Electronically Filed 05/08/2013 02:44:26 PM ET

RECEIVED, 5/8/2013 14:48:34, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ANA I. GARDINER,

Respondent.

_____/

Supreme Court Case
No. SC11-2311

The Florida Bar File
No. 2010-71,157 (11G)

INITIAL BRIEF OF THE FLORIDA BAR

Jennifer R. Falcone Moore, Bar Counsel
The Florida Bar
Miami Branch Office
444 Brickell Avenue, Suite M-100
Miami, Florida 33131-2404
(305) 377-4445
Florida Bar No. 624284
jmoore@flabar.org

Kenneth Lawrence Marvin, Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 200999
kmarvin@flabar.org

John F. Harkness, Jr., Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390
jharkness@flabar.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Florida Standards for Imposing Lawyer Sanctions

Rules Regulating The Florida Bar

SYMBOLS AND REFERENCES

For the purpose of this brief, Ana I. Gardiner may be referred to as "Respondent". The Florida Bar may be referred to as "The Florida Bar" or the "Bar". The referee may be referred to as the "Referee". Additionally, the Rules Regulating the Florida Bar may be referred to as the "Rules" and the Florida Standards for Imposing Lawyer Sanctions may be referred to as the "Standards".

References to the Report of Referee will be by the symbol "ROR" followed by the corresponding page number(s). References to the transcripts of the final hearing held on November 27 and 28, 2012 will be by the symbol "TR" followed by the corresponding page number(s).

References to The Florida Bar's exhibits will be by "TFB Ex.", followed by the exhibit number. References to Respondent's exhibits will be by "R Ex.", followed by the exhibit number.

STATEMENT OF THE CASE AND OF THE FACTS

On December 7, 2011, the Florida Bar filed a formal Complaint, alleging that Respondent, Ms. Ana I. Gardiner, violated Rules 3-4.3 (Misconduct and Minor Misconduct), 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice) of the Rules Regulating The Florida Bar.

This Court referred the matter to the Eleventh Judicial Circuit for appointment of a referee, and the Honorable Sheree Cunningham was appointed on December 21, 2011, and thereafter granted Respondent's motion to recuse. On March 5, 2012 the Honorable David Crow was appointed in her stead, and presided over the proceedings.

The following evidence was presented at the Final Hearing in this cause:

Respondent was admitted to the Florida Bar in 1988. Thereafter, in 1998, after ten years of family law practice, Respondent was appointed to the Circuit Court bench in Broward County. (R. Ex. 14). The events giving rise to these proceedings began in March, 2007, when Respondent presided over the first degree capital murder case, styled *State of Florida v. Omar Loureiro*. (TFB Ex. 5; TFB Ex.

10). Assistant State Attorney Howard Scheinberg was the lead prosecutor on the case. (TFB Ex. 3, page 10).

Several days into the guilt phase of the proceedings, on the night of Friday, March 23, 2007, Respondent met up with ASA Scheinberg at a local restaurant, Timpano's Chop House and Martini Bar (Timpano's). (TFB Ex. 8 page 10-11; TFB Ex. 17, page 1). Respondent was at the restaurant with then law student Ms. Sheila Alu, and two other women. (TR 446; TFB Ex. 17, page 1). ASA Scheinberg and the late Judge Charles Kaplan, were also present at the restaurant and sat at a table beside Respondent. (TR 446; TFB Ex. 17, page 1). This appears to have been an unplanned, chance encounter. (TFB Ex. 3, page 14-15; TFB Ex. 17, page 1). At the conclusion of their meals and drinks, Respondent and Ms. Alu decided to continue their evening with ASA Scheinberg and Judge Kaplan at a nearby bar, The Blue Martini. (TR 508; TFB Ex. 17, page 2).

Respondent went to The Blue Martini with Judge Kaplan, while ASA Scheinberg drove with Ms. Alu. (TR 450; TFB Ex. 17, page 2). During their drive, Ms. Alu raised the issue of the appearance of impropriety in ASA Scheinberg's socializing with the judge who was presiding over the capital murder trial in which he was lead prosecutor, while the guilt phase of the proceedings was still ongoing. (TR 512-13; TFB Ex. 17, page 2). Due to Ms. Alu's accusations, ASA Scheinberg

was visibly upset upon entering The Blue Martini. (TFB Ex. 17, page 2; TR 508). ASA Scheinberg immediately asked to speak to Judge Kaplan privately, and both left shortly thereafter. (TR 451; TFB Ex. 17, page 2). Respondent was aggressively persistent in her attempts to determine the source of ASA Scheinberg's unease, even following the two out of the bar. However, both Kaplan and ASA Scheinberg refused to discuss the issue with her at that time. (TR 452-454, 508; TFB Ex. 7, pg 36-44; TFB Ex. 17, page 2). Undeterred by ASA Scheinberg's evasion of the question, Respondent exchanged several phone calls with ASA Scheinberg beginning in the early morning hours of that Friday night and continuing throughout the weekend. (TR 508, 509, 510; TFB Composite Ex. 2b; TFB Ex. 7, pgs 36-44; TFB Ex. 17). When the guilt phase of the trial reconvened on Monday, March 26, 2007, neither Scheinberg nor Respondent disclosed their encounters at Timpano's and the Blue Martini to the defense, nor did they disclose the phone calls exchanged over the weekend. (TR 511-13, 520; TFB Ex. 7, pgs 44-45). This failure to disclose, when disclosure was required, left the defense with the misleading impression that there was nothing to disclose, and that there was nothing that could give rise to the appearance of impropriety in this case.

