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IN THE SUPREME COURT OF FLORIDA

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| THE FLORIDA BAR,<br><br>Complainant,<br><br>v.<br><br>ZANA HOLLEY DUPEE,<br><br>Respondent. | Supreme Court Case No. SC13-921<br>TFB No. 2012-00,429 (08B) |

# APPELLANT/RESPONDENT'S INITIAL BRIEF

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## SYMBOLS AND REFERENCES

The Florida Bar, Appellee, will be referred to herein as "The Bar" or "Complainant." Appellant, Zana Holley Dupee will be referred to as "Respondent" or "Mrs. Dupee." The symbol "RR" will be used to designate the Report of Referee. The symbol "Tr" will be used to designate the transcript of the Final Hearing held before the Referee. The symbol "EXH" will be used to designate the Exhibit introduced into evidence at the Final Hearing herein.

## STATEMENT REGARDING ORAL ARGUMENT

Respondent, Zana Holley Dupee, respectfully suggests that, because the facts in this case are lengthy and confusing, the decisional process would be significantly aided by oral argument.

## STATEMENT OF THE CASE AND THE FACTS

On June 6, 2013, Complainant, The Florida Bar, filed a Complaint against Respondent, Zana Holley Dupee, alleging misconduct while representing Miriam Steinberg in her dissolution of marriage: Steinberg v. Steinberg, Case No. 01 2010 DR 4094, in the Eighth Judicial Circuit in and for Alachua County, Florida.

In its Complaint, The Bar alleged the following violations: Misconduct and Minor Misconduct, R. Regulating Fla. Bar 3-4.3; False Evidence; Duty to Disclose, R. Regulating Fla. Bar 4-3.3 (a); Criminal or Fraudulent Conduct, R. Regulating Fla. Bar 4-3.3 (b); Fairness to Opposing Party and Counsel, R. Regulating Fla. Bar 4-3.4 (a)-(d); Truthfulness in Statements to Others, R. Regulating Fla. Bar 4-4.1; Violate or Attempt to Violate a Rule, R. Regulating Fla. Bar 4-8.4 (a); Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, R. Regulating Fla. Bar 4-8.4(c); Trust Accounting, R. Regulating Fla. Bar 5-1.1. The Bar sought a 91-day or more suspension. Respondent requested diversion or a Public Reprimand. The Referee recommended a finding of guilt and recommended a 90-day suspension and 2 years of Probation and Ethics School. The Referee found no aggravating factors. However, the Referee found two mitigating factors of no prior discipline and a fine reputation in the legal community. On December 27, 2013, the Referee filed the Report of Referee. The Respondent filed a Motion for Reconsideration/Clarification and or

Rehearing on December 26, 2013 that the Referee denied. On January 30, 2013, The Respondent timely filed a Notice of Intent to Seek Review of the Report of Referee. The Bar filed a Cross-Petition for Review on February 3, 2014, seeking a one year suspension and attendance at Ethics School.

Mr. Steinberg, the former husband, alleged that Mrs. Dupee conspired with Mrs. Steinberg to conceal marital assets and failed to properly disclose all assets in the divorce. The Final Judgment of Dissolution of Marriage ("Final Judgment") shows that all assets controlled by Mrs. Steinberg were included in the equitable distribution of their multi-million dollar marital estate, which included $1,103,106.00 of cash and liquid assets. Comp. EXH 17, 4-6. The First District Court of Appeal per curiam affirmed the equitable distribution when Mr. Steinberg appealed. Tr158:14-17; Tr230:13-20.

Mrs. Steinberg's marital troubles began in 2000. She discovered that Mr. Steinberg had hidden multiple extramarital affairs. Many involved the family business's employees. Tr219-20. To keep her from divorcing him, Mr. Steinberg signed over $100,000 in funds to Mrs. Steinberg. Tr99:7-15. Mr. Steinberg also agreed that the business begin paying Mrs. Steinberg a salary. Tr118:16-17; Comp. EXH 4, 1. Mrs. Steinberg's mother gave her $63,400 in bonds. Tr219:2-5; Comp. EXH 16, 7. Mrs. Steinberg put all of these funds into her personal account, along with interest earned on CDs from 2000 to 2010. Tr221-222, Comp. EXH 16, 7.

The account balance grew to around $480,000 by 2010. Tr205:21-25. Mrs. Steinberg shared the account data with the couple's joint CPA who reported the interest on tax returns. Tr55:15. Mrs. Steinberg knew Mr. Steinberg was aware she and he shared the same accountant. Tr108:18-21. Mrs. Steinberg knew that her financial documents, including tax returns, were kept in a shared office to which Mr. Steinberg had "complete and unfettered" access. Tr220:14-19; 109:15-17.

Mrs. Steinberg obtained a check from Campus USA Credit Union ("Campus USA") for $482,980.46 payable to "Parenting Education Charitable Trust" ("PECT"). Comp. EXH 12. The Bar focused primarily on these funds in the Final Hearing, alleging that Mrs. Dupee conspired with Mrs. Steinberg to conceal these assets from her husband. Tr18: 11-12.

In December, 2010, Mrs. Steinberg filed a notice that she had produced documents responsive to Husband's Request to Produce. Comp. EXH 6. In the notice under "Banking Information," she mentioned records from Campus USA. Comp. EXH 6, ¶ 6. This put the Court and Mr. Steinberg on notice she had Campus USA accounts. She knew Mr. Steinberg could learn the account's contents and history. He could consult the accountant, check the tax returns in their office, or subpoena records from the accountant or credit union.

Mrs. Steinberg did not know, until she consulted with Mrs. Dupee, that this account was a marital asset and would be equitably distributed. Tr218: 2-11.

Mrs. Steinberg was distraught to think that half would be given to her husband. Tr 151:4-5. She had an emotional interest in this particular corpus of money because of its origins – her mother's bonds and Mr. Steinberg's $100,000 payment. Tr 150:20-151:12; 218-219. She decided to give it away rather than let Mr. Steinberg have the pleasure of getting half of this particular corpus. Tr119:11-14; 151: 6-12.

