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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Supreme Court Case No. SC11-1780

Complainant.

v. The Florida Bar File No. 2010-70,709(11D)

JOSE CARLOS MARRERO,

Respondent.

_______________________________/

RESPONDENT'S ANSWER BRIEF

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Table of Contents

Table of Contents i

Table of Authorities ii

Statement of Facts 1

Summary of Argument 3

Point I: **THE COURT SHOULD APPROVE THE AMENDED REPORT OF REFEREE RECOMMENDING A 90-DAY SUSPENSION FOLLOWED BY 3 YEARS OF PROBATION WITH SPECIAL CONDITIONS** 7

a. Standard of Review 7

b. The Referee's Recommendation of a 90-Day Suspension Followed by 3 Years of Probation is Supported When Considering the Applicable Aggravating and Mitigating Circumstances 8

c. The Standards for Imposing Lawyer Discipline and the Case Law Support the Referee's Recommendation of Suspension, Followed by a Three Year Probationary Period as the Appropriate Sanction 16

Conclusion 29

Request for Oral Argument 31

Certificate of Service 31

Table of Authorities

Case Law

Fla. Bar. v. Abrams, 919 So.2d 425 (Fla. 2006) 7, 8

Fla. Bar. v. Adler, 126 So.3d 244, 247 (Fla. 2013) 25, 26

Fla. Bar v. Arcia, 848 So.2d 296 (Fla. 2003) 4, 5, 13

Fla. Bar. v. Baker, 810 So.2d 876 (Fla. 2002) 28

Fla. Bar. v. Behm, 41 So.3d 136 (Fla. 2010) 7

Fla. Bar v. Committee, 916 So.2d 741, 745 (Fla.2005) 9

Fla. Bar v. Cox, 718 So.2d 788, 794 (Fla. 1998) 17

Fla. Bar. v. Del Pino, 955 So.2d 556 (Fla. 2007) 24, 25

Fla. Bar. v. Erlenbach, 138 So.2d 369 (Fla. 2014) 4, 6, 26, 27, 28

Fla. Bar. v. Forrester, 818 So.2d 477 (Fla. 2002) 7

Fla. Bar. v. Hirsch, 342 So.2d 970, 971 (Fla.1977) 17

Fla. Bar v. Kassier, 711 So.2d 515, 517 (Fla. 1998) 17

Fla. Bar v. Kavanaugh, 915 So.2d 89 (Fla. 2005) 7, 8

Fla. Bar v. Nuckolls, 521 So.2d 1120(Fla. 1988) 28

Fla. Bar. v. Miller, 322 So. 2d 502 (Fla. 1975) 14

Fla. Bar. v O'Conner, 945 So.2d 1113, at 1120 (Fla. 2006) 17

Fla. Bar v. Orta, 689 So.2d 270 (Fla. 1997) 4, 5, 10, 11, 12

Fla. Bar v. Rotstein, 835 So.2d 241, 246 (Fla.2002) 22, 28, 29

Fla. Bar v. Scheinberg, 129 So.3d 315 (Fla. 2013)....7

Fla. Bar. v Siegel, 511 So.2d 995 (Fla. 1987)....29

Fla. Bar. v Shoureas, 892 So.2d 1002, 1006 (Fla. 2004)....17

Fla. Bar. v. Snow, 397 So.2d 295 (Fla. 1981)....14

Fla. Bar v. Summers, 728 So.2d 739, 742 (Fla. 1999)....17

Fla. Bar v. Tipler, 8 So.3d 1109, 1118 (Fla. 2009)....9

Fla. Bar v. Temmer, 753 So.2d 555, 558 (Fla.1999)....8

Fla. Bar v. Travis, 765 So.2d 689 (Fla. 2000)....4, 5

Fla. Bar. v. Watson, 76 So.3d 915, 922 (Fla. 2011)....4, 6, 26, 27

Fla. Bar v. Watson, 88 So.3d 151 (Fla. 2012)....27

Statutes and Rules

Rules Regulating the Florida Bar

Rule 3–4.3....23, 24

Rule 3-7.7....4, 7

Rule 4-8.4(c)....1, 10, 21, 22, 23, 24, 26

Rule 5-1.1(b)....1

Florida Standard for Imposing Lawyer Discipline

Florida Standard for Imposing Lawyer Discipline 4.1....21

Florida Standard for Imposing Lawyer Discipline 4.11....21

Florida Standard for Imposing Lawyer Discipline 4.12....21

Florida Standard for Imposing Lawyer Discipline 5.1 16

Florida Standard for Imposing Lawyer Discipline 5.11(b) 16

Florida Standard for Imposing Lawyer Discipline 5.11 .... 16, 17

Florida Standard for Imposing Lawyer Sanctions 5.12 17

Florida Standard for Imposing Lawyer Discipline 9.22 .... 8, 12

Florida Standard for Imposing Lawyer Discipline 9.22(c)............................ 3, 9, 10

Florida Standard for Imposing Lawyer Discipline 9.22(d) 3, 9, 10

Florida Standard for Imposing Lawyer Discipline 9.22(g) 12

Florida Standard for Imposing Lawyer Discipline 9.22(h) 3, 12, 13

Florida Standard for Imposing Lawyer Discipline 9.32 8

Florida Standard for Imposing Lawyer Discipline 9.32(a) 14, 3

Standards for Imposing Lawyer Sanctions, Standard 9.32(e)................................ 14

Florida Standard for Imposing Lawyer Discipline 9.32(f) 14

Standards for Imposing Lawyer Sanctions, Standard 9.32(j) 15

Standards for Imposing Lawyer Sanctions, Standard 9.32(k)................................ 13

Standards for Imposing Lawyer Sanctions, Standard 9.32(l) 14

Standards for Imposing Lawyer Sanctions, Standard 9.32(m) 14

Florida Rules

Fla.R.App.P. 9.320 30

STATEMENT OF THE CASE AND OF THE FACTS

On January 15, 2015, the Court entered its Opinion in the guilt phase of the captioned matter.[1] The Court found Respondent guilty of three violations of rule 4-8.4(c) and one violation of rule 5-1.1(b). The Court then ordered the following:

> …The case is referred back to the referee to hold a hearing to consider the appropriate sanction. The referee shall consider evidence, make findings of fact regarding possible aggravating and mitigating factors, and submit an Amended Report of Referee to the Court recommending a disciplinary sanction….