On March 27, 2007, the jury returned a verdict of guilty of first degree murder. (TR 512; TFB Ex. 5; TFB Ex. 17, page 3). Respondent immediately

adjourned to her chambers and placed a call to Judge Kaplan asking that he have ASA Scheinberg call her. (TR 512). ASA Scheinberg called that evening and the two engaged in a long telephone conversation, in which he told Respondent about Ms. Alu's allegations of the appearance of impropriety raised by their encounters the prior weekend. (TR 512-13; TFB Ex. 7 page 48; TFB Ex. 17, page 3). Respondent calmed ASA Scheinberg down, told him not to worry, and dissuaded him from taking any action regarding their encounter. (TR 513; TFB Ex. 17, page 3). From that day forward, Respondent and ASA Scheinberg embarked on a significant emotional relationship, wherein they became each other's confidants. (TFB Ex. 7, pages 49-50; TFB Ex. 17). They helped each other through the most traumatic events of their lives, including the death of family members, their divorces, and raising their children as single parents. (TR 514; TFB Ex. 7, pages 49-50,50-53; TFB Ex. 8, page 59; TFB Ex. 16, page 36, 71-76; TFB Ex. 17). There was extensive testimony at trial of the traumatic impact, and severe depression created by, the deaths of Respondent's grandmother and father within a couple of months of each other. (TR 434-37, 457, 462-3, 514). Respondent testified that she "went under the pillow." (TR 515). She was shutting people out and not speaking with anyone due to her depression, except to those who were most close to her, including ASA Scheinberg. (TR 515; TFB Ex. 7, page 59-60).

These events occurred while the Loureiro capital murder case was still ongoing. The penalty phase of the trial began on April 30, 2007, and the jury recommended death on May 1, 2007. (TR 466; TFB 3, page 12). Respondent imposed the death sentence on August 24, 2007. (TR 465; TFB 3, page 12). Between March 23, 2007, the date of their encounter at Timpano's, and August 24, 2007, the date Respondent imposed the death penalty on defendant Loureiro, Respondent and ASA Scheinberg engaged in 1,420 telephonic communications. There were 949 telephone calls and 471 text messages during this period between Respondent and ASA Scheinberg. (TFB Composite Ex. 2b). Indeed, On April 30 and May 1, 2007, the dates of the penalty phase of the proceedings, they engaged in 10 telephone calls and 2 text messages. (TFB Composite Ex. 2b; TR 515). Additionally, on the day before, the day of, and the day following Respondent's imposition of the death penalty on Defendant Louriero, there were 44 telephonic communications between Respondent and ASA Scheinberg; specifically, 19 phone calls and 25 text messages. (TFB Composite Ex. 2b; TR 516). At no point during the pendency of the trial did Respondent reveal the encounter at Timpano's, nor the significant nature of her relationship with ASA Scheinberg, to the defendant or his counsel. (TR 511-13, 520).

In March of 2008 while preparing for his upcoming appeal, Defendant Loureiro's attorney became aware of Respondent and ASA Scheinberg's evening at Timpano's and The Blue Martini, and brought it to the attention of the Court. (TR 88, 494-5, 500; TFB Ex. 5). In response to this new information, on November 13, 2008 the Judicial Qualifications Commission (JQC) convened a panel to investigate whether or not the Respondent had engaged in any misconduct related to her encounter with ASA Scheinberg. (TR 475-6; TFB Ex. 3). At this time the JQC was unaware of the significant emotional relationship that had developed between Respondent and ASA Scheinberg. (TR 519-525; TFB Ex. 1, page 4).

Between the end of March 2008, when the details of the Timpano's incident first began to come to light, and the end of August 2008, shortly before the JQC testimony, Respondent and ASA Scheinberg engaged in 3,388 phone calls and text messages. (TFB Composite Ex. 2b). During this 154 day period, there was an average of 22 communications per day, which is almost one communication per hour for each 24 hour day. (See TFB Ex. 1; TFB Ex. 2; TFB Composite Ex. 2b; TFB Ex. 16, page 38). Thus, the relationship was increasing in intensity during this period of time.

Despite the increasing intensity of their communications, during her testimony before the JQC panel, Respondent misled the JQC into believing that she shared

nothing more than an inconsequential and purely professional relationship with ASA Scheinberg. (TR 518-20; TFB Ex. 1, page 5; TFB Ex. 3 page 51-53). For example, during the hearing, one of the JQC panelists, Judge Wolfe, requested that Respondent clarify her relationship with ASA Scheinberg, and specifically asked, "[c]ould you explain the relationship with Howard Scheinberg since 1987?" (TR 518; TFB Ex. 1, page 5; TFB Ex. 3, page 51). Respondent answered that she first knew of him through an associate of hers at her old law firm, and that she "never, ever had lunch with him before, never socialized with him before. This (Timpano's) was the first time [she] ever, ever saw him outside, basically, of the courthouse . . . [and] he had, [she] believe[s] two cases in front of [her] before " (TFB Ex. 3, page 52). Judge Wolfe then followed up by asking, "[d]uring the time that you were a judge and he was a prosecutor, you did not have any kind of social relationship with Howard Scheinberg?" (TR 519; TFB Ex. 3, page 52). To which Respondent answered:

> If I saw him maybe at one retirement - - they give plaquings to the younger prosecutors when they leave after three years. He could have been at a plaquing where the attorneys and the judges go. But I don't ever remember even sitting with him and socializing.

(TFB Ex. 3, page 52). Additionally, another JQC panelist, Mr. Russell, asked several times if the only thing she believed she had done wrong was to simply be in

Scheinberg's presence that night at Timpano's, to which Respondent answered in the affirmative. (TFB Ex. 3, pgs. 41-42, 46).