Mrs. Dupee recommended against this, advising that it would "obviously stir up a whole bunch of hatred and difficulties with [Mr. Steinberg]." Tr151:17-18. Mrs. Dupee also advised her to disclose the transaction and that she "was still gonna be on the hook" for Mr. Steinberg's half. Tr119-20; 150:16-23. Mrs. Steinberg indicated she understood, but nevertheless, she wanted to create a charitable trust to donate this corpus. Tr151:10-12. When deciding where to donate the money, Mrs. Steinberg remembered a possible charity she had discussed with Mrs. Dupee six months earlier. Tr140:16-20.

Six months earlier, Mrs. Dupee met Mrs. Steinberg when Bogin, Munns & Munns ("Bogin Munns"), assigned Mrs. Dupee to draft Mrs. Steinberg's simple will. Tr 203:1. Mrs. Steinberg requested Mrs. Dupee brainstorm charities to find an alternate beneficiary in case her primary beneficiary, her sister, predeceased her. Tr215:19-22. Mrs. Dupee complied, going through every charity imaginable. Tr 121:3, 6-10. Mrs. Steinberg preferred a local charity. Tr 121:6. Mrs. Dupee recalled Kim Foli, a local long-time parenting educator, had considered doing non-

profit work to help "low income families as far as their parent training and with supplies and educational materials and follow-up." Tr206:11-13; Comp. EXH 26. Previously, Mrs. Foli ran an international parenting network which had a non-profit arm. Mrs. Foli sells parenting books via the Family Team Institute, LLC, a for-profit company. Comp. EXH 26. Although interested in this possible charity, Mrs. Steinberg chose Gainesville Hillel, Inc. as her alternate beneficiary. Tr 141:16-18.

When considering where to donate the Campus USA funds, Mrs. Steinberg remembered Mrs. Foli's non-profit idea and wanted to fund it. Mrs. Dupee made clear she would not be creating the charitable trust for Mrs. Steinberg. Mrs. Steinberg had to use other counsel. Tr143:21-25; 144:1-2. Mrs. Dupee suggested trust attorneys in town, including attorney Jack Bovay. Tr216:4-6 &12-16. Mrs. Dupee left that meeting believing Mrs. Steinberg would create the trust using another attorney. Tr144:1-6; 216:12-16.

Days later, Mrs. Steinberg came to Bogin Munns and told Jan Boyd, a paralegal for the firm, she had a check for Mrs. Dupee. It was the PECT check. Mrs. Dupee refused to take the actual check. Tr144-145; 195-96; 207:17-24. Instead, she directed Mrs. Boyd "copy [it] for the disclosures and give it back to her." Tr145:3-8. Mrs. Dupee knew Mrs. Steinberg needed the check to create the charitable trust. Tr144:1-6; 216:12-16. At the divorce trial, Mrs. Steinberg

testified she retained the check. Comp. EXH 21, 85:5-6. Then, at the grievance hearing, she testified she thought she had left the check with Mrs. Dupee. Comp. EXH 29, 212. She later admitted during the Final Hearing before the Referee she had been confused during the grievance committee testimony. Tr210:8-14. Her later testimony was unequivocal and consistent with Mrs. Dupee's and Mrs. Boyd's testimony that the check was not left with Mrs. Dupee. Tr220: 4-23. In fact, the Referee found Mrs. Dupee "did not have possession of the actual check." RR7.

Mrs. Boyd verified either she or the receptionist, not Mrs. Dupee, copied the check and put it in the box assigned to the case. Tr195:17-18. There is no evidence that Mrs. Dupee had any contact with the original check. Nor is there any evidence Mrs. Dupee knew about the Wife's failure to set up the trust prior to August, 2011.

On July 13, 2011, the Court issued a Pre-Trial Order, which gave deadlines for updating Financial Affidavits and completing discovery. Comp. EXH 21, 15:3-4. A few weeks later, Mrs. Dupee met with Mrs. Steinberg to discuss that order. Updating the financial affidavit would take a while. They had to order appraisals of 31 pieces of real estate, update bank account balances, and catalogue over 900 items of personal property. Comp. EXH 16. Mrs. Dupee asked Mrs. Steinberg for copies of the paperwork setting up the charitable trust. It was at this time Mrs. Steinberg first admitted she had never set up the trust. Tr190:9-12.

Mrs. Dupee advised her to set up the charitable trust immediately or to

deposit the funds in a disclosed account and update her Financial Affidavit. Mrs. Steinberg chose the latter option. Tr166:4-8. Mrs. Steinberg deposited the funds in Campus USA on August 10, 2011. Comp. EXH 21, 98. When the funds cleared on August 18, 2011, she transferred them to her previously disclosed account at Alarion Bank. Tr209:12-16. These remedial measures were in mid-August 2011, before Mrs. Steinberg's September 9, 2011, deposition when she told Mr. Silverman about the Campus USA account and PECT funds. Comp. EXH 11. Mr. Silverman inconsistently testified he was not aware of the PECT check until one month after he got copies of discovery documents on September 19, 2011. Tr48:6.

At the September 9, 2011, deposition, when Mrs. Steinberg was asked about the $100,000 that Mr. Steinberg had signed over to her, Mrs. Steinberg disclosed

- the prior Campus USA account, [Comp. EXH 11, 130:12-19; 125:13-18];
- that her salary had been added to it, [Comp. EXH 11,126:10-14];
- the cashier's check she had written, [Comp. EXH 11; Tr129:3-23];
- that she had retained possession of the check but had declined to follow through on the donation, [Tr130:22-24]; and
- that she eventually deposited the check back into the previously disclosed Alarion account. Comp. EXH 11,126: 6-9; Tr128:11-15.

She also explained she would be updating her Financial Affidavit to include the PECT funds. Comp. EXH 11, 127:6; 137:7 & 9. Further, Mrs. Steinberg stated in her deposition she was meeting with her CPA in order to ensure her updated Financial Affidavit would be accurate. Comp. EXH 11, 263:1-5.