On February 27, 2015, the Referee conducted the final disciplinary hearing. The Bar did not present any witnesses or evidence and rested its case in chief. The Bar requested the disbarment of Respondent.

Respondent argued that either a public reprimand or a short term suspension was warranted based upon the case law, as well as the existence of several mitigating factors which included the following: (1) absence of dishonest or selfish motive. (TR 75); (2) the non-existence of multiple offenses, or a pattern of misconduct. (TR 76); (3) an acknowledgement of the wrongful nature of his misconduct, (TR 78); (4) good moral character; (5) interim rehabilitation and (6) full and free disclosure to the Bar. (TR 79-80, 82).

In his case in chief, Respondent presented the testimony of the following character witnesses: Anthony Georges-Pierre, Esq.; Victor Rones, Esq.; Rick

[1] On February 26, 2015, the Court entered its Corrected Opinion.

Pedrosa, a mortgage lender; Bruce Marx, Esq.; Lee Osiason, Esq.; Enrique Barton, CEO at Met 21 Real Estate; Andrea Montany, a Pastor assistant at the Saint Jude Melikite Catholic Church and Reverend Damon Geiger, Pastor of St. Jude Melikite Church. These witnesses described Respondent as an "upstanding individual," "honest, "hard-working, "trustworthy" and having a good reputation for truthfulness. (TR 11-15, 24, 30, 36, 39). Andrea Montany also noted the vast community service performed by the Respondent including his involvement in various outreach programs dedicated to feeding the poor.

Respondent testified on his own behalf and established that he fully cooperated with the Bar in this proceeding by providing every document requested in a timely manner (TR 51); that he received the sum of $300.00 as his share of the transaction which was the focus of this proceeding; that his misconduct was not borne out of any malicious motives (TR 58-59) and that he was remorseful for his actions. Respondent also testified that he completed real estate courses and performed community service work for First Baptist Church of Hialeah and Chapman Partnership for the Homeless. *Id*.

The Bar did not cross examine Respondent or any of the witnesses which Respondent presented during his case in chief.

On April 15, 2015, the Referee entered her Amended Report of the Referee. The Referee analyzed the testimony adduced at the final disciplinary hearing and

applied same to the Standards for Imposing Lawyer Sanctions and existing case law regarding disciplinary actions. Finding the presence of two aggravating factors and five mitigating factors, the Referee ultimately concluded that a 90 day suspension followed by a 3 year probationary period was the appropriate sanction.[2]

The Florida Bar has petitioned the Court for review of the Amended Report of the Referee.

SUMMARY OF THE ARGUMENT

The Bar appeals the comprehensive and well-supported Amended Report of the Referee. Of the 25 aggravating and mitigating factors set forth in Standard 9.0 which were analyzed by the Referee in the context of this case, the Bar takes issue with the Referee's failure to consider 9.22(h) "vulnerability of victim"; 9.22(d) "multiple offenses" and 9.22(c) "pattern of misconduct" as factors in aggravation. (Brief at p. 7). The Bar also contests the Referee's findings that Respondent "expressed contrition and remorse at the sanctions hearing." (Brief at 7).[3]

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[2]The Referee's disciplinary sanction also requires Respondent to take the following classes during his probationary period: (1)ALTA's Best Practices Workshop (settlement statements); (2) ALTA's Best Practices Workshop II(escrow and title); (3)Understanding and Using Residential Real Estate Contracts for Sale and Purchase; (4) e-Consumer Financial Protection Bureau Closing Disclosure Form and Ethics in Your Closing Practice.

[3]The Bar conceded that 9.22(h) "substantial experience in the practice of law" was not an aggravating factor given Respondent's lack of substantial experience at the time of the alleged violations. (Brief at p. 5). The Bar also conceded that 9.32(a) "absence of a prior disciplinary record" was an applicable fact in mitigation given that Respondent did not have a prior disciplinary record. *Id.* While the Bar took no

Finding the cases of *Fla. Bar v. Watson*, 76 So. 3d 915 (Fla. 2011) and *Fla.Bar v. Erlenbach*, 138 So. 3d 369 (Fla. 2014) to be the most instructive and helpful in determining the issue of discipline, the Referee recommended a 90 day suspension followed by a 3 year probationary period. Rule 3-7.7 of the Rules Regulating the Florida Bar places the burden upon the Bar, as Appellant, to demonstrate that the Amended Report of Referee is "erroneous, unlawful, or unjustified." Thus, it is the Bar's burden to demonstrate to the Court that the Referee mis-applied the law in reaching her recommendation on sanctions.

In its Initial Brief, the Bar fails to demonstrate that the Referee mis-applied *Watson* to the facts of this case. More importantly, the Bar does not even address the Referee's reliance upon *Erlenbach* inasmuch as that case is not discussed in the Bar's Initial Brief. It was incumbent upon the Bar to demonstrate how the Court's reliance upon *Erlenbach* was improper. *Rule 3-7.7 of the Rules Regulating the Florida Bar.* Lastly, the Bar relies upon the cases of *Fla. Bar v. Orta*, 689 So.2d 270 (Fla. 1997); *Fla. Bar v. Arcia*, 848 So.2d 296 (Fla. 2003) and *Fla. Bar v. Travis*, 765 So.2d 689 (Fla. 2000) in support of disbarment. (Brief at pp. 25, 27 and 28). The Bar's reliance upon these cases is misplaced inasmuch as the conduct

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position on Respondent's argument as to his interim rehabilitation, it did concede at the sanctions hearing that Respondent "has testified to some interim rehabilitation" and that the Referee "[could] certainly take that into consideration." (TR 72).

involved therein does not remotely approach that which is presented in this cause.

