IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. : SC11-2311

v.

TFB File No.: 2010-71,157 (11G)

ANA I. GARDINER,

Respondent.
_____/

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

The undersigned was appointed as a referee for the Supreme Court of Florida to conduct the disciplinary proceedings herein according to Rule 3-7.6 of the Rules Regulating the Florida Bar. Final hearing was held November 27 and November 28, 2012 at which time testimony and documentary evidence was received. All items properly filed including pleadings, recorded testimony (if any), exhibits and evidence and the Report of Referee constitutes the record in this case and are forwarded to the Supreme Court of Florida.

The following attorneys appeared as counsel for the parties:

On Behalf of The Florida Bar –
JENNIFER R. FALCONE MOORE
The Florida Bar
444 Brickell Avene, Suite M-1
Miami, Florida 33131

On Behalf of the Respondent, ANA I. GARDINER –
J. DAVID BOGENSCHUTZ, ESQUIRE
600 S. Andrews Ave., Suite 500
Ft. Lauderdale, FL 33301

JACK A. GOLDBERG, ESQUIRE
250 Australian Ave. S., Suite 1400
West Palm Beach, FL 33401.

On December 7, 2011, The Florida Bar served its Complaint in these proceedings. An initial Motion to Dismiss was denied and the Respondent filed her Answer. At the time of the misconduct alleged in the Complaint, the Respondent resided in and served as a Circuit Judge in the Seventeenth Judicial Circuit, in and for Broward County. The circumstances of the current matter arise out of a similar set of facts which resulted in the filing of a Florida Judicial Qualifications Inquiry against the Respondent, which ultimately resulted in her resignation from the bench.

II. FINDINGS OF FACT

A. Jurisdictional Statement: The subject matter of the current proceeding occurred while the Respondent, ANA I. GARDINER, was a Judge of the Seventeenth Judicial Circuit and under the disciplinary jurisdiction of the Judicial Qualifications Commission of the State of Florida. The Respondent is, and at all times material hereto, has been a member of The Florida Bar and subject to the

jurisdiction and disciplinary rules of the Supreme Court of Florida. Nevertheless, since the subject matter of this proceeding occurred while sitting as a Circuit Judge, the Respondent claims exclusive jurisdiction remains with the JQC pursuant to Article V, Section XII of the Florida Constitution. While the acts occurred while the Respondent was a sitting judge, and she has subsequently resigned her position, I find the misconduct at issue involves dishonesty and deceit. Thus, this matter is under purview of the Florida Bar and Respondent is properly subject to discipline by the Florida Bar. *The Florida Bar v. Graham*, 662 So.2d 1242, 1244 (Fla. 1995); *The Florida Bar v. Mogil*, 763 So.2d 303, 311 (Fla. 2000).

B. Findings of Fact: In 2007, the Respondent resided in and served as Circuit Judge in the Seventeenth Judicial Circuit, in and for Broward County, Florida and in all relevant periods was the Administrative Judge in the Criminal Division. She had been serving in her capacity as a Circuit Judge since 1998. The Respondent was the presiding judge in the first degree capital murder case of *State of Florida v. Omar Loureiro*, in which former Assistant State Attorney Howard Scheinberg was the lead prosecutor.

On March 27, 2007, the jury returned a verdict of guilty on the first degree capital murder charge. On May 30, 2007 and May 1, 2007, the penalty phase of the proceedings occurred following which the jury recommended the death

penalty. The Respondent sentenced the Defendant Loureiro to death on August 24, 2007.

Subsequently, and as a result of public disclosure of interactions between the Respondent and ASA Scheinberg, the Supreme Court of Florida relinquished jurisdiction to the trial court to investigate the matter and determine whether a new trial was required. The Broward State Attorney hired a special prosecutor to conduct an investigation and in April in 2009, after both the Respondent and ASA Scheinberg's depositions were taken, the special prosecutor recommended stipulating to a new trial in *State of Florida v. Omar Loureiro.* The Respondent's deposition in that proceeding was the first time that she acknowledged the ongoing significant emotional relationship and the voluminous communications between herself and ASA Scheinberg beginning in the guilt phase of the trial and continuing throughout the death penalty phase of the proceedings and thereafter. A new trial was held at which time the Defendant Loureiro was again convicted, following which a life sentence was imposed.

