

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

S.C. Case No.: SC23-0869

Complainant,

v.

The Florida Bar File

Nos: 2022-30,321 (9A)

2022-30,423 (9A)

RYAN F.C. MITCHELL,

Respondent.

_____ /

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Throughout this brief, the Respondent, Ryan F.C. Mitchell, will be referred to by his proper name or as the Respondent. The Complainant, The Florida Bar, will be referred to as the Bar. The symbol “R”, followed by applicable page numbers, will be used to reference the filings referenced in the Index of Record filed on December 15, 2023. The symbol “T1” will be used to reference the transcript of the final hearing held on November 13, 2023, followed by applicable page numbers. The symbol “T2”, followed by appropriate pagination, will be used to refer to the hearing transcript of December 5, 2023. The Report of Referee will be referred to as “ROR”, followed by appropriate pagination.

Mitchell agrees with The Bar’s articulation of the “Nature of the Case” found at pages 1-2 of the Initial Brief. In view of the strong mitigation factors presented at the final hearing, including interim rehabilitation and remorse, he urges this Court to approve the referee’s disciplinary recommendation of a public reprimand and continued private therapy and treatment for anxiety, depression, and alcohol abuse until the end of his criminal probation. No controversy is presented as to the referee’s guilt recommendations.

STATEMENT OF THE CASE AND FACTS

Mr. Mitchell, age 47, has been a Florida resident and member of The Florida Bar since 2009. (T1:59). He met his wife, Amy Mitchell, when they were both attending law school in another state. (T1:21). Over the course of a 13-year marriage, they became parents to 3 girls. (T1: 22). However, in the months leading up to September 21, 2021, their marital relationship became greatly strained and there was continual arguing and much talk of divorce. (T1:23, 94). On the night of September 21, 2021, he and his wife (and their young children) were home. From the patio, he sent his wife a text stating, in essence, the marriage was over and he was going to file for divorce. (T1: 66, 75). Further texts went back and forth on such matters as his announced decision to file for divorce as well as her continuing displeasure over his mother's plan to come and stay in the general area for a number of months. (T1:25).

Later that same night, shortly after midnight, Mitchell was awakened by his wife while sleeping in bed. (T1:26, 29, 59-60). He became angry, got out of bed, and the arguing turned physical. (T1:70). He punched his wife in the face several times and she

sustained a black eye and a fractured nose. (T1:26, 40). He left the house before law enforcement arrived. (T1: 59-60). His wife's cell phone was subsequently found, damaged, at the bottom of the backyard pool. (T1:27, 34-35).

He was physically arrested at his office on December 7, 2021. (T1:77). By early December 2021, he was charged with one count of felony battery. By mid-January 2022, the State amended the information adding a second count of felony criminal mischief based on the cell phone damage. On January 13, 2023, Mitchell pled nolo contendere to the reduced misdemeanor charges of battery (domestic violence) and criminal mischief. (R:151). Adjudication of guilt was withheld, 2 days of jail credit was recognized, and he was placed on a total of 18 months of supervised probation. (R:157-160). Conditions of his probation included no contact with his wife, no alcohol or drugs, random testing, submitting to a drug and alcohol evaluation, completing the Batterers' Intervention Program, submitting to a mental health evaluation, and paying a restitution sum of \$2,224.23 to cover his wife's medical bills stemming from the September 22, 2021

incident. The probationary order required him to successfully complete any treatment deemed necessary as a result of the evaluations. He promptly self-reported the foregoing determinations of guilt, as required by Rule 3-7.2(e). (R:161). The State Attorney's Office had extended this plea offer over his wife's objection. (T1:42).

While Mrs. Mitchell had previously filed a bar complaint in January of 2022 alleging the battery incident of September 22, 2021—the bar deferred its disciplinary prosecution pending the outcome of the criminal case. After the no-contest plea, the bar filed a formal complaint against Mitchell on June 14, 2023. (R:1-8). Therein, it asserted his commission of misdemeanor crimes—battery and criminal mischief—thus violating Rules Regulating the Florida Bar 3-4.3 (prohibiting the “commission by a lawyer of any act that is unlawful or contrary to honesty and justice” and 4-8.4(b) (prohibiting an attorney from “commit[ing] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.”).

At the start of the disciplinary trial held on November 13, 2023, the referee was informed that while there were factual disputes over

what happened on September 21-22, 2021—Mr. Mitchell would not be disputing that he had wrongfully reacted by punching his wife in anger and had subsequently pled nolo contendere to misdemeanor battery and misdemeanor criminal mischief. (T1:8-16).