Thus, Respondent gave technically accurate answers but omitted the pertinent details that would have portrayed the true nature of their relationship, and thereby created the false impression that ASA Scheinberg was nothing more than a professional acquaintance. Based on this false impression of minimal and purely professional contact between them, the JQC gave Respondent an extremely lenient sanction following its investigation. (TFB Ex.1, page 6). The JQC imposed only an admonishment, termed a "fireside chat," for Respondent's conduct which gave rise to the appearance of impropriety from her supposedly isolated encounter with ASA Scheinberg during a capital murder trial. (TR 525).

Defendant Loureiro filed a Motion for a New Trial based on the previously undisclosed contact between Respondent and ASA Scheinberg at Timpano's during the trial. (TFB Ex. 5). In April of 2009, the Broward State Attorney hired a special prosecutor to conduct an investigation regarding Respondent's relationship with ASA Scheinberg. (TR 86-88). Both Respondent and ASA Scheinberg sat for depositions, and for the first time Respondent acknowledged ongoing communications by phone with ASA Scheinberg. (TR 88-9; TFB Ex. 7, page 53; TFB Ex. 8). As a result, the Special Prosecutor recommended a new trial, indicating

that the imposition of such a severe sanction as the death penalty could not stand where there was such a taint attached to the proceedings. (TR 91). A new trial was conducted, following which Loureiro was convicted and sentenced to life in prison.

Nearly one year following the granting of the motion for a new trial, and upon learning that it had been misled by Respondent's prior testimony, the JQC initiated additional proceedings against Respondent. These proceedings led to Respondent's resignation from the bench in order to avoid the JQC's prosecution, and her subsequent agreement not to seek judicial office again. (TR 505; TFB Ex. 1; TFB Ex. 11; TFB Ex. 12). Thereafter, the JQC's case against her was dismissed.

Throughout these proceedings Respondent has maintained that she "just didn't see [the night at Timpano's]" as creating an appearance of impropriety. (TFB Ex. 3, page 19). She has repeatedly stated that it "just didn't cross [her] mind," and that she just "didn't think of it." (TR 447; TFB Ex. 3, page 36). Indeed, Respondent testified that she did not see her communications with ASA Scheinberg as improper, even though they occurred while the death penalty case was still ongoing. (TR 515). Despite these assertions, Respondent has acknowledged that, at all times, she was aware of her obligations to disclose their encounter, and she was aware of the judicial canons governing her conduct, and of her ethical obligations. (See TR 96-97, 483-484, 507; TFB Ex. 3, page 19; TFB Ex. 16, page 19).

Throughout the disciplinary proceedings, Respondent has refused to accept responsibility for the natural results of her misconduct with ASA Scheinberg, and has shown no actual remorse for the effect her actions had on the defendant, the family members of the victim, or the criminal justice system as a whole. For example, when she was asked on cross examination whether she agreed that her actions affected the justice system as it is supposed to work in a death penalty case, Respondent replied,

> [t]hat I know I said, and I have thought about it again and again, and *I don't know why I said it*. But I don't understand clearly in my mind right now if you were to ask me how I did that, what exactly I meant by the way it was supposed to work.

(TR 117)(emphasis added).

Following the presentation of the evidence, and consideration of the written closing arguments of counsel, the Referee issued his Report of Referee containing his findings and recommendations. (ROR). Specifically the Referee found that Respondent was dishonest and intentionally misled the defense and the JQC regarding her relationship with ASA Scheinberg during the pendency of the death penalty proceedings; and further, that her misconduct was prejudicial to the administrative of justice, both during the death penalty case and during the subsequent JQC investigation. The Referee recommended Respondent be found

guilty of violating Rules 3-4.3 (Misconduct and Minor Misconduct); 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and 4-8.4(d) (A lawyer shall not engage in conduct in the practice of law that is prejudicial to the administration of justice) of the Rules Regulating the Florida Bar. (ROR 14). In aggravation the Referee considered Respondent's substantial experience in the practice of law and as a judge, and found that Respondent's actions constituted multiple offenses. (ROR 18). In mitigation, the Referee considered Respondent's lack of a disciplinary record, emotional problems, full disclosure to the Disciplinary Board, mental impairment, remorse, loss of her judgeship, and her good character. (ROR 18-20). Based upon his findings the Referee recommended that Respondent receive a one year suspension, and that she pay The Florida Bar's costs in these proceedings. (ROR 17).

On January 9, 2013, Respondent submitted a Motion for Retroactive Application of Suspension, alleging that she had engaged in a "self-imposed suspension." Respondent averred that she voluntarily suspended her practice of law in early December 2011, and that any suspension received in these proceedings should run retroactive to that date. On January 14, 2013 the Referee issued his order, which stated:

> The Motion is denied. There is no legal authority or factual predicate in the evidence for this request. There is no legal precedent nor does the Respondent cite any legal precedent for the proposition that a voluntary sabbatical or leave of absence while still a member in good standing of the Bar is a suspension or should retroactively apply to a suspension recommendation. Furthermore, as a matter of fact, the Respondent's voluntary sabbatical/leave of absence was not a "self imposed" discipline for the conduct for which I recommended a finding of guilt. To the contrary, the Respondent maintained throughout the proceedings that THE FLORIDA BAR lacked jurisdiction to discipline her, that she is not guilty of the charges, or alternatively should not be disciplined in addition to her relinquishment of her judicial position as a result of the Judicial Qualifications Commission inquiry. The Respondent's voluntary sabbatical/leave of absence was for personal and emotional reasons which, at least in part, were to defend the allegations of misconduct.

(Order on Motion for Retroactive Application of Suspension).