The circumstances giving rise to the current proceedings began on the evening of March 23, 2007 during the guilt phase of the *Loureiro* capital murder case. That evening, the Respondent and ASA Scheinberg encountered one another at a local restaurant, Timpanos. By all accounts, the meeting at the restaurant was accidental and not planned. Nevertheless, ASA Scheinberg and the Respondent,

along with others, after dinner decided to continue their evening at a local bar, The Blue Martini. ASA Scheinberg and the Respondent did not travel together to The Blue Martini, as Mr. Scheinberg traveled with one Sheila Alu, then a law student who was also present at Timpanos. While traveling to the Blue Martini, Ms. Alu raised with ASA Scheinberg the issue of the possible appearance of impropriety with the lead prosecutor and the Respondent socializing during a first degree murder trial. Upon arriving at the Blue Martini, ASA Scheinberg appeared visibly upset and left shortly after a conversation with Charlie Kaplan, also a judge, and close friend of ASA Scheinberg and one of the members of the group at Timpanos. Nevertheless, while at the Blue Martini, the Respondent attempted to determine what was concerning Mr. Scheinberg to the extent of following him and Judge Kaplan out of the club. She was unsuccessful. Nevertheless, there were several phone calls to and from ASA Scheinberg and the Respondent throughout the course of the weekend and prior to the resumption of the trial on Monday, March 26, 2007.

On March 27, 2007, following the jury's verdict of guilty in the capital murder trial, ASA Scheinberg had a lengthy telephone conversation with the Respondent during which he informed the Respondent about his conversation with Ms. Alu and her raising the issue of the appearance of impropriety. The Respondent assured Mr. Scheinberg that there was nothing to be concerned about.

The Respondent made a conscious decision not to disclose or make known her social contact with ASA Scheinberg, her phone calls with Mr. Scheinberg or Ms. Alu's concerns to the Defendant's counsel in the capital murder trial over which she was presiding. This failure to disclose to defense counsel in the murder case continued throughout the penalty phase of the proceeding and the actual sentencing to death of the Defendant.

After this lengthy phone conversation on March 27, 2007, ASA Scheinberg and the Respondent commenced a significant personal and emotional relationship where they assisted each other in dealing with traumatic life events such as recent marital difficulties, death of family members, etc. Between March 23, 2007 and August 24, 2007, the date that the Respondent imposed the death penalty, the Respondent and ASA Scheinberg communicated through over 949 cell phone calls and 471 text messages. There were over 12 phone and text communications between the Respondent and the prosecutor on the date of the death penalty phase proceedings. On the day before, the day of, and the day following Respondent's actual imposition of the death penalty on the Defendant, the records demonstrate that the Respondent and prosecutor communicated by phone and text 44 times. Regardless of her motive for choosing not to disclose her social interactions, communications and the significant emotional relationship, the Respondent's decision was clearly a deliberate and knowing act. This is independent of whether

or not she believed the circumstances would or would not result in her disqualification and regardless of whether there were any discussion or communications with ASA Scheinberg concerning the pending trial. Neither Respondent nor ASA Scheinberg revealed the significant nature of their relationship nor their personal phone calls and text messages or contacts to the attorneys representing the Defendant in the *State of Florida v. Omar Loureiro* at any time, although the Respondent was under a clear duty to make such a disclosure.

Shortly after the Defendant Loureiro filed a direct appeal in the Supreme Court of Florida of his conviction, various media began to report allegations of social interactions at Timpano's and the Blue Martini between ASA Scheinberg and the Respondent during the pendency of the murder trial. As a result, on November 13, 2008, the Judicial Qualifications Commission convened a panel to investigate to determine whether or not the Respondent engaged in any misconduct. Throughout these proceedings, the Respondent failed to disclose the honest and true nature of her relationship with ASA Scheinberg. 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.

During the entire course of the JQC proceedings, the Respondent omitted and failed to advise the JQC that she had a significant emotional relationship with ASA Scheinberg and never once disclosed that she engaged in over 1,400 text and phone communications with the prosecutor during the pendency of the murder trial. The Respondent also failed to disclose or advise the JQC that the relationship with the prosecutor had intensified between March 2008 and August 2008. During that period, the Respondent and ASA Scheinberg engaged in over 3,000 phone and text messages. I find that the Respondent's portrayal of her relationship as no more than professional was a deliberate act of dishonesty and deceitfulness.

For example, during the hearing before the JQC, the Respondent was asked:

> So from the standpoint of us trying to boil this down to what you think you may have done wrong, that was simply it, just simply being in the presence of him [Scheinberg], having a drink and having people who are familiar with the court system and knowing who you are observe that, that that's what was wrong?

The Respondent agreed but failed to advise the JQC of the significant personal and emotional relationship, and/or the extensive cell phone and text message contact, that developed subsequent to the evening at Timpanos and The Blue Martini and

continued throughout the sentencing phase of the *Loureiro* capital murder trial and thereafter.