After verifying the PECT check was for more than $100,000, she then stated she did not know the amount. Comp. EXH 11, 130:7-11. She disclosed the check had been drawn for the full balance of the Campus USA account. Comp. EXH 11, 130:17-19. Mr. Silverman asked whether it was less than $200,000. She responded, "I don't know." Comp. EXH 11, 130:20-21. When asked at the Final Hearing to explain this testimony, she testified that:

> A: (Mrs. Steinberg) Mr. Silverman spent an inordinate amount of time bullying me. I could not think straight. It was very, very difficult to answer his questions.
>
> Before I could even finish answering one question, he had already started asking me another question. I was distraught, distracted, bullied, at times absolutely humiliated in front of a roomful of people. It was -- I remember thinking he's going to ask me how much the check is and that I honestly could not remember. That's – my brain just shut down just from the bullying.

Tr224:12-22. Even the cold record of the transcript reveals that Mr. Silverman's deposition strategy was to intimidate her and create a distraught state. His strategy was successful. First, he threatened her with filing a motion for contempt and attorney's fees. Comp. EXH 11, 6-7. Then, he abruptly asked her 2 questions about whether she had ever had sexual contact with a certain man she had met after the separation from her husband. Comp. EXH 11, 7-8.

Next, he harangued her 21 times about whether she understood the penalties for perjury for documents she signed under oath. Comp. EXH 11, 9-17. Then, he switched to a series of intrusive questions about her sexual activities with her new

boyfriend – asking her whether she had vaginal, oral, or anal intercourse with him. Comp. EXH 11, 18-19. Incredibly, Mr. Silverman continued by asking about the Husband's requests for anal sex which she refused to participate in. Comp. EXH 11, 19. Mr. Silverman verified the Husband did not "hold you down and make you do it." Comp. EXH 11, 19: 24. Mr. Silverman then asked emotional questions about Mr. Steinberg raping her on the day that he admitted his serial infidelity. Comp. EXH 11, 20-21. Then, Mr. Silverman abruptly, and somewhat bizarrely, changed questioning: "Does your son have a dog?" Comp. EXH 11, 23: 6.

The effect of Mr. Silverman's deposition style was shown by her responses to these questions that could not have meant anything important to the case. She was unable to remember whether her son had a dog. Then, she was unable to understand the question, "What type of dog?" Comp. EXH 11, 23:10-12.

Mrs. Dupee objected several times. Mr. Silverman simply plowed on. At one point, Mrs. Dupee objected, "How is this relevant?" to Mr. Silverman's question about types of sexual intercourse Mrs. Steinberg had engaged in with her new boyfriend. Comp. EXH 11, 18. Mr. Silverman responded, "Objection is noted for the record," and demanded his answer. Comp. EXH 11, 18:10-17.

Mr. Silverman went through the financial affidavit and accused Mrs. Steinberg of perjury for mistakes. Mr. Silverman asked her if she understood she was subject to perjury for thinking the amount the family company spent on her

health insurance, which she would pay after the dissolution, was properly denoted as an expense on the financial affidavit. Comp. EXH 11, 65-72. Then, he mentioned the penalty for perjury five more times. Comp. EXH 11, 77-82.

Then, again changing topics abruptly for emotional effect, he changed the questioning from the financial affidavit to this: "When was the last time you and Mr. Steinberg had sex?" Comp. EXH 11, 83. Mr. Silverman made Mrs. Steinberg recount the night Mr. Steinberg revealed his affairs and forced himself upon her. Comp. EXH 11, 83-88. He levied the very accusations a former prosecutor like Mr. Silverman would eviscerate a defense counsel for asking a rape victim: "What were you wearing?" Comp. EXH 11, 87:13. "Did you tell him to stop more than once?" Comp. EXH 11, 86:10. "Did you attempt to fight him off?" Comp. EXH 11, 86:16. "Did you go to a domestic violence shelter?" Comp. EXH 11, 88:13.

Mr. Silverman turned the deposition to Mrs. Steinberg's complaints that Mr. Steinberg had stalked her, intimidated the security company and employees, and assaulted her at the office. Comp. EXH 11, 93-114. Then, after asking emotional questions about Mr. Steinberg's stalking episodes, Mr. Silverman again changed topic. He asked about the $100,000 Mr. Steinberg gave Mrs. Steinberg to keep her from divorcing him because of his repeated affairs. Comp. EXH 11, 125.

As discussed above, Mrs. Steinberg disclosed the account where the PECT money was currently, where it started, and what happened to it in between. Comp.

EXH 11, 128-130. However, she declined to state the exact amount in the Alarion account – an account which she had disclosed on her December 2010 Financial Affidavit and whose records were known to be easily learned. Comp. EXH 4, 8.

During a break at the deposition, Mrs. Dupee discussed Mrs. Steinberg's evasive testimony with Mr. Silverman. She advised him the bank records were among the documents produced in response to his discovery requests 9 months earlier. Tr130:10-16. She explained Bogin Munns had the documents. They had a lien on the file for Mrs. Steinberg's unpaid legal fees. Mrs. Dupee advised Mr. Silverman to get the documents from Bogin Munns. Tr 130:14. This was on September 9th.

Three days later, on Sept. 12, 2011, the parties mediated. Comp EXH 21, 91:22-24. Mr. Silverman failed to spend the $400 in copy costs to have Bogin Munns copy the documents. He failed to give Bogin Munns Managing Partner Mr. Towers a time certain when staff would be available at Mr. Silverman's office for copying documents. Mr. Silverman went to mediation without the copies, despite the suspicions raised during deposition three days earlier and despite Mrs. Dupee's assurances the documents were available.

The documents had been compiled 9 months earlier, in December 2010, in response to Husband's Requests to Produce. Tr 125. Before the documents were compiled, Mrs. Dupee had given Mrs. Steinberg a list of items to provide in

mandatory disclosure in the divorce. Comp. EXH 21, 109:22-110:11. Mrs. Dupee advised Mrs. Steinberg to obtain the financial documents and turn them over to the Bogin Munns firm so they could be produced to Attorney Silverman.