Orta is inapplicable since it involved an attorney who was suspended for three years ***following felony convictions for income tax evasion*** and who engaged in unethical conduct during his suspension. (Emphasis added). *Id*. at p. 271. The *Orta* court concluded that "Despite the evidence of recent rehabilitation and other mitigation, we are unable to overcome the fact that Orta's current multiple violations all took place while he was under suspension for past similar conduct involving dishonesty—a time when he should have been conducting himself in the most upstanding manner"). *Id*. at p. 273. *Orta*, therefore, cannot be applied to the facts of this case.

Arcia is inapplicable since it involved an attorney who, while employed with another firm, formed his own P.A. and took clients from his employer. *Id*. at p. 296. The attorney intercepted firm mail and induced the firm's clients to issue payment to his P.A. *Id*. The attorney also utilized the assets of his employer during employment hours to undertake fraudulent activities for his personal benefit. *Id.* *Arcia*, therefore, cannot be applied to the facts of this case.

Travis is inapplicable as it involved an attorney who misappropriated and/or converted to his personal use the total sum of $35,850 ***over a three year period***. *Travis*, at p. 689. *Travis*, therefore, cannot be applied to the facts of this case.

The Bar did not present any testimony to the Referee. Respondent, however, presented significant reputation and character testimony. The Referee, who was in the best position to observe their demeanor, gave great weight to Respondent's reputation and character witnesses. The Bar did not cross examine any of Respondent's witnesses.

The Bar has failed to meet its requisite burden of demonstrating the Referee's recommendation of a 90 day suspension followed by a 3 year probationary period does not have a reasonable basis in existing case law and/or was erroneous, unlawful or unjustified. There was substantial and competent evidence in the record to support the Referee's application of *Watson* and *Erlenbach* in fashioning her recommendation of a 90 day suspension. Respectfully, to order disbarment in this case when the Bar did not put on any evidence in support of aggravating factors and simply stood on the record of the guilt phase of this proceeding would be tantamount to eliminating the important function that a Referee occupies in the disciplinary process and would violate fundamental concepts of due process.

The facts in this case have been viewed differently by the Referee and by the Court on the issue of Respondent's guilt. There was no summary judgment entered on the issue of Respondent's guilt. The Bar's request that Respondent be disbarred pursuant to inapplicable precedent cannot be granted by the Court given

the complete record in this cause. For the following reasons and authorities, the Referee's recommendation of a 90 day suspension must be approved by the Court.

THE COURT SHOULD APPROVE THE AMENDED REPORT OF REFEREE RECOMMENDING A SANCTION OF A 90-DAY SUSPENSION FOLLOWED BY 3 YEARS OF PROBATION WITH SPECIAL CONDITIONS

A. Standard of Review

In determining the appropriate sanction for lawyer misconduct, the Florida Supreme Court considers the case law and the Florida Standards for Imposing Lawyer Sanctions. *Fla. Bar v. Forrester,* 818 So.2d 477 (Fla. 2002); *Fla. Bar v. Behm*, 41 So.3d 136 (Fla. 2010). A presumptive sanction under the Standards for Imposing Lawyer Sanctions is subject to aggravating and mitigating circumstances set forth in Standards 9.2 and 9.3 of the Florida Standards for Imposing Lawyer Sanctions. *Fla. Bar v. Abrams*, 919 So.2d 425 (Fla. 2006) and *Fla. Bar v. Kavanaugh*, 915 So.2d 89 (Fla. 2005).

The Florida Bar, as the appellant, has the burden under Rule 3-7.7(c)(5) of the Rules Regulating the Florida Bar to demonstrate that the Amended Report of Referee is "erroneous, unlawful, or unjustified." It is well-settled that with respect to a Referee's disciplinary recommendation, the Court's review is broader than that afforded to a Referee's finding of fact. *Fla. Bar v. Scheinberg*, 129 So.3d 315 (Fla. 2013). Generally speaking, however, the Court will not second guess the Referee's

recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *Fla. Bar v. Temmer,* 753 So.2d 555 (Fla. 1999).

B. The Referee's Recommendation of a 90-Day Suspension Followed by 3 Years of Probation is Supported When Considering the Applicable Aggravating and Mitigating Circumstances.

The Florida Standards for Imposing Lawyer Sanctions identify the mitigating and aggravating circumstances in Standards 9.22 (Aggravating Circumstances) and 9.32 (Mitigating Circumstances) which are considered in fashioning sanctions. Once the presumptive sanction under the Standards for Imposing Lawyer Sanctions is determined, it is then subject to aggravating and mitigating circumstances. *Fla. Bar v. Abrams*, 919 So.2d 425 (Fla. 2006) and *Fla. Bar v. Kavanaugh*, 915 So.2d 89 (Fla. 2005). The mitigating factors presented by this case (and which the Bar did not contest) support the Referee's recommended sanction of a 90 day suspension.

1. Aggravating Factors

The Referee gave the following opening remarks at the sanctions hearing: "What I'm expecting to hear at today's hearing…is argument from both parties regarding aggravating and mitigating factors." (TR 3-4). In response Bar Counsel stated, "The Bar is not going to be presenting any witnesses." (*Id*.). Bar Counsel went on to say, "The Bar doesn't have any evidence to present, except the

affidavit of costs, Your Honor…Other than that, we are going to be relying on the evidence deduced at the Final Hearing in 2012." (TR 6-7).[4] Before Respondent's counsel began presenting his case the Referee once again asked the Bar if they were going to be presenting any evidence and Bar Counsel replied, "No, Your Honor, not on aggravating and mitigating factors, but relying on the evidence deduced previously." (TR 9).

