IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. SC10-1333

v.

TFB FILE NO. 2009-10,288(13B)

MARC EDWARD YONKER,

Respondent.

RESPONDENT YONKER'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

IB.	=	The Florida Bar's Initial Brief.
RR.	=	Report of Referee.
FH. Exh.	=	Final Hearing Exhibit.
T.	=	Transcript of Final Hearing, including closing arguments, Before the Referee on March 21 – 28, 2011.
SH.	=	Transcript of Sanctions Hearing before the Referee on June 8, 2011.

STATEMENT OF THE CASE AND OF THE FACTS

I. Statement of the Case.

The Florida Bar seeks review of the Report of Referee in a case involving allegations of violations of Rules 4-8.4(b), (c) and (d) by Marc E. Yonker, member of The Florida Bar. The Referee conducted a five-day final evidentiary hearing in this case on March 21-24 and 28, 2011. At the sanctions hearing held June 8, 2011, the Referee determined that Mr. Yonker was guilty of technical violations regarding his use of letterhead and possession of Mulholland firm files. (SH. 121-122). On July 19, 2011, consistent with his prior ruling, the Referee issued his Report of Referee recommending that Mr. Yonker be found to have violated Rule 4-7.10(f) (lawyers may state or imply that they practice in a partnership or authorized business entity only when that is the fact) and Rule 3-4.3 (misconduct and minor misconduct – conduct not otherwise enumerated). (RR. 13). The Referee expressly found no other violations to have been proven by clear and convincing evidence. (RR. 13). The Referee recommended that Mr. Yonker be admonished. (RR. 13-15).

On September 9, 2011, the Bar filed a Petition for Review of the Report of Referee, seeking a *de novo* review by this Court to overturn the Referee's recommendation that Mr. Yonker receive an admonishment. (IB. 9). The Bar did not petition for a review of the Findings of Fact. (IB. 5). The Bar now requests

that this Court impose a suspension of sixty (60) days for his conduct surrounding his departure from the Mulholland firm more than ten (10) years ago. (IB. 14)[1].

The Referee thoroughly considered the "conflicting evidence that was presented" throughout the hearing. (RR. 2). Not only was the "credibility of the various witnesses . . . an important factor to be weighed when considering the overall fabric of the evidence presented," but so too were the "portions of evidence not mentioned specifically in the Findings of Fact" and their lack of relevance. (RR. 2). The Referee noted that the decision to omit certain evidence from the Report "was based upon the lack of credibility of the witness *given both the testimony of the witness and the totality of the presentation when considered in total*." (RR. 2) (*emphasis added*). The "inter-relation of the credibility of the various witnesses was critical in the [Referee] arriving at the Findings of Fact in this case." (RR. 2).

The Bar's Statement of the Case and of the Facts, however, references numerous disputed facts not found by the Referee and re-states evidentiary arguments previously presented to the Referee, who determined them to be either

[1] Mr. Yonker's understanding is that the Bar petitions this Court to impose a sixty (60) day suspension, as reflected by its Petition for Review of Report of Referee and page 14 of its Initial Brief, despite contrary references in its Initial Brief to a ninety (90) day suspension.

lacking in credibility or relevance.[2] Accordingly, the Bar's Statement inappropriately asks this Court to substitute its view of the evidence for that of its appointed referee. Florida Bar v. Frederick, 756 So. 2d 79, 86 (Fla. 2000). The relevant facts are as follows.

II. Statement of the Facts.

This is a case of a lawyer leaving a law firm, ten years ago, and having files copied before he left. (RR. 9, 15; FH. Exh. 6; T. 216, 652). The Bar novelly charged this as theft and now petitions this Court to overrule the Referee. Because Mr. Yonker's actions did not violate any Rules Regulating The Florida Bar, except Rule 4-7.10(f) with regard to letterhead and Rule 3-4.3 for misconduct otherwise not enumerated, the Report of Referee should be approved in its entirety.

Mr. Yonker began working for Richard Mulholland and Associates in December of 1995. (T. 185). During his time at the firm, Mr. Yonker saw a severe downturn in the size and scope of the firm: from 12 to 14 lawyers and 60 or more staff in the late 1990s, to only Mr. Winters and Mr. Yonker with a handful of staff in 2001. (RR. 7; T. 147-148). On or about April 26, 2001, Elizabeth Chapa

[2] In its Statement of the Case and of the Facts, the Bar justifies its incorporation of "facts" beyond the Findings of Fact by the Referee as follows: the "Court is asked to consider admissions and undisputed facts that, although relevant to this review, were omitted in the report of referee." (IB. 5). The Bar peppers "facts" throughout its Initial Brief and re-argues the evidence deemed unreliable or irrelevant by the Referee and thus not included in his Report. (RR. 2, 4; IB. 5, 9, 10, 11, 28, 37).

("Ms. Chapa") was fired from the Mulholland firm. (T. 279). She had been the primary legal assistant to Mr. Yonker, who was handling between four hundred (400) and four hundred fifty (450) files at the time. (T. 280, 345).

On June 15, 2001, Mr. Yonker left the Mulholland firm. (T. 196-197). Prior to his departure, over a lunch period, he delivered files to Ms. Chapa so she could copy certain documents within the files. (RR. 10). Mr. Yonker admitted that he "didn't ask anybody for permission" to make the copies; he asserted that he felt like he was those clients' attorney. (T. 192). Numerous former Mulholland attorneys testified, and the Referee found, that when attorneys left the firm they were immediately cut off from any client contact or information. (RR. 6, 7, 8; T. 191, 378, 569, 707). Mr. Yonker then tried to resolve the Mulholland firm's quantum meruit claims, with respect to departing clients, but Mr. Mulholland did not respond to those overtures. (RR. 8).

At the Final Hearing, there was "no testimony or suggestion that any clients were harmed or not properly represented" by Mr. Yonker. (RR. 4). Additionally, "[n]o evidence was produced" before the Referee "as to the nature of the information in the client files of the Mulholland law firm." (RR. 10). In fact, "[l]aw office files generally have information of different types . . . includ[ing] information that has been collected at the ultimate expense of the client which

information would arguably be the property of the client . . . [and] include attorney work product," to which Mr. Yonker was likely entitled. (RR. 10-11).