In December 2010, Bogin Munns paralegal Mrs. Boyd met with Mrs. Steinberg to obtain discovery. Tr23:19-22; 183:5-15; 184:9-12. Mrs. Steinberg provided her with copies of her financial documents. Tr194:16-18. Mrs. Boyd and the receptionist added them to the box. Tr194:1-195:3. The documents in the box included a copy of the PECT check. Tr125:7-8.

In December, 2010, Mrs. Steinberg provided a Financial Affidavit draft. Tr152. It listed current assets and liabilities but did not include the PECT funds. Comp. EXH 4. The financial affidavit is a standard family law document with 2 sections: (1) current income & expenses, and (2) current assets & liabilities. It has no section for past assets that were dissipated; those must be disclosed separately.

Given that Mrs. Steinberg left Mrs. Dupee's office months earlier with the stated goal of creating a charitable trust with lawyers other than Mrs. Dupee,[Tr140; 216], Mrs. Dupee erroneously concluded Mrs. Steinberg had set up the charitable trust. In fact, Mrs. Steinberg had not created the charitable trust. Mrs. Steinberg signed the Financial Affidavit under oath that it was an accurate statement of her current financial assets and liabilities. Comp. EXH 21, 90: 9-14.

Mrs. Dupee believed the PECT funds had been disbursed to a third party.

Tr152:19-22. She thought they should be disclosed in response to requests to produce past bank accounts. Thus, she referenced the Campus USA accounts in the court-filed notice in response to the Requests to Produce. Comp. EXH 6, ¶ 6.

The notice stated that "the following disclosures and documents as set out below are available for inspection and copying at the office of the undersigned." Comp. EXH 6, ¶ 1. When the notice was filed, Mrs. Dupee observed that the copy of the PECT check and 2010 Campus USA account statements were included in the box. Tr152:23-153:2. Mrs. Boyd also verified all the documents Mrs. Steinberg produced were in the box. Tr195:16-196:4. Mrs. Boyd admitted the response to Paragraph 6 had typographical errors and was incomplete. Tr188-189.

Mrs. Steinberg signed her Interrogatory Answers under oath verifying their accuracy. Comp. EXH 4. Mrs. Dupee signed the Financial Affidavit, the Interrogatory Answers, and the Requests to Produce response, so they could be filed with the court. No evidence on the record shows Mrs. Dupee believed that that the Financial Affidavit was inaccurate when it was filed. In fact, the record shows Mrs. Dupee believed it was accurate when it was filed. Tr164: 5-13.

Mr. Silverman failed to inspect or copy the discovery for 9 months. Bogin Munns "had the documents and we were willing to produce them." Tr192-194. Mrs. Boyd, a 40-year paralegal, [Tr181:23], described how Mrs. Dupee was caught between Mr. Silverman and Mr. Towers:

A. (Mrs. Boyd) We had the documents and we were willing to produce them and we had several correspondence, e-mails, phone calls going back and forth to let Mr. Silverman know that the documents were ready for him to review, and that he wanted us to deliver the box of documents and sit over at his office while he went through them. And I said, we can't do that but I'll be happy to take the documents to the copying center, have them scanned in, put them on a disk, but you'll have to pay for the cost of the copying, because there was voluminous documents, I'm guessing in excess of a thousand pages or more. And so it's our firm's policy that when we have a large expense like that, that they have to pay for the copies before we will send them out and, you know, have that done. And I said, we'll send it out and have them copied if you want them copied or we'll have them scanned, but whatever the cost is to have them duplicated, you know, he would have to pay for the copies.

So, it went back and forth and back and forth several times, but he wanted somebody to deliver them to his office and sit at the office and let him go through and pick out what he wanted and copy them. Because we weren't gonna drop the box of documents off because those were all our original documents and we had not scanned them in or cataloged them or Bates stamped them, you know, to know what -- everything that's in there, so we weren't just gonna drop the box of documents off and let him go through and copy them.

Q. (by Mr. Ristoff, counsel for Mrs. Dupee) Did Zana ever express her personal desire to you just to go ahead and deliver the documents copied?

A. Yes.

Q. And was there a lawyer in the office or a partner that would not allow that to happen?

A. Yes, the managing partner Mr. Towers.

Q. So, he specifically instructed you not to make the copies without being compensated first?

A. Prepayment, yes.

Q. Okay. Now; when the documents were finally delivered by Zana -- do you know that Zana actually delivered the documents to Mr. Silverman?

A. That might have been after she left [Bogin Munns].

Tr192-194. The Referee did not address this testimony. He failed to mention Mrs. Boyd or her testimony in any way.

Mr. Silverman, on cross-examination, testified he did not recall Bogin Munns asking him to pre-pay. Tr74:20-25. But he reversed himself:

> Q. (by Mr. Ristoff, counsel for Mrs. Dupee) Did she tell her that her firm had some type of a policy that they would not reproduce the documents, that you had to pay for those?
>
> A. (Mr. Silverman) I do recall her mentioning that and – now that you mention it. I do recall my responses to her. They were verbal or e-mail, which I told her, that's fine, you don't have to have your firm copy this stuff. I'll send someone to pick it up, I'll have it copied and scanned the same day and I'll bring it back to you the same day, but again, those efforts were unsuccessful until September of 2011.

Tr. 75. Mr. Silverman subtly distorted Bogin Munns' true concerns about the documents. First, he testified that Mrs. Dupee said they were too voluminous to produce at his office. Tr41:20-21. Then, he noted that once he obtained the copies, he could lift the box with one hand. Tr45:20. In other words, he implied that the physical size concerned Bogin Munns. In reality, it was the copy costs of 1,000+ pages that concerned the firm. Tr194. Also, the firm would not drop off the originals at Mr. Silverman's office because they were the only copies. Tr192.

