

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RYAN F.C. MITCHELL,

Respondent.

Supreme Court Case No.
SC23-0869

The Florida Bar File Nos.
2022-30,321 (09A)
2022-30,423 (09A)

THE FLORIDA BAR'S INITIAL BRIEF

Daniel Quinn
Bar Counsel
The Florida Bar
1000 Legion Place, Suite 1625
Orlando, FL 32801-1050
dquinn@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

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

TABLE OF CONTENTS

TABLE OF CONTENTS.....	II
TABLE OF CITATIONS	IV
PRELIMINARY STATEMENT	1
NATURE OF THE CASE	1
STATEMENT OF THE CASE AND FACTS	2
I. Following a domestic violence incident in September 2021, Mr. Mitchell pled nolo contendere to two misdemeanors.....	2
II. According to respondent’s wife, Ms. Mitchell, the respondent battered her in the couple’s master bedroom, chased her as she fled to the living room, continued battering her in the living room, threw her cell phone into the pool, then fled the scene.....	4
III. According to the respondent, his wife provoked him to commit the criminal conduct at issue, though he stipulated that he did not act in self-defense when he chased his wife into the living room and punched her repeatedly in the head and face.....	8
IV. Following evaluation and treatment by medical professionals, Mr. Mitchell was diagnosed with alcohol use disorder and an adjustment disorder.....	13
V. The report of referee recommends a public reprimand and no contract with FLA, Inc. based on Mr. Mitchell’s stipulated violations of Rules 3-4.3 and 4-8.4(b).	17
SUMMARY OF THE ARGUMENT	19
THE DECISION-MAKING PROCESS IN A DISCIPLINARY PROCEEDING AND THE STANDARD OF REVIEW.....	21
1. Findings of Fact:.....	21
2. Recommendation of Discipline:	22
3. Consideration of Mitigating and Aggravating Factors:.....	23
ARGUMENT	24

I. Mr. Mitchell’s nolo contendere plea to two misdemeanor offenses constitutes conclusive proof of guilt of the criminal offenses charged.....	24
II. Based on the violations at issue, the Standards for Imposing Lawyer Sanctions, and relevant case law, this Court should reject the referee’s recommendation and sanction Mr. Mitchell with a 90-day suspension and a one-year probationary period.	25
A. The applicable standards:	25
B. The aggravating and mitigating circumstances:	26
C. The case law:.....	34
D. The probationary period and one-year monitoring contract with FLA, Inc.:.....	38
CONCLUSION.....	42
CERTIFICATE OF SERVICE.....	43
CERTIFICATE OF TYPE SIZE & STYLE.....	43

TABLE OF CITATIONS

Cases

<i>The Florida Bar v. Alters</i> , 260 So. 3d 72 (Fla. 2018)	22
<i>The Florida Bar v. Altman</i> , 294 So. 3d 844 (Fla. 2020)	22
<i>The Florida Bar v. Anderson</i> , 538 So. 2d 852 (Fla. 1989)	22
<i>The Florida Bar v. Arcia</i> , 848 So. 2d 296 (Fla. 2003)	23
<i>The Florida Bar v. Bartholf</i> , 775 So. 2d 957 (Fla. 2000)	36, 39, 40
<i>The Florida Bar v. Cohen</i> , 908 So. 2d 405 (Fla. 2005)	34
<i>The Florida Bar v. De La Torre</i> , 994 So. 2d 1032 (Fla. 2008)	22
<i>The Florida Bar v. Frederick</i> , 756 So. 2d 79 (Fla. 2000)	21
<i>The Florida Bar v. Germain</i> , 957 So. 2d 613 (Fla. 2007)	23
<i>The Florida Bar v. Glick</i> , 693 So. 2d 550 (Fla. 1997)	23
<i>The Florida Bar v. Hecker</i> , 475 So. 2d 1240 (Fla. 1985)	23
<i>The Florida Bar v. Herman</i> , 8 So. 3d 1100 (Fla. 2009)	29
<i>The Florida Bar v. Hoag</i> , Case No. SC21-1683, 2021 WL 6012710 (Fla. Dec. 16, 2021)	37
<i>The Florida Bar v. Locy</i> , Case No. SC13-1187, 145 So. 3d 829 (Fla. 2014)	37
<i>The Florida Bar v. Moeller</i> , Case No. SC16-651, 2016 WL 4138256 (Fla. Aug. 4, 2016)	36

<i>The Florida Bar v. Pahules</i> , 233 So. 2d 130 (Fla. 1970)	38
<i>The Florida Bar v. Picon</i> , 205 So. 3d 759 (Fla. 2016)	21, 22
<i>The Florida Bar v. Roberts II</i> , Case No. SC20-142, 2020 WL 2204804 (Fla. May 7, 2020).....	36
<i>The Florida Bar v. Rosenberg</i> , 169 So. 3d 1155 (Fla. 2015).....	23
<i>The Florida Bar v. Schwartz</i> , SC2019-0983 & SC2021-01484 (Fla. Jan. 18, 2024).....	35
<i>The Florida Bar v. Shreiber</i> , 631 So. 2d 1081 (Fla. 1994).....	26, 35
<i>The Florida Bar v. Summers</i> , 728 So. 2d 739 (Fla. 1999)	23
<i>The Florida Bar v. Thomas</i> , 582 So. 2d 1177 (Fla. 1991)	22
<i>The Florida Bar v. Tobkin</i> , 944 So. 2d 219 (Fla. 2006).....	22
<i>The Florida Bar v. Wolis</i> , 783 So. 2d 1057 (Fla. 2001).....	23

Statutes

§ 784.03(1)(a)(1), Fla. Stat. (2023)	2, 24
§ 806.13(1)(b)(1), Fla. Stat.	2, 24, 33

Rules Regulating the Florida Bar

Rule 3-4.3	passim
Rule 3-4.4	3, 31
Rule 3-7.2	3, 24, 25

Rule 4-8.4passim

Constitutional Provisions

Art. V, §15, Fla. Const.....21

Florida's Standards for Imposing Lawyer Sanctions

Standard 3.2 24, 27

Standard 3.3passim

Standard 3.4 29

Standard 5.1 25, 26, 31

PRELIMINARY STATEMENT

Complainant is referred to as The Florida Bar or the bar. The respondent, Ryan F.C. Mitchell, is referred to as Mr. Mitchell or respondent.

The electronic record in this case contains all filings referenced in the Index of Record filed in this Court on December 15, 2023. Citations to the electronic record are referred to by “R:” followed by the applicable page number(s) of the 237-page electronic record.

Contemporaneously with this brief, the bar is filing transcripts of the final hearing conducted November 13, 2023, and a brief hearing held on December 5, 2023 during which the referee announced her ruling; this brief cites these transcripts as “T1:”, and “T2:” respectively, followed by the applicable page number(s). The report of referee is referred to as “ROR:” followed by the applicable page number(s).