Finally, based upon ongoing discussions between Mr. Winters and Burt Alvarez, Esquire, letterhead was generated in June 2001 that included Mr. Alvarez to-wit: Winters, Yonker & Alvarez. (RR. 9). When Mr. Alvarez realized his name was on the letterhead, although he had not agreed to join the partnership, he sent word that the letterhead should no longer be used. (RR. 9). The letterhead continued in use for a short period of time thereafter. (RR. 9).

In his Report, the Referee expressly found that the Bar did not prove any violations of Rules Regulating The Florida Bar, other than Rules 4-7.10(f) and 3-4.3, by clear and convincing evidence. (RR. 13).

STANDARD OF REVIEW

The Standard of Review for evaluating a referee's factual findings and conclusions as to guilt is limited. "[I]f a referee's findings of fact and conclusions concerning guilt 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." Florida Bar v. Rose, 823 So. 2d 727, 729 (Fla. 2002). "Further, a referee's findings of fact carry a presumption of correctness which will be upheld unless 'clearly erroneous or lacking in evidentiary support.'" Id. citing Florida Bar v. Stalnaker, 485 So. 2d 815, 816 (Fla. 1986); Florida Bar v. Neely, 502 So. 2d 1237 (Fla. 1987). The Bar "cannot prevail on review by contesting factual findings and simply pointing to contradictory evidence, when competent, substantial evidence . . . supports the referee's findings." Florida Bar v. Head, 27 So. 3d 1, 8 (Fla. 2010).

When challenging a referee's conclusions as to guilt, the Bar has the burden of demonstrating that the record is devoid of evidence to support those findings or that the record evidence clearly contradicts the conclusions. Florida Bar v. Vining, 761 So. 2d 1044, 1047 (Fla. 2000). Because a referee is in the best position to evaluate the demeanor and credibility of witnesses, this Court "neither re-weighs the evidence in the record nor substitutes its judgment for that of the referee so long as there is competent, substantial evidence in the record to support the

referee's findings." Florida Bar v. Marable, 645 So. 2d 438, 442 (Fla. 1994). Accordingly, the burden is on "the party seeking review to demonstrate that a report of referee . . . is erroneous, unlawful, or unjustified." R. Regulating Fla. Bar 3-7.7(c)(5).

Although this Court has greater discretion in reviewing sanction recommendations, this Court has repeatedly explained as follows:

> [T]he referee in a Bar proceeding again occupies a favored vantage point for assessing key considerations – such as a respondent's degree of culpability and his or her cooperation, forthrightness, remorse and rehabilitation (or potential for rehabilitation). Accordingly, we will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law.

Florida Bar v. Lecznar, 690 So. 2d 1284, 1288 (Fla. 1997). In evaluating a recommended sanction, the standard of review not only gives deference to the referee, but requires restraint in not substituting the opinion of the Court for that of the referee as long as the recommended findings of fact and conclusions as to guilt are supported by competent substantial record evidence. Id.

SUMMARY OF THE ARGUMENT

Mr. Yonker left Richard Mulholland and Associates in 2001. This was five years before the promulgation of Rule 4-5.8, which now serves as a mandatory directive as to how lawyers and law firms are required to deal in good faith regarding notice to clients about departures. The Florida Bar argues that Mr. Yonker, by having information from Mulholland firm files copied before he left the firm, committed criminal theft. The Bar further asserts that Mr. Yonker's non-disclosure of his plans surrounding his departure from the firm amounted to an ethical violation that reflected adversely on his honesty, trustworthiness and fitness as a lawyer. The Bar argues that these alleged facts combine to result in violations of Rules 4-8.4(b), (c) and (d).

The Referee considered the evidence presented by the parties and considered all legal arguments. He carefully weighed the credibility of the evidence and the totality of the circumstances relevant to Mr. Yonker's actions. The Referee made Findings of Fact that are unchallenged.

The Bar's argument that Mr. Yonker violated Rule 4-8.4(b) hinges on the theory that he violated the criminal theft statute, which first requires proof that he deprived the Mulholland firm of property by removing files from the office during lunch. But the Bar did not prove such a violation by clear and convincing evidence. There is no evidence that Mr. Yonker deprived the Mulholland firm of

anything. Moreover, there is no record evidence proving that any other firm lawyer was representing those clients except Mr. Yonker. Thus, even assuming that the removal of files over a lunch period could constitute a "theft" under the criminal statute, no other person at the Mulholland firm would have been "temporarily deprived" of the files while they were copied. The second necessary component of the Bar's argument also fails. The Referee specifically found that Mr. Yonker's lack of disclosure of his departure plans was not improper under the circumstances at the Mulholland firm in 2001 and the Rules Regulating The Florida Bar. The Bar's argument misconstrues the elements necessary to prove violations of the rules it cites.

Attempting to sidestep the Referee's findings, the Bar relies on caselaw about lawyers moonlighting in an attempt to mischaracterize Mr. Yonker's actions as a misuse of firm resources. Those cases have nothing to do with this case. The Bar also attempts to use the civil case brought by Mr. Mulholland against Mr. Winters and Mr. Yonker, and the opinion of the Second District Court of Appeal, to which Mr. Yonker was not a party, as binding precedent. This is despite its own admission that the portions it asserts as precedent are *dicta*, which had no bearing on the ultimate outcome in favor of Mr. Winters. Again, Mr. Yonker was not party to the appeal at all. In sum, there is no basis for disturbing the Report of Referee. It should be approved in its entirety.

ARGUMENT

I. The Referee's Recommendation of No Violations of Rule 4-8.4(b), Rule 4-8.4(c) and Rule 4-8.4(d) Should be Affirmed by This Court.

The Referee found, based upon the Findings of Fact, that there were two "technical violations" by Mr. Yonker, to wit: "the inclusion of Mr. Alvarez on the letterhead for a short period of time and the personal use of the files of the Mulholland firm." (RR. 12). The Referee recommended that Mr. Yonker be found to have violated Rule 4-7.10(f) and Rule 3-4.3. (RR. 13). The Referee expressly found that no other violations were proven by clear and convincing evidence. (RR. 13). The Florida Bar has not met its burden of showing that the Referee erred in finding that no violations of Rules Regulating The Florida Bar were proven by clear and convincing evidence, beyond Rule 4-7.10(f) and Rule 3-4.3.