The Referee fails to acknowledge the inconsistencies in Mr. Silverman's testimony. The Referee found this conclusion so important he underlined it: "contrary to earlier representations by Respondent, the box of documents was not so voluminous as to require the production of documents at her office, rather than Mr. Silverman's office." RR12. This conclusion –that the problem was physical size rather than expense – is contradicted by Mrs. Boyd's testimony, yet the

Referee does not reference Mrs. Boyd's testimony on this point in any way.

The record shows Mrs. Boyd consistently emailed Mr. Silverman, imploring him to (1) pre-pay for copies; or (2) provide a time certain for someone from the firm to bring the documents to his office. Tr192-194. No evidence is on the record that Mr. Silverman specified a date and time for production, except for one email. Despite knowing Mrs. Dupee was scheduled for surgery the next day as specified in her Notice of Unavailability, [Tr78:20-21], he sent the email to Mrs. Dupee, at 5:17 pm on May 24, 2011. Comp. EXH 9. The email set production for the day after surgery, May 26, 2011. Comp. EXH 9; Tr42:20-25; 43:6-10; 78:20-21.

Mrs. Dupee never saw the email prior to the specified time for production. Tr77:18-23. Mr. Silverman failed to specify another time. The stand-off between Mr. Towers and Mr. Silverman persisted. And so, although the responses were available in December of 2010, [Tr192], Mr. Silverman failed to inspect or copy them during the summer of 2011, even though trial loomed in October.

The Referee never discussed (1) that Mrs. Dupee referenced Campus USA in the court-filed notice in response to the Request to Produce; (2) Mrs. Boyd's testimony about Mr. Silverman's stubborn conduct and Bogin Munns' policy; and (3) Mr. Silverman's own admission he was asked to pre-pay but refused to. Instead, the Referee made this finding: "[Mrs. Dupee] did not serve a timely

response to Mr. Silverman's first interrogatories and Mrs. Dupee never objected to any of those interrogatories, nor did Mrs. Dupee serve a timely response to Mr. Silverman's first request for production, and did not produce the documents as requested." RR7. The Referee stated "[t]here was some dispute about who was going to pay for this copying and this may have resulted in some delay" but concluded without explanation that "this was not the major reason for the delay in responding to Mr. Silverman's requests." RR7. The Referee also gave credibility to Mr. Silverman despite the inconsistencies in his testimony. RR4.

Mrs. Boyd continued to work for Bogin Munns at the time of her testimony before the Referee. Tr181:9-14. Thus, Mrs. Boyd was not professionally affiliated with or working for Mrs. Dupee at the time of this testimony and had no professional reason to vary her testimony from what really happened.

Contrary to the Referee's findings that Mrs. Dupee never objected to discovery, Mrs. Dupee did object to the discovery service. Comp EXH 21, 84:12-18. On August 27, 2010, Mr. Silverman failed to include his initial discovery requests with the service package when he served the petition for dissolution. Instead, Mr. Silverman faxed the discovery requests to Bogin Munns, which represented Mrs. Steinberg in a real estate transaction. At that time, Mrs. Steinberg had not retained anyone, including Bogin Munns, to handle the dissolution. Tr146.

On September 10, 2010, Mrs. Steinberg retained Bogin Munns to represent

her in the dissolution. The firm assigned Mrs. Dupee to be one of her attorneys. Mrs. Dupee asked Mrs. Steinberg for permission to waive Mr. Silverman's failure to properly serve discovery. Tr146-147. Mrs. Steinberg refused to review the discovery requests and respond. Tr147:8-13. Thus, Mrs. Dupee could not provide responses even if she felt compelled to go against her client's wishes.

When Mr. Silverman learned Mrs. Steinberg refused to waive proper service, he began an aggressive course of conduct. Rather than re-serve discovery, Mr. Silverman filed a Motion to Compel, even though it was less than 30 days since he filed the discovery. Tr19:21-22; 22:7-9; 73:6-10; 146: 22-25; 147:1-3. Mrs. Steinberg contested the Motion to Compel rather than simply answer the improperly served discovery. At the Dec. 2010 hearing, the judge ruled on the side of practicality and ordered Mrs. Steinberg answer discovery in 10 days.

At the Final Hearing, Mr. Silverman was impeached on this issue. Mr. Silverman originally testified, "I believe she had filed pleadings in this case and my understanding pursuant to the rules of judicial administration is that when she files a pleading, even if it is prior to her notice of appearance, that is a de facto notice of appearance." Tr71: 6-11. Upon cross examination, he admitted, "Yes, sir, the docket does refresh my recollection and it appears I was incorrect. She did not file any affirmative pleadings." Tr72:4-6.

Mr. Silverman admitted Mrs. Dupee objected to improper service of

discovery. Tr22:3-9. Nevertheless, the Referee found Mrs. Dupee never objected to discovery. RR7. The Referee failed to address Mr. Silverman's false testimony.

On September 1, 2011, Mrs. Dupee left Bogin Munns and began her own firm. Tr194:8-11. Bogin Munns asserted a lien on Mrs. Steinberg's file for unpaid fees. Tr 154:22-24. Mrs. Steinberg paid the fees in full a few weeks later, and Bogin Munns released the lien. On September 19, Mrs. Dupee, free from her prior firm's policy, brought the documents to Mr. Silverman's office. Tr 127:23-128:8.

During the time between picking up the box from Bogin Munns and taking it to Mr. Silverman, Mrs. Dupee had sole control of the box. This was the box which she had told Mr. Silverman contained the copy of the PECT check. Tr130:13. But Mr. Silverman claimed the copy of the check was not there. Tr47:25-48:7. He also claimed that there were no Alarion Bank records. Tr 48:8-10. The deposition transcript proves that the Alarion records were there. Comp. EXH 11, 257:3-5.

When Mrs. Dupee arrived at Mr. Silverman's office, both Mr. Towers' concerns about discovery came to fruition: 1) Mr. Silverman was not there to check the documents, [Tr84:17-18], so they were copied for him, [Tr84:3-6], and 2) his staff failed to maintain a chain of custody of the documents when they were out of Mrs. Dupee's sight. Tr148:6-17. Mr. Silverman had to care for his children that night and could not review the "quite a number of pages" that were in the box. Tr45-46. Also, Mrs. Dupee was not able to personally observe Mr. Silverman's

staff copy the documents in the back of his office. When she inspected the documents that the staff brought her back, "a substantial amount of the documents were missing." Tr148:12-13. The staff went back into the copy room, found the missing documents, and gave them to Mrs. Dupee, who put them back in the Christmas card box she had brought. She then left with the originals. Tr148:16.