Likewise, when specifically asked to clarify her relationship with ASA Scheinberg, she omitted the significant personal and emotional relationship that had developed or the extensive phone and text message communications. Again, she gave the dishonest impression of a relationship that was merely professional.

As a result of Respondent's failure to provide the JQC panel with an honest portrayal of her relationship during the trial with ASA Scheinberg, she was given an admonishment called a "fireside chat" based upon the appearance of impropriety from her merely socializing one evening with the prosecutor in a death penalty case. It was only after she was deposed in April of 2009 that she acknowledged the true ongoing relationship and telephone contacts between herself and ASA Scheinberg throughout the death penalty proceedings.

C. Conclusion of Law: I find by clear and convincing evidence that the Respondent was dishonest and deceitful in failing to disclose her social encounters and her significant emotional and personal relationship and extensive communications with the prosecutor in a pending death penalty case over which she presided and in which she recommended the imposition of the death penalty, all in violation of Rule 4-8.4(c). Further, I find through clear and convincing evidence that the Respondent's failure to accurate portray the nature and extent of

her relationship with ASA Scheinberg to the JQC was dishonest and deceitful and a violation of Rule 4-8.4(c). In addition, I find by clear and convincing evidence that the Respondent's failure to disclose the nature and extent of her relationship with ASA Scheinberg prejudiced the administration of justice in a pending death penalty case in violation of Rule 4-8.4(d) of the Rules Regulating the Florida Bar. Furthermore, I find by clear and convincing evidence that the Respondent's failure to provide a truthful and accurate account of her relationship with ASA Scheinberg to the JQC inquiry also prejudiced the administration of justice and, therefore, is a violation of Rule 4-8.4(d).

The Respondent has conceded that she was aware of her obligations in regard to disclosure of even the appearance of impropriety in her social and professional associations. Her social interactions with ASA Scheinberg, both at Timpanos and the Blue Martini, during the pendency of the trial created the appearance of impropriety. A judge should disclose information the parties or attorneys might consider relevant to the question of disqualification, even if the judge believes there to be no basis for disqualification. *In Re. Frank*, 753 So.2d 1228, 1239 (Fla. 2000). Moreover, the Respondent was placed on actual notice of the appearance of impropriety when she was advised by Mr. Scheinberg about the accusations of Ms. Alu. Nevertheless, the Respondent chose to disregard this

notice. Therefore, her failure to disclose the events that occurred was not only misleading but dishonest.

Furthermore, the Respondent engaged in further dishonest and misleading conduct in failing to disclose the significant personal and emotional relationship that developed between herself and ASA Scheinberg during the pendency of the death penalty case. *See e.g., The Florida Bar v. Berthiaume*, 78 So.2d 503, 509 (Fla. 2001)[omission and concealing of relevant documents is deceptive by its very nature]. *The Florida Bar v. Herman*, 8 So.3d 1100, 1106 (Fla. 2009)[attorney's failure to inform his client that his business activities were in direct competition with client's activities dishonest and deceitful]. *The Florida Bar v. Adorno*, 60 So.3d 1016, 1029 (Fla. 2011)[failure to inform members of the putative class that he had negotiated a settlement only on behalf of the named Plaintiffs and hid that through a non-disclosure agreement was dishonest]. The Respondent's explanation that she did not recognize, at the time, that her social encounter and subsequent significant emotional relationship and numerous communications with ASA Scheinberg should be disclosed is simply not credible.

In order to show an intent to act with dishonestly, misrepresentation, deceit or fraud, it must only be shown that the conduct itself was deliberate and knowing. *The Florida Bar v. Fredericks*, 731 So.2d 1249, 1252 (Fla. 1999); *The Florida Bar v. Brown*, 905 So.2d 76, 81 (Fla. 2005). Motive should not be confused with

intent. The Respondent's conduct was knowing and deliberate. The motive behind the Respondent's actions is not determinative of the issue, the question is whether the Respondent deliberately or knowingly engaged in the conduct. *Id*.

I also reject the Respondent's explanation for her answers to the Judicial Qualifications Commission. Furthermore, the fact that the Respondent did not make an affirmative misrepresentation and her answers may have been technically correct does not absolve her of responsibility for misleading the JQC as to the nature of her relationship with Mr. Scheinberg. *See, The Florida Bar v. Forrester*, 818 So.2d 477, 483 (Fla. 2002). A misleading answer to a question, even technically correct, can be an intentional misrepresentation. *See, The Florida Bar v. Berthiaume*, 78 So.3d 503, 509 (Fla. 2001). The failure to disclose information can be a misrepresentation by omission. *See e.g., The Florida Bar v. Webster*, 647 So.2d 816, 817 (Fla. 1994).