A. The Referee expressly found no violation of Rule 4-8.4(b) because Mr. Yonker did not commit a criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects.

Mr. Yonker "took files from the Mulholland law firm over a lunch period and had information from those law firm files copied for his own personal use." (RR. 10). In order for there to be a finding that this conduct violated Rule 4-8.4(b), the Bar was required to prove two elements by clear and convincing evidence: first, that Mr. Yonker committed a criminal theft; and second, that the criminal theft adversely reflected on his honesty, trustworthiness or fitness as a lawyer. The

Bar failed to prove these two elements; accordingly, Mr. Yonker was found not to have violated Rule 4-8.4(b).

In 2001, Rule 4-8.4(b) stated that a "lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." R. Regulating Fla. Bar (2001). Florida's theft statute provided that a "person commits theft if he or she knowingly obtains or uses . . . the property of another with intent to, either temporarily or permanently: (a) *Deprive the other person of a right to the property* or a benefit from the property; (b) Appropriate the property to the use of any person not entitled to the use of the property." Fla. Stat. § 812.014(1)(2001) (*emphasis added*).

Although the Bar asserts that it does not challenge the Referee's Findings of Fact, it repeatedly attempts to recast Mr. Yonker having files copied as rising to the level of criminal theft. However, this Court has repeatedly explained that a petitioner who merely continually "restate[s] his arguments . . . cannot prevail on review by contesting factual findings and simply pointing to contradictory evidence, when competent, substantial evidence . . . supports the referee's findings." Florida Bar v. Head, 27 So. 3d 1, 8 (Fla. 2010), citing Florida Bar v. Varner, 992 So. 2d 224, 228 (Fla. 2008).

As a prefatory matter, the Bar appears to fundamentally misinterpret Rule 4-8.4(b), arguing that Mr. Yonker's conduct "in itself, reflects adversely on his

honesty, trustworthiness, or fitness as a lawyer." (IB. 25). In doing so, the Bar seems to assert that, even if this Court finds Mr. Yonker's conduct was not a criminal theft, it can still find him in violation of Rule 4-8.4(b) if his actions reflect "adversely on [his] honesty, trustworthiness, or fitness as a lawyer." R. Regulating Fla. Bar 4-8.4(b). This is not the case. If this Court finds that Mr. Yonker having files copied is not criminal theft, the Rule 4-8.4(b) analysis must cease.

In order to prove that Mr. Yonker's conduct constituted criminal theft, the Bar needed to have proved by clear and convincing evidence that the Mulholland firm was deprived of a right to its property. The Bar could not prove this. Therefore, the Referee did not find that Mr. Yonker deprived the firm of property. There is no record evidence showing that any lawyer other than Mr. Yonker was representing the clients. Thus, even assuming that the removal of files during lunch could constitute a "theft" under the criminal statute as asserted by the Bar, no other person at the Mulholland firm would have been "temporarily deprived" of the files while they were copied. The Bar repeatedly states that Mr. Yonker's actions were out of a desire to have "unimpeded" access to Mulholland firm clients. (IB. 6, 10, 13, 26, 38). This assertion is irrelevant to determining whether Mr. Yonker having information copied from files constituted criminal theft.

The Bar also argues that a critical fact is that Mr. Yonker did not disclose his departure to the firm in advance. The Bar asserts that this reflects adversely on Mr.

Yonker and violates Rule 4-8.4(b). (IB. 13, 26-27). On this issue, the Referee found that the manner in which the Mulholland firm was run "is deeply intertwined with the matters regarding Mr. Winters and Mr. Yonker." (RR. 6). The Bar argues that this finding essentially condones self-help by Mr. Yonker and justified his conduct – that the Referee excused Mr. Yonker's actions because of Mr. Mulholland's firm management. (RR. 6; IB. 30). To the contrary, the Referee never condoned any conduct proven to have been a rule violation. In fact, he found that Mr. Yonker violated Rules and should be disciplined.

The Referee rejected the Bar's argument that the copying of files rises to the level of criminal theft. For example, the Referee stated "I'm not labeling these lawyers as thieves. I'm just saying, a technical violation by appropriating the files on a temporary basis to their own use, it was not in the interest of Mr. Mulholland's law firm. If somebody wants to label that, they would be mislabeling it." (SH. 77). The Referee recognized the novelty of the Bar's charge, when he doubted that counsel for either Mr. Yonker or the Bar had "found a case where anybody has been prosecuted for anything like this." (SH. 77).

When directly asked how the Bar would handle a situation like an attorney prosecuted "for anything like this," the Bar *conceded that the criminal statute might not be applicable*. (SH. 77-78). The Bar acknowledged that it "would have

to look at the facts-specific . . . [and] does evaluate cases based on the Bar standards, not necessarily on a criminal standard." (SH. 78).

Just as the Bar conceded, the Referee evaluated the copying of files in view of the "facts-specific" and the "Bar standards" in this case. (SH. 78). He concluded that the Bar failed to prove, by clear and convincing evidence, that Mr. Yonker's actions constituted a criminal theft. Accordingly, no criminal act reflected adversely on Mr. Yonker's honesty, trustworthiness or fitness as a lawyer. As such, the Referee expressly found no violation of Rule 4-8.4(b).

CASELAW

This Court has never held that removing files from a "law firm over a lunch period and [having] information from those law firm files copied for . . . personal use" was theft. (RR. 10). No authority exists for such a claim. The Bar's reliance on Florida Bar v. Kossow, 912 So. 2d 544 (Fla. 2005), is misplaced. Indeed, despite citing sizable sections of the Court's analysis in Kossow, the Bar ignores the facts underpinning the case and the authority upon which it is based, including Florida Bar v. Cox, 655 So. 2d 1122 (Fla. 1995). Further, although the Bar cites these cases as authority under which this Court should find that Mr. Yonker violated Rule 4-8.4(b), both Kossow and Cox are Rule 4-8.4(c) cases. They do not provide authority that supports the Bar's assertion that Mr. Yonker violated Rule 4-8.4(b).