Mr. Silverman testified that at Mrs. Steinberg's 2nd deposition on September 28, 2011, he still had the original box – meaning the Christmas card box. Tr84:21-85:3. In reality, the box he brought to the September 28 deposition was a banker's box, which his staff had filled while copying documents from the original box. Tr126:11-17. Mr. Silverman should have known the original box was not the banker's box prepared by his staff because he emailed a picture of the Christmas card box to the judge to show it was delivered. Tr46:6-8; 127:2-5. The difference is important because Mr. Silverman was establishing a chain of custody by saying he had the original box. In reality, he did not have the original box, and his staff broke the chain of custody by misplacing a substantial portion of the original disclosure. Tr148:12-13. On cross-examination, Mr. Silverman admitted he was unaware of how the copies had been created. Tr84:7-12. The Referee did not refer to this testimony in his Report. Nor did the Referee acknowledge everyone knew about Campus USA and the PECT check from the Sept. 9th deposition.

On October 7, 2011, Mrs. Dupee filed a Pre-Trial Catalogue. Comp. EXH

16, 1. This financial affidavit listed the Alarion account and its balance of $437,422.04. Despite this being filed and served on October 7, 2011, the Referee found it was filed on October 10, 2011. The Referee also found Mr. Silverman did not receive a copy until after October 13, 2011. RR14. Neither of these statements are supported by evidence. Mrs. Dupee served a Corrected Updated Financial Affidavit on Mr. Silverman on October 13, 2011. Comp. EXH 16. This corrected affidavit differed from the one filed October 7, 2011, only in a minor way.

Meanwhile, in Wife's initial discovery responses in December 2010, she indicated she provided the Campus USA records for 2010, but records for prior years were in storage. Comp. EXH 6, ¶6. On October 13, 2011, Mrs. Steinberg brought Mrs. Dupee the prior years' records. Comp. EXH 21, 123:14-25. That same day, Mr. Silverman called Mrs. Dupee and asked how Mrs. Steinberg earned $6,000 per year in interest, as reported on her tax returns. Tr87:5-9. He claimed that phone call inquiry caused him to learn of the PECT check, [Tr87:5-10] -- despite the September 9 deposition, the September 28 deposition, and the October 7 Pre-Trial Catalogue which listed the Alarion account. The Referee does not mention or explain Mr. Silverman's inconsistent testimony in his Report.

Mrs. Dupee, on October 13, 2011, brought the older bank records over to Mr. Silverman's office. Tr 56:9-13; 87:20; 88:2-6. She went through the records with him and demonstrated exactly how all the interest earned was derived from

known, disclosed sources. Mr. Silverman never again raised the argument that the interest was generated by anything other than the disclosed funds.

The Final Judgment equitably distributed the Alarion account. Comp. EXH 17, 6. Mr. Steinberg repeatedly raised his suspicions to the Family Law Court, but all motions relating to these suspicions were denied, including a Motion to Continue the trial. Tr81:7-12, 19-20; 82:3-5, 12-13, 16-17; 158:5-13; 235:18-237:2. His appeal was denied. Tr158. He filed a fraud suit against Mrs. Steinberg that he lost on Summary Judgment. Resp. EXH 3.

In contrast to Mrs. Dupee's efforts to update discovery responses and complete them by the Pre-Trial deadline, Mr. Silverman failed to file a Pre-Trial Catalog for his client. Tr82:18-20. Mr. Silverman did not update his client's Financial Affidavit. He never answered Wife's requests to produce. Mrs. Steinberg was forced to subpoena records to obtain Mr. Steinberg's financial information. When the records custodians produced the records during trial, Mrs. Steinberg discovered undisclosed accounts, including an undisclosed ScottTrade account with $105,536.00 titled in Mr. Steinberg's name alone. Tr79:18-25; 161:10-16; Comp. EXH 21, 458:17-459:11; 467:22-468:10; Comp. EXH 17, 4-5. When questioned during the Final Hearing about his lack of disclosure, Mr. Steinberg denied it. He was impeached because his attorney had already admitted the failure to disclose on direct examination. Tr109: 24-25; 110:1-14.

Mrs. Dupee requested Mrs. Steinberg list 900+ personal property items in inventories for her Pre-Trial Catalogue. Comp. EXH 21, 480:5-488:11. Exhibit B listed coins her mother gave her. The coins were U.S. coins dated from 1878 – 1980. Many were dated well after Mr. Steinberg's 18th birthday. The coins totaled $32 and were kept in a Ziploc bag in Mrs. Steinberg's jewelry box. Tr159:11-21.

Mr. Steinberg submitted Petitioner's Exhibit 6 ("Exhibit 6") at the divorce trial requesting items be distributed to him, [Comp. EXH 21, 285-286], including a childhood coin collection located in a fireproof safe in the study. When Mrs. Steinberg saw her husband was requesting a coin collection, she asked Mrs. Dupee to hold her coins at her office so that they would be safe from Mr. Steinberg. Tr 131:3-10. Mrs. Dupee agreed. Because Mr. Steinberg had no Pre-Trial Catalogue, Mrs. Dupee was not aware of Mr. Steinberg's personal property. Tr82:19. She assumed he must possess another undisclosed coin collection. Tr132:7-10.

The Final Judgment included a table awarding each spouse their non-marital assets. Comp. EXH 17, ¶ 6. The Final Judgment directed that "the other party shall have no further rights or responsibilities regarding said assets." Comp. EXH 17, ¶ 6. The table stated Husband received items listed in Exhibit 6 and in Exhibit C to the Wife's Updated Financial Affidavit (listing items that Wife thought were Husband's non-marital assets). Comp. EXH 17, ¶ 6. The table stated the Wife received items listed in Exhibit B. Comp. EXH 17, ¶ 6. By giving each party the

items on each list, the Final Judgment implied two coin collections existed – one owned by the Husband, and another owned by the Wife. Tr160:15-19.