NATURE OF THE CASE

This lawyer disciplinary proceeding involves undisputed findings of guilt that Mr. Mitchell violated Rules 3-4.3 and 4-8.4(b) of the Rules Regulating The Florida Bar. The formal complaint charging him with these rule violations followed Mr. Mitchell’s nolo contendere plea to misdemeanor violations of battery and criminal mischief. The referee recommends that this Court publicly reprimand Mr. Mitchell by publication and require Mr.

Mitchell to continue private therapy and treatment for anxiety, depression, and alcohol abuse until the end of his criminal probation. The Florida Bar has sought review of this recommendation and seeks Mr. Mitchell's suspension from the practice of law for 90 days and a one-year probationary period during which Mr. Mitchell must be bound by a monitoring contract with Florida Lawyers Assistance, Inc.

STATEMENT OF THE CASE AND FACTS

I. Following a domestic violence incident in September 2021, Mr. Mitchell pled nolo contendere to two misdemeanors.

On January 13, 2023, Mr. Mitchell pled no contest to a first-degree misdemeanor of battery (domestic violence) in violation of section 784.03(1)(a)(1), Florida Statutes, and a second-degree misdemeanor of criminal mischief in violation of section 806.13(1)(b)(1), Florida Statutes. (R:151). The Circuit Court of the Ninth Judicial Circuit entered an order sentencing Mr. Mitchell to a term of two days in the Orange County Jail with credit for time served. (R:157-60). He was placed on probation for a period of 18 months: 12 months for domestic violence battery plus six months for criminal mischief to be served consecutively. *Id.* Relevant probation terms included Mr. Mitchell's completion of a Batterer's Intervention Program, abstention from possessing or consuming illegal drugs or alcohol, restitution to the victim (the respondent's wife, Ms. Mitchell), and

completion of a mental health evaluation and a drug and alcohol evaluation. *Id.* The order required Mr. Mitchell to successfully complete any treatment deemed necessary as a result of the evaluations. *Id.* Four days later, Mr. Mitchell, through his counsel, self-reported these determinations of guilt against him to the bar as required by Rule 3-7.2(e). (R:161).

The bar had previously received a complaint filed by the respondent's wife, Ms. Mitchell, in January 2022 alleging the acts of domestic violence by Mr. Mitchell which later led to the determinations of guilt. (R:113-16). Due to the pending criminal charges, the bar exercised its discretion to defer prosecution of disciplinary proceedings pending the outcome of criminal proceedings under Rule 3-4.4. After the no contest plea, the bar filed a formal complaint against Mr. Mitchell on June 14, 2023. (R:1-8). Mr. Mitchell's answer to the formal complaint admitted that he had been charged with one count of felony battery for assaulting his wife and one count of felony criminal mischief for damaging his wife's cell phone, and he later entered a plea of no contest to two reduced misdemeanor charges. (R:14-17). Mr. Mitchell stated at trial that his no contest plea to the two misdemeanors "seemed like a reasonable and fair proposition by the state attorney, so I accepted it." (T1:90). However, Mr. Mitchell's answer categorically denied all allegations regarding the events of September 22,

2021 leading to the charges and the plea, except for an admission that his three minor children were present in the house when the incident occurred.

Id.

- II. According to respondent's wife, Ms. Mitchell, the respondent battered her in the couple's master bedroom, chased her as she fled to the living room, continued battering her in the living room, threw her cell phone into the pool, then fled the scene.**

Since the perpetrator and victim share a last name, for the sake of clarity, this brief will refer to Mr. Mitchell as Respondent and his wife as Ms. Mitchell in summarizing their respective version of events described in both written statements to the bar and in their testimony at trial. Ms. Mitchell testified that on September 21, 2021, Respondent arrived home around 8:30 p.m. and began drinking a bottle of wine. (T1:24). Respondent stated he drank half the bottle. (T1:83). After putting the children to bed, Ms. Mitchell went to sleep around 10:30 p.m. (T1:25). She later woke up to Respondent's loud snoring and woke him up. (T1:26). The probable cause affidavit recounted that at 12:15 a.m. on September 22, 2021, Ms. Mitchell was awakened by Respondent's snoring, which prompted her to record him as he was sleeping. (R:124). She woke Respondent, showed him the video, and he became angry. *Id.*

Ms. Mitchell stated that Respondent got out of bed and began punching her in the head and face. *Id.* She testified at trial that she was hit at least four to five times in the master bedroom. (T1:20). Ms. Mitchell grabbed her phone off the nightstand and ran to the living room, but Respondent chased after her and stated, "I am going to kill you." (R:124; T1:26). Ms. Mitchell jumped on the couch and used a pillow to protect her face. *Id.* Respondent pulled the pillow away and punched her seven to eight times. *Id.* Respondent's fist was closed and he punched her in the right eye repeatedly. (T1:20). Respondent largely corroborated Ms. Mitchell's testimony on this issue: he testified that he punched her four or five times in the living room with an open hand and a closed fist. (T1:59-60).

The probable cause affidavit stated that Ms. Mitchell threatened to call 911, then Respondent grabbed his car keys and left the residence. (R:124). At trial, Ms. Mitchell could not specifically recall if she told Respondent she would call 911 or only intended to do so. (T1:27). At hearing, Ms. Mitchell testified that she begged Respondent to please let her live as the mother of his three children, and that she would leave his life. (T1:26-27). Respondent responded, "No. I'm going to leave." *Id.* Respondent then left the residence. *Id.*

Their three daughters, who at the time were between seven and twelve years old, were present at the residence when these events occurred, though they did not witness the incident. (R:124-25; T1:22). However, Ms. Mitchell testified that two children heard noises, because the oldest daughter was listening from the stairs, another daughter hid in a corner in her bedroom, and the third one was asleep. (T1:28). Ms. Mitchell explained that this incident was the last of 12 documented incidents of domestic violence by Respondent against Ms. Mitchell spanning from 2010 to 2021. (T1:31).

After Respondent left, Ms. Mitchell searched for her cell phone she had previously taken from her nightstand when she fled the bedroom, but she could not find it. (T1:27). She used a landline to call her mother and then the police. (T1:27-28). Ms. Mitchell's cell phone was discovered by her youngest daughter the following day at the bottom of the pool. (T1:27). When a deputy arrived, Ms. Mitchell described her demeanor as excited, stunned, and dizzy. (T1:32). She explained, "I was a hot mess, really." *Id.* The probable cause affidavit described the visible injuries sustained by Ms. Mitchell (black and blue swelling with minimal bleeding on Ms. Mitchell's right eye). (R:125). Though she initially declined the police recommendation to go to the hospital, Ms. Mitchell later realized that her

injuries were significant and had a friend drive her to the hospital at around 3:00 a.m. while Ms. Mitchell's mother watched the children. (T1:35). At trial, she testified that had a CT scan and revealed she suffered a fractured nose; hemorrhaging of her right eye; her face was bruised for a long period of time; and she suffered a mild concussion. (T1:20-21, 39). The bar produced medical records corroborating the injuries sustained by Ms. Mitchell. (R:141-45). Ms. Mitchell also attached photographs of her injuries to a petition for a temporary injunction against Respondent. (R:140, 146). She obtained an injunction later that same day. (T1:32).