Kossow and Cox are moonlighting cases. For at least 3 months, Kossow "continued to represent clients outside of the firm and accept new clients despite his knowledge of the firm's policy against outside employment." Id. at 546. Kossow "emailed documents to himself, had the firm's administrative staff copy books and treatises from the firm's library, and utilized work time to talk to other members of the firm about his outside cases." Id. The Court concluded that "by using the firm's equipment, materials, and time . . . [he] misappropriated the resources of the firm." Id. Kossow earned at least $18,500 handling matters for outside clients. Id. at 545.

Unlike Mr. Yonker, who had information from Mulholland firm files copied during a couple of lunch hours, Kossow operated his "clandestine activities" for several months, despite being "given a number of opportunities to disclose, admit, and confront his misconduct." Id. at 548 (Lewis, J., concurring). The Bar does not argue and the facts do not support any claim that Mr. Yonker used any Mulholland firm staff or resources inappropriately. Mr. Yonker used neither firm equipment nor firm materials. (T. 191-192). There are no factual similarities between Mr. Yonker's conduct and that of Kossow.

Specifically, the Court noted in Kossow that: "[i]n prior cases, we have suspended attorneys who moonlighted in contravention of firm policy and who willfully deceived their firms with regard to this outside representation." Kossow

at 547. Citing Cox, where the respondent also represented clients on the side, without the consent of his employer law firm and in contravention of firm policy, the Kossow Court held that a suspension was appropriate "[w]ith regard to Kossow's ongoing misuse of the firm's resources to represent his own personal clients." Id. at 547.

In Cox, the respondent "billed [personal] clients on firm stationary . . . requested in writing that the clients make payments to him personally rather than to the firm . . . [and] actually collected and kept some of these fees." Cox at 1122. All of this, Cox did without the knowledge or consent of the firm that employed him. Then, after initially denying it and being presented with documentary evidence in each case, Cox "admit[ted] that he engaged in 'moonlighting.'" Id. at 1123. Kossow cited Cox for the proposition that unauthorized moonlighting constituted grounds for serious discipline.

The Bar repeatedly characterizes the "secret plans" of Mr. Yonker in an effort to buttress its moonlighting argument. But the Referee's unchallenged Findings of Fact regarding "secret plans" undermine the Bar's argument. (RR. 11-12). The Referee concluded that Mr. Yonker's failure to disclose his departure was reasonable in view of the past actions of Mr. Mulholland in such situations. (RR. 11-12). The Bar cites the language of Kossow and Cox to suggest that any attorney who places personal interest over the interest of the firm engages in

misconduct worthy of suspension. This suggestion is misplaced. Any time an employee leaves one job for another, he puts his own interest ahead of those of his former employer; any time a lawyer leaves a law firm, he is potentially guilty of secretly preparing his next move at the expense of his former employer. But a violation of our rules does not necessarily result. This was particularly true in 2001, before Rule 4-5.8 was established.

Mr. Yonker was not moonlighting. Because there are no cases analogous to Mr. Yonker's conduct that have risen to the Supreme Court level, the Bar attempts to analyze Mr. Yonker's actions with precedent that involves completely different facts. The Bar is forced to do this for two reasons: one, as discussed above, Rule 4-5.8 was not established to govern the procedure for lawyers leaving law firms in 2001; and two, a lawyer copying a few files before leaving a law firm has never been the conduct that rises to the Supreme Court level. Copying files is not action that has ever been or should now be characterized as criminal theft or found to violate Rule 4-8.4(b).

Notably, The Florida Bar has investigated more egregious conduct regarding law firm/departing attorney file disputes without charging a theft violation or a violation of Rule 4-8.4. In Florida Bar v. Brinn, TFB No. 2003-11,634(13D), a Grievance Committee and the Bar agreed that an admonishment was appropriate for a violation of Rule 3-4.3. In Brinn, the responding attorney left his law firm in

July 2002. After his departure from the firm, Brinn retained possession of twenty-six (26) law firm files pertaining to clients who had previously signed fee agreements with the firm. Brinn intended to continue representing those clients after his departure because he was concerned that there would be no one at the firm to handle the client matters after he left. Although he returned some parts of the twenty-six (26) law firm files, he never returned such things as "handwritten notes, original photographs, original videotapes, medical records, insurance, and some of the Genet law firm retainer agreements." Brinn, Report of Minor Misconduct and Admonishment, p. 2.

Not only was the "temporary deprivation" of law firm property in the Brinn matter much longer than with Mr. Yonker, Brinn permanently deprived the law firm of property because materials were never returned. Nonetheless, the Bar determined that the appropriate rule violation was Rule 3-4.3, which generally references "misconduct and minor misconduct – conduct otherwise not enumerated." Brinn, p. 3. The Florida Bar also determined that an admonishment was the appropriate sanction for this Rule 3-4.3 violation. A theft was never alleged.

Rule 3-4.3 is a rule that applies when an act of misconduct is not directly prohibited by the Rules Regulating The Florida Bar. Charging Rule 3-4.3, without reference to any other rule violation in the Brinn matter, indicates the

inapplicability of any other rules to file dispute cases. As of 2004, the date of the Report of Minor Misconduct in Brinn, The Florida Bar's Chief Staff Counsel, the Grievance Committee and the Board of Governors determined that Rule 3-4.3 was the only applicable rule pertaining to such a law firm/departing lawyer dispute.

In another case occurring during the same time as Mr. Yonker's departure from the Mulholland firm, a Grievance Committee and The Florida Bar found a departing associate attorney to have committed only minor misconduct, even though his conduct was far worse than Mr. Yonker. In Florida Bar v. Shaffer, TFB No. 2001-11,850(6B), the responding attorney left a law firm in June 2001. He had handled the firm's personal injury cases as an associate attorney. Due to strain in his relationship with his managing partner, Shaffer left the firm with no notice, taking with him "certain personal injury client files on which he had worked, as well as the client list." Shaffer, Report of Minor Misconduct, p. 1.

When the firm demanded that Shaffer return the files and list, he refused. Although Shaffer and a partner in the firm did subsequently agree to send a joint letter to clients advising them of Shaffer's departure and of their right to choose representation, Shaffer prepared the letter with signature blocks for both he and the partner and signed the partner's initials to the letter. Shaffer, p. 1. Shaffer then sent the letter to clients, representing that both he and the partner had signed the letter when, in fact, the partner had not seen the letter. Shaffer had forged his

initials. Id. On June 10, 2002, the Grievance Committee determined the appropriate resolution was a finding of minor misconduct, without any finding of theft, and the Bar approved the recommended admonishment.