Mrs. Mitchell testified that on the night of September 21st, her husband came home from work about 8:30 p.m. (T1: 24). He was sitting alone and drinking some wine before she went to bed around 10:30 p.m.. (T1:24-25). Before she fell asleep, they exchanged texts about divorcing each other and she expressed her views on his mother's plan to come and stay nearby for an extended period. (T1:25). By her account, she was later awakened by her husband's snoring. (T1:26). When she woke him up to tell him to stop snoring, he became angry and hit her in the face with a pillow. (T1:26). Upon her return to the bedroom from the bathroom, she found the lights were on and her husband was out of bed. (T1:26). He told her to sit on the nearby sofa. When she did so, he angrily started punching her about the face, head, and body. He said things like "I will kill you. I hate you." (T1:26). After she grabbed her cell phone and ran out to the living room, he caught up with

her, threw her on a couch, and punched her some more in the face. (T1:26). He then left the house. (T1: 27). Afterwards, she couldn't find her cell phone so she used the landline to call 911. (T1: 27-28). She obtained a temporary injunction against domestic violence later that same day. (T1: 32, 41).

Mrs. Mitchell claimed that between 2010 and September 22, 2021, there were "12 documented instances" of domestic violence in their marriage. (T1:31). She based her "documented instances" testimony on her characterization of a supposed admission her husband had made in a pleading filed in their divorce case. (T1:31). She stated she could remember each and every one of the 12 instances. (T1:32). When cross-examined, however, she conceded that in all but one or possibly two instances those incidents were wholly unreported to law enforcement. (T1:48-49). She subsequently obtained a permanent injunction banning her husband from, inter alia, stepping foot at his children's schools or stepping foot in the residential community of Keene's Point where he had lived for years and had social contacts. Apart from the current divorce litigation, she has brought suit against her husband

for the tort of battery. (T1:52). Her father, whom she is close to, has also initiated civil litigation against her husband. (T1:46, 52).

Mr. Mitchell acknowledged he had become angry and hit his wife 4 or 5 times and that his fist was closed for a couple of those hits. (T1:59). He testified he was embarrassed and very sorry for the harm he had caused her, and for the impact of his wrongful conduct on his children (T1:92). While she hit him first, he acknowledged he did not strike her back in self-defense—but in anger. (T1:59, 61). He has consistently stated his belief that his wife created a “domestic event” because he had told her earlier that night he would be filing for a divorce and she wanted to gain an advantage in the dissolution proceedings to keep their children from him. (R:167; T1:91). Even though she had an agenda—he recognized it didn’t change the fact that he was still ultimately responsible for his conduct because her agenda didn’t make him strike her. (T1:98-99).

Mr. Mitchell testified to a materially different account of what precipitated his wrongful conduct. He came home about 8 p.m. on the night of September 21, 2021. (T1: 81). He was exhausted,

having spent the night before on a couch at the office. (T1:83). He and his wife had another argument over his mother. (T1:83). He sought to relieve his stress by drinking 2 glasses of wine and smoking a cigarette out on the patio. (T1:83). He texted his wife about his decision to file a divorce petition. (T1:66, 75). He was surprised then at later being asked if he wanted to sleep in the master bedroom, as opposed to the spare bedroom. (T1:66). He turned in about 10:30 p.m., and fell asleep with his wife reading next to him. (T1:66, 84). Around midnight, he was awakened by her beating on his back with her fists. (T1:84). She was fully clothed, had her cell phone pointed at his face, and was screaming “stop hitting me, stop hitting me” while recording. (T1:60, 67). She then ran out of the bedroom and began yelling up the stairs that she was being hit. (T1:60). Mitchell got out of bed and chased after her into the living room because he believed she was trying to wake the kids up. (T1:60). He tried to cover her mouth with his hands. (T1:60). His wife hit and slapped him, and kned him in the testicles. (T1:60). It was at that point that he struck back in his anger. (T1:59, 61, 70). He then left the house to avoid any further escalation. (T1:71, 87). He denied touching his wife’s cell phone,

let alone throwing it in the pool. (T1:71-72). On September 23, 2021, Mitchell filed a petition seeking a dissolution of the marriage. (T1:75). On or about that same day, he was served a domestic violence injunction at his office. (T1:32, 75-76).

Mitchell testified that in the months leading up to September of 2021, their marriage had unraveled past the point of return. They had simply been muddling along due to a reluctance to inflict divorce on their daughters. (T1:85). What had developed over time was that he and his wife's relationship became very toxic and filled with argument. (T1:94). She'd recently begun telling him she thought he would try to get her Baker-Acted so he could take the kids away from her and move his mother into the house. (T1:81, 91). Their mutual level of wine consumption—sometimes drinking together—was also a factor contributing to the toxicity. (T1:96-97). He vigorously disputed his wife's assertion about the occurrence of some 12 incidents of domestic violence he had supposedly admitted to committing in a divorce pleading. (T1:86). He testified he made no such admission. (T1:85-86). He stated there was an instance in 2018 where his wife, who was extremely intoxicated, had called the

police. No arrest was made, and the responding officers endorsed his proposed solution of removing himself from the house and going to his nearby office. (T1:86-87). Lastly, he testified to an occasion in 2010 where his wife was physically blocking his ability to leave the house. While he remembered the situation he couldn't recall whether he did or didn't slap her in his effort to leave. (T1:86).