Mr. Steinberg visited his ex-wife's home to retrieve some personal property items. Tr131:11-18. Both parties' counsel and a Sheriff's deputy attended to keep the peace while the ex-husband visited. Tr106:3-5. During the visit, Mr. Steinberg asked where his childhood coin collection was.Tr106:13-14. Mrs. Steinberg responded there never were any coins there. Tr106:14.

To collect his coins, Mr. Steinberg filed a Motion for Contempt and set it for hearing. That hearing was the first time Mrs. Dupee learned Mrs. Steinberg's coins from her mother were one and the same as coins Mr. Steinberg was claiming he had collected in his childhood. When Mrs. Dupee learned Mr. Steinberg was making a claim on the very coins she held at her office, she gave both the court and Mr. Steinberg full disclosure regarding the location of the coins. Tr133:2-4.

Mrs. Dupee also provided a list of the coins to the court and Mr. Steinberg. Tr132:22-25; 133:1-4. Declining to rule on who was being deceptive, the court ordered the coins to be divided between the parties. Mrs. Dupee sent a courier to opposing counsel's office with Mr. Steinberg's half of the coins the next day. Tr107:7-13.

During June 2011, prior to Mrs. Steinberg's revelation she never set up the charitable trust, the parties scheduled mediation. In preparation, Mrs. Dupee

generated a Settlement Agreement using ProDocs forms. Comp. EXH 7. Under the agreement's Section 3.6(b), the undeposited PECT check would be distributed to Mrs. Steinberg if the settlement had been signed. There is no evidence in the record that Mrs. Dupee knew that the PECT check had not been negotiated and was a part of the marital estate at the time the agreement was generated.

Again, mediation was set for September 12, 2011. Comp. EXH 21, 90:23-24. Mrs. Dupee did not have the case file because Bogin Munns had a lien on the file after she left the firm. Tr 154:22-24. Mrs. Dupee prepared a spreadsheet for reference. Comp. EXH 8; Tr154-156. The spreadsheet was for her use only. When she arrived at mediation, it was only in electronic form on her laptop. Tr156:3-6. The mediator asked Mrs. Dupee to print the spreadsheet, [Tr156:7-18], and Mrs. Dupee originally refused, stating that it was not intended to be complete but was just a thumbnail sketch for her personal use. Tr156:19-22. The mediator persisted and Mrs. Dupee turned over the spreadsheet, which included the note to herself about the Alarion account, calling it the $100,000 account, referring to the $100,000 from Mr. Steinberg that began the account. Tr157:7-15. Mrs. Dupee "didn't hand this to the opposing side" and certainly did not use it to attempt to deceive them or mislead them about the assets. Tr157:12-15.

Mr. Silverman testified that the spreadsheet was "given to me by her [meaning Mrs. Dupee] just prior to the commencement of substantive discussions

in the mediation, presented as essentially a guide to – or an aid to help guide our discussions." Tr39:11-14. The case did not settle at mediation.

The Referee mentions a spreadsheet in his Report, stating it was offered at mediation after September 19, 2011. He states the spreadsheet listed $450,000 as the amount in the Alarion account. RR13. No evidence in the record supports the Referee's finding. The September mediation was on September 12, 2011, not after the 19th, and Mrs. Dupee's spreadsheet identified Alarion as the $100,000 account.

Mrs. Dupee filed a Notice of Intent to Seek Review of Report of Referee. Mrs. Dupee challenged the findings as to the Referee's recommendations for guilt and sanctions. Mrs. Dupee challenged the Referee's findings of facts and the application of facts in the instant case to law.

## SUMMARY OF ARGUMENT

The Referee's findings of fact and law are not supported by the evidence presented at the Final Hearing or by the law. The Bar now seeks a one-year suspension based upon the Referee's findings that Mrs. Dupee concealed assets from Mr. Steinberg during the dissolution of marriage. These findings are flawed. The evidence, testimony, and record reflects that: Mrs. Dupee took adequate remedial measures to remedy the client's misrepresentations; Mrs. Dupee did not commit fraud in the concealment; Mrs. Dupee did not commit fraudulent misrepresentation or any other act of dishonesty; and Mrs. Dupee notified a third

party of holding disputed coins at the same time she understood they were the coins the third party was making a claim to.

First, no assets were concealed, and all assets were equitably distributed by the Family Law Judge. Second, the same allegations raised here were raised before the Family Law Judge. The Family Law Judge declined to find Mrs. Dupee concealed or attempted to conceal assets. Mrs. Dupee provided all financial disclosures to opposing counsel and the Court pursuant to the court's deadlines for disclosure.

There is not a scintilla of evidence to establish an intentional act by Mrs. Dupee. Because there is no direct evidence, any findings of complicity would have to be based on inferences from discovery disputes and Mrs. Steinberg's actions. There is no evidence that Mrs. Dupee caused the discovery disputes or advised Mrs. Steinberg to do anything improper. Instead, the evidence at the Final Hearing showed that Mrs. Dupee became involved in a bitter and complicated divorce between two multimillionaires. Each spouse wanted to cause as much grief to the opposing spouse as possible.

In the end, the Steinbergs' marriage was equitably dissolved. Only Mrs. Dupee has suffered, due to Mr. Steinberg's allegations of complicity to conceal assets – despite all the assets being in fact disclosed due to Mrs. Dupee's efforts. To suspend a lawyer for the actions of the client without any intent or complicity

flies in the face of all of the existing case law and standards for imposing lawyer discipline. This case should put fear in the hearts of every family law practitioner who by proxy are placed in jeopardy by the acts of their clients.