The reporting officer could not immediately locate Respondent; Respondent's vehicle was not at his residence or at his law office, and several telephone calls made to Respondent's cell phone were forwarded to voicemail. (R:125; T1:32). After looking up call logs, Ms. Mitchell learned that after Respondent left the house, he called his mother and multiple attorneys in the middle of the night. (T1:34). Respondent confirmed he retained a family lawyer after leaving the house. (T1:88). Within the next three days following the battery, Respondent filed for divorce and returned to the house with a police officer to collect his belongings. (T1:32-33). Ms. Mitchell later filed a civil tort action against Respondent, which was still

pending at the time of trial. (T1:52). The two have had no contact since September 2021. (T1:56).

III. According to the respondent, his wife provoked him to commit the criminal conduct at issue, though he stipulated that he did not act in self-defense when he chased his wife into the living room and punched her repeatedly in the head and face.

Respondent's response letter to the bar and his trial testimony offered a different version of events. Through counsel, Respondent's written response to a notice of Grievance Committee Review claimed that he was sleeping and Ms. Mitchell aggressively woke him by punching him repeatedly in the back. (R:167). He stated that she was holding a phone in his face with the camera light on, and while his hands were still beneath his pillow, Ms. Mitchell screamed, "Stop hitting me, stop hitting me!" while continuing to film Respondent. *Id.* At trial, he additionally claimed that Ms. Mitchell ran out of the bedroom yelling to wake the children, so he tried to put his hand over her mouth while following her into the living room. (T1:60, 95).

Before trial, Respondent did not explain what his response was after the physical altercation he alleged was instigated by Ms. Mitchell. Specifically, even though Respondent's recollection of events immediately upon being awakened was apparently sufficient to recall Ms. Mitchell's

actions with perfect clarity, his response to these alleged actions, as explained by his lawyer, was summarized as follows:

Thereafter, they began arguing and it became physical. Mr. Mitchell left the house in order to calm the situation. Mrs. Mitchell then called the police and made her report.

(R:167). He provided more detail at trial. Respondent testified that he chased Ms. Mitchell as she ran out of the bedroom and punched her in the head with a fist and an open hand a total of four or five times. (T1:59-60). He recalled his actions “all along,” even though they were not disclosed in his letter to the bar. (T1:61). When asked to explain why he told a psychologist performing a mental health evaluation that he was unable to recall punching his wife, Respondent first stated that the events were fuzzy on that night, but he then admitted he was concerned about criminal charges and “I imagine I was hedging.” (T1:64). He then denied withholding information during the mental health evaluation. *Id.*

Respondent testified at trial that before he punched his wife four or five times, Ms. Mitchell hit him, slapped him, then kneed him in the testicles. (T1:60). When asked by bar counsel if he was asserting that his actions constituted self-defense, Respondent responded, “Not necessarily.” (T1:60). When asked to clarify this answer, Respondent claimed Ms. Mitchell instigated the conflict by recording him while falsely accusing him

of hitting her. *Id.* He further claimed that he was initially confused by his wife's actions because he was sleeping and had not touched her, but he "got mad" when she hit him. (T1:60-61). He finally clarified that he did not act in self-defense but out of anger. (T1:61). His lawyer's response letter to the bar's inquiry similarly stated that Respondent believed Ms. Mitchell created a "domestic event" because he had told her earlier that night that he would be filing for a divorce, and Ms. Mitchell wanted to gain an advantage in dissolution proceedings to keep their children from Respondent. (R:167).

Respondent offered similar testimony at trial, stating that he "fell right into" a trap by his wife. (T1:91). Then he again stated that he battered his wife that night, accepted responsibility for it, and felt terrible for what he did to his wife and the impact it had on his children. (T1:92). Specifically, Respondent stated that even though his wife had a plan, she did not make him punch her repeatedly. (T1:98-99). Bar counsel asserted during closing argument that even under Respondent's version of events, he was not acting in self-defense because Ms. Mitchell ran away from him, he followed her, put his hand over her mouth, then punched her repeatedly. (T1:221).

Respondent further denied ever taking possession of Ms. Mitchell's cell phone. (T1:71). He admitted that he had thrown her cell phone in the

pool in the past, but he did not do so on that night and did not “really have any thoughts on the matter” regarding how the phone ended up in the pool. (T1:72). Instead, after he stopped punching her, he left the living room, put on some clothes, then left. (T1:71). He stated that he never received any voicemails from the deputy who completed the probable cause affidavit, nor did he later learn the police tried to contact him. (T1:73-74, 88). The next morning, Respondent went to his law office and drafted a petition for dissolution of marriage. (T1:75-76). He was also served an injunction at his law office the same day. (T1:75-76).

According to the written response letter to the bar’s inquiry, when Respondent became aware of an arrest warrant, he turned himself in, posted bond, and reported the arrest to the bar. (R:168). Respondent clarified at trial that the police came to his office and arrested him on December 7, 2021. (T1:78-79). Though he disagreed with almost every material factual assertion in the police report and witness statement, Respondent acknowledged that he entered a plea of no contest to misdemeanor charges. (R:168). He offered similar testimony regarding the prior instances of domestic violence Ms. Mitchell referenced in her testimony; he claimed that he stipulated to the allegations for the purposes of a hearing because the issue was not material. (T1:86). However, he

testified that he may have slapped Ms. Mitchell in 2010, stating “I don’t recall if I slapped her. I don’t recall that I didn’t.” *Id.*

Respondent also described another incident in 2018 in which Ms. Mitchell called the police on him while she was intoxicated. (T1:86-87). Respondent deemed this memorable because he had two or three glasses of wine that night, he told police that he was probably over the limit but wanted to leave and drive ten minutes to his office, and they allowed him to do so even though he would be driving under the influence. *Id.* When asked if alcohol influenced the problems in his relationship, Respondent stated that the problem was drinking alcohol with Ms. Mitchell. (T1:96). He further stated that he was diagnosed with gastroesophageal reflux disease (GERD) at least five years earlier, and so he cannot drink more than three days a week anyway. (*Id.*; T:152, 186). Respondent blamed his wife for putting pressure on him to drink. (T1:96-97). He also stated that she caused further stress by filing lawsuits against him, which he believed to be in retaliation for his filing for divorce, as opposed to the result of the domestic violence incident. (T1:183-84).

IV. Following evaluation and treatment by medical professionals, Mr. Mitchell was diagnosed with alcohol use disorder and an adjustment disorder.