In contrast to the 2001-2002 misconduct in Brinn and Shaffer, there is no finding of fact that Mr. Yonker failed to return any law firm property to the Mulholland firm. Instead, Mr. Yonker removed the files "over a lunch period" and returned them promptly. (RR. 10). Importantly, Brinn took the firm files for the purpose of depriving the firm of the use of the files, as well as the firm's fee agreements. No such finding exists here. Moreover, unlike Shaffer, Mr. Yonker never prepared fraudulent documents with regard to the change in representation. In light of Brinn and Shaffer, Mr. Yonker's actions do not rise to the level of a violation of either the Florida theft statute or Rule 4-8.4(b).

The Bar also asserts that Mr. Yonker's case is different because "there was concealment . . . it is theft." (SH. 78). Not so. First, the Findings of Fact do not support this assertion. Second, concealment is not an element of theft. Mr. Mulholland's "autocratic" firm management ensured that Mr. Yonker would never have had access to any of the clients he was representing if Mr. Mulholland knew he was leaving. (RR. 7, 11). Simply put, the Bar's attempts to use the moonlighting jurisprudence to re-cast Mr. Yonker as a thief are unavailing. The Bar's argument is not supported by the facts and circumstances underpinning the

Court's decisions in Kossow and Cox. Nor is it supported by the Referee's Findings of Fact. Mr. Yonker's case is far more analogous to the decisions reached at the Grievance Committee level. Accordingly, the Referee's determination that Mr. Yonker is not guilty of a violation of Rule 4-8.4(b) should be affirmed.

B. The Referee expressly found no violation of Rule 4-8.4(c) because Mr. Yonker did not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

In 2001, Rule 4-8.4(c) stated that a "lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." R. Regulating Fla. Bar (2001). The Referee found, in the unchallenged Findings of Fact, that the "fact that Respondents did not share their plans with Richard Mulholland or others in the firm does not fit as a violation of any provision of the Rules of The Florida Bar." (RR. 11). Further, the Referee found it "important to note that in this proceeding there was no testimony or suggestion that any clients were harmed or not properly represented." (RR. 4). The Referee found that given the "operating procedure/history of the Mulholland law firm in dealing with individuals who announce their plans to leave, the not sharing of plans appears to have been a reasonable, if not necessary, step [for Mr. Yonker]." (RR. 11).

In making this finding, the Referee gave "great consideration . . . to observing the witnesses during the course of the four days of presentation of

evidence and considering their basis of knowing the subject and facts about which they testified, their demeanor in testifying, their interest or lack of interest, their interest in the outcome of the matter, and evaluation of their testimony in light of the entirety of the testimony that has been presented." (RR. 5). The Bar, however, characterizes this finding as the Referee "condon[ing] the self-help nature by respondent as justified." (IB. 26). In the Bar's view, the Referee should have found that Mr. Yonker's actions, even if not a criminal theft, were "dishonest, deceitful and involve[d] misrepresentation to the Mulholland firm." (IB. 27).

The Bar cannot cite any caselaw that stands for the proposition that, by copying information in law firm files before leaving the Mulholland firm, Mr. Yonker engaged in dishonesty, fraud, deceit, or misrepresentation toward the Mulholland firm. Instead, the Bar asserts that Florida Bar v. Shankman, 908 So. 2d 379 (Fla. 2005), is analogous in that Shankman's behavior was not characterized as theft, yet he was still guilty of violating Rule 4-8.4(c). The Bar ignores the egregious facts in that case. Shankman "took unfair advantage of a vulnerable, emotional person, who was dependent upon Shankman for advice and trust in a fiduciary relationship." Id. at 384. He also misrepresented to his firm that it needed to reduce its fee in order for his client to accept settlement. When this happened and the firm's reduced contingency fee was negotiated, Shankman took the client to the bank, at which time the client gave Shankman $20,000.00 in

cash. Shankman, rather than disclosing the money to his firm, "put the cash in the ceiling of his apartment for personal use." Id. at 382.

In addition to his stolen ceiling cash, Shankman arranged for another client to close out her case with Shankman's old firm when he discovered "that there was a potential whistleblower action" worth considerably more money. Id. Shankman did not disclose this other action to his firm; he "directed that [the client's] cost account be closed out and a refund made." Id. Subsequently, Shankman resumed representation of the client under his new firm and "took five other clients without full disclosure to the firm." Id.

Shankman has no bearing on this case. Mr. Yonker did not conceal money from Mr. Mulholland. Nor did Mr. Yonker take advantage of vulnerable clients. Mr. Yonker made multiple attempts to resolve fee disputes with the Mulholland firm. (RR. 8). Shankman's misconduct was clearly dishonest, fraudulent and deceitful. In contrast, Mr. Yonker's conduct was, in light of all the evidence presented, reasonable and fair to both the firm and the clients. (RR. 4, 8, 9, 11, 12).

The Referee also rejected "The Florida Bar['s] charges that the attorneys should have been more complete in their disclosure of what might happen" when clients left the Mulholland firm to be represented by either Mr. Winters or Mr. Yonker. In doing so, the Referee noted that "the Rules in effect in 2001 did not

require such disclosure." (RR. 10). "The secrecy with regard to logistical planning by Mr. Winters and Mr. Yonker did not violate any of the Rules of Conduct." (RR. 12). The Bar cannot rebut this finding.

The Bar's argument that Mr. Yonker violated Rule 4-8.4(c) appears to hinge on its assertion that the clients somehow belonged to the Mulholland firm. In that regard, the Bar argues that Mr. Yonker violated Rule 4-8.4(c) by not informing Mr. Mulholland that June 15, 2001, would be his last day at the firm, "secretly sign[ing] *Mulholland Firm clients* to new fee agreements." (IB. 28) (*emphasis added*). The Bar refers to clients as "Mulholland Firm clients" throughout its Initial Brief. (IB. 2, 6, 9, 10, 11, 13, 21, 26, 28 and 38). The Bar ignores the fundamental fact that clients do not belong to the law firm. Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982). They are free to choose their own lawyers. And as explained herein above, the Bar cannot challenge the factual finding that "there was no testimony or suggestion that any clients were harmed or not properly represented." (RR. 4). Nor can the Bar challenge the finding that "there [was] no contention that the clients belonged to either the departing lawyers or law firm." (RR. 10).