Mitchell's combined 18 months of supervised probation in his criminal case began on January 13, 2023. His conditions included no alcohol or drugs, random testing, submitting to a drug and alcohol evaluation, attending and completing the Batterers' Intervention Program, having no contact with his wife, submitting to a mental health evaluation, and paying \$2,224.23 in restitution. (R:157-160). He was further required to successfully complete any treatment deemed necessary as a result of the evaluations. (R:157-160). At the time of his November 13, 2023 disciplinary trial, he was in full compliance with his probation. The mental health and substance abuse evaluations had been done; the ordered restitution had long been paid; and he was more than halfway through his second Batterers' Intervention Program. (T1:55, 80).

Mitchell testified he has no present issues with managing his anger. (T1:147). He is voluntarily working with a therapist named Dr. Kevin Mertens to learn how to respond in a more compassionate way versus an aggressive way in the context of litigation he's involved in. (T1:146). He had initially sought out Dr. Mertens assistance in working through a temporary bout of frustration he was experiencing as a result of not being able to see his daughters apart from meeting them at a mall for over a year now. (T1:182). The ordinary scope of that restricted contact involves seeing his children once a week for a couple of hours. (T1:178). In compliance with his probation conditions he has previously taken an anger management course with a licensed mental health counsel named Kourtenay Nash. (T1:147, 196-197). With Ms. Nash, he worked on recognizing the triggers that set him off and appropriately controlling his emotions. (T1:147-148).

Mitchell is an avid cook and wine collector/hobbyist. (T1:169-170). He described himself as a person who is disciplined and methodical by nature. (T1:183). He also described himself as a person who enjoys alcohol but doesn't crave it. (T1:185). He has

not been drinking due to his probation status. (T1:153). He acknowledged there had previously been times where he drank excessively—and pointed to the COVID- 19 lockdown as an example of a time when both he and his wife drank too much. (T1:151-152, 183). Between September 22, 2021 and the January 13, 2023 start of his probation, he dramatically cut back his alcohol consumption through self-moderation. (T1:154, 183-185). He was focusing on self-care, exercising, managing his law practice, and defending himself in the lawsuits filed by his wife. (T1:149, 184-185). He stated that not living with her after September 22, 2021, had actually made it easier to cut back since their relationship had devolved to the point that sitting down and drinking was one of the few things they still did together. (T1:154-156). Nonetheless, he stressed his past abuse of alcohol was fundamentally a matter of personal responsibility—and that it wasn't his wife's "fault" he had done so. (T1:157-158).

In February or March of 2023, Mitchell had been evaluated by Florida Lawyers Assistance, Inc. (T1-160). What came from that was a recommendation he be placed on a year of probation tied to a

one-year monitoring contract, with that organization, to ensure sobriety be maintained. (T1:160). He testified he was opposed to such a monitoring contract being imposed as a component of the disciplinary sanctions the referee might recommend in light of the other penalties or sanctions he'd been complying with for the past year or more, stating:

Since all this has transpired, I have been on probation for the better part of a year, I have taken anger management courses, I had to take a batterers' intervention course, twice, not once but twice, for the same incident. So, I was in batterers' intervention for an entire year doing weekly classes. I have been subject to at least four psychological evaluations, and incidentally, two of them—three of them were actually performed by the same people that the Florida Lawyers Assistance used. And two of the three physicians or practitioners from that practice did not recommend I have a substance abuse problem and need any treatment. The one guy who did is this Dr. Gupta, I believe, who really didn't spend any time with me. He came in for ten minutes and talked about some retreat to Tibet he was going to take, and then said, "Well, you got referred here, so you're going in the program."

(T1: 160-161).

The referee also heard directly from Ms. Nash,--the clinical mental health counselor who worked with Mitchell after he was

placed on probation and ordered to attend and complete an anger management program; attend and complete the batterers' intervention program; and submit to an assessment for mental health and substance abuse. (T1:196-197). She described the anger management course as consisting of eight 1-hour individual sessions. (T1:198). Mitchell was engaged in treatment and able to understand cognitive behavior therapy strategies. (T1:198). He successfully completed the program. He did the same for the 29-week batterers' intervention program. (T1:199-201). In fact, he repeated (and completed) the program for a second time when requested by a different court. (T1: 171, 200-201). Both times, he was a cooperative and willing participant. (T1:200-201). Ms. Nash also conducted a mental health and substance abuse assessment. (T1:201-202). She saw no evidence or indication that additional treatment was needed as it pertained to anger issues or that he required additional substance abuse counseling. (T1:202-204). At the time she prepared her written assessment dated February 9, 2023, Mitchell identified himself as a victim of domestic violence but brought her legal documents which described him as the perpetrator. (T1:202, 206, 211-212).