Dr. Andrew Pittington testified regarding mental health and alcohol concerns regarding Mr. Mitchell; Dr. Pittington performed a risk evaluation in relation to the divorce proceedings. (T1:104). He stated the evaluation screened for clinical concerns such as depression, anxiety, pathology, hysteria, psychopathic deviate, and paranoia scales. (T:105-06). Mr. Mitchell's depression scale was elevated, and Dr. Pittington explained this meant Mr. Mitchell was stressed and dissatisfied with his life circumstances. (T1:107). The psychopathic deviate scale was high, because Mr. Mitchell had strong opinions about what is right and wrong, which impacted his thinking to the extent "when he makes a decision, it's more all or nothing." (T1:108-09). Dr. Pittington further explained that Mr. Mitchell "tends to be overly sensitive and can be very resentful for things that have occurred to him." (T1:109). Based on the evaluation, he diagnosed Mr. Mitchell with an adjustment disorder with a mix of anxiety and depression. (T1:109). Dr. Pittington opined that the disorder was more a result of Mr. Mitchell's life circumstances at the time rather than a chronic problem. (T1:109-10). Therefore, he stated that Mr. Mitchell's anxiety and

depression would likely reduce once the pending criminal and civil litigation involving Mr. Mitchell resolved. (T1:113).

As a result of an alcohol screening test, Dr. Pittington determined that Mr. Mitchell was in the early stages of remission at the time of the evaluation. (T1:112). He diagnosed Mr. Mitchell with alcohol use disorder, though he stated that Mr. Mitchell had discontinued use. (T1:112-13).

Dr. Pittington testified that he had not seen Mr. Mitchell since early 2022. (T1:117). He further clarified on cross examination that his evaluation was predicated on the accuracy of answers provided by Mr. Mitchell. (T1:121). Mr. Mitchell made a significant misrepresentation to Dr. Pittington during the evaluation. He told Dr. Pittington during the evaluation that he did not recall punching his wife. (T1:126). Dr. Pittington opined that Mr. Mitchell may have withheld that information because it may have demonstrated a level of violence that could disadvantage Mr. Mitchell in the divorce proceedings. (T1:127). Dr. Pittington testified that the risk assessment report statement that Mr. Mitchell was “factual and accurate” was not correct due to Mr. Mitchell’s misrepresentation that he did not recall punching his wife. (T1:127-28). He also agreed that the results of his evaluation are not definitive, because he would need additional clinical data beyond the test results. (T1:123-24).

Mr. Mitchell also presented testimony from Kourtenay Nash, a clinical mental health counselor with Central Florida Recovery Centers. (T1:196). She assessed Mr. Mitchell as part of his court requirement to complete anger management, two batterer's intervention programs, and a substance abuse program. (T1:197). She testified that Mr. Mitchell successfully completed the programs, and she did not believe he required additional substance abuse counseling. (T1:204). At trial, she could not recall specifics regarding what she reviewed before her assessment of Mr. Mitchell and deferred to her report. (T1:207-10). She stated that Mr. Mitchell did not state that he was a perpetrator of domestic violence at the time of her report. (T1:211). Instead, her report indicates that Mr. Mitchell identified himself as the victim of domestic violence, though legal filings identified him as the perpetrator: "Client reports legal documentation describes client as the perpetrator and Client identifies as victim of domestic violence." (R:191).

Mr. Mitchell denied having anger management issues, though he was seeing a therapist to work on compassionate responses as opposed to aggression responses in the context of practicing law. (T1:146-47). He stated that his only trigger causing him to engage in any kind of violence was his "toxic relationship," and nothing else ever set him off. (T1:148). Mr.

Mitchell explained that he believed private therapy was a sufficient means of monitoring his compliance with coping strategies to control his emotions. (T1:150). He stated that his probation would end in March 2024, after which there would be no external agency monitoring his compliance with anger management. (T1:151). He also testified that he last drank alcohol two days before his probation began, he “stopped because [he] was on probation,” but he also reduced his consumption before probation voluntarily. (T1:153-54). Specifically, Mr. Mitchell stated that during the height of the pandemic, he would drink a bottle and a half per night on weekends, which did not adversely affect anything other than his waistline, but he does not drink as much anymore. (T1:183; see also R:187).

Notably, after two months of probation in March 2023, Mr. Mitchell filed an unsuccessful motion to modify the terms of his probation so that he could drink alcohol. (T1:162-63). Mr. Mitchell stated that drinking during probation was not important to him and he “never craved it,” but he decided to “give it the old college try.” (T1:163, 185). Mr. Mitchell was also evaluated by Florida Lawyers Assistance, Inc. (“FLA, Inc.”) in early 2023, and FLA, Inc. recommended a one-year monitoring contract, which Mr. Mitchell deemed unnecessary given the evaluations and treatment he had already undergone. (T1:160-61). An affidavit executed by the Clinical

Director of FLA, Inc., Carol Parks, further stated that Mr. Mitchell underwent a comprehensive psychiatric and substance abuse evaluation by a FLA, Inc. approved evaluator, who recommended the one-year monitoring contract. (R:228-29). The contract would require Mr. Mitchell's participation in an abstinence-based mutual aid support group two times per week, psychiatric follow-up with medication management appointments at least quarterly, weekly individual psychotherapy, and abstinence from mood and mind-altering substances with random toxicology screening. *Id.*

V. The report of referee recommends a public reprimand and no contract with FLA, Inc. based on Mr. Mitchell's stipulated violations of Rules 3-4.3 and 4-8.4(b).

At trial, respondent's counsel stipulated that Mr. Mitchell's conduct violated Rule 3-4.3 and 4-8.4(b), and the referee therefore made findings of guilt for both rule violations. (T1:140). The only disputes related to the sanction to be imposed. The bar asserted that based on the applicable case law and Standards for Imposing Lawyer Sanctions, Mr. Mitchell's misconduct warranted a 90-day, non-rehabilitative suspension from the practice of law and completion of the recommended one-year FLA, Inc. contract. (T1:215-33). The bar did not seek a rehabilitative suspension for Mr. Mitchell's criminal conduct, which would require Mr. Mitchell to petition for reinstatement to the practice of law. Instead, the bar asserted that a

non-rehabilitative suspension was sufficient when coupled with the monitoring contract with FLA, Inc., which would obviate the need for reinstatement proceedings. (T1:231).

Mr. Mitchell's counsel argued that a public reprimand was a sufficient sanction based on mitigating factors, the applicable standards, and case law. (T1:233-). One of the mitigating factors argued by his counsel was a physical or mental disability or impairment. (T1:236-37). In arguing this mitigating factor, Mr. Mitchell's counsel stated, "I think Mr. Mitchell clearly has testified that he was drinking too much prior to that." *Id.* In nevertheless asserting that a FLA, Inc. contract was unnecessary, Mr. Mitchell's counsel asserted that the respondent took a batterer's intervention course twice, he participated in anger management meetings, and he complied with the terms of his probation. (T1:237). He also argued that such a contract has a financial component, the random toxicology screenings are inconvenient for a busy lawyer, and that since the bar only sought a one-year contract rather than a longer contract, this indicated that the bar did not believe there was a substantial problem. (T:242-43). Though acknowledging that Mr. Mitchell would be incarcerated if he violated his probation by drinking, his counsel argued that if Mr. Mitchell had a significant problem with

alcohol, “something is going to pop up at some point. And it, quite simply, just hasn’t.” (T1:244-45).