The Bar's general identification of evidence was inappropriate and violated even the most relaxed rules of procedure. The Bar left the Respondent, the Referee, and this Court to guess as to what portions of the record are germane to these proceedings.[5] The Referee then confirmed that the Bar was resting its case without addressing the aggravating or mitigating factors. (TR 10).

i. Factors in Aggravation 9.22(c) and 9.22(d)

Essentially, the Bar argues on this appeal that it did not need to submit evidence in support of aggravating factors given the content of the record and the Court's opinion stemming from the guilt phase of this proceeding. More

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[4]Although the Florida Bar had the burden of proof at the sanctions hearing to establish the existence of aggravating factors by clear and convincing evidence, the Bar did not put on any evidence. This was contrary to the mandate of the Court in its Opinion, as well as that of the Referee at the sanctions hearing. Not only did the Bar fail to produce any evidence in support of aggravating factors, they did not identify what parts of the record from 2012 hearing they intended to rely upon.

[5]The Bar's failure to disclose and specify the evidence that it relied upon in support of aggravation is a violation of Respondent's due process right to notice and opportunity to be heard. *See Fla. Bar v. Committee,* 916 So.2d 741, 745 (Fla. 2005); *Fla. Bar v. Tipler*, 8 So.3d 1109, 1118 (Fla. 2009).

particularly, the Bar argues that the Court's opinion on the guilt phase of this proceeding is tantamount to a finding that Respondent was involved in a pattern of misconduct/multiple offenses. The Bar mis-reads the Court's opinion, as well as the applicable case law on the aggravating factors 9.22(c) and 9.22(d).

Respondent recognizes that this Court held, *inter alia*, the following: "Based upon these facts, which show that Respondent engaged in a pattern of knowing decisions and deliberate acts, the Court finds him guilty of a third violation of rule 4-8.4(c)." Respectfully, this holding was not tantamount to a finding that Respondent was guilty of the aggravating factors 9.22(c) and 9.22(d).[6]

The Referee was justified in not considering 9.22(c) and 9.22(d) as factors in aggravation. The Referee was justified in reviewing the underlying conduct as arising out of one transaction as all of the activity occurred in connection with the Gutierrez loan. In fact, the Referee's refusal to consider 9.22(c) and 9.22(d) as factors in aggravation is bolstered by the very case upon which the Bar relies for its argument that disbarment is warranted. More particularly, relying upon *Orta*, 689 So.2d at 270, the Bar argues that Respondent should be disbarred "because a pattern of misconduct and multiple offenses involving dishonesty are considered

[6]Had the Court intended this statement to be construed as a finding of the presence of aggravating factors 9.22(c) and 9.22(d), it would have likely so stated in its Opinion. Moreover, as will be further discussed in Section "C", *infra*, this case did not involve multiple bad acts of conduct occurring over a period of time which are discussed in the Court's existing case law on this aggravating factor—rather, the conduct in issue arose out of one real estate transaction.

cumulative misconduct, and the same is treated more severely by this Court than are isolated acts." (Brief at 25). Neither *Orta* nor the Court's opinion in the guilt phase of this proceeding can be read and/or applied to support the Bar's argument in support of disbarment.

The attorney in *Orta* had been suspended for three years ***following felony convictions for income tax evasion***. *Id.* at p. 271. During this suspension, the attorney was engaged in fraudulent and deceitful conduct including statements made under oath to government officials. *Id*. Although the referee attempted to show leniency to this attorney given that he had been effectively suspended for eight years, the *Orta* court concluded that "[d]espite the evidence of recent rehabilitation and other mitigation, we are unable to overcome the fact that Orta's current multiple violations all took place while he was under suspension for past similar conduct involving dishonesty—a time when he should have been conducting himself in the most upstanding manner." *Id*. at p. 273.

Although relied upon by the Bar for the disbarment of Respondent, *Orta* cannot be read to warrant same given the loan transaction in this case that did not involve multiple bad conduct over a long period of time unlike the conduct in *Orta* that took place over years. Had Respondent been engaged in multiple closings for different borrowers involving the same conduct, then he would agree that *Orta* would have relevance. Given the one transaction in issue in this case and the fact

that it does not present multiple bad acts over an extended period of time, however, *Orta* simply cannot apply.

ii. Factor in Aggravation 9.22(g)

The Referee assessed the Respondent's testimony and demeanor at the sanctions hearing with respect to Factor in Aggravation 9.22(g). Observing the Respondent at trial, including his testimony, allowed the Referee to not consider 9.22 as a factor in aggravation since Respondent "expressed contrition and remorse at the sanctions hearing."[7] The Referee's conclusion in this regard should not be disturbed by the Court.

iii. Factor in Aggravation 9.22(h)

The Referee properly found that the Bar had not proven victim vulnerability. *Standards for Imposing Lawyer Sanctions 9.2(h).* The Referee properly found that the evidence did not prove that Ms. Gonzalez was a vulnerable victim. The Referee correctly stated that the evidence adduced at the 2012 hearing, through Gonzalez' own testimony, established that she made previous loans of large sums of money through Respondent's business partner, Rick Pedrosa in the same manner as she did in the transaction in this case. Even the Court's opinion acknowledged that Ms. Gonzalez had prior dealings and "business practices" with Mr. Pedrosa. Ms.

[7]Respondent gave the following testimony at the hearing: "Yes. I should have been a better lawyer. I should have read more, looked at things in more detail—I mean, I'm sorry for what happened. I'm sorry to this Court, I'm sorry to my family, I'm sorry to Jennifer, the Florida Bar. I'm sorry. I'm truly sorry. (TR 58-59).

Gonzalez was not a vulnerable victim.[8]

The Bar argues that *Fla. Bar v. Arcia*, 848 So.2d at 296 establishes that the Court was incorrect in not considering 9.22(h) as a factor in aggravation. *Arcia* is inapplicable to the facts of this case.

Arcia involved an attorney who, while employed with another firm, formed his own P.A. and stole clients from his employer. *Id*. at p. 296. The attorney intercepted firm mail and induced the firm's clients to issue payment to his P.A. *Id*. The attorney also utilized the assets of his employer during employment hours to undertake fraudulent activities for his personal benefit. *Id.*

Indeed, the firm involved in *Arcia* was a vulnerable victim where its employee was stealing clients, re-routing attorney's fees to his separate P.A. and using his employer's time to further his own interests. Accordingly, *Arcia* has no application to this case.