The Florida Bar challenges the recommended sanction of a one year suspension for Respondent's misconduct, because it is too lenient given the totality of the circumstances. The proper sanction is disbarment. The Florida Bar's Initial Brief on Appeal follows.

SUMMARY OF THE ARGUMENT

The referee's recommendation of a one year suspension in this matter is wholly unsupported by existing case law, and has no reasonable basis in the Florida Standards for Imposing Lawyer Discipline, and as such should be rejected by this Court. The appropriate sanction for Respondent, where she withheld pertinent information to the prejudice of the defendant in a criminal death penalty case, deprived the defendant and the public of the perception that he was receiving a fair and impartial trial, prejudiced the integrity of the entire legal system, intentionally misled the Judicial Qualifications Commission during her disciplinary hearing, caused extensive judicial resources to be unnecessarily expended, and also provided misleading testimony during the instant disciplinary proceedings, is disbarment.

Further, the Referee did not properly weigh the mitigating factors offered by Respondent, and failed to make appropriate findings regarding aggravating factors that were clearly present in the instant case. Upon a proper weighing of the aggravating and mitigating factors, it is clear that disbarment is the appropriate sanction in the instant case.

ARGUMENT

THE REFEREE'S RECOMMENDED SANCTION OF A ONE YEAR SUSPENSION HAS NO REASONABLE BASIS IN EXISTING CASE LAW, NOR THE STANDARDS FOR IMPOSING LAWYER DISCIPLINE, AND THEREFORE SHOULD NOT BE ACCEPTED BY THIS COURT. THE APPROPRIATE SANCTION IN THIS MATTER IS DISBARMENT.

The referee's recommendation of a one year suspension in this matter is wholly unsupported by existing case law, and has no reasonable basis in the Florida Standards for Imposing Lawyer Discipline, and as such should be rejected by this Court. The appropriate sanction for Respondent, where she withheld pertinent information to the prejudice of the defendant in a criminal death penalty case, deprived the defendant and the public of the perception that he was receiving a fair and impartial trial, prejudiced the integrity of the entire legal system, caused extensive judicial resources to be unnecessarily expended, intentionally misled the Judicial Qualifications Commission during her disciplinary hearing, and further provided misleading testimony during the instant disciplinary proceedings, is disbarment.

"The Supreme Court shall have exclusive jurisdiction to regulate…the discipline of persons admitted [to the practice of law]." Art. V, §15, Fla. Const.

Therefore, "unlike the referee's findings of fact and conclusions as to guilt, the determination of the appropriate discipline is peculiarly in the province of this Court's authority." *The Florida Bar v. O'Connor*, 945 So.2d 1113, 1120 (Fla. 2006). As ultimately it is this Court's responsibility to order the appropriate punishment, this Court enjoys broad latitude in reviewing a referee's recommendation. *The Florida Bar v. Anderson*, 538 So.2d 852 (Fla. 1989). The Court usually will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Temmer*, 753 So.2d 555 (Fla. 1999). Here, the recommended discipline has no reasonable basis in existing case law, nor the Florida Standards for Imposing Lawyer Discipline, and the Referee's recommendation should be rejected.

The instant proceedings arise from Respondent's misconduct in failing to disclose her social encounters, and significant emotional relationship, with the prosecutor in a pending death penalty case over which she presided, and in which she actually recommended imposition of the ultimate penalty, death. The Referee in the instant proceedings found that her failure to make such disclosure to the defense when same was required pursuant to the judicial canons, was an intentional and deliberate violation of Rule 4-8.4(c), in that it was dishonest and misled the defense

into believing that there was no basis upon which the Defendant could ask for a mistrial and/or recusal of the presiding judge. (ROR 6). Respondent's failure to disclose under these circumstances was the functional equivalent of an affirmative misrepresentation that there had been no conduct which would impact on the Defendant's belief that he was receiving a fair and impartial trial, that there were no appearances of impropriety to disclose.

Respondent engaged in an additional violation of Rule 4-8.4(c) when she deliberately misled the JQC regarding the true nature and significance of her relationship with ASA Scheinberg upon their specific inquiry. Respondent's failure to disclose the pertinent facts regarding their relationship was dishonest and misled the JQC into believing there was nothing more than an inconsequential relationship between Respondent and the prosecutor in the case. (ROR 7-8). Specifically, the Referee found:

> Considering her testimony as a whole, the Respondent provided a deceitful and dishonest portrayal of her relationship with the prosecutor. Clearly, her testimony would leave any reasonable person with the misimpression that the relationship was inconsequential and merely professional. While the Respondent's specific answers to the questions may have been technically truthful, it was not an honest portrayal of the significant personal and emotional relationship that had developed between ASA Scheinberg and the Respondent during the pendency of the trial. (ROR 7-8). . . .

> I find that the Respondent's portrayal of her relationship as no more than professional was a deliberate act of dishonesty and deceitfulness. (ROR 8).

Based on these findings of deliberate dishonesty, it is clear that the appropriate sanction for Respondent is disbarment. By her omissions, Respondent knowingly deceived the defense in a death penalty case into believing that there was no possible basis for a motion to recuse and/or a motion for mistrial. She further intentionally and deliberately misled the JQC while testifying under oath before that tribunal. This Court has stated that "[a] lawyer may commit no greater professional wrong [then testifying falsely while under oath]. Our system of justice depends for its existence on the truthfulness of its officers. When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct is grounds for disbarment." *The Florida Bar v. O'Malley*, 534 So.2d 1159, 1162 (Fla. 1988) citing *The Florida Bar v. Manspeaker*, 428 So.2d 241 (Fla. 1983); *see also The Florida Bar v. Cox*, 794 So.2d 1278, 1285 (Fla. 2001), stating ". . . disbarment is the presumptive sanction for an attorney knowingly presenting false testimony in a judicial proceeding"). Respondent's actions demonstrate an intentional disregard for the truth, and blatant disrespect for the legal system she has sworn to uphold. Basic, fundamental dishonesty is a serious flaw, which cannot be tolerated, because "[d]ishonesty and a lack of candor cannot be tolerated by a profession that relies on

the truthfulness of its members." *The Florida Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2002). The appropriate sanction for Respondent's multiple acts of dishonest behavior is disbarment.