Separate from any court order limiting contact with his children, his wife obstructed his ability to see them for about 6 months following September 22, 2021. (T1:92). An order issued in the divorce case initially only permitted him to see his daughters in a supervised setting at a place called Family Ties. (T1: 92-93). With the divorce litigation still dragging on, he is now only allowed to see them in a public place for a limited time,--so he meets them at a shopping mall. (T1:77, 93).

In the permanent injunctive case, Mitchell has been barred from, inter alia, stepping foot into his old neighborhood or going to any of the schools his children attend. (T1:51).

The referee also heard testimony from Dr. Andrew Pittington, a licensed psychologist, who met with Mitchell in early 2022, about 4 times, over 8 hours or so, to complete a risk evaluation done to enable him to spend time with his children. (T1:102-104, 127, 130). It was Dr. Pittington's overall assessment that Mitchell was experiencing a heightened level of anxiety and depression consistent with the life circumstances he was under [marital discord, estrangement from his children, the divorce litigation process, the

criminal prosecution] but that his anxiety and depression would likely go down as he moved past these events. (T1-109-110). He did not view Mitchell as presenting with personality characteristics that would warrant the removal of his ability to have his children in his care; and saw nothing to suggest a chronic mental health disorder. (T1:110-111, 114). As a result of administering the Michigan Alcohol Screening Test [MAST], he classified Mitchell with “alcohol use disorder” because Mitchell had reported he had occasionally drank alcohol excessively, i.e., 3 or 4 drinks, and it had caused life problems for him. (T1:113). At the time of the evaluation, Mitchell was considered to be in the early stages of remission because he had discontinued his alcohol use. (T1:111-112). He found Mitchell to be extremely motivated to make changes in his life. (T1:118-119). For clinical assessment purposes, the “alcohol use disorder” label is considered applicable if an individual reports having consumed 3 or 4 drinks coupled with some legal intervention. (T1:113).

In closing argument, bar counsel told the referee the bar was seeking a 90-day suspension of Mitchell’s law license, plus one year

of probation with the condition that he execute and complete a 1-year contract with Florida Lawyers Assistance, Inc. (T1:215). The bar's rationale for its requested disciplinary sanction was "Mr. Mitchell has a problem with alcohol. He has a problem with anger." (T1:215). It argued the 90-day suspension was appropriate given Mitchell's misdemeanor plea; and the added 1-year probation term (with its tie-in to a Florida Lawyers Assistance, Inc. contract) was necessary and appropriate for his rehabilitation. (T1:217-218). Mitchell argued a public reprimand was the appropriate disciplinary sanction given the level of mitigation present; and that further sanctions were unnecessary for his rehabilitation. (T1:233-246).

On December 5, 2023, the referee held a hearing and informed the parties of her recommendations. (T2:5-16). As to guilt, she recommended Mr. Mitchell be found guilty of violating Rule 3-4.3 and Rule 4-8.4(b) of the Rules Regulating The Florida Bar.—a matter Mitchell had stipulated to. (T2:7; ROR:4). The referee went on to consider Standard 5.1(c), and make findings as to the existence of aggravating and mitigating factors pursuant to Standards 3.2 and 3.3. (T2:7-11; ROR:5-7). She then specified the

case law she'd considered prior to recommending discipline. (T2:11-12; ROR:7-12). In light of the foregoing procedure and analysis, it was her recommendation that Mr. Mitchell be publicly reprimanded by publication, continue his private therapy and treatment for anxiety, depression, and alcohol abuse until the end of his criminal probation, and pay the bar's costs in the proceedings. (T2:12-13; ROR:13-14).

The bar initiated these review proceedings because it disagrees with the referee's recommended sanctions; and desires this Court to, instead, order that Mr. Mitchell 's license to practice law be suspended for 90 days, to be followed by a 1-year probationary period concurrent with the execution and completion of the 1-year contract recommended by FLA, Inc.

SUMMARY OF THE ARGUMENT

The referee's factual findings in mitigation and aggravation—leading to her recommended discipline of a public reprimand—have a reasonable basis in the case law and the Standards, and are supported by the evidence. The bar has not met its required burden of proving the referee's findings are clearly erroneous or without record support. This Court should approve the referee's recommended sanction of a public reprimand.