2. Mitigating Factors

The Referee properly found that there was sufficient evidence of mitigating factors warranting a sanction less severe than the presumptive sanction.[9] At the

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[8]On this appeal, the Bar also argues that Countrywide was an innocent victim. Such argument was not presented at either the guilt and/or sanctions trial. Such an argument demonstrates why the Bar should be held to proper proofs at this stage of the proceeding.

[9]Respondent argued additional mitigating factors which were rejected by the Referee. Respondent argued mitigation pursuant to Section 9.32(k) (imposition of other penalties or sanctions), because he suffered great emotional and financial

sanctions trial, the Bar conceded that Respondent had no prior disciplinary history. (TR 71).[10] *Standards for Imposing Lawyer Sanctions, Standard 9.32(a). Fla. Bar v. Snow,* 397 So.2d 295 (Fla. 1981). The Bar also conceded that Respondent was inexperienced in the practice of law at the time of the misconduct.[11] *Standards for Imposing Lawyer Sanctions, Standard 9.32(f); Fla. Bar v. Miller*, 322 So. 2d 502 (Fla. 1975).

The Referee found by substantial competent evidence that Respondent gave full and free disclosure to the Bar and was cooperative. *Standards for Imposing Lawyer Sanctions, Standard 9.32(e).* As evidence of this mitigating factor, Respondent fully complied with all requests made by the Florida Bar during the disciplinary proceeding. Respondent cooperated and agreed to an intensive

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hardships due to this proceeding. It has cost him thousands of dollars to defend himself and he suffered mentally, emotionally and physically from this 6 year proceeding dating back to 2009 (which is when the Bar's investigation started.) Respondent also asserted that he was remorseful pursuant to *Standards for Imposing Lawyer Sanctions, Standard 9.32(l).* This has been a true wake-up call for Respondent. He understands the consequences of his actions. Understanding that remorse is more than just saying "I'm sorry," Respondent participated in interim rehabilitation as described above even after the filing of the Amended Report of Referee. He has also performed community service by feeding the homeless. Respondent also contends that remoteness as a mitigating factor pursuant to Section 9.32(m) because the transactions complained of occurred 5 years before a Bar inquiry was filed. As such, this action was remote to the alleged misconduct.

[10]"As to the mitigating factors, the Bar concedes there is an absence of a prior disciplinary record. He has not been previously disciplined." *Id.*

[11]"He was inexperienced in the practice of law at the time this occurred, so (f) would apply." (TR 72).

interview with the investigating member of the Grievance Committee. Respondent was candid with the investigator, answered all of his questions, and agreed to provide whatever information he requested. (TR 51).

The Referee also correctly found that the Respondent's interim rehabilitation was a mitigating factor. *Standards for Imposing Lawyer Sanctions, Standard 9.32(j).* This finding was based upon the live testimony of Ms. Montany and Rev. Geiger who confirmed that Respondent performed community service work at the Chapman Partnership for the Homeless and at the First Baptist Church of Hialeah and at St. Jude Melkite Church. (TR 41-48). Respondent also confirmed the real estate courses which he took. (TR 59).

The Referee also properly found as a mitigating factor that Respondent has a good character and reputation. The Amended Report of Referee states:

> With regard to Respondent's reputation, the Referee gives great weight to the testimony of attorneys Anthony Georges-Pierre, Victor Rones and Lee Osiason, real estate broker Enrique Barton, and mortgage broker Rick Pedrosa, all of whom testified that they knew Respondent in a professional capacity. These individuals all described Respondent as: having "high honesty and high integrity" (Georges-Pierre); "being honest, hardworking and attempting to try to do what he is supposed to do and be candid in what he is saying" (Rones); "[I] hold him in the highest regard ...My personal opinion, I trust him completely" (Osiason); "[Respondent] is the only legal representative we have in the real estate business,,,[his] honesty and integrity is impeccable (Barton); [Respondent] is the most honest person I probably know" (Pedrosa).

> With regard to Respondent's character, the Referee gives great weight to the testimony of Reverend Damon Geiger and pastor's assistant Andrea Montany, both of St. Jude Melkite Church in Miami. These witnesses know him in a personal capacity and testified to his character as an "honest man, very spiritual, very caring and a very nice person" who has subsidized the church's outreach program to feed the poor for the past four years (Montany); and as a "simple, humble man with great integrity" (Geiger).

The mitigating factors set forth above support the Referee's recommendation of a 90 day suspension.

C. The Standards for Imposing Lawyer Discipline and the Case Law Support the Referee's Recommendation of Suspension, Followed by a Three Year Probationary Period As the Appropriate Sanction.

The Referee's Recommendation of a 90-day suspension followed by 3 years of probation is supported by the Standards for Imposing Lawyer Discipline. In determining the proper discipline to be imposed, the starting point is Standard 5.1, which states:

> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:
>
> **5.11** Disbarment is appropriate when:
> a. a lawyer is convicted of a felony under applicable law; or
> b. a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or
> c. a lawyer engages in the sale, distribution or importation of controlled substances; or

> d. a lawyer engages in the intentional killing of another; or
> e. a lawyer attempts or conspires or solicits another to commit any of the offenses listed in sections (a)-(d); or
> f. a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> **5.12** Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

Contrary to the Bar's position on appeal, this is not a disbarment case. Disbarment "occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings." *Fla. Bar v. Summers,* 728 So.2d 739, 742 (Fla.1999) (quoting *Fla. Bar v. Hirsch,* 342 So.2d 970, 971 (Fla.1977)). *Fla. Bar v. Shoureas*, 892 So.2d 1002, 1006 (Fla. 2004). This Court has held that "Disbarment is an extreme form of discipline and is reserved for the most egregious misconduct. *Fla. Bar v O'Conner,* 945 So.2d 1113, at 1120 (Fla. 2006); *Fla. Bar v. Summers,* 728 So.2d 739, 742 (Fla. 1999); *Fla. Bar v. Cox,* 718 So.2d 788, 794 (Fla. 1998) (holding disbarment is appropriate where there is a pattern of misconduct and a history of discipline); *Fla. Bar v. Kassier,* 711 So.2d 515, 517 (Fla. 1998) (holding disbarment is an extreme sanction that should be imposed only in those rare cases where rehabilitation is highly improbable).

