems to the misconduct at issue. (IB:53). Ms. Martinez's counsel obtained some medical records, and the bar did not argue that Ms. Martinez's medical issues were not established. The lack of other medical records did not prejudice her.

Finally, in arguing a delay, Ms. Martinez asserts that this Court does not impose a statute of limitations, and instead determines whether the circumstances of a particular case result in an unreasonable delay. (AB:51). Rule 3-7.16(a)(1) states that a bar complaint must be made within six years from the time the matter giving rise to the complaint is discovered or, with due diligence, should have been discovered. The answer brief does not allege that the complaint filed by Silverberg Brito against her was untimely. She also does not allege that the bar erred in suspending the disciplinary investigation pursuant to Rule 3-7.4(e) based on the pending litigation initiated by Silverberg Brito against her. (See IB:53).

H. The referee erred in failing to award the bar's costs.

Ms. Martinez argues that the referee did not err in failing to award the bar's costs. (AB:94-95). The answer brief asserts that the transcript was not necessary to accurately draft a proposed report. This is a new assertion by

Ms. Martinez, as her counsel had demanded a copy of the transcript ordered by the bar, stating:

> We need the transcripts to prepare our proposed ror [report of referee] since your "practice" in Miami is to provide simultaneous reports rather than try to submit a jointly drafted ror. It is unfair and burdensome to expect my client to essentially pay twice for the transcripts.

(T3:14). The transcripts were necessary up until the bar requested its costs, at which point the very same counsel who stated she should not have to "pay twice" for necessary transcripts then argued at a November 9, 2023 hearing that she should not have to pay once for them either. The parties clearly understood the need for transcripts, and the referee explicitly declined to reach the issue of whether the transcript costs were unnecessary or excessive. (R:1094-95). Consequently, the referee abused his discretion in denying this portion of the bar's costs.

II. The Florida Bar's Answer to Ms. Martinez's Initial Brief on Cross-Appeal:

On cross-appeal, Ms. Martinez asserts that (1) Ms. Martinez's counsel stipulated at the sanction hearing that the referee's recommendation of a ten-day suspension and a public reprimand was "extremely fair and relevant." (T2:41). Nevertheless, she argues on cross-

appeal that the referee erred in certain findings of guilt, and therefore she should only be subject to a public reprimand. (AB:97).

A. There is clear and convincing evidence that Ms. Martinez spoliated evidence by deleting files from the USB drive before returning it.

Ms. Martinez employs backwards logic in arguing that "[t]he referee erred in factually finding that Ms. Martinez's [sic] deleted files from the USB drive." (AB:37). Specifically, Ms. Martinez asserts that this was not established because the contents of the USB drive was unknown at trial. *Id*. The prior contents of the drive were not established because Ms. Martinez deleted the files. As noted by the referee, the bar's inability to prove whether Ms. Martinez had stolen from her former employer is "the whole problem with destruction of evidence, isn't it?" (T1:305). The bar presented uncontroverted evidence showing that Ms. Martinez, as an officer of the court, represented to a circuit court judge at hearing that the drive contained at least one motion. (See R:1877). The drive was returned empty. This was clear and convincing evidence establishing that Ms. Martinez deleted files from the drive before turning it over to Silverberg Brito pursuant to a court order.

Ms. Martinez's argument that she may not have stolen files because either they were public record or available from a third party misses the

point. (See AB:38-39). Setting aside that her argument on this issue is almost entirely based on citations to documents never entered into evidence, her argument is completely irrelevant to the issues on appeal. The bar's initial brief is not seeking a finding that Ms. Martinez stole confidential or proprietary information from Silverberg Brito in violation of Rule 4-8.4(b), and the referee did not make any such recommended finding of guilt. Ms. Martinez's brief is arguing a point that is not contested.

In arguing a due process violation, Ms. Martinez asserts that the bar "informed the referee that they would not pursue the USB-related allegations due to insufficient evidence." (AB:37, 46-50). This is a significant overstatement of the bar's decision not to pursue a finding that Ms. Martinez violated Rule 4-8.4(b) (commission of a criminal act reflecting adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer). The referee found Ms. Martinez not guilty of violating that rule. The bar stipulated at trial that it could not prove Ms. Martinez engaged in criminal conduct without knowing whether there were stolen files on the USB. (T1:305). The answer brief is attempting to conflate this isolated, limited concession as a much broader concession that the bar would not seek *any* rule violation at all related to the USB drive. The referee corrected Ms.