ARGUMENT

THE REFEREE’S RECOMMENDED DISCIPLINE OF PUBLIC REPRIMAND TO BE ADMINISTERED BY PUBLICATION, CONTINUED PRIVATE THERAPY TREATMENT UNTIL THE END OF CRIMINAL PROBATION, AND PAYMENT OF THE FLORIDA BAR’S DISCIPLINARY COSTS, SHOULD BE APPROVED FOR IT HAS A REASONABLE BASIS IN EXISTING CASE LAW AND THE STANDARDS, AND IS SUPPORTED BY THE EVIDENCE.

Overview of disciplinary law

In The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970), this Court recognized that the desired goal of disciplinary judgments is to strike a balanced end which is fair to society both in terms of protecting the public from misconduct and in not denying the public the services of a qualified lawyer; fair to the violating attorney in terms of being sufficient to punish while simultaneously encouraging reformation and rehabilitation; and yet severe enough to deter similar violations. Due process considerations require that the accused lawyer be given a full opportunity to explain the circumstances and offer testimony in excuse or mitigation of the penalty. The Florida Bar v. Schreiber, 631 So.2d 1081, 1082 (Fla. 1994).

Here, the bar takes the position that the referee committed legal error when she exercised her independent judgment to recommend Mr. Mitchell be sanctioned with a public reprimand (coupled with an obligation to continue his private therapy and treatment until the end of his criminal probation) versus the 90-day suspension followed by a year of probation urged by the bar. Respondent Mitchell disagrees. He submits the referee followed the law and her disciplinary recommendation is supported by the evidence and strikes an appropriate balance given the demonstrated mitigation.

Prior to making a recommendation as to discipline, a referee is required to consider Standards for Imposing Lawyer Sanctions, which discuss presumptive sanctions in relation to the established misconduct and are subject to aggravating and mitigating factors, as well as this Court's case law. See, *The Florida Bar v. Schwartz*, 2024 WL 188335 (Fla. January 18, 2024). It is the responsibility of the referee to weigh all the evidence and decide which factors have been proven by clear and convincing evidence. *The Florida Bar v. Herman*, 8 So.3d 1100, 1106 (Fla. 2009). The referee is equipped with the authority to exercise independent decision-making. The

Florida Bar v. Picon, 205 So.3d 759, 763 (Fla. 2016). The referee is further recognized to be in a unique position to assess the credibility of witnesses, and his or her judgment on credibility should not be overturned absent clear and convincing evidence that his or her judgment is incorrect. The Florida Bar v. Tobkin, 944 So.2d 219, 224 (Fla. 2006). The factual findings of the referee—including his or her findings in mitigation and aggravation—are presumed correct, and will be upheld unless clearly erroneous or without record support. The Florida Bar v. Arcia, 848 So.2d 296, 299 (Fla. 2003); Herman, supra at 1106, (the presumption of correctness that attends the referee’s findings of mitigation and aggravation also applies to a referee’s determination that an aggravating factor or mitigating factor does *not* apply). And while a referee’s sanction recommendation is considered persuasive, this Court does not grant the same deference as it does to guilt recommendations because the ultimate responsibility for determining the appropriate sanction lies with this Court. The Florida Bar v. Cohen, 908 So.2d 405, 411 (Fla. 2005); Herman, supra at 1107. Even so, this Court has generally refrained from second-guessing a referee’s recommended discipline as long as it

has a reasonable basis in existing case law or in the Standards for Imposing Lawyer Sanctions. Cohen, supra at 411; The Florida Bar v. Altman, 294 So.3d 844, 847 (Fla. 2020). The Court typically takes an incremental approach when imposing discipline for misconduct,--meaning it imposes increasingly heavier sanctions on attorneys who had previously been disciplined for engaging in similar misconduct. Altman, Id. at 848. In recent years the Court has moved toward imposing harsher sanctions for attorney misconduct. Altman, Id. at 847-848, (rejecting the referee's sanction recommendation of public reprimand followed by probation for an attorney with an extensive disciplinary history).

The referee's sanction recommendation of a public reprimand (with no probation added to the criminal probation being served) over the bar's request for a recommendation of a 90-day suspension followed by one year of probation tied to a FLA, Inc. contract

Mitchell re-alleges and incorporates by reference the procedural and case facts set forth in his Statement of the Case and Facts to avoid needless repetition.