I have not overlooked the Report of Referee submitted in the case of the *The Florida Bar v. Charles Mays*, Supreme Court Case No. SC01-1011. *Mays* is both legally and factually inapposite to the case at issue. To the extent the Respondent cites that case for the proposition that standing silent and failing to disclose material facts when disclosure is necessary is not sufficient to sustain a violation of Rule 4-8.4(c), it is clearly not consistent with the long held view of the Florida

Supreme Court. Furthermore, *Mays* must be limited to the specific and unique facts of that case.

The Respondent's failure to disclose her social encounter with the prosecutor, the significant emotional relationship that developed during the pendency of the trial, and her extensive telephone and text message communications tainted the entire legal process. The Respondent's argument that there were no discussions about the trial, only an appearance of impropriety and no reversible error in the trial misses the point. Due process embodies the fundamental concept of fairness, and "especially in a death penalty case, [the proceedings] must both be and appear to be fundamentally fair. *Steinhorst v. State*, 636 So.2d 498, 501 (Fla. 1994). [Emphasis supplied.] The public's perception of fairness and impartiality of the judiciary is the bedrock of our legal system.

Nevertheless, even if there was not reversible error in the trial itself, the Respondent's actions caused the Supreme Court to remand the matter to the trial court to conduct an investigation, and the State was required to hire a special prosecutor. That special prosecutor concluded that the Respondent's actions were such that the imposition of the death penalty could not possibly stand when there was such a taint on the proceeding. Importantly as well, the conduct itself need not have an actual affect on the specific proceeding. *See e.g., The Florida Bar v. Machin*, 635 So.2d 938, 940 (Fla. 1994).

Furthermore, the Respondent's failure to provide a truthful and accurate account of her relationship with ASA Scheinberg to the JQC also constitutes conduct inherently prejudicial to the administration of justice. *See, The Florida Bar v. Winters*, ___ So.3d ___, 2012 WL 3853528 (Fla.), 37 Fla. L. Weekly 5545, pg. 4 [conduct that is dishonest is inherently prejudicial to the administration of justice].

III. RECOMMENDATION AS TO GUILT

Based upon the foregoing, I recommend that the 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.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS:

I considered the following Standards prior to recommending discipline:

Standard 5.1 Failure to Maintain Personal Integrity

> Absent aggravating or mitigating circumstances, and upon application of the factors as set out in Standard 3.0, the following sanctions are generally appropriate . . .
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> **5.11** Disbarment is appropriate when: . . .

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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.

Standard 5.2 Failure to Maintain Public Trust

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate . . .

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5.22 Suspension is appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

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Standard 6.1 False Statements, Fraud and Misrepresentation

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 conduct that is prejudicial to the administration of justice or that involve dishonesty, fraud, deceit, or misrepresentation to a court:

6.11 Disbarment is appropriate when a lawyer:

a. with the intent to deceive the court, knowingly makes a false statement or submits a false document; or

b. 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.

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Standard 6.2 Abuse of the Legal Process

> 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 . . . failure to obey any obligation under the rules of a tribunal . . .
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> ***
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> **6.22** Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

Standard 7.0 Violations of Other Duties Owed as a Professional

> 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 false or misleading communication . . .
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> ***
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> **7.2** Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Pursuant to Standard 3.0, I also considered the following factors in recommending discipline:

(a) the duty violated;

(b) the Respondent's mental state;

(c) the potential or actual injury caused by the Respondent's misconduct; and

(d) the existence of aggravating or mitigating circumstances.

V. CASE LAW:

I considered the following case law prior to my recommending discipline:

The Florida Bar v. Orta, 689 So.2d 270 (Fla. 1997); *The Florida Bar v. Varner*, 992 So.2d 224 (Fla. 2008), together with cases cited in Section VII of this Report.

VI. RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend the Respondent be found guilty of misconduct justifying disciplinary measures and that she be disciplined by the imposition of:

a) one year suspension; and

b) payment of the Florida Bar's costs in these proceedings.

I recognize, as The Florida Bar argues, that the violations found would generally, and absent mitigating factors, justify a more substantial discipline. However, the mitigating factors set forth under Section VII of this Report justify my recommendation of a lesser discipline. The Respondent has already lost her judicial position, suffered public humiliation, and shows genuine remorse. The actions which are the subject matter of the current proceedings appear to be an

aberration at the time of emotional and personal turmoil and should not end an otherwise distinguished career.