Martinez's counsel when she argued that the bar's concession rendered all misconduct related to the USB drive irrelevant:

> MS. THOMPSON: The first thing I'd like to point out is that the Bar specifically told me that they were seeking authority to drop the rule of criminal conduct based on theft of the USB, and that's why that issue wasn't addressed so much.
>
> THE COURT: Sure. I'm not talking about the theft.
>
> MS. THOMPSON: The issue –
>
> THE COURT: I'm talking about the spoliation and the fact there was –

(T1:325).

The bar's formal complaint asserted that Ms. Martinez retained a USB drive containing Silverberg Brito files after she was fired, she used the information on the drive for her own pecuniary gain, and she falsely stated that she offered to return the USB drive. (R:5-11). The content of the USB drive, and Ms. Martinez's handling of the USB drive following her termination, was within the scope of the formal complaint. This Court has held that an attorney could be found guilty of misconduct not specifically charged in the complaint "where the complaint alleged the actual conduct which formed the basis of the violation and, therefore, put the attorney on notice". *The Florida Bar v. Fredericks*, 731 So. 2d 1249, 1253 (Fla. 1999)

(citing *The Florida Bar v. Vaughn*, 608 So. 2d 18 (Fla. 1992)). Ms. Martinez was on notice that the contents of the USB drive and her refusal to return it were at issue in the formal complaint. The bar's concession that it would no longer seek a finding that she engaged in criminal conduct in violation of Rule 4-8.4(b) cannot be reasonably interpreted as a waiver of all rule violations relating to the USB drive. Ms. Martinez's counsel seemingly understood that her client's handling of the USB drive remained an issue at trial, as she conducted cross examination of Mr. Silverberg and solicited extensive testimony from him regarding the drive. (T1:177-84). Yet the answer brief confusingly states that "Ms. Martinez did not elicit testimony from any witness regarding the USB, in reliance on the Bar's stated intention of not prosecuting any of its USB allegations or presenting related evidence." (AB:48).

Ms. Martinez next asserts that she was explicitly directed by Silverberg Brito to delete files from the drive pursuant to a cease-and-desist letter. (AB:41-42). This is a misrepresentation of the letter, which states in pertinent part as follows:

> The Firm therefore demands the following: (1) the immediate return of Firm property to my office, including, without limitation, client files, and your destruction of ***any copies***, whether digital

> or hard copy, accompanied by an affidavit attesting to such destruction. . . .

(R:1705 (emphasis added)). The letter clearly requests the return of client files—not their destruction—and for Ms. Martinez to destroy *copies* of such files in her possession, digital or hard copy. No reasonable reading of this letter could have led Ms. Martinez to believe that the firm asked her to wipe the drive of all files prior to its return. 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 of litigation; Ms. Martinez clearly understood this, as she stated at hearing on the motion for a preliminary injunction that the firm sought its return because it wrongly believed she had "entire files on it." (R:1877).

Equally important, Ms. Martinez was not complying with a cease-and-desist letter when she eventually turned over the USB drive; she was complying with a court order. (See R:2020). The order required Ms. Martinez to "immediately hand over the USB drive to plaintiff's counsel." *Id*. She knew or should have known to turn over the USB drive *immediately*, without wiping its contents beforehand given the allegations in the civil complaint and the issues raised at the emergency hearing leading to this order. Nevertheless, the answer brief disingenuously asserts that Ms. Martinez's actions "should be seen as compliance rather than destruction

of evidence." (AB:42). She did not comply with either the cease-and-desist letter or the court order when she deleted all files from the drive.

Ms. Martinez finally argues that deletion of a draft motion does not satisfy the elements of spoliation. (AB:43). This assertion is (1) based on Ms. Martinez's version of events, which was not incorporated in the referee's report; and (2) irrelevant. Though the referee sometimes phrased Ms. Martinez's actions in terms of spoliation of evidence, Rule 4-3.4(a) states that a lawyer must not "unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding." In this case, Silverberg Brito filed a civil suit which asserted that Ms. Martinez downloaded confidential firm information, client contact information, client files, and proprietary firm property onto a USB drive. (R:1104). After the civil suit was filed, Ms. Martinez represented at hearing that the drive only had a draft motion on it. (R:1877).