At a subsequent hearing, the referee announced her findings regarding aggravating and mitigating factors. In finding a physical or mental disability or impairment, the referee found that “Mr. Mitchell admitted that he had been drinking excessively during this time in his marriage and that he was also suffering from anxiety and depression.” (T2:10). The referee then determined that a public reprimand was a sufficient sanction, coupled with a recommendation that Mr. Mitchell continue with private therapy and treatment for alcohol abuse, anxiety, and depression for as long as he is on probation. (T2:12).

SUMMARY OF THE ARGUMENT

Mr. Mitchell’s criminal conduct resulted in significant injury to his wife, Ms. Mitchell. Mr. Mitchell did not act in self-defense; he chased his wife into the living room, tried to cover her mouth, stripped away a pillow his wife had used to protect her face, and he beat her to the point she suffered a fractured nose, hemorrhaging of the right eye, and a mild concussion. The right side of his wife’s face was bruised and swollen. Mr. Mitchell did nothing to aid his wife after he inflicted these injuries. In fact, he exacerbated the situation by throwing his wife’s cell phone in the pool and

leaving her to both tend to her own injuries and simultaneously care for their three children on her own. Meanwhile, Mr. Mitchell prioritized his own interests by leaving the house, immediately seeking legal counsel, and filing for divorce. Importantly, this criminal conduct occurred after Mr. Mitchell had spent the evening drinking a half of a bottle of wine by himself.

Mr. Mitchell acknowledged his commission of a crime while he simultaneously portrayed himself as the victim in this disciplinary proceeding. He claimed that he has already suffered significant consequences of his criminal conduct. He claimed that Ms. Mitchell was a contributing cause of both his excessive drinking and his commission of two misdemeanors. But regardless of Ms. Mitchell's disputed role in contributing to the couples' marital discord, no one forced Mr. Mitchell to drink excessively or break his wife's nose. He is solely responsible for these decisions. Further, Mr. Mitchell has experienced other sanctions and penalties due to his actions, but this mitigating factor does not warrant a public reprimand and a recommendation of continued private therapy, for which there is no oversight and enforcement mechanism. The applicable case law and standards establish that a significant, non-rehabilitative suspension period of 90 days is a fair punishment without being overly punitive.

Further, Mr. Mitchell’s history of drinking excessively must be considered in conjunction with the criminal conduct at issue. Though the bar is not seeking a rehabilitative suspension, there needs to be continued monitoring of Mr. Mitchell after his suspension period concludes. A licensed evaluator found that a one-year contract with FLA, Inc. is appropriate, which is reasonable under the circumstances without being too onerous given the misconduct at issue. A 90-day suspension and a one-year monitoring contract with FLA, Inc. appropriately redress the rule violations, protect the public, and aid in ensuring Mr. Mitchell’s rehabilitation.

THE DECISION-MAKING PROCESS IN A DISCIPLINARY PROCEEDING AND THE STANDARD OF REVIEW

This is an original proceeding filed under this Court’s exclusive jurisdiction “to regulate the admission of persons to the practice of law and the discipline of persons admitted.” Art. V, §15, Fla. Const. Standards of review used to evaluate a trial court’s final judgment do not apply here.

1. Findings of Fact:

As this Court explained in *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016): “This Court’s review of a referee’s findings of fact is limited. If a referee’s findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and

substitute its judgment for that of the referee. *The Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000).” In reaching findings of fact, the referee has a heightened role in determining issues of credibility, which are important in this particular review. This Court has long held, “The referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect.” *The Florida Bar v. Tobkin*, 944 So. 2d 219, 224 (Fla. 2006) (quoting *The Florida Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991)).

2. Recommendation of Discipline:

The referee’s recommendation of discipline is subjected to greater review by this Court because of this Court’s ultimate responsibility to make that decision:

In reviewing a referee’s recommended discipline, this Court’s scope of review is broader than that afforded to the referee’s findings of fact because, ultimately, it is the Court’s responsibility to order the appropriate sanction. See *The Florida Bar v. Picon*, 205 So. 3d 759, 765 (Fla. 2016) (citing *The Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989)). At the same time, this Court will generally not second-guess the referee’s recommended discipline, as long as it has a reasonable basis in existing case law and the standards. See *The Florida Bar v. Alters*, 260 So. 3d 72, 83 (Fla. 2018); *The Florida Bar v. De La Torre*, 994 So. 2d 1032 (Fla. 2008).

The Florida Bar v. Altman, 294 So. 3d 844, 847 (Fla. 2020).

This Court has given notice that it is moving toward stronger sanctions than in the past. See *The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015). As a result, case law prior to 2015 needs to be examined carefully to make certain that the application of sanctions in these earlier cases comports with current standards.

3. Consideration of Mitigating and Aggravating Factors:

A referee's findings on mitigating and aggravating factors are treated essentially like any other finding of fact:

[A] referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. See *The Florida Bar v. Summers*, 728 So. 2d 739, 741 (Fla. 1999). This standard applies in reviewing a referee's findings of mitigation and aggravation. See, e.g., *The Florida Bar v. Wolis*, 783 So. 2d 1057, 1059 (Fla. 2001); *The Florida Bar v. Hecker*, 475 So. 2d 1240, 1242 (Fla. 1985).

The Florida Bar v. Arcia, 848 So. 2d 296, 299 (Fla. 2003).

“[A] referee's findings of mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record.” *The Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007). The burden of demonstrating that the findings in aggravation or mitigation are clearly erroneous lies with the party challenging the findings. See *The Florida Bar v. Glick*, 693 So. 2d 550, 552

(Fla. 1997) (holding that the burden of disproving a referee's findings of fact or recommendations as to guilt is on the party challenging those findings).

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

ARGUMENT

I. Mr. Mitchell’s nolo contendere plea to two misdemeanor offenses constitutes conclusive proof of guilt of the criminal offenses charged.

There is no dispute that Mr. Mitchell’s actions in battering his wife and then destroying her cell phone violated Rules 3-4.3 (commission of any act that is unlawful or contrary to honesty and justice) and 4-8.4(b) (commission of a criminal act reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects). Mr. Mitchell entered a plea of no contest to (1) a first-degree misdemeanor of battery (domestic violence) in violation of section 784.03(1)(a)(1), Florida Statutes; and (2) a second-degree misdemeanor of criminal mischief in violation of section 806.13(1)(b)(1), Florida Statutes. When a lawyer enters a plea of no contest to criminal charges, this constitutes a determination of guilt

under Rule 3-7.2(a)(2). A determination of guilt “is admissible in proceedings under these rules and is conclusive proof of guilt of the criminal offense(s) charged for the purposes of these rules.” Rule 3-7.2(b). Therefore, it is an incontrovertible fact in these proceedings that Mr. Mitchell’s battery of his wife constituted a first-degree misdemeanor, and his destruction of her cell phone constituted a second-degree misdemeanor.