Cloaked in the dismissive suggestion that the "referee did not specifically address this testimony [regarding Mr. Yonker's failure to inform the Mulholland firm of his departure]," the Bar surmises that the Referee "either considered the

testimony to be irrelevant, or considered respondent's conduct to be 'a reasonable, if not necessary, step.'" (IB. 28). This Court should not permit the Bar to challenge the Findings of Fact tacitly by re-arguing facts not considered relevant or credible by the Referee — particularly where the Bar has expressly declined to challenge the Referee's Findings of Fact.

According to the Bar, "[t]he referee also made it clear that he considered the deceptive conduct directed toward Richard Mulholland during departure from the Mulholland Firm to be acceptable conduct." (IB. 28). To the contrary, the Referee explained that "the exit would have been better for all involved had the procedure described by Mr. Pope [expert witness for Respondents] been followed." (RR. 12). The Referee recognized an important distinction: on one hand, the best possible course of conduct, predicated on mutual cooperation and respect for clients by the firm and the departing lawyer; while on the other, the complicated circumstances confronting Mr. Yonker in 2001. In doing so, he recognized that the "Rules of Professional Conduct are rules of reason." R. Regulating Fla. Bar (Preamble). The Referee, after considering all the circumstances, determined that Rule 3-4.3 was the applicable rule, which balanced Mr. Yonker's actions with the unique and difficult Mulholland firm environment and lack of any regulatory guidance.

In sum, the Bar has no cases or rules to support its position that Mr. Yonker's conduct surrounding his departure from the Mulholland firm constituted

dishonesty, fraud, deceit, or misrepresentation. The Referee correctly found him not guilty of violating Rule 4-8.4(c). That finding should be affirmed.

C. The Referee expressly found no violation of Rule 4-8.4(d) because Mr. Yonker did not engage in conduct that was prejudicial to the administration of justice.

In 2001, Rule 4-8.4(d) stated that a "lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice." In arguing that Mr. Yonker violated this rule, the Bar merely re-asserts that Mr. Yonker's conduct constituted theft and, accordingly, his conduct was "inherently . . . prejudicial to the administration of justice." (IB. 29). Specifically, the Bar "simply point[s] out contradictory evidence" in the record and attempts to undermine the Report of Referee by suggesting the Referee ignored or incorrectly weighed evidence. Florida Bar v. Head, 27 So. 3d 1, 8 (Fla. 2010).

If the Bar wanted to challenge the Referee's Findings of Fact, it had to do so in its petition. It did not. The Bar cannot meet its burden simply by pointing out other evidence it wishes the Referee would have included in his factual findings. Id. Absent any fact tending to prove any prejudice or adverse effect on the administration of justice, the Referee correctly found that Mr. Yonker did not violate Rule 4-8.4(d). That finding should be affirmed.

II. The Referee Correctly Found that the Second District Court of Appeal's Decision in Winters v. Mulholland is not Precedent for a Decision in The Florida Bar Proceeding.

One of the opening sections of the Referee's Findings of Fact is entitled: "Other Prior Proceedings." (RR. 4). The Referee took care to acknowledge that Mr. Mulholland had sued Mr. Winters and Mr. Yonker civilly. Importantly, the Referee found it "necessary to issue a cautionary note that the proceeding conducted before the Bench in this disciplinary proceeding is a much different proceeding than the jury trial that occurred in the civil section of the Circuit Court of Hillsborough County." (RR. 4).

More importantly, the facts underlying the Second District's decision in Winters v. Mulholland, 33 So. 3d 54 (Fla. 2d DCA 2010), were taken "in the light most favorable to the jury's verdict." Id. at 55, 57. In its Initial Brief, the Bar quotes from the court opinion, but uses an ellipsis to omit the standard of review in that case. (IB. 24). Specifically, the Bar omitted the Second District's caveat: "In this case, taking the evidence in the light most favorable to the jury's verdict, the evidence showed that Winters . . ." Id. at 57. Obviously, this ignores a fundamental principle of appellate law: that "[o]n appeal from an adverse judgment after a jury verdict, an appellate court must view the record and all reasonable inferences therefrom in the light most favorable to the appellee." Fountainhead Motel, Inc. v. Massey, 336 So. 2d 397, 398 (Fla. 3d DCA 1976).

Here, the Referee was not similarly restrained and he made his own independent findings of fact based upon the evidence presented. The Referee owed no deference to the jury's findings in the civil case.

Furthermore, the Bar attempts to represent what is clearly *dicta* in the opinion that "Mulholland did prove that a 'theft' occurred," as having "precedential value." (IB. 24-25). However, the Referee correctly noted that "language that's not pertinent to the ultimate decision" is *dicta*, or "editorializing" by the court. (T. 920). The language in the Second District's opinion that the Bar continually relies on as precedent was, in the Bar's own words, "not critical to the outcome." (T. 921). The Referee in the instant matter was well aware of these facts and noted that "[p]ersons looking at the proceeding before this Bench should understand that . . . the matter in The Florida Bar v. Winters and Yonker is not a retrial or reconsideration of the legal issues tried before the jury in Hillsborough County in 2008." (RR. 4). In spite of this, the Bar continues, from its opening argument at the final hearing through the very first page of its Initial Brief in this matter, to assert that the *dicta* in the Second District Court of Appeal's decision in Winters v. Mulholland has "precedential value" both as to Mr. Winters and also for Mr. Yonker, who was not a party to the appeal. (IB. 25).