In asserting that deletion of this referenced motion does not constitute spoliation, Ms. Martinez is asking this Court to accept her representation at hearing regarding the contents of the drive. The referee did not accept her

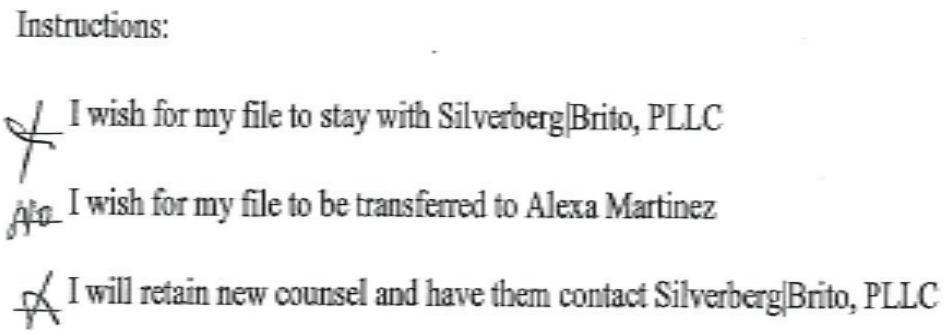
representation as true and did not make any factual finding regarding the specific contents of the drive. Instead, the referee only found that there "were at least some documents belonging to the Firm on the subject USB drive." (ROR:2). Ms. Martinez asserts that the referee found there was only a draft motion on the drive. (AB:44-45). There is no such finding in the report of referee, as the referee found at hearing that "Potential evidence in this case has disappeared. We don't know what it is because it's disappeared." (T1:327). Ms. Martinez is simply reiterating her self-serving testimony about what was on the drive before she wiped it of all files, but the referee never made any finding that her testimony was credible on the issue. In fact, Ms. Martinez's misconduct in destroying the evidence was the main reason the referee recommended her suspension from the practice of law for engaging in "serious dishonesty to destroy evidence." (See T1:327-28). Ms. Martinez destroyed that evidence *after* a lawsuit had been filed against her alleging that she had stolen confidential and proprietary information on the drive. Her argument that she had no duty to preserve evidence pre-suit is misplaced. (See AB:43-44).

Further, Ms. Martinez's own answer brief attempts to distance herself from the veracity of *any* statement she made at the emergency hearing by

implying that she was heavily medicated during the hearing and should not be held accountable for her statements to the court. (See AB:40-41). She is simultaneously asserting that (1) her representation at the hearing that the drive only contained a draft motion was accurate, and therefore did not satisfy the elements of spoliation; and (2) she may have been heavily medicated at the hearing and her own representations cannot constitute clear and convincing evidence that the drive contained files on it. These arguments are completely inconsistent with each other.

B. Clear and convincing evidence supported the referee's finding that Ms. Martinez lacked authorization to file a notice of appearance on behalf of Luckner Morelus and unreasonably delayed her withdrawal from his case.

On cross-appeal, Ms. Martinez disputes the referee's finding that she filed a notice of appearance on behalf of Luckner Morelus without client authorization and unreasonably delayed her withdrawal for approximately one month. (See ROR:6-7). In asserting that she had client authorization, she cites to her own testimony broadly claiming that all clients verbally confirmed hiring her. (AB:65-66). Mr. Morelus signed a form clearly showing his intent to remain a client of Silverberg Brito. (R:1754). Ms. Martinez argues that his intent was unclear, because it checks off multiple boxes on the form as follows:


Instructions:

I wish for my file to stay with Silverberg|Brito, PLLC

I wish for my file to be transferred to Alexa Martinez

I will retain new counsel and have them contact Silverberg|Brito, PLLC

(See AB:67 (citing R:1754)). Her argument is that this form establishes that the client was likely confused by the letter. He wrote "no" next to the option for his file to be transferred to Ms. Martinez. When Ms. Martinez initially refused to withdraw from Mr. Morelus's case and demanded extra clarification, Mr. Spuches bluntly responded as follows:

> Next to your box, our client clearly wrote "NO". That is all you need to know. Please withdraw your notice of appearance by tomorrow. You have no right to continue to represent Mr. Morelus, effective immediately.
>
> You expect our client to agree to permit you to substitute as counsel based on a signed document from the client—but when a client signs a document selecting Silverberg Brito, *then* you need additional consent? No.