II. Based on the violations at issue, the Standards for Imposing Lawyer Sanctions, and relevant case law, this Court should reject the referee’s recommendation and sanction Mr. Mitchell with a 90-day suspension and a one-year probationary period.

A. The applicable standards:

The Standards for Imposing Lawyer Sanctions provide a baseline for determining the appropriate sanction for a lawyer’s misconduct before consideration of aggravating or mitigating circumstances that may justify an upward or downward departure from the sanction to be imposed. Given the criminal conduct at issue, the Standards for Imposing Lawyer Sanctions establishes that a suspension is the appropriate sanction in this case:

Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included elsewhere in this subdivision or other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice.

Standard 5.1(b). This Court has stated that offenses involving violence warrant suspension, because such criminal actions affect the perception of the public that lawyers of this state “uphold the laws and do not intentionally batter women, intentionally harass them or torment them.” *The Florida Bar v. Shreiber*, 631 So. 2d 1081, 1082 (Fla. 1994).

The referee’s recommendation of a public reprimand is not the appropriate sanction under the Standards. Specifically, according to Standard 5.1(c):

Public reprimand is appropriate when a lawyer engages in conduct involving dishonesty, fraud, deceit or misrepresentation that is not included elsewhere in this subdivision and that adversely reflects on the lawyer’s fitness to practice law.

Mr. Mitchell did not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. He engaged in a violent criminal act and the destruction of property. His knowing commission of two misdemeanor offenses implicates Standard 5.1(b), which establishes that a suspension is the appropriate sanction.

B. The aggravating and mitigating circumstances:

The referee recommended a significant downward adjustment from the established sanction of suspension due to the substantial weight she afforded certain mitigating factors. The presence of aggravating factors

may justify an increase in the degree of discipline to be imposed, while the presence of mitigating factors may justify a reduction in the discipline to be imposed. See Standards 3.2(a) & 3.3(a). Therefore, the only way in which the referee's recommendation of a public reprimand is supportable under the Standards for Imposing Lawyer Sanctions is if there was an absence of aggravating factors and substantial mitigating factors. But there were substantial aggravating factors, and the referee erred in both finding two mitigating factors and affording too much weight to other mitigating factors.

Regarding the aggravating factors, under Standard 3.2(b), the referee found the following factors present in this case:

- Vulnerability of the victim under Standard 3.2(b)(8); and
- Substantial experience in the practice of law under Standard 3.2(b)(9).

(ROR:5).

Mr. Mitchell has been a member of the bar since 2009, and therefore the second factor is clearly established. (T1:59). The first factor warrants discussion. Mr. Mitchell was much larger and stronger than the victim. (T1:27, 68). Ms. Mitchell had no sufficient means of protecting herself other than by using a pillow, which the respondent stripped away from her so that he could continue punching her in her right eye. He threw her cell phone in

the pool and fled the house after his commission of these crimes while their three minor children were still in the house. Ms. Mitchell had to call a friend to take her to the hospital and had to call her mother to watch the children, because Mr. Mitchell left his battered wife alone while he drove off and pursued his own interests by calling his lawyers and prepared to file divorce. This is a significant aggravating factor that should justify an increase in the recommended discipline to be imposed, or at the very least offset some of the mitigation found by the referee.

The referee found the following mitigating factors:

- Absence of a prior disciplinary record under Standard 3.3(b)(1);
 - Personal or emotional problems under Standard 3.3(b)(3);
 - Restitution to the victim under Standard 3.3(b)(4);
 - Cooperative attitude towards proceedings under Standard 3.3(b)(5);
 - Physical or mental disability or impairment or substance related disorder under Standard 3.3(b)(8);
 - Interim rehabilitation under Standard 3.3(b)(10);
 - Imposition of other penalties or sanctions under Standard 3.3(b)(11);
- and
- Remorse under Standard 3.3(b)(11).

(ROR:5-7). The bar disputes some of these mitigating factors and disputes the overall weight the referee afforded the mitigating factors present in this case.

The referee erred in finding that restitution was a mitigating factor under Standard 3.3(b)(4). Mr. Mitchell was court ordered to pay \$2,224.23 in restitution to the victim to cover her hospital bills. (T1:43). His payment of this restitution is not a mitigating factor because under Standard 3.4(a), forced or compelled restitution is neither aggravating nor mitigating.

The referee also erred in finding that Mr. Mitchell's cooperative attitude towards the proceedings was a mitigating factor under Standard 3.3(b)(5). The applicability of this mitigating factor "contemplates something above and beyond the normal cooperation expected of every member of the Bar." *The Florida Bar v. Herman*, 8 So. 3d 1100, 1107 (Fla. 2009). Mr. Mitchell's participation in the bar proceeding did not involve any such cooperation "above and beyond" what is already expected of him. His initial response to a notice of Grievance Committee Review did not explain his actions in battering his wife, and instead only stated "they began arguing and it became physical." (R:167). Mr. Mitchell's answer to the formal complaint categorically denied the bar's allegation that his conduct violated Rules 3-4.3 and 4-8.4(b) (see R:16), though he stipulated to findings of guilt

after the bar presented its case in chief (see T1:140). Instead, his answer to the formal complaint only admitted to allegations that could be readily proven through court records. The referee's finding that this factor applies only states, "Respondent has cooperated during the bar's investigation." (ROR:6). Even if this Court defers to this finding, the weight afforded this mitigating factor should be minimal, as there was nothing "above and beyond" about Mr. Mitchell's cooperation in the disciplinary proceeding.

The referee did not err in finding a physical or mental disability or impairment or substance-related disorder under Standard 3.3(b)(9), but this factor should be afforded little weight. Dr. Pittington testified that he diagnosed Mr. Mitchell with alcohol use disorder. Mr. Mitchell's counsel argued that this mitigating factor should apply because his client was drinking too much. (T1:237). But Mr. Mitchell testified that he does not have a drinking problem and he should therefore not be required to be subject to a one-year monitoring contract with FLA, Inc. He cannot argue that this is a significant mitigating factor warranting a lesser sanction and simultaneously argue that his alcohol use disorder is insignificant. The bar stipulated at trial that this mitigating factor was established, and that Mr. Mitchell's alcohol use disorder, coupled with his anger management issues, justified a one-year monitoring contract with FLA, Inc. (T1:215-19, 225).

Mr. Mitchell established that he was subject to other penalties and sanctions under Standard 3.3(b)(11). He testified at great length about his probation and the evaluations and treatment he had undergone, the stigma he had suffered in his local community, and the limited visitation rights with his three minor daughters since September 2021. These were the foreseeable consequences of Mr. Mitchell's knowing decision to chase his wife from the bedroom into the living room, batter her, throw her cell phone in the pool, and flee the scene. The referee did not err in finding the mitigating factor but erred in attributing it greater weight than it deserved. Criminal conduct will generally result in criminal consequences. Standard 5.1(b) nevertheless establishes that suspension is appropriate for criminal conduct seriously adversely reflecting on a lawyer's fitness to practice. Disciplinary proceedings will generally follow the imposition of criminal penalties, as the bar has discretionary authority to defer prosecution pending the outcome of criminal proceedings under Rule 3-4.4. But this does not minimize the importance to take meaningful licensure action afterward, which in this case means a suspension from the practice of law.