The Bar states that the Referee "was careful to point out that he did not rely on the opinion," noting that the Referee's "disregard can not diminish the

precedential value of the *Winters* opinion." (IB. 25). This is a mischaracterization of the weight given the Second District's opinion by the Referee in a number of ways. First, the Referee recognized the state of the law in Shankman, wherein the Referee could afford the Second District any weight he chose, from relying heavily to disregarding it completely. (T. 41-42). The Referee noted that this "proceeding is a much different [one]" and the findings in the disciplinary Bar matter should be "based solely on the evidence presented in this proceeding." (RR. 4). Second, the Referee correctly noted that "language that's not pertinent to the ultimate decision" is *dicta*. (T. 920). The Referee gave the opinion the weight it was due, which was insufficient to require a recommendation of guilt.

In sum, the standards, evidentiary rules, witnesses, testimony, charges and standard of review were all different in the Second District. The Referee considered the Second District's opinion and assigned it proper weight. The Referee's treatment of that opinion does not provide a basis for reversal.

III. The Referee's Recommendation of Admonishment is Fully Supported and Should be Upheld.

A. The cases cited by the Bar in support of its request for a sixty-day suspension are distinguishable and do not compel more serious discipline.

In addition to the cases discussed above, the Bar cites several additional inapposite cases in support of its request for more severe discipline. One of those cases is Florida Bar v. Arcia, 848 So. 2d 296 (Fla. 2003). In Arcia, the Court

considered the actions of an associate attorney who, about half-way though his tenure with the firm, formed his own professional association of which he was sole shareholder and employee. Id.

Over the next two years, Arcia engaged in a systematic "theft of firm funds and possibly client funds." Id. at 298. He solicited "ten to twenty clients or potential clients by, among other things, intercepting phone calls directed to the firm." Id. at 297. He violated firm policy by intercepting the mail and removing checks payable to Arcia, P.A. He "induced some of the firm's clients to deliver payments of fees to the Arcia P.A. by claiming he was a partner of the firm." Id. Arcia, "prepar[ed] misleading documents such as stationary and other materials suggesting a relationship between the Arcia P.A. and the firm." Id. On "many occasions, Arcia executed retainer agreements with clients in which he listed Arcia P.A. and the firm as the attorneys retained." Id. In fact, "Arcia also agreed, without the firm's knowledge, to represent a client that created a conflict of interest." Id. Arcia admitted to depriving the firm of $62,000.00 in legal fees alone.

The facts of Arcia are not remotely comparable with the actions of Mr. Yonker. Mr. Yonker did not steal money or anything else from the Mulholland firm. The files Mr. Yonker had copied were out of the Mulholland office for "a lunch period." (RR. 10). They were returned fully intact and the Mulholland firm

suffered no harm as a result of not having those files during a lunch period. No right to or benefit from the property was deprived.

The Bar also cites Warshall v. Price, 629 So. 2d 903 (Fla. 4th DCA 1993), which involved a conversion of a "confidential" list – something that is indisputably not at issue here. In Warshall, a doctor named Price resigned from his employer's practice and took a confidential list of over five hundred of his employer's patients. Id. at 904-905. Dr. Price used the list, which he was not allowed to have, to solicit the patients and over three hundred transferred to him. Id. There is no suggestion that Dr. Price treated or even knew the three hundred patients before he resigned. Id. at 903-904. In fact, as the court noted, the list was very valuable because Dr. Price could not have lured the patients from his former employer without it. Id. at 905. Under these facts, the Fourth District held the employer could sue Dr. Price for conversion of the patient list. Id.

In contrast to Dr. Price, Mr. Yonker already represented the clients whose files he had copied before his departure from the Mulholland firm. (RR. 4, 10). He was in fact the only lawyer with whom the clients had a relationship. (T. 683-684, 693-694, 722-726). Mr. Yonker did not need or use a confidential list to contact and continue to represent the clients. In Warshall, Price *had* to have his employer's confidential list to lure the three hundred patients and collect fees. Warshall at 905. For Mr. Yonker, there is no evidence or even a suggestion that

that any of the clients continued with him because of something he may have copied from a file. Rather than support the Bar's position that Mr. Yonker's actions constituted theft or conversion, Warshall highlights the invalidity of the Bar's argument.

The Bar also relies upon Florida Bar v. Machin, 635 So. 2d 938 (Fla. 1994). Machin has nothing to do with this case. In Machin, the respondent was found to have violated Rule 4-8.4(d) for attempting to buy a victim's silence in return for the establishment of a trust fund for the victim's child. Id. at 939. Machin claimed "ignorance of the impropriety of the trust offer simply because he was unable to find any authority addressing the precise situation with which he was confronted." Id. at 940. The Bar asserts that a lack of precedent in Mr. Yonker's case creates no impediment to characterizing his having copied some information from client files before he left the firm as theft. But Machin does not stand for the proposition that the Court should assign severe discipline even where there is no precedent for doing so. And as explained above, much more egregious conduct than that of Mr. Yonker was found not deserving of the severe discipline sought by the Bar. See Brinn and Shaffer.

In short, none of the cases upon which the Bar relies are applicable to Mr. Yonker's departure from the Mulholland firm. Therefore, none support the

discipline requested. The Referee's recommendation of an admonishment should be affirmed.

B. An admonishment is supported by the Standards for Imposing Lawyer Sanctions and meets the purposes of lawyer discipline.

In evaluating a recommended sanction, the Standards for Imposing Lawyer Sanctions direct the consideration of the following factors:

> 3.0 GENERALLY
>
> In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:
>
> (a) the duty violated;
> (b) the lawyer's mental state;
> (c) the potential or actual injury caused by the lawyer's misconduct; and
> (d) the existence of aggravating or mitigating factors.

Fla. Stds. Imposing Law. Sancs. 3.0. In this case, neither the Standards nor the existing caselaw support a suspension.

In arguing that the Referee's recommendation of admonishment is insufficient, the Bar highlights its own failure to prove by clear and convincing evidence that the alleged conduct constituted an ethical violation rising to a level warranting suspension. As stated in the Preamble, the "Rules of Professional Conduct are rules of reason." The Preamble further states:

> The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the *facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete*

> *evidence of the situation*. Moreover, the rules presuppose that *whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations*.

Preamble, Rules Regulating The Florida Bar. (*emphasis added*).

The Bar argues that the applicable Standards for Mr. Yonker's conduct are 7.2 and 5.12, both of which require suspensions. These Standards and level of discipline are not supported by the facts in this case. Again, the Bar cites this Court's moonlighting jurisprudence to support suspension and the according Standards. This level of sanction is not appropriate for Mr. Yonker.