(R:1755).

In claiming an ambiguity, the answer brief fails to acknowledge that the client clearly wrote "NO" next to the option to transfer his case to Ms. Martinez, and instead only explains that the client checked off two contradictory boxes. (AB:67). But any remaining ambiguity in the form

would be appropriately addressed by Silverberg Brito; Ms. Martinez cannot assert in good faith that she believed Mr. Morelus wished to retain her as his counsel once she received this form.

Mr. Morelus signed the form on July 27, 2017, which was nine days after Ms. Martinez filed two notices of appearance on his behalf. (R:1755, 1674-79). Ms. Martinez's assertion that she withdrew her notice of appearance 14 days after learning of her client's intent should be rejected. (See AB:68). It is based on her claim that Mr. Morelus initially consented to her representation prior to her notices of appearance filed on his behalf—before he later withdrew his consent on July 27, 2017. But the referee did not find that Mr. Morelus ever gave Ms. Martinez consent to represent him. Further, her delay in withdrawing her notice of appearance was unreasonable regardless of whether she delayed the matter by 14 days or 27 days. When falsely asserting that Silverberg Brito failed to consult with her regarding the content of a joint letter, Ms. Martinez argues that a delay of one week was excessive. Her delay in withdrawing from Mr. Morelus's case was, at the very least, twice as long, and it did not require any negotiation on her part.

C. Case law:

The answer brief asks this Court to either issue a public reprimand or approve the referee's recommendation of a 10-day suspension. (AB:97). In *The Florida Bar v. Bischoff*, 212 So. 3d 312 (Fla. 2017), this Court imposed a one-year suspension on a respondent who filed a notice falsely indicating he served discovery responses, ignored discovery orders, and filed frivolous pleadings. The answer brief asserts that this case is distinguishable because Ms. Martinez was not found guilty of the majority of the allegations in the formal complaint. (AB:89). But the record evidence readily establishes that Ms. Martinez (1) failed to comply with a court order in the lawsuit filed against her by Silverberg Brito by failing to appear for court ordered depositions and produce documents; (2) failed to comply with another court order in the litigation by destroying evidence on a USB drive before returning the empty drive to Silverberg Brito pursuant to a stipulated court order; (3) failed to timely withdraw from cases after clients had terminated her legal representation; and (4) attempted to undo a $30,000.00 settlement and collect an unearned $15,000.00 attorney fee for herself. Though the answer brief claims the bar relied on unverified pleadings, disputed facts, and a confidential settlement agreement, the bar

established these facts through testimony, court orders, and e-mail correspondence entered into evidence. (See AB:89).

Ms. Martinez also attempts to distinguish *Bischoff* by stating that no *clients* suffered injury, and she has already been sanctioned for some of her misconduct. (AB:90). But her conduct both wasted judicial resources and harmed Silverberg Brito, who had retained counsel to handle the litigation. Her conduct also delayed a client from receiving an acceptable settlement offer. Further, the respondent in *Bischoff* was likewise subject to other sanctions, because a magistrate ordered the respondent to pay $77,790.49 in fees and costs. *Bischoff*, 212 So. 3d at 314. This Court nevertheless suspended the respondent for one year.

Ms. Martinez asserts that her nonappearance at her own deposition occurred in personal litigation rather than in the course of representing a client. (AB:90). First, this Court has stated that "[c]onduct while not acting as an attorney can subject one to disciplinary proceedings." *The Florida Bar v. Della-Donna*, 583 So. 2d 307, 310 (Fla. 1989). Whether Ms. Martinez failed to comply with a court order in her role as an attorney or a defendant has no bearing on her culpability. She was required to attend a deposition and she failed to appear. She was required to return a USB

drive she stipulated contained at least some files, but she returned it empty. Her conduct is not less egregious simply because she was a defendant when she failed to comply with court orders. Second, Ms. Martinez also failed to appear for a deposition in the *Gershfeld* matter set for July 10, 2017 even though she claimed that the client had retained her on June 30, 2017. This failure to appear occurred in her capacity as a lawyer.