The referee found 2 aggravating factors and 8 mitigating factors. (ROR:5-7). The aggravating factors were vulnerability of the victim and Mitchell's substantial experience in the practice of law (since

2007, counting Canada). The mitigating factors were: (1) absence of a prior disciplinary record; (2) personal or emotional problems stemming from the marital issues he and his wife were experiencing at the time; (3) restitution to the victim for the medical expenses she incurred after the domestic incident; (4) Mitchell's cooperative attitude during the bar's investigation; (5) physical or mental disability or impairment or substance related disorder; (6) interim rehabilitation; (7) the imposition of other penalties and sanctions arising from the various conditions of his 18-month criminal probation and the limitation of contact with his minor children by the terms of an permanent injunction for protection against domestic violence; and (8) remorse for his conduct. In her report, the referee took specific note of both Mitchell's testimony describing the "toxic relationship" which had developed in his marriage leading up to the domestic violence incident, and how he was suffering at that time with anxiety and depression. (ROR:6). The referee also referenced his testimony outlining a number of positive changes he had made in his life since departing the relationship such as engaging in private therapy, self-moderating his alcohol consumption [prior to being placed on probation], changing his diet,

exercising, and losing weight. (ROR:6). She also noted there had been no other like incidents in the past 2 years. (ROR:6). The referee's written report suggests that her finding that Mitchell had remorse for his conduct was rooted in her acceptance of his testimony as credible. (ROR:6). Addressing her determination not to include a FLA, Inc. monitoring agreement as part of her recommended sanction, the referee stated: "[b]ased on Respondent's proactive steps to mitigate any issue with alcohol and continued participation in private therapy, this Referee finds a Florida Lawyer Assistance agreement is not necessary." (ROR:13).

At the time of the December 5, 2023 hearing announcing her recommendations, the referee noted that when it came to the mitigator of Mitchell's cooperative attitude toward the proceedings, it fully appeared he had started responding and cooperating without delay as soon as his wife had filed a bar complaint, and he had acted quickly to obtain counsel who also provided responsive representation in the disciplinary proceedings. (T2:9-10). She further noted her finding of the mitigator of "physical or mental disability or impairment or substance-related disorder" had record support given Mitchell's admission he had been drinking excessively

during this time in his marriage and he was also suffering from anxiety and depression. (T2:10). She briefly expounded on her finding of the mitigator of interim rehabilitation based on evidence he was in private therapy he'd initiated, he had undergone multiple evaluations as required, and he'd participated in a batterers' intervention program for approximately a year. (T2:10). When addressing the mitigator of other penalties or sanctions, the referee addressed the maximum length and conditions of his criminal probation as well as the continuing restrictions on his ability to have contact with his children due to the injunction action. (T2:10-11). The referee was cognizant that his criminal probationary period would end around June or July of 2024. (T2:12). As to the last mitigator of remorse, the referee stated she was accepting Mitchell's testimony that he was very sorry for the harm he had caused his wife and ashamed of his actions. (T2:11). Mr. Mitchell was instructed to continue his private therapy and treatment for alcohol abuse, anxiety, and depression until at least through his criminal probationary period. (T2:12).

In both her written report and during the hearing, the referee indicated that prior to reaching her sanction recommendation she

had reviewed The Florida Bar v. Hoag, 2021 WL 6012710 (Fla. December 16, 2021) (unpublished disposition); The Florida Bar v. Moeller, 2016 WL 4138256 (Fla. August 4, 2016) (unpublished disposition); The Florida Bar v. Bartholf, 775 So.2d 957 (Fla. 2000); The Florida Bar v. Roberts,II, 2020 WL 2204804 (Fla. May 7, 2020) (unpublished disposition); and The Florida Bar v. Schreiber, 631 So.2d 1081 (Fla. 1994). (ROR:7-12; T2:11-12).

Responding to the bar's arguments regarding Standard 5.1 and the referee's findings on aggravating and mitigating factors

At pg. 26 of its Initial Brief, the bar asserts the referee's recommendation of a public reprimand under Standard 5.1(c) is inappropriate because of Mitchell's stipulation that he entered a nolo contendere plea to misdemeanor battery and misdemeanor criminal mischief. The bar maintains that due to his commission of 2 misdemeanor offenses the appropriate sanction is suspension under Standard 5.1(b). According to the bar, the "only way" the referee's recommendation of a public reprimand would be supportable is if there were no aggravating factors whatsoever and the case had more substantial mitigating factors. (Initial Brief, pg. 27). In the bar's stated view, however, the referee failed to give

sufficient weight to the aggravating factors she found while simultaneously either affording too much weight to other mitigating factors or else finding them inappropriately to begin with. (Initial Brief, pg. 27).

At pg. 29 of its Initial Brief, the bar argues the referee erred in assigning restitution as a mitigating factor under Standard 3.4(a) because his restitution payment was a condition of his criminal probation. The evidence before the referee showed that Mitchell expeditiously paid the restitution figure at or near the front end of his 18-month probationary period out of appropriate recognition he had acted wrongly in striking his wife in anger and injuring her. He submits it was not error for the referee to treat this as a legitimate mitigating factor and there is no suggestion in the record that the referee placed undue emphasis or weight on it.