Further, and perhaps more significantly, Respondent's failure to avoid the appearance of impropriety, and her failure to disclose same, constitutes serious misconduct that is prejudicial to the administration of justice, and deserving of the most severe of sanctions. By failing to disclose her social encounters with the prosecutor in the pending death penalty trial, as well as the significant emotional relationship that developed between them while the proceedings were still ongoing, Respondent deprived the Defendant, defense counsel, and the public of the perception and security that Defendant received a fair and impartial trial and due process of law, which is the cornerstone of our criminal justice system.

Respondent's actions tainted the outcome of the proceedings such that neither the Defendant, nor the public, had cause to believe in the integrity and sanctity of the legal system and the process in this case. This Court has stated that "[o]ne of the most important dictates of due process [is that] proceedings involving criminal charges, and especially the death penalty, must both be *and appear to be* fundamentally fair." *Steinhorst v. State*, 636 So.2d 498, 501 (Fla. 1994)(emphasis added). The appearance of irregularity "is as much a violation of due process as

actual bias would be." *Scull v. State*, 569 So.2d 1251, 1252 (Fla. 1990). This is because "life is at stake and . . . the . . . sentencing decision is so important." *Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983). "[A]ny conduct of a lawyer which brings into scorn and disrepute the administration of justice demands condemnation and the application of appropriate penalties." *State ex rel. Florida Bar v. Calhoon*, 102 So.2d 604, 608 (Fla. 1958).

Respondent's misconduct in this regard is especially egregious because she was the judge presiding over a death penalty case. She was the gatekeeper of the process, and the one person on whom the defendant should have been able to rely to maintain the Constitutionally mandated fairness and impartiality of the criminal justice system. Respondent was the one who ultimately imposed that harshest of all possible punishments on the defendant, death. Therefore, when determining the appropriate sanction in this matter, and evaluating the severity of the duty violated, it is necessary to evaluate Respondent's actions in light of her position of trust and power. *See Cox*, 794 So.2d at 1285 (an attorney's position as prosecutor must be considered when determining the gravity of the conduct in question.). "[A] judge is required to conduct himself under standards which are much higher than those required of an attorney." *The Florida Bar v. Graham*, 662 So.2d 1242, 1244 (Fla.

1995) *citing In re LaMotte*, 341 So.2d 513, 517 (Fla.1977). As this Court has previously stated,

> We must not forget that those entrusted with the authority to carry out justice have the burden to not fail that awesome responsibility; fulfillment of that responsibility encompasses, inter alia, being entirely forthcoming in all judicial or quasi-judicial proceedings irrespective of whether one appears as a witness, a party, or a judge.

In re Frank, 753 So.2d 1228, 1241 (Fla. 2000). Indeed,

> When people are led to believe that justice is dispensed on the basis of corrupt influences, the public cannot have confidence in the integrity or impartiality of the judiciary or the bar. The entire judicial process is undermined as a result.

The Florida Bar v. Swickle, 589 So.2d 901, 905 (Fla. 1991) *citing The Florida Bar v. McCain*, 361 So.2d 700, 707 (Fla.1978); *The Florida Bar v. Davis*, 657 So.2d 1135, 1137 (Fla. 1995). In order to preserve the credibility of the legal profession, breaches of the public trust must be addressed in a manner that is proportionate to the severity of the breach. *Cox*, 794 So.2d at 1286. Respondent violated her position of trust and authority and deprived the defendant, and the public, of the perception that the defendant received a fair and impartial trial. Therefore, the appropriate sanction in this matter is disbarment.

Additionally, as a direct result of Respondent's misconduct, not only was the legal system prejudiced, but extensive judicial resources were expended, the direct appeal was interrupted, post conviction proceedings were held, and ultimately a new trial was granted. The family members of the murdered victim, believing the matter to be behind them, and justice to have been served, were required, years later, to sit through a second trial and again relive the excruciating testimony, and come to terms with the fact that the justice they thought had been served was in fact tainted and undone. Moreover, Respondent's failure to provide a truthful and accurate account of her relationship with Scheinberg to the JQC upon their inquiry constitutes a separate and distinct act of misconduct that was prejudicial to the administration of justice. Her failure to provide the JQC with all of the facts pertinent to the inquiry prejudiced the administration of justice, and resulted in her receiving an admonishment, rather than a more severe sanction in that proceeding. Additional resources were expended when the JQC was required to undertake a second investigation once it became clear that Respondent had been dishonest in her prior testimony and that there was indeed a significant emotional relationship between herself and ASA Scheinberg during the pendency of the criminal death penalty case. Such cumulative misconduct requires a more severe sanction than that recommended by the Referee in the instant case.

Therefore, given the totality of the circumstances, and considering the serious and egregious nature of the misconduct at issue, the Respondent's violation of her position of trust and authority, and the far reaching consequences of same, as well as the cumulative nature of the misconduct in the present case, it is clear that the Referee's recommended sanction of a one year suspension is not supported by existing case law and should be rejected by this Court. Respondent's conduct caused significant and serious injury to the judicial system, the legal process, the Defendant in a death penalty case, and the public. The appropriate sanction in this matter is disbarment.