What distinguishes this case from almost every disbarment case is that Respondent did not defraud the Court; did not intend to defraud a client and/or any other person or entity; did not steal; did not mis-appropriate a client's funds; did

not undertake multiple dishonest acts over a significant period of time and was not convicted of a crime. Moreover, Respondent's misconduct was not borne out of any sinister intentions and was not part of a calculated scheme to defraud anyone.[12]

Unfortunately, the facts and findings recited in this Court's Opinion disapproving the Report of Referee on misconduct, and which the Bar relies upon in support of disbarment, are significantly incomplete. For example, the Court's Opinion does not mention the undisputed fact that the money for the Gonzalez loan was deposited in Weston's escrow account, and not into the Respondent's lawyer's trust account. Moreover, it is undisputed that Respondent disbursed the funds to the borrowers the next day because Ms. Gonzalez specifically instructed him to do so in order for her to start earning interest on the loan immediately. (TR 54 & Gonzalez Depo. Pages 44, 55-56).[13] In fact, the evidence established that it was Gonzalez' usual business practice to disburse the loan funds to borrowers prior to a formal closing, receipt of a mortgage and/or receipt of any other security documents so that she could earn interest on the loan as soon as possible. (TR 30-32; Gonzalez Depo Page 28). Therefore, while it is true that Respondent

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[12]There certainly was no evidence in the record that Respondent knowingly created a fraudulent mortgage which was used to perpetrate a fraud on Countrywide and that Respondent "took evasive actions to cover up this misconduct" as now argued by the Bar. (Brief at p. 9). Indeed, the word "fraud" was never contained in the Court's opinion of this cause.

[13]Gonzalez was a "hard equity lender" who was in the business of providing high interest rate loans to borrowers. (TR 367).

performed the above referenced acts knowingly and intentionally (as concluded by the Court), same were undertaken at the specific direction of Gonzalez and with her knowledge and consent.[14]

Finally, the Court's Opinion ignored the Referee's finding that, even though Respondent was the President of Weston and ran the day-to-day business operations, he had no training as to how to conduct a closing or perform title work. (Amended Report of Referee at p. 6).[15] All of the title and closing work was performed by other Weston employees who were trained and were experienced in those fields. (Amended ROR at p. 12). Respondent relied upon loan processors and other employees at Weston to prepare those documents, which he would, then sign assuming that they were accurate.[16]

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[14]The Court's opinion also omits the undisputed fact that Respondent did not know any of the details of the Gonzalez transaction and that he did not make any misrepresentations to Gonzalez. This was established by Respondent's testimony and Gonzalez' testimony. It is also undisputed that irrespective of the use of the funds, Gonzalez always knew that she would be in second position behind the first lien holder, Countrywide Bank, which is exactly what occurred. (TR 55).

[15]The testimony established and the Referee found that Respondent did not know how to read or prepare HUD-1's, title commitments, title policies, and other closing documents. (Amended ROR p. 6). Moreover, the Bar conceded Respondent's inexperience inasmuch as it stated the following in final argument at the sanctions hearing: "He was inexperienced in the practice of law at the time this occurred, so (f) would apply." (TR 72).

[16]There was no evidence presented establishing that if Countrywide knew of the second loan it would not have agreed to loan money to borrowers. Such a contention is pure speculation, since this loan was made during a time-period when Countrywide could not give money away money fast enough without any verified income or supporting documents for the loans. In fact, it is just as possible that the

If the Bar is going to rely upon the record of the misconduct hearing for its position on this appeal, then the **entire record** must be analyzed by the Court, not just the part the Bar emphasizes. Likewise, when the Court determines whether the Referee's decision on sanctions is proper, it too, should consider these important and distinguishing facts. These facts are critical inasmuch as they demonstrate that while Respondent's *actus reus* supports liability, his *mens rea* does not support a sanction of disbarment. This is what separates a disbarment sanction from a suspension sanction.

After weighing all the evidence, including the live testimony presented by Respondent, the Referee found that even though Respondent was guilty of misconduct involving dishonesty and deception, the misconduct was punishable by suspension as opposed to disbarment. As the Amended Report of Referee states:

> The record in this proceeding is replete with examples of Respondent's lack of competence. The Referee notes that the Florida Supreme Court has found that this respondent "cannot avoid a finding that he acted intentionally by claiming he was ignorant of the documents he signed or filed." Therefore, the Referee must conclude that Respondent'slack of competence was knowing and therefore, deserving of suspension under these Standards. (Amended Report of Referee Page 5).

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lender did know about the second loan based upon the fact that a $650,000 loan went into default and neither Countrywide nor its successors in interest ever filed a lawsuit or sought reimbursement from Respondent or Weston Title for fraud or negligence. Perhaps this is why the Bar did not call anyone from Countrywide Bank to testify at any of the hearings in this case (n/k/a Bank of America).

Perhaps the best evidence that this is not a disbarment case is the fact that there have been two diametrically opposed views on whether the Respondent violated Rule 4-8.4(c)—the Referee said no and the Court said yes. Therefore, when considering the totality of the circumstances alone, this is not a case where the presumptive sanction is disbarment. With such a disparity in viewing the conduct in issue, the Referee's recommendation of a 90 day suspension should be accepted by the Court.

The standard for imposing sanctions for the mishandling of client property is found in Florida Standard for Imposing Sanctions 4.1. This standard states:

> **Standard 4.1** Failure to Preserve the Client's Property
>
> Absent aggravating or mitigating circumstances, and upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:
> **4.11** Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.
> **4.12** Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

The standard supporting disbarment requires the intentional conversion of client's property. It is undisputed that Respondent did not convert funds from a trust account and did not disburse money from his lawyer's trust account without the client's permission and knowledge.[17] In fact, just the opposite occurred in this

[17]The Court's opinion suggests that the money should have been held until a

case.