At page 29-30 of its brief, the bar asserts error in the referee's finding that Mitchell was cooperative in the disciplinary proceedings. The bar's contention boils down to the notion that Mitchell (who, among other things, came into trial indicating he would be stipulating to findings of guilt in the wake of his having entered negotiated nolo contendere pleas to misdemeanor offenses)

didn't sufficiently cooperate because he, through counsel, had refrained from filing patently damaging pleadings with the bar back during the time he was facing felony battery and felony criminal mischief charges. The referee had a legitimate record basis to support both her observation about Mitchell's cooperation at the hearing of December 5, 2023, and her finding that this mitigation factor was appropriately established. (T2:9-10).

The bar's initial brief, pgs. 31-32, next asserts that the referee erroneously made the mitigation finding of remorse. In the bar's stated view, there was no basis for remorse to be a valid mitigator since Mitchell was "constantly blaming" his wife for his criminal conduct and had asserted throughout the disciplinary case that he fell into a trap she set that night to gain an advantage in the coming dissolution action when it came to child custody. The bar's argument misses the mark. In her findings, the referee made clear she found Mitchell's expression of remorse to be credible. All Mitchell did in the disciplinary case was exercise his due process right to explain the circumstances and offer testimony in excuse or mitigation of the penalty. Schreiber, supra at 1082. His ability to do that did not foreclose his ability to be remorseful for his wrongful

conduct and the injury he caused. This was evident to the referee although, apparently, not to bar counsel.

As for the remaining 5 mitigators found by the referee [absence of a prior disciplinary record, personal or emotional problems, physical or mental disability or impairment or substance-related disorder, interim rehabilitation, and imposition of other penalties and sanctions] the bar argues that while the mitigating factors were appropriately found to exist, they were accorded too much weight by the referee.

For example, at pg. 30 of the Initial Brief, the bar asserts it is inconsistent for Mitchell to maintain his case appropriately involved the mitigating factor of a substance-related disorder because he was drinking too much in the months leading up to the domestic violence incident of September 22, 2021, when he testified before the referee on November 13, 2023, he was currently sober and also not dealing with any anger issues; able to self-moderate his future alcohol consumption when no longer on no-alcohol probation; and did not have an underlying problematic relationship with alcohol such that it warranted a 1-year monitoring contract with FLA, Inc. to ensure his rehabilitation. Mitchell submits his expressed

opposition to being made subject to a 1-year FLA, Inc. contract doesn't reveal an inconsistency in the slightest—for the simple reason that he has experienced interim rehabilitation and personal growth in the 2-plus years since September 22, 2021.

At pg. 31 of the Initial Brief, the bar acknowledges Mitchell established the mitigating factor of being subject to other penalties and sanctions. However, it asserts the other penalties and sanctions he became subject to were simply the “foreseeable consequences” of his criminal conduct. Consequently, the referee erred by giving the factor too much weight.

Case law relied on by the referee

Prior to recommending discipline, the referee indicated her consideration of 5 cases which are discussed at some length in her report. (ROR:7-12; T2:11-). She viewed Schreiber, supra as being factually “on point” yet distinguishable from Mitchell’s case because Schreiber had moved out of the country, had not meaningfully participated in the disciplinary case, and there was no evidence of any mitigating factor. (T2:11-12). In Schreiber, the attorney’s disciplinary case arose from his conduct described only as “beat[ing] up his girlfriend”. After being charged with misdemeanor

battery, Schreiber pled nolo contendere to the charge, adjudication was withheld, and 6 months probation was ordered. Schreiber had the case records sealed. After the bar filed a complaint alleging a violation of Rule 4-8.4(b), Schreiber moved to Israel. He did not return to Florida for any of the disciplinary proceedings or otherwise participate in a meaningful way. Apart from calling witnesses at the trial, the bar introduced into evidence his now-unsealed court records. Following the evidentiary hearing, the referee recommended, in part, that Schreiber be suspended for 120 days. On review, this Court approved the recommended suspension period and noted the attorney had chosen not to participate in the disciplinary case despite multiple opportunities to do so. Supra at 1082. While the Schreiber opinion does not describe exactly what Schreiber's misconduct toward his girlfriend entailed, it does include a quote from the referee indicating the lawyers of this state are expected to uphold the law and to "...not batter women, intentionally harass them or torment them." Supra at 1082. The foregoing quote carries the suggestion that Schreiber's misconduct may have gone well beyond an isolated instance of an argument becoming physical.