VII. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

Prior to recommending discipline pursuant to Rule 3-7.6(k)(l), I considered the following:

A. Personal History of Respondent:

Age: 50
Date admitted to the Florida Bar: January 25, 1988
Prior Discipline: None

B. Factors Considered in Aggravation:

Pursuant to Standard 9.22, I considered in aggravation that the Respondent's actions constituted multiple offenses and the Respondent's substantial experience both in the practice of law and as a judge.

C. Factors Considered in Mitigation:

Pursuant to Standard 9.32, I considered the following factors in mitigation:

(a) Absence of prior disciplinary record. An attorney's lack of prior disciplinary history may be considered as a mitigating factor in any disciplinary action. *The Florida Bar v. Shankman*, 41 So.3d 166, 174 (Fla. 2010). The Respondent has a 24 year unblemished record without any complaint, except for the circumstances surrounding the current complaint.

(b) Personal/Emotional Problems. The testimony indicated the Respondent displayed significant personal and emotional problems. *See, The Florida Bar v. Shoureas*, 913 So.2d 554, 559-560 (Fla. 2005).

(c) Full Disclosure Disciplinary Board/Cooperation. The Respondent cooperated and participated in these proceedings testifying freely and openly about her involvement and the sadness and remorse that she felt as a result of her actions. *See, The Florida Bar v. Tauler*, 775 So.2d 944 (Fla. 2000).

(d) Physical/Mental Disability or Impairment. The testimony indicated that the Respondent at the time of the circumstances involved in this case suffered from clinical depression. *See, The Florida Bar v. Broom*, 932 So.2d 1036, 1043 (Fla. 2006)[clinical depression might mitigate what would otherwise be a disbarment].

(e) Imposition of Other Penalties or Sanctions. The Respondent has suffered the loss of her judgeship and the exclusion of her ability to run or to be appointed as a judicial officer or to serve as a senior judge in the future. *See, the Florida Bar v. Graham*, 662 So.2d 1242 (Fla. 1995).

(f) Remorse. The Plaintiff has demonstrated remorse in her testimony and courtroom admissions.

(g) Character: Other than the circumstances involved in this case, the testimony of good character and reputation was overwhelming. This testimony

was not rebutted by The Florida Bar. The Respondent was recognized by members of the Bar and also by her judicial colleagues as an excellent, fair and hardworking judge with an impeccable reputation for honesty and integrity. I also note that during her service on the bench the Respondent has served in many leadership roles within the Seventeenth Judicial Circuit as well as the Conference of Circuit Judges. The Respondent has also volunteered her time unpaid to a number of worthwhile community and charitable programs. She has mentored young law students, has been a leader in Hispanic Unity, has been honored as a Woman of Distinction in 2011, served as President of the Hispanic Bar, served six years on the North Broward Hospital Board Commissioners and has served in various other service and charitable organizations. She has also served as a Board Member of the Legal Aid Services of Broward County and on Board of Advisors of St. Thomas Law School. As summarized by counsel for the Respondent, "the litany of community service is, truly, extraordinary and compels consideration". [Emphasis supplied.]

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the Florida Bar is the prevailing successful party in this matter and awarded their necessary taxable costs. If the parties cannot agree as to the amount,

they shall submit a statement of costs and schedule hearing upon same.

Dated this 8th day of January, 2013.

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Hon. DAVID F. CROW, Referee
Circuit Court Judge
Fifteenth Judicial Circuit
Palm Beach County Courthouse
205 North Dixie Highway, Room 9.1215
West Palm Beach, Florida 33401

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Report of Referee was mailed to the **Honorable Thomas D. Hall**, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399 (also provided by e-mail to e-file@flcourts.org); and a true and correct copy was mailed to **J. David Bogenschutz**, Attorney for Respondent, 600 S. Andrews Ave., Suite 500, Ft. Lauderdale, Florida 33301 (and by e-mail to kkllaw@bdkpa.com); and to **Jack A. Goldberger**, Attorney for Respondent, 250 Australian Avenue South, Suite 1400, West Palm Beach, Florida 33401 (and by e-mail to jgoldberger@agwpa.com); and to **Jennifer R. Falcone Moore**, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131 (and by e-mail to jmoore@flabar.org); and **Kenneth Lawrence Marvin,** Staff Counsel, The Florida

Bar, 651 East Jefferson Street, Tallahassee, FL 32399, on this 8th day of January, 2013.

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Hon. DAVID F. CROW, Referee
Circuit Court Judge