Ms. Martinez also argues that her lack of compliance was due to her medical condition, and as such her case is distinguishable from *The Florida Bar v. Marcellus*, 249 So. 3d 538 (Fla. 2018). (AB:91). For the mitigating factor of personal or emotional problems to apply, the respondent must correlate the personal or emotional problem at issue to the misconduct. See *The Florida Bar v. Behm*, 41 So. 3d 136, 150 (Fla. 2010). Ms. Martinez did not establish the correlation of her medical condition of ADHD to her misconduct in initially refusing to return a USB drive, deleting its contents, or failing to appear at a court ordered deposition because she conjectured that Mr. Silverberg would harass her. Ms. Martinez cannot use her medical condition as a scapegoat when the record evidence shows that her noncompliance with court orders to return the drive and appear for deposition was deliberate and unrelated to her medical condition. (See

R:2020, R:2346-2347). In further distinguishing *Marcellus*, Ms. Martinez asserts her misconduct is less egregious. (AB:91). The bar agrees, which is why it is seeking her one-year suspension from the practice of law rather than the 18-month suspension entered in *Marcellus*.

This Court has held that "[d]ishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole." *The Florida Bar v. Head*, 27 So. 3d 1, 8-9 (Fla. 2010). This Court has further explained that "basic fundamental dishonesty . . . is a serious flaw, which cannot be tolerated." *The Florida Bar v. Rotstein*, 835 So. 2d 241, 246 (Fla. 2002). The legal profession relies on the truthfulness of its members. *The Florida Bar v. Head*, 84 So. 3d 292, 302 (Fla. 2012) (quoting *The Florida Bar v. Korones*, 752 So. 2d 586, 591 (Fla. 2000)). Here, Ms. Martinez's failure to abide by court orders was deliberate and knowing, which was sufficient to prove intent. See *The Florida Bar v. Berthiaume*, 78 So. 3d 503, 510 n. 2 (Fla. 2011).

The answer brief's argument regarding applicable case law is mostly limited to distinguishing cases argued in the bar's initial brief. The only cases argued *in support of* either a public reprimand or a non-rehabilitative suspension include three unpublished dispositions by this Court entered

without opinion. (See AB:93-94). All involve isolated instances of misconduct. In *The Florida Bar v. Gibson*, Case No. SC2021-1716 (Fla. 2021), this Court publicly reprimanded an attorney who did not timely withdraw as counsel of record after the client terminated his services, and he delayed refund of the unused portion of a retainer. In *The Florida Bar v. Davis*, Case No. SC2019-1447 (Fla. 2019), this Court admonished an attorney who did not seek a hearing on a motion for substitution of counsel for three months, even though the client had retained the respondent and terminated prior counsel. In *The Florida Bar v. Llopiz*, Case No. SC2016-884 (Fla. 2016), this Court publicly reprimanded an attorney who left employment with a law firm and then requested a client make direct payments for unpaid legal services to his new firm. The respondent subsequently agreed to reimburse his former employer for almost all the funds he received from the client.

All three of these cases involve isolated instances of misconduct. Only *Llopiz* involves deliberate misconduct borne out of a respondent's concern that his former employer would not compensate him after he left the firm, while *Gibson* and *Davis* both involve negligence. Conversely in this case, Ms. Martinez's misconduct was deliberate, in violation of court

orders, ongoing, and harmful to the judicial system and her former employer. None of these cases support Ms. Martinez's argument that she should be publicly reprimanded.

CONCLUSION

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,

Mark Lugo Mason, Bar Counsel

CERTIFICATE OF SERVICE

I certify that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, on this 28th day of May, 2024, and a true and correct copy of the foregoing has been furnished via e-service to Alexa Martinez, Respondent, at alexamartinezlaw@gmail.com.

Mark Lugo Mason, Bar Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5839
Attorney Number 98013
mmason@floridabar.org

CERTIFICATE OF TYPE SIZE & STYLE

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Mark Lugo Mason, Bar Counsel