The referee erred in finding that the record supported a finding of remorse under Standard 3.3(b)(11). Mr. Mitchell's written response to a notice of Grievance Committee Review glossed over his violent criminal act

and instead claimed the event was staged by the victim to provoke his response. Though Mr. Mitchell's counsel argued that this response should be viewed in the context of Mr. Mitchell's pending criminal charges, the looming threat of charges no longer remained at the time of the disciplinary proceeding. Mr. Mitchell entered his no contest plea in January 2023, and the bar filed its formal complaint in June 2023. He still had great difficulty acknowledging wrongdoing during trial. He reiterated his claim that his commission of a violent crime was a trap set by his wife, as though she was responsible for his decision to chase her into another room and batter her. He claimed that his wife was a significant contributing cause to his excessive drinking. He claimed that his wife was being vindictive in divorce proceedings and unreasonably refusing to reach an amicable settlement. To be clear, Mr. Mitchell did express remorse, but this should be placed in the broader context of Mr. Mitchell's constant blaming of his wife for his criminal conduct and for the consequences of his own actions.

Specifically, Mr. Mitchell's counsel first inquired into the subject of remorse by asking, "Do you acknowledge – what is your feeling about how you reacted?" (T1:85). Mr. Mitchell instead expressed remorse that he stayed in a toxic relationship for too long for the sake of his children and because his parents never divorced. *Id.* He then concluded by vaguely

stating that his decision to stay in the relationship caused him to make poor choices, and that he regretted it. *Id.* However, when his counsel inquired into the same subject a second time, Mr. Mitchell testified that he acknowledged that he battered his wife and that he felt terrible about “what I did to her and the impact it had on my kids.” (T1:92). This expression of remorse was preceded by much lengthier testimony by Mr. Mitchell blaming his wife for provoking his reaction, and it was immediately followed by testimony blaming his wife for unreasonably contesting visitation rights for months after the domestic violence incident. (T1:60-70, 91-93). During closing argument, Mr. Mitchell’s own counsel tacitly admitted Mr. Mitchell’s struggles acknowledging wrongdoing as follows:

Remorse, he did indicate. ***He’s obviously working through some issues here***, but he did indicate he has remorse for this situation for what he did to his wife and additionally how this affected his family, and that’s here.

(T1:238 (emphasis added)).

Further, Mr. Mitchell heavily implied that his wife destroyed her own cell phone, because it allegedly contained a recording corroborating his version of the event. (T1:72-73). He denied ever taking possession of her cell phone. *Id.* Therefore, the referee’s finding of remorse is strictly limited to the domestic violence and does not apply to the destruction of property. Mr. Mitchell did not even acknowledge the determination of guilt that he

committed a second-degree misdemeanor violation of section 806.13(1)(b)(1). He was charged with this additional misdemeanor based on the destruction of the cell phone, and his no contest plea constitutes a determination of guilt. But he still denied the event happened, though he admitted he threw her cell phone in the pool on a prior occasion.

This Court has held that “[a]lthough a referee may not “go behind a conviction to determine the attorney’s guilt, a referee may consider evidence concerning the circumstances behind a conviction in determining the recommended discipline.” *The Florida Bar v. Cohen*, 908 So. 2d 405, 409 (Fla. 2005) (internal citation omitted). Mr. Mitchell can explain the circumstances behind his no contest plea to two misdemeanors, but he cannot retract the determination of guilt as he attempted at trial. Even if this Court defers to the referee’s finding that Mr. Mitchell expressed remorse, the limits of this remorse and the heavily qualified nature of it should substantially diminish the weight afforded this mitigating factor.

C. The case law:

Based on the misconduct at issue, the bar seeks Mr. Mitchell’s 90-day suspension from the practice of law and a one-year probation concurrent with the execution and completion of the one-year dual diagnosis contract recommended by FLA, Inc. as the appropriate sanction

in this case. This Court has repeatedly stated its intent to impose stronger sanctions for lawyer misconduct than it has in the past. In a very recent opinion, this Court rejected a referee's recommended sanction, in part, because "the referee here neither cited nor applied our recent case law imposing more severe sanctions for lawyer misconduct." *The Florida Bar v. Schwartz*, SC2019-0983 & SC2021-01484 at *25 (Fla. Jan. 18, 2024). The report of referee in this case also neither cited nor applied this Court's intent to impose more severe sanctions.

In *Schreiber*, 631 So. 2d 1081 (Fla. 1994), the respondent beat up his girlfriend and pled nolo contendere to misdemeanor battery. He then moved to Israel and did not meaningfully participate in the disciplinary proceeding, other than to submit an offer of judgment and file a meritless motion for a directed verdict. This Court suspended the respondent for 120 days and required the respondent to complete a batterer's intervention program. The referee noted the factual similarities between *Schreiber* and this case but found it distinguishable because the respondent in *Shreiber* did not participate in the disciplinary proceeding and took no mitigating actions. As argued *supra*, the referee afforded too much weight to the mitigation in this case. It is not significant enough to justify a public reprimand when Mr. Shreiber was suspended for 120 days for the same

misconduct, especially considering this Court's move towards imposing stronger sanctions for lawyer misconduct after its decision in *Schreiber*.

In recommending a public reprimand, the referee cited *The Florida Bar v. Bartholf*, 775 So. 2d 957 (Fla. 2000), in which this Court publicly reprimanded a lawyer who pled guilty of battery after he was initially charged with aggravated assault for assaulting an individual with a golf cart and golf club. (ROR:10-11). Notably, *Bartholf* did not involve a vulnerable victim who suffered a fractured nose, hemorrhaging of the eye, a mild concussion, and a bruised face. It also did not involve the destruction of the victim's property. Finally, *Bartholf* was also decided before this Court's move toward imposing stronger sanctions for lawyer misconduct.

The remaining case law addressed in the report of referee regarding the appropriate discipline to be imposed is limited to unpublished dispositions. (See ROR:7-12). To the extent these unpublished dispositions are considered, they are all distinguishable for the same reason as *Bartholf*. None of these respondents inflicted the type of injuries on a vulnerable victim that is present in this case. The conditional guilty plea submitted to this Court in *The Florida Bar v. Roberts II*, Case No. SC20-142, 2020 WL 2204804 (Fla. May 7, 2020) (unpublished disposition) explicitly stated that there were no visible injuries or marks on the victim

other than an old injury unrelated to the domestic violence. In *The Florida Bar v. Moeller*, Case No. SC16-651, 2016 WL 4138256 (Fla. Aug. 4, 2016), it is unclear the extent of the victim's injury, as the respondent's wife declined to proceed with prosecution after a probable cause affidavit alleged that the respondent fired a gun at her and the bullet grazed her left thigh. The respondent denied the accuracy of the allegation, and therefore there was no conclusive determination of guilt as there is in Mr. Mitchell's case. Further, in *The Florida Bar v. Hoag*, Case No. SC21-1683, 2021 WL 6012710 (Fla. Dec. 16, 2021) (unpublished disposition), the conditional guilty plea for a consent judgment is entirely silent on the circumstances of the misdemeanor battery offense, and the respondent voluntarily agreed to comply with a three-year monitoring contract with FLA, Inc.