Similarly, the Referee's recommended sanction of a one year suspension is not supported by the Florida Standards for Imposing Lawyer Sanctions (hereinafter referred to as the Standards). Review of the Standards applicable to the instant case demonstrates that disbarment is the appropriate sanction. Standard 5.11(f) indicates that "disbarment is appropriate when 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." In the instant case, Respondent's failure to disclose her social interactions and significant emotional relationship with the prosecutor in a death penalty case was dishonest and misleading, both to the defense at trial, and to the JQC during its investigation. The

Referee in this matter found her dishonest acts to be deliberate and intentional. This is exactly the type of dishonesty contemplated by this Standard. Respondent, as the presiding judge in a death penalty case, had an affirmative duty to protect and preserve the integrity of the process, and to reveal any facts which may give rise to an appearance of impropriety. Respondent's failure to disclose such information, in a situation such as this, where disclosure was necessary to protect the process, demonstrates that she cannot be trusted to uphold her oath and to do the right thing. Her subsequent dishonest and misleading responses, given under oath when she appeared before the JQC, conclusively demonstrates this principle. Indeed, it appears that truth, for Respondent, is whatever is expedient at the moment. This adversely reflects on her fitness to practice law, and disbarment is the appropriate sanction. Such inherent dishonesty simply cannot be tolerated in a community that relies on the truthfulness of its members.

Similarly, Standard 6.11(a) and (b) indicates that "disbarment is appropriate when a lawyer, with intent to deceive the court, knowingly makes a false statement or submits a false document;" or "improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." In the instant case, Respondent deliberately misled the JQC Panel by omitting pertinent facts and

portraying her relationship with Scheinberg as inconsequential and one of mere professional acquaintances. In this circumstance, her omissions were the functional equivalent of an affirmative misrepresentation, and same resulted in her receiving an extremely lenient sanction in that forum. Further, Respondent's withholding of material information in the underlying death penalty case, such as her significant emotional relationship with ASA Scheinberg, resulted in the Defendant being deprived of the perception and security that he received his Constitutionally guaranteed rights to due process and a fair and impartial trial, the overturning of his death sentence, the interruption of the direct appeal in that matter, the expense and expending of judicial resources in post conviction proceedings and a new trial, and the ordeal of the victim's family having to undergo a second trial and living with the knowledge that the justice they thought had been served was in fact tainted and undone. Thus Respondent's conduct caused significant and serious injury to the judicial system, the legal process, the Defendant, the victim's family, and the public. As such, the Standards clearly indicate that disbarment is the appropriate sanction in this case. Since the Referee's recommendation of a one year suspension does not comport with either existing case law, nor the Florida Standards for Imposing Lawyer Discipline, same should not be accepted by this Court, and this Court should instead order that Respondent be disbarred.

Finally, the Referee did not make findings concerning all of the aggravating factors present in the instant case, and made erroneous findings concerning the mitigating factors he found in the matter. Upon a proper weighing of the aggravating and mitigating factors, it is clear that disbarment is the appropriate sanction in this matter.

In his Report of Referee, the Referee only acknowledges two aggravating factors: Standard 9.22(d) multiple offenses, and Standard 9.22(i) substantial experience in the practice of law. The Referee did not make any findings regarding the multitude of aggravating factors present in this case. The Florida Bar respectfully requests that this Court find that the Referee erred in failing to make findings of aggravating factors that were supported by clear and convincing Record evidence.

The Record in this matter provides clear and convincing evidence to support a finding of the following aggravating factors: Standard 9.22(b) dishonest or selfish motive. Given the Referee's findings that Respondent engaged in intentionally dishonest conduct, it is clearly erroneous that he did not find that she had a dishonest motive. Additionally, the Record is replete with references to Respondent's self serving and self interested actions. This is evidenced most clearly by her testimony before the JQC wherein she intentionally misled the Panel

members into believing that she had only an inconsequential and purely professional relationship with Scheinberg so that she could conceal the true extent of her wrongdoing, and thereby receive an extremely lenient sanction in that forum.

Standards 9.22(c) a pattern of misconduct and 9.22(d) multiple offenses are also present in the instant case. While the Referee did make findings of multiple offenses, it does not appear that he properly weighed this factor in making his recommendation. This Court treats each individual instance of dishonesty as separate offenses. *The Florida Bar v. Orta*, 689 So.2d 270 (Fla. 1997). In the instant case, the Respondent engaged in a pattern of dishonest conduct, beginning with her failure to disclose the initial social interaction at Timpano's and the Blue Martini, and culminating in her failure to disclose the true nature and extent of her relationship with Scheinberg to the JQC upon its specific inquiry. Respondent had numerous opportunities to right this wrong, and disclose these material facts, but chose not to do so. This was especially egregious after she was put on direct notice of the appearance of impropriety inherent in their conduct when Scheinberg informed her of Sheila Alu's accusations. At that time she made an affirmative decision not to disclose these pertinent and material facts to the defense in the case. Nor did she mention these facts at any subsequent hearing, including the penalty phase of the trial, or the hearing in which she actually imposed the death penalty,

despite the increasing intensity of her relationship with Scheinberg throughout that time period. Instead, Respondent actively concealed this information upon direct inquiry by the JQC. This pattern of misconduct and multiple offenses involving dishonesty is considered cumulative misconduct, and is treated more severely by this Court than are isolated acts. *Orta* (holding that disbarment is the appropriate sanction for an attorney who was found guilty of multiple instances of dishonesty).