The justification underpinning lawyer sanctions is the need to evaluate whether sanctions are necessary, and to what degree. Mr. Yonker had some information copied from Mulholland firm files before he left the firm. He also used letterhead that contained the name of another lawyer who declined the partnership. No client was harmed by either action. The public was not misled or harmed. The Bar was not prejudiced. The lack of harm to the Mulholland firm was confirmed by the Second District's opinion in Mulholland's civil action against Mr. Yonker. Any clients who intended to maintain their representation by Mr. Yonker did so; his having a copy of their files only facilitated the representation. The Referee competently and thoroughly weighed all testimony and determined that the facts in this case support violations only of Rule 4-7.10(f)

(lawyers may state or imply that they practice in a partnership or authorized business entity only when that is the fact) and Rule 3-4.3 (misconduct and minor misconduct – conduct not otherwise enumerated). (RR. 13). The Referee expressly found no other violations were proven by clear and convincing evidence.

Importantly, Mr. Yonker has never before been disciplined by The Florida Bar. The Referee also found "the positive testimony of Judges Gregory P. Holder and James D. Arnold, before whom Respondents have practiced, as well as that of Thomas R. Bopp, Esquire . . . compelling in determining that rehabilitation is not warranted." (RR. 15). Further, Bruce Kaplan, Esquire, testified. (SH. 17-23). Mr. Kaplan noted that Mr. Yonker not only coaches, but also provides *pro bono* and financial assistance to the Lutz Little League. (SH. 20-22). Mr. Kevin McCall testified that Mr. Winters and Mr. Yonker volunteered a $50,000.00 reward for information leading to the conviction of the murderer of Mr. McCall's son. (SH. 34-35). Neither Mr. Winters nor Mr. Yonker formerly knew Mr. McCall. (SH. 34-35). Mr. Brad Baumgardner testified about the heavy involvement of Mr. Winters and Mr. Yonker in the Boys and Girls Club and their contribution of $250,000.00 to the program. (SH. 38-41). The testimony of Mr. Michael Fenton was proffered without objection. (SH. 46). Mr. Fenton would have testified about Mr. Winters and Mr. Yonker volunteering to provide the Jefferson High School football team with state championship rings, which they were unable to afford

without Mr. Winters' and Mr. Yonker's generosity. (SH. 46-48). The Referee's admonishment of Mr. Yonker should be affirmed.

C. An admonishment is supported by existing caselaw.

At the Sanctions Hearing, both the Bar and counsel for Mr. Winters and Mr. Yonker agreed that Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983), established the criteria for imposing lawyer sanctions. (RR. 13; SH. 49). Specifically, the Lord factors consider protection of the public, discipline sufficient to punish while encouraging rehabilitation, and deterrence of future behavior – each of which the Referee weighed with regard to Mr. Yonker's actions. (RR. 13-15). Because the Bar disagrees with the Referee's findings, it now seeks to change the analysis.

However, in the most relevant analysis for Mr. Yonker, discussed above, The Florida Bar has investigated more egregious conduct regarding other unrelated law firm/departing attorney file disputes without charging a theft violation or a violation of Rules 4-8.4(b), 4-8.4(c) or 4-8.4(d). In Brinn, the responding attorney retained possession of twenty-six (26) law firm files. He never returned such things as "handwritten notes, original photographs, original videotapes, medical records, insurance, and some of the Genet law firm retainer agreements." Brinn, p. 2.

Not only was the "temporary deprivation" of law firm property in the Brinn matter much longer than with Mr. Yonker, Brinn permanently deprived the law

firm of property because materials were never returned. Nonetheless, The Florida Bar determined that the appropriate rule violation was Rule 3-4.3, which generally references "misconduct and minor misconduct – conduct otherwise not enumerated" and the proper discipline an admonishment. Brinn, p. 3.

The attorney in Shaffer left the firm with no notice, took files and a client list. Shaffer, p. 1. Shaffer also prepared a joint letter and forged his partner's initials. Id. Shaffer then sent the letter to clients, representing that the communication was a joint letter. On June 10, 2002, the Grievance Committee determined the appropriate resolution was a finding of minor misconduct, without any finding of theft. Shaffer received only an admonishment.

The Referee's decision with regard to Mr. Yonker is perfectly consistent with these cases. In fact, the Referee found Mr. Yonker guilty of violating Rule 3-4.3, even though his behavior was far less egregious than that of the lawyers in Brinn and Shaffer.

The Bar suggests that the decisions in Brinn and Shaffer have no value because they did not reach the Florida Supreme Court. But the reason those cases did not reach this Court is that the Grievance Committees and the Board of Governors recognized that the purposes of Bar discipline were served by imposing admonishments. It makes no sense for the Bar to seek more severe punishment in this case for violations that were plainly less egregious than those at issue in Brinn

and Shaffer. Having information from firm files copied before an associate's departure – where the firm suffered no loss and no clients were harmed in any way – has never before been characterized as theft. The Bar's attempt to ignore its own actions as this Court's disciplinary agent in Brinn and Shaffer only highlights the excessiveness of its position in Mr. Yonker's case.

CONCLUSION

The Referee's recommendation that Mr. Yonker be found guilty of violations of Rule 4-7.10(f) (lawyers may state or imply that they practice in a partnership or authorized business entity only when that is the fact) and Rule 3-4.3 (misconduct and minor misconduct – conduct not otherwise enumerated) is supported by substantial credible record evidence. The Referee's recommendation that Mr. Yonker be disciplined by an admonishment is also consistent with the purposes of Bar discipline and prior Bar disciplinary decisions involving similar facts. The cases relied upon by the Bar do not justify additional violations or enhanced discipline. Accordingly, Mr. Yonker requests that this Court issue an order approving the Report of Referee in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Respondent's Answer Brief has been furnished by FedEx overnight delivery and electronic submission via e-file@flcourts.org to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-2300; and true and correct copies have been furnished by U.S. Mail to Henry Paul, Esquire, Bar Counsel, The Florida Bar, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607, and to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this 30th day of November, 2011.

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DONALD A. SMITH, JR., ESQUIRE

CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font.

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DONALD A. SMITH, JR., ESQUIRE