Respondent is well-aware of the Court's pronouncement in *The Fla. Bar v. Rotstein,* 835 So.2d 241, 246 (Fla.2002) that it has moved towards stronger sanctions for attorney misconduct. *Rotstein*, however, did not overrule prior disciplinary cases. Moreover, not every case decided in the post-*Rotstein* era that involves a violation of Rule 4-8.4(c) requires the ultimate sanction of disbarment. Indeed, the Court in *Rotstein*, as well as in cases post-*Rotstein*, has found suspension, rather than disbarment, to be the appropriate sanction even in cases where the conduct in issue was particularly egregious.

In *Rotstein*, an attorney was charged with multiple acts of wrongful conduct in connection with his representation of ***3 different clients***. With respect to Client 1 (Count I), the attorney committed the following acts and/or omissions: he negligently failed to file a personal injury claim before the expiration of the statute of limitations; after realizing his error, he took steps to immunize himself from liability by preparing a back dated letter to his client withdrawing from representation and advising that the statute of limitations would soon be running

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closing occurred. One wonders what would have had happened if Gonzalez filed a Bar complaint against Respondent for not giving the borrowers the money immediately as she instructed and, instead, prepared all of the paper work first and in doing so cost Gonzalez money that she would have earned in interest. Would this not also have been a breach of a fiduciary duty to Gonzalez which would subject Respondent to a Bar complaint?

and he sent letters to the grievance committee indicating his withdrawal letter was accurate and true. The referee recommended the attorney be found guilty of violating Rules 3-4.3; 4-1.4(a); 4-3.3; 4-8.1; 4-8.4(c) and 4-8.4(d).

With respect to Client 2 (Count II), the attorney filed a motion to enforce settlement when his client would not execute the required release. This motion was filed without his client's consent. The referee recommended that the attorney was guilty violating rule 4-1.7 for taking a position adverse to his client.

With respect to Client 3 (Count III), the attorney settled a case for $500.00 on behalf of his client. When his client refused to endorse the settlement check, the attorney filed a motion to enforce the settlement. This motion was filed without his client's consent. The referee recommended that the attorney was guilty of violating rule 4-1.7 for taking a position adverse to his client.

With respect to sanctions, the referee found the following factors in aggravation: (1) prior disciplinary offense; (2) dishonest or selfish motive; (3) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency; (4) submission of false evidence, false statements, or other deceptive practices during the disciplinary process and (5) substantial experience in the practice of law. In mitigation, the referee found (1) timely good faith effort to make restitution or to rectify consequences of misconduct and (2) remorse. The referee recommended a one year suspension.

The Bar appealed and argued that a suspension of at least 3 years was warranted. Although finding the attorney's "intentional and egregious misconduct has demonstrated an attitude that is wholly inconsistent with professional standards", the Court approved the referee's recommendation of a one-year suspension. *Id*. at p. 247.

In *Fla. Bar v. Del Pino,* 955 So.2d 556 (Fla. 2007), an attorney was charged with misconduct after she was convicted of ***two federal felonies*** involving tax evasion and mail fraud. The referee found the attorney guilty of violating rules 3-4.3; 3-4.4; 4-8.4(b) and 4-8.4(c). The referee found the following factors in aggravation: (1) dishonest or selfish motive; (2) multiple offenses; (3) experience in the practice of law. The referee found the following mitigating factors: (1) no prior disciplinary record; (2) personal or emotional problems; (3) full and free disclosure to disciplinary board and cooperative attitude toward proceedings; (4) good character or reputation; (5) interim rehabilitation; and (6) remorse. The referee recommended disbarment. *Id*. at p. 559.

The *Del Pino* Court did not accept the referee's recommendation of disbarment. Instead, the *Del Pino* Court found that the mitigation evidence presented warranted a 3 year suspension, notwithstanding the egregious conduct that resulted in two federal criminal convictions. *Id*. at p. 563.

The conduct in *Del Pino* was far worse than the conduct in this case inasmuch as the attorney was ***convicted of two felonies*** involving fraud and dishonesty. Moreover, *Del Pino* involved more aggravating factors that those involved in this case including the attorney having "substantial experience in the practice of law"—it bears repeating that the Bar conceded that Respondent did not have such experience.

In *Fla. Bar v. Adler*, 126 So.3d 244, 247 (Fla. 2013), an attorney misrepresented the state of his finances to an apartment board in connection with his purchase of a cooperative apartment. The attorney also falsely represented to a broker that the attorney had a 20% equity share in his law firm when he did not. *Id*. at p. 249. The attorney also sought a letter from his employer containing false information about his position and financial status to submit to the apartment board. *Id*. Lastly, the attorney failed to obtain executed settlement statements from his clients. *Id*. All of the attorney's various acts of misconduct were deliberately deceptive.

The *Adler* Court affirmed the Referee's findings that the attorney had violated 5 Rules Regulating the Florida Bar including rule 3–4.3 (misconduct and minor misconduct), rule 4–1.5(f)(5) (closing statement to be executed upon conclusion of representation), rule 4–8.4(a) (violating or attempting to violate the rules, or knowingly assisting or inducing another to do so, or doing so through the

acts of others), and rule 4–8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). *Id*. at p. 247. The *Adler* Court disapproved the Referee's recommended sanction of a 30 day suspension in favor of a 91 day suspension due to the following reasoning: "Considering Respondent's improper conduct, and especially his false statements and actions to obtain a letter making false statements from his law firm, we conclude that a ninety-one day suspension is the appropriate sanction." *Id*. at p. 245.