Indeed, this pattern of dishonest conduct carried over to the instant disciplinary proceeding, and provides support for finding another aggravating factor. Standard 9.22(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process is also present in this case. It is apparent that truth for Respondent is whatever is expedient, and she will say whatever is needed depending on the forum she is speaking to and the concern she is attempting to address. This is evidenced, for instance, by her testimony before the JQC wherein she purposely diminished her relationship with Scheinberg in order to support the JQC's finding of only minor misconduct, in comparison with her sworn testimony before the Grievance Committee, wherein she purposefully and falsely magnified her relationship with Mike Tenzer in order to demonstrate that she had a similar relationship with defense counsel as she did with Scheinberg. (See TFB Ex. 16, pages 26-27, 29). At the Hearing before the Grievance Committee, Respondent

testified that she and Mike Tenzer were great friends, that they often had breakfast and lunch together, and had been out to dinner together. She indicated that she spent most every Saturday at the gym with him, and they had breakfast together afterwards. Similar to her intentional misleading of the JQC regarding her relationship with Scheinberg, by this testimony she deliberately and intentionally misled the Grievance Committee regarding the nature and extent of her relationship with Tenzer. (TFB Ex. 16, pages 26-27, 29). Respondent omitted the pertinent details that would have accurately portrayed her relationship with Tenzer. Again, in the Final Hearing in this cause, Respondent testified under oath that her relationship with Tenzer was similar to, or on par with, her relationship with Scheinberg. (TR 517). However, these statements by Respondent were not true. Mr. Tenzer testified that they were not friends, they did not socialize, but instead were mere professional acquaintances who sometimes happened to dine in the same locations. (TR 83-85). The appropriate sanction in this case is disbarment. Indeed, in *The Florida Bar v. Senton*, 882 So.2d 997 (Fla. 2004), this Court held that lying in the disciplinary proceeding alone is worth disbarment.

Standard 9.22(g) refusal to acknowledge the wrongful nature of conduct, is also present in the instant case. Respondent has paid lip service to accepting responsibility for her conduct throughout these proceedings, however, not once did

she truly acknowledge the nature and extent of her wrongdoing. Consistently she states her position that she did nothing wrong, because she and Scheinberg did not discuss the case. She evidences no real understanding that her actions tainted the outcome of the proceedings and are, in and of themselves, a basis for a new trial of the Defendant. Indeed, on cross examination, when asked whether she agreed that her actions affected the justice system as it is supposed to work in a death penalty case, Respondent replied, "That I know I said, and I have thought about it again and again, and I don't know why I said it. But I don't understand clearly in my mind right now if you were to ask me how I did that, what exactly I meant by the way it was supposed to work." (TR 528).

Standard 9.22(h) vulnerability of victim, is another factor that the Referee should have found in aggravation in this case. Here, although the victim of Respondent's misconduct, the criminal death penalty Defendant, is not a sympathetic figure, he was still entitled to a fair and impartial trial. Respondent was the gatekeeper of that process, the only one that could ensure that his right to due process and a fair trial was enforced. As such, the Defendant was particularly vulnerable to Respondent's misconduct, in a matter where his life was literally on the line.

Finally, the Referee properly found Standard 9.22(i) substantial experience in the practice of law, as an aggravating factor in this matter. This was well documented throughout the Final Hearing and was the cornerstone of Respondent's defense.

Although mitigating factors were present, same do not outweigh the substantial aggravation present in this case; nor do those mitigating factors outweigh the serious nature of the misconduct in this case, the fundamental fact that Respondent cannot be trusted to do the right thing and make disclosures where same are required, and the serious and significant harm that has resulted from her failure to make those necessary disclosures.

Specifically, the Referee found the following mitigating factors to be present: Standard 9.32(a) absence of a prior disciplinary record (aside from the admonishment issued by the JQC in the underlying case); 9.32(c), personal or emotional problems; 9.32(g) character or reputation; 9.32 (k) imposition of other penalties or sanctions; and 9.32(l) remorse.

It appears that the Referee relied heavily on evidence of Respondent's severe depression as evidence of her personal or emotional problems, and gave this mitigation evidence great weight in recommending that a one year suspension was the proper sanction in this matter. However, this Honorable Court has expressly

stated that such mitigation evidence must be must be tempered by Respondent's failure to seek treatment in advance of her misconduct coming to light. *The Florida Bar v. Brownstein*, 953 So.2d 502, 512 (Fla. 2007).[1] Further, this Court has consistently imposed the sanction of disbarment, where same is warranted, despite evidence of depression and emotional problems of the Respondent. *See ie.*, *Brownstein* (holding disbarment was the appropriate sanction for misrepresentations and misappropriation of client funds, despite attorney's claim that his depression affected his decision making abilities); *The Florida Bar v. Horowitz*, 697 So.2d 78 (Fla. 1997) (holding disbarment was the appropriate sanction for an attorney's neglect of his clients and failing to respond to the Bar's inquiry, despite evidence of his clinical depression). Finally, Respondent's own witness, Judge Backman, who had the opportunity to observe her on a regular basis, testified that her conduct of her judicial functions was performed in an exemplary manner, despite her depression. Judge Backman testified that he did not observe any indication that Respondent's ability to understand and discern her ethical obligations was impacted during this period. Accordingly, in the instant case, Respondent's depression and

1 By her own testimony, Respondent did not seek any psychological treatment for her depression until 2009, a date following her testimony before the JQC Panel, and around the time the allegations of additional impropriety began to surface. (TR 469-

emotional problems are not sufficient to overcome the presumption of disbarment for her actions. Her depression cannot outweigh the vast evidence of serious misconduct and significant harm caused by Respondent in this case.