At trial, the bar argued an unpublished disposition in *The Florida Bar v. Locy*, Case No. SC13-1187, 145 So. 3d 829 (Fla. 2014) (unpublished disposition) further supported the imposition of a suspension in this case. (T1:139). In *Locy*, the lawyer was arrested for aggravated assault based on the allegation that he threatened his girlfriend with a sword and then struck her several times with a closed fist. The arresting officer reported injuries consistent with the allegations, and the lawyer pled nolo contendere to a first-degree misdemeanor battery. *Locy* involved the use of a deadly

weapon and an additional matter in which the lawyer refunded a client's fee with a check he knew to be worthless at the time of issuance. Therefore, the bar is not seeking the 120-day suspension imposed by this Court in *Locy*. However, this case further supports the imposition of a lengthy suspension based on the injuries inflicted on the victim. Nevertheless, the report of referee fails to cite to it, even though the referee relied on other unpublished dispositions argued by respondent's counsel in recommending a public reprimand.

D. The probationary period and one-year monitoring contract with FLA, Inc.:

This Court has stated that the three purposes of lawyer discipline are as follows:

First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970).

A contract with FLA, Inc. encourages reformation and rehabilitation. FLA, Inc. "is a non-profit Florida corporation, funded in part by The Florida Bar, which assists legal professionals with chemical dependency or

psychological problems or both.” *Bartholf*, 775 So. 2d at 958 n.1 (Fla. 2000). The bar is not the authority stating that such a contract is necessary in this case. This is a recommendation that needed to be made by a medical professional. In this case, Mr. Mitchell underwent a medical evaluation with FLA, Inc. by a licensed evaluator and it resulted in a recommendation that Mr. Mitchell enter a one-year monitoring contract, during which he must abstain from alcohol. Importantly, Dr. Pittington never testified that Mr. Mitchell would not benefit from such treatment. In fact, he agreed that it is helpful to have an external motivator for Mr. Mitchell to avoid alcohol abuse, like the terms of his probation. (T1:120-21). Although a mental health counselor, Kourtenay Nash, stated that additional substance abuse counseling was not necessary, her written assessment was based on Mr. Mitchell’s self-reporting of his alcohol use—one and a half bottles of wine per night on weekends—during which he blamed his wife as the cause of his excessive drinking. (R:185-87). The report indicated that Mr. Mitchell denied a current alcohol/drug problem (ROR:188), but at that point Mr. Mitchell’s abstinence from alcohol was court-ordered. Further, the substance abuse psychoeducation course was completed by a Dr. Shaw, not Ms. Nash. (See R:189). Her testimony that further substance abuse counseling was not necessary is of limited value.

Case law addressing the criteria for requiring a lawyer to submit to a monitoring contract with FLA, Inc. based on a potential substance abuse problem is limited. In *Bartholf*, 775 So. 2d 957 (Fla. 2000), one evaluator recommended a FLA, Inc. contract to assist the respondent in developing a program to maintain abstinence from alcohol, while three other evaluators concluded that the respondent was not in need of treatment. This Court declined to adopt the referee's recommendation of alcohol treatment in that case.

This is not the situation present here. There are objective reasons to mandate a period of abstinence from alcohol as a condition to Mr. Mitchell's practice of law following any suspension period imposed by this Court. By his own admission, Mr. Mitchell drank a half of a bottle of wine before punching his wife in the head and face with a closed fist five times. He only abstained from drinking because it was a condition of probation. He did not last two months into his one-year probation before he asked the court to remove the requirement that he abstain from alcohol. He admitted to driving drunk in 2018—though purportedly with express permission from law enforcement—to exit a tense situation with his wife, who he said was also drunk.

He claimed that his GERD prevents him from drinking heavily, but he also stated he was diagnosed with GERD five years before trial. Mr. Mitchell's heaviest drinking period occurred after this diagnosis, at the height of the pandemic. Further, his claims that his wife was the cause of his excessive drinking should be flatly rejected. Mr. Mitchell is responsible for his own actions. The fact that he is drinking less since their separation is a result of his probation; it was not a decision Mr. Mitchell made voluntarily, as evidenced by his filing of a motion two months into his one-year probation so that he could drink alcohol. The referee erred in finding that Mr. Mitchell made "proactive steps to mitigate any issue with alcohol." (See ROR:13). His efforts so far have been *reactive* to court ordered requirements in the criminal matter, except for his participation in private therapy. Other than the criminal probation, which will end before this Court's order imposing a sanction in this case, there is no external motivator in place to assist Mr. Mitchell in managing his alcohol use disorder. Further, if this Court imposes a non-rehabilitative suspension without a probationary period and a monitoring contract with FLA, Inc., the bar lacks the same ability to monitor the respondent as the criminal court. Unlike a court order requiring participation in a contract with FLA, Inc., the referee's recommendation that this Court require Mr. Mitchell to continue

private therapy and treatment lacks any oversight and enforcement mechanism. Given the above, a recommendation that Mr. Mitchell be subject to monitoring for one year through a binding contract with FLA, Inc. as a condition of his continued practice of law following a non-rehabilitative suspension period is objectively reasonable and necessary.

CONCLUSION

For the above stated reasons, The Florida Bar asks this Court to approve the referee's findings of guilt regarding Rules 3-4.3 and 4-8.4(b). The bar asks this Court to reject the referee's recommended sanction of a public reprimand and instead impose a 90-day suspension from the practice of law followed by a one-year probationary period to include a one-year dual diagnosis contract with FLA, Inc. as the appropriate sanction in this case.

Respectfully submitted,

/s/ Mark Lugo Mason

Mark Lugo Mason, Esq.

FL Bar No: 98013

651 E. Jefferson St.

Tallahassee, FL 32399

The Florida Bar

mmason@floridabar.org

CERTIFICATE OF SERVICE

I certify that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, on this 14th day of March, 2024, and a true and correct copy of the foregoing has been furnished via e-service to Thomas Delvin Sommerville, Attorney for Respondent, 820 N Thornton Ave, Orlando, FL 32803-4003 at tom@sommervillelaw.com.



Mark Lugo Mason, Bar Counsel

CERTIFICATE OF TYPE SIZE & STYLE

I certify that this document complies with the applicable font and word count limit requirements of Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2)(B). The font is 14-point Arial. The word count is 9,145 words. It has been calculated by the word-processing system, and it excludes the content authorized to be excluded under the rule, but it includes any footnote.



Mark Lugo Mason, Bar Counsel