In her Amended Report of the Referee, the *Fla. Bar v. Watson*, 76 So.3d 915, 922 (Fla. 2011) was identified as the most relevant an instructive case with respect to the recommended discipline. More particularly, the Referee stated the following:

> The undersigned Referee finds Watson I to be the most relevant and instructive case with regard to the recommendation and imposition of discipline for multiple violations of the same rule. In Watson I, the attorney with two prior disciplinary offenses was found guilty of three violations of Rule 4-8.4(c) and four violations of Rule 5-1-1(b). The Florida Supreme Court imposed a three year suspension. In comparison, in the case at bar, Respondent has been found guilty of three violations of Rule 4-8.4(c), only one violation of Rule 5-1.l (b), has no prior disciplinary record, and has more factors in mitigation than in aggravation. The Referee is also guided by Erlenbach, in which the Florida Supreme Court imposed a one year suspension followed by two year probationary period, for an attorney with two prior disciplinary actions, who violated 4-8.4(c) in failing to timely file her income tax returns for a period of nine separate years. Respondent's lack of prior discipline, inexperience in the practice of law, the fact that the conduct leading to this disciplinary action arose out of one transaction, and the presence of significant factors in mitigation, all warrant the imposition of a

lesser suspension than that imposed in Watson I and Erlebach.[18]

The Referee properly applied *Watson* to this case. More particularly, the Referee properly recommended a 90 day suspension, rather than the 3 year suspension ordered by the Court, due to the fact that there were four violations of Rule 5.1.1(b).

Significant is the Bar's failure in this appeal to address the Referee's reliance upon *Fla. Bar v. Erlenbach*, 138 So.2d 369 (Fla. 2014). Respectfully, it was the Bar's burden to demonstrate that the Court's reliance upon *Erlenbach* in the fashioning of her recommended sanction of a 90 day suspension was erroneous. The Bar did not carry its burden.

In *Erlenbach*, the attorney admitted to failing to file her personal tax returns, failing to pay her income tax obligations and committed criminal acts by collecting money from her employees under the pre-text of tax withholdings but not sending same to the IRS. The attorney had been the subject of three prior disciplinary proceedings which resulted in an admonishment and one year of probation, public reprimand and two years of probation and suspension subject to compliance with terms of probation, respectively. The attorney's prior disciplinary history was a serious aggravating factor. *Id*. The attorney's repeated late filing of tax returns

[18]The Referee also noted in footnote 1 of the Amended Report of Referee while the Court permanently disbarred Watson in *Fla. Bar v. Watson,* 88 So.3d 151 (Fla. 2012), the disbarment was clearly based upon Watson having a prior discipline (unlike Respondent in this case).

and failure to pay taxes, demonstrated a pattern of misconduct.[19] *Id*. at p. 374. Lastly, the attorney's experience served as the third aggravating factor.

The referee recommended an 89 day suspension. *Id*. at p. 373. However, the *Erlenbach* Court, noting the "2002 philosophy shift" in imposing more severe sanctions for attorney misconduct, found that a one year suspension was warranted even though the conduct that did not involve "an isolated lapse in judgment" and that it "extended over a significant span of time."[20] *Id*. at p. 374.

Respondent submits that *Rotstein* and its progeny did not overrule the prior established precedent of this Court on disciplinary matters. Accordingly, cases such as *Fla. Bar v. Baker*, 810 So.2d 876 (Fla. 2002) (ordering 90 day suspension as opposed to disbarment recommended by referee in case where attorney "committed three criminally punishable forgeries on legal documents, caused his secretary to unlawfully notarize two of the forgeries, caused two other employees to witness the forgeries, and submitted the forged documents to an attorney for use in a real estate closing."); *Fla. Bar v. Nuckolls*, 521 So.2d 1120 (Fla. 1998) (adopting referee's recommendation of 90 day suspension in case where attorney

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[19]Respondent also submits that this is the type of "pattern of misconduct" occurring over a substantial period of time, not the pattern that the Bar now argues herein arising out of one real estate closing, is the type of conduct that the Standards are designed and/or intended to punish.

[20]Respondent, again, notes the commentary from the Court regarding pattern of conduct and how same must be "significant over time" as opposed to the conduct in the ***one*** real estate transaction that is involved in this case.

was guilty of two counts of misconduct involving a scheme to fraudulently obtain financing for the purchase of townhouses and one count of misconduct for violations of obligations as a land trustee) and *Fla. Bar v. Siegel*, 511 So.2d 995 (Fla. 1987) (91 day suspension, as opposed to the two week suspension recommended by the referee was ordered in case involving attorney who was involved in "a deliberate scheme to misrepresent the facts in order to secure full financing" of his purchase) all support the Referee's recommendation herein of a 90 day suspension. Even if the Court does not find these cases persuasive, *Rotstein* and the post-*Rotstein* cases noted above certainly provide the legal support for the Referee's recommendation of a 90 day suspension.

CONCLUSION

This is not a case involving an attorney who was guilty of engaging in conduct that resulted in federal felony convictions; who stole his clients' funds; who engaged in a pattern of wrongful conduct over a lengthy period of time; who engaged in wrongful conduct while under suspension by the Court; who presented forged documents to lenders for personal gain; who caused his employees to notarize forged documents; who lied to clients about withdrawing from representation before the running of the statute of limitations; who presented fraudulent documents to the grievance committed and who has engaged in a prolonged scheme to defraud others. In other words, this is not a case that contains

the hallmark characteristics of a disbarment case.

This is a case about an inexperienced attorney; who had no prior disciplinary history; who had no motive or intent to defraud anyone and who made mistakes due to his inexperience and neglect. When the underlying transaction is examined closely, the Court must conclude that the conduct involved in this case nowhere remotely approaches the conduct involved in the cases discussed, *supra*, where the Court has adopted and/or ordered the sanction of suspension as opposed to disbarment.

The Referee authored a well-supported and legally correct recommendation of a 90 day suspension and subsequent probation of Respondent. For the foregoing reasons and authorities stated, Respondent respectfully submits that the Referee's recommended discipline must be accepted by the Court.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure Respondent requests oral argument before the Court and submits that the Court's decision making process will be enhanced by hearing oral argument.

Respectfully submitted,

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By: ______________________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been E-Filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; and that a copy has been sent to (jfalcone@flabar.org) Jennifer R. Falcone, Bar Counsel, The Florida Bar 444 Brickell Avenue, Suite M-100, Miami, Florida 33131 and via email only (aquintel@flabar.org) to Adria E. Quintela, Staff Counsel, The Florida Bar, on September 2, 2015.

____
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