The Referee also erred in assigning great weight to the aggravating factor of character or reputation. (Standard 9.32(g)). In accordance with this Court's prior jurisprudence, in the instant case, Respondent's evidence of good character and good deeds in the community do not warrant a lesser discipline than case law and the Florida Standards for Imposing Lawyer Discipline would otherwise require. For example, in the *The Florida Bar v. Ryder*, 540 So.2d 121, 122 (Fla. 1989), this Court rejected a respondent's argument that his past services to the legal community, and his having been a credit to the Bar, warranted a lesser sanction than disbarment for his act of perjury. *Ryder*, 540 So.2d at 123. The Referee in Ryder correctly stated that:

> The crime of perjury involves an intentional interference with the very system and process we at the Bar are sworn to serve and uphold. Such an offense must be sternly and positively denounced in every instance, but when committed by a member of the Bar the crime is greater, and the punishment must be greater. We must avoid in every instance the impression that "we protect our own"

---

470). Thus, Respondent failed to seek psychological care until after allegations of her improper behavior had surfaced.

> when dealing with such intrinsic threats to our courts and our system of justice.

Ryder, 540 So.2d at 122. Similarly, in *The Florida Bar v. Travis*, this Court disbarred an attorney for misappropriation of client funds and rejected an argument that good works should lessen the severity of the sanction. This Court stated that "[a]n attorney does not perform such good works so that they can be used as a credit against such severe misconduct. The public has a right to have confidence that all lawyers who are members of The Florida Bar are deserving of their trust in every transaction." *The Florida Bar v. Travis*, 765 So.2d 689, 691 (Fla. 2000). Given the magnitude of Respondent's misconduct, and the significant harm resulting from same, Respondent's good deeds and good character cannot provide sufficient mitigation to overcome the presumption of disbarment inherent in her actions.

The Referee also appeared to weigh the fact that Respondent resigned from the bench as a substantial mitigating factor in this case. (Standard 9.32(k)). The Florida Bar objects to any characterization of this evidence as mitigation in this case. Respondent asserts, and the Referee apparently agreed, that she resigned her position as a judge and agreed to forego running for judicial office again, and that same was a sanction received in another forum. However, this is not a completely accurate depiction of the events surrounding her resignation. Following denial of

her motions to dismiss the JQC proceedings on procedural grounds, Respondent agreed to resign and forego running for judicial office again in exchange for the JQC dismissing its proceedings. As such, Respondent resigned in order to *avoid* sanctions in another forum; she did not have same imposed on her. Further, in her written response to the instant disciplinary proceedings, Respondent directly contradicted any such contention that she resigned as part of a disciplinary action. In her written response, Respondent stated:

> Ana Gardiner, a single mother, was offered a partnership in a prestigious Florida firm: Cole, Scott and Kissane, a firm boasting 177 Florida lawyers and the talents of Richard Cole and former federal Judge and United States Attorney Thomas Scott, to leave the Broward bench. The Judicial Administration Commission and Legislature have reduced the salaries of Circuit Judges by 2% and future reductions are anticipated. *The opportunity to become financially secure was the driving force in her resignation from the bench.*

(TFB Ex. 13, pg 1) (emphasis added).

Finally, the Referee erred in finding Standard 9.32(l), remorse, as a mitigating factor in this matter. While Respondent has played lip service throughout these proceedings to her remorse for her actions, same is expressed in relation to her remorse that she has been made to suffer the consequences of her misconduct. Indeed, in these very proceedings, when asked what she was remorseful for, she

stated she was remorseful for what her kids had suffered, what she had suffered, what her colleagues had suffered, and all the rest. (TR 503-504). She does not express any sorrow for the true victims in this case, the family members of the slain murder victim, the Defendant, as unsympathetic a character as he is, nor for the diminished integrity of the judicial system as a whole. Respondent's remorse is for herself, for the fact that her misconduct was discovered, not true remorse for her wrongdoing in the first place. As such, same should not be considered as mitigation in the instant case.

Therefore, the Referee's recommended sanction of a one year suspension is not supported by existing case law, nor by the Florida Standards for Imposing Lawyer Discipline. As such, the recommended sanction should be rejected by this Court. Based on the totality of the circumstances in this case, the cumulative nature of the misconduct, the multiple offenses, the deliberate and intentional misrepresentations, some of which occurred while Respondent was testifying under oath, and the significant harm resulting from her actions, the appropriate sanction for Respondent's misconduct is disbarment. Respondent's mitigation evidence is simply not sufficient to outweigh the presumption of disbarment established by her misconduct, nor the vast weight of the aggravating factors present in this case.

CONCLUSION

In consideration of this Court's broad discretion as to discipline and based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Court reject the Referee's recommendation that Respondent be suspended for one year and that instead, this Court impose the sanction of disbarment.

Jennifer R. Falcone Moore, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399, using the E-Filing Portal; and that a copy has been furnished by United States Mail to J. David Bogenschutz, Attorney for Respondent, 600 South Andrews Avenue, Suite 500, Ft. Lauderdale, Florida 33301 (and emailed at jdblaw0515@aol.com), and by U.S. Mail to Jack A. Goldberger, Attorney for Respondent, 250 Australian Avenue South, Sutie 1400, West Palm Beach, Florida 33401 (and emailed at jgoldberger@agwpa.com), and emailed to Kenneth L. Marvin, Staff Counsel, The Florida Bar, at his designated E-Mail address of kmarvin@flabar.org on this 8th day of May, 2013.

Jennifer R. Falcone Moore, Bar Counsel
The Florida Bar
Miami Branch Office
444 Brickell Avenue
Rivergate Plaza, Suite M-100
Miami, Florida 33131-2404
(305) 377-4445
Florida Bar No. 624284
jmoore@flabar.org

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been E-filed with The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, using the E-Filing Portal. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

Jennifer R. Falcone Moore, Bar Counsel