The referee also considered Hoag, supra—an unpublished disposition—where attorney Hoag had entered into a Conditional Guilty Plea for Consent Judgment for a public reprimand tied to a 3-year rehabilitation contract with FLA, Inc. (ROR:7-8). Attorney Hoag had pled nolo contendere to misdemeanor domestic violence and successfully completed the terms of his criminal probation. An evaluation by FLA, Inc. had recommended a 3-year monitoring contract and continued individual counseling. In mitigation, he had no prior disciplinary history, suffered from personal or emotional problems, fully cooperated with the bar, and suffered the imposition of other penalties or sanctions.

The referee also considered Moeller, supra, which is another unpublished disposition. (ROR:8-10). There, Moeller (a licensed pharmacist as well as an attorney) and his wife were having considerable marital and family issues. One evening he returned home, drank heavily, and took a sleeping pill. He awakened to discover his wife was moving out of their home. They got into a heated argument which purportedly escalated to the point that Moeller fired a gun at his wife. Moeller was arrested but the criminal case ultimately was not pursued because the wife refused

to cooperate. Upon his release from jail, he checked into the Florida Recovery Center for his substance abuse addiction. The Florida Board of Pharmacy declined to take any disciplinary action against him provided he successfully completed the program at the Florida Recovery Center and entry into a monitoring/therapy contract with the Professional Resource Network (PRN). Moeller resolved his bar disciplinary case by entering into a Conditional Guilty Plea for Consent Judgment which was accepted by this Court. Under its terms he received a public reprimand tied to his entry into a 3-year monitoring contract with FLA, Inc. Mitigation factors present in Moeller's case included such matters as the absence of a prior disciplinary history, lack of dishonest or selfish motive, suffered from personal or emotional problems, restitution, and cooperated with the bar's investigation.

The referee also considered Bartholf, supra. (ROR:10-11). There, Bartholf was publicly reprimanded and placed on a 1-year period of probation after he was charged with aggravated battery for assaulting a person with a golf cart and golf club at a golf course. This Court declined to require him to enter into a FLA, Inc. treatment contract for alcohol even though it had been

recommended by the referee based on an evaluation done by FLA, Inc. finding him to be in need of intensive outpatient treatment. Contesting FLA, Inc.'s recommendation, Bartholf had underwent 2 additional evaluations—both of which concluded alcohol treatment was unnecessary. Bartholf had previously resolved his criminal case by pleading guilty to the lesser offense of battery and the State dropped the assault charge. As a condition of his criminal probation, he had attended a class on anger management and was screened for alcohol abuse. The evaluation conducted in the criminal case had, likewise, found that alcohol treatment was unnecessary.

The referee also considered Roberts, II, supra, an unpublished disposition where Roberts was suspended for 45 days for committing three separate criminal acts occurring in 2012 and 2014. (ROR:11-12). The two instances in 2014 involved allegations he had committed domestic battery on his then wife. The State Attorney's Office declined to prosecute the first 2014 incident. But in the second incident he was charged. He subsequently pled guilty to simple battery, adjudication was withheld, and he was placed on 12 months' probation. He was required to attend anger

management classes. Evaluations done by FLA, Inc. found he was not in need of treatment or follow-up. Mitigating factors included acceptance of responsibility for his misconduct, no prior disciplinary history, no dishonest or selfish motive, suffered from emotional or personal problems, full cooperation with the bar, remorse, and had suffered the imposition of otherwise undescribed penalties or sanctions.

At pgs. 37-38 of its brief, the bar discusses the unpublished disposition in The Florida Bar v. Locy, 145 So.3d 829 (Fla. 2014). Attorney Locy's disciplinary case stemmed from his being arrested for aggravated assault based on the allegation that he threatened his girlfriend with a sword and struck her several times with his closed fist. Locy resolved his criminal case by pleading nolo contendere to misdemeanor battery. This Court approved the uncontested report of the referee which had recommended Locy be suspended for 120 days. While the bar's brief is factually correct in noting the referee's report did not mention her consideration of Locy—though the bar had argued the case below—there is no merit to the bar's insinuation that the omission suggests the referee reached her

sanction recommendation by means of a legally flawed or biased analysis.

Mitchell urges this Court to approve the referee's recommended sanction of a public reprimand, as the appropriate sanction in this case.

CONCLUSION

BASED ON the foregoing argument and authorities, Respondent Mitchell requests this Court to approve the referee's recommended sanction of a public reprimand.

CERTIFICATES

I hereby certify this brief 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 original hereof has been e-filed with the Clerk of the Supreme Court of Florida on this 3rd day of April, 2024, and a true and correct copy has been furnished via e-service to the following attorneys for The Florida Bar: Joshua E. Doyle, Executive Director, at jdoyle@floridabar.org; Mark Lugo Mason, at mmason@floridabar.org; Patricia Ann Toro Savitz, at psavitz@floridabar.org; and Daniel Quinn, at dquinn@floridabar.org.

Respectfully submitted,

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