## ARGUMENT

### ISSUE I
### THE REFEREE'S FINDINGS OF FACTS ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

The Bar must present the Referee with clear and convincing evidence of a rule violation in order for the Referee to make a finding of misconduct. Such a finding will be sustained only if it is supported by competent and substantial evidence. The Bar v. Hopper, 509 So. 2d 289 (Fla. 1987). Although a Referee's findings of fact carry a presumption of correctness, they will not be upheld if they are clearly erroneous or there is no evidence in the record to support them. See Florida Bar. v. Vannier, 498 So.2d 896, 898 (Fla. 1986). If a Referee's findings are not supported by competent, substantial evidence, this Court must reweigh the evidence and can substitute its judgment for that of the Referee. See Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992). Here, the Bar has failed to shoulder its burden of proving a violation by clear and convincing evidence. Indeed, many of the Referee's findings are not supported by, and in fact contradict, competent and substantial evidence.

While a party challenging the Referee's findings carries the burden of demonstrating that the record clearly contradicts those conclusions, see The Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996), here, the record evidence does not

support a violation of any of the rules alleged by the Bar. The Bar failed to provide competent substantial evidence to prove its case against Respondent.

A. Referee's Finding that Respondent is Guilty of Violating Rules Regulating The Bar 3-4.3 is Clearly Erroneous and Lacks Evidentiary Support

Rule 3-4.3 says lawyers shall not engage in "any act that is unlawful or contrary to honesty and justice." The Referee recommended that Mrs. Dupee should have filed "an accurate Financial Affidavit," [RR19], and then found the "honest and just thing to do would be to disclose the facts surrounding the PECT check" implicitly finding that Mrs. Dupee failed to do so.

As an initial matter, this is not a case where the Family Law Trial Judge found any misconduct on the part of Mrs. Dupee. In fact, Mr. Steinberg raised the allegations at the heart of his Bar complaint before Judge Monaco on more than one occasion and Judge Monaco declined to find any wrongdoing. Also, Mr. Steinberg's filed a Complaint alleging fraud before Judge Huslander that was rejected on Summary Judgment. Resp. EXH 3.

In fact, no evidence in the record contradicts the testimony that Mrs. Dupee reasonably believed when the initial Financial Affidavit was filed that Mrs. Steinberg had created the trust using other attorneys as she had said she would do. When Mrs. Steinberg gave Mrs. Dupee her filled-out Financial Affidavit, she did not include the PECT funds, implying she had done what she said she would do –

negotiate the PECT check by giving the funds to a charitable trust. Thus, when the Financial Affidavit was filed on December 10, 2010, Mrs. Dupee properly included the information about the Campus USA account and the copy of the check in response to the requests to produce dealing with past bank account activity rather than on the list of current assets in the Financial Affidavit.

The Referee stated the "honest and just thing to do would be to disclose the facts surrounding the PECT check." The Referee thus implicitly recommends that Mrs. Dupee had not disclosed the check. But the evidence shows that Mrs. Dupee specifically disclosed the Campus USA accounts in her Notice to the Court filed in December, 2010. Tr125:14-22. Also, Ms. Boyd, Mrs. Steinberg, and Mrs. Dupee all testified that a copy of the check was provided with the disclosures made available to Mr. Silverman in December, 2010, and that it was only the stubbornness or lack of diligence of Mr. Silverman that caused him to not be aware of the account and check. Thus, Mrs. Dupee acted in accordance with honesty and justice despite Mr. Silverman's recalcitrance.

B. Referee's Finding that Respondent is Guilty of Violating Rules Regulating the Bar 4-3.3(a) and (b) is Clearly Erroneous and Lacks Evidentiary Support

Under Rule 4-3.3(a), "[i]f a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary,

disclosure to the tribunal." Rule 4-3.3(b) requires a lawyer to take reasonable remedial measures if the lawyer's client has engaged in fraudulent conduct. The Referee recommended that Mrs. Dupee "failed to take steps to correct Ms. Steinberg's Financial Affidavit, as well as failing to correct the false evasive testimony given by Ms. Steinberg at her deposition." Upon examination of the record, it becomes clear that Mrs. Dupee took reasonable remedial measures and that the Referee made such conclusions without considering, or even mentioning, considerable exculpatory and flat-out contradictory evidence in the record.

First, the Referee never mentions the uncontradicted testimony of Mrs. Dupee, Mrs. Boyd and Mrs. Steinberg that when Mrs. Dupee became aware of the falsity of the initial Financial Affidavit -- having discovered in mid-August 2011 that Mrs. Steinberg had not negotiated the PECT check as she had said she would -- Mrs. Dupee took immediate remedial measures. Mrs. Dupee instructed Mrs. Steinberg to deposit the funds in a known account, the Alarion account. The Referee acknowledges in his Report that the cashed PECT check funds were originally put into an account at Campus USA but that they were then re-deposited into "her existing account at Alarion Bank." RR 11. But then, despite Mrs. Dupee's testimony that the transfer from Campus USA to Alarion was specifically done to make reporting the funds inevitable (sua sponte, before any concern had been raised by the other side), the Referee fails to mention this testimony at all.

That is, the Referee failed to discuss and then discount Mrs. Dupee's, Mrs. Steinberg's, and Ms. Boyd's testimony on this issue; he simply ignored it.

Moreover, Mrs. Steinberg, the first time she was asked about it -- at her September 9, 2011, deposition -- disclosed the existence of the Campus USA account, the PECT check, the fact that she had not followed through with creating the trust, and that she had then deposited the check into the known Alarion account. The Referee did not note these specifics but instead stated: "Mrs. Steinberg evaded questions concerning the proceeds of that payment and the amount of funds available to her from the proceeds of the PECT check." RR 12. A simple review of the deposition transcript reveals, however, that within 3 weeks of Mrs. Dupee's discovery that the check had not been negotiated, the other side knew about the Campus USA account, the PECT check, and, most importantly, where to look to see how much was involved (the Alarion account).

Thus, Mrs. Steinberg's later bizarre deposition testimony – that she did not know the amount of a check she deposited 22 days earlier only makes sense as an irrational, emotional shutting down of her brain during a tough, emotional deposition. A lawyer does not violate 4-3.3 simply because her client gives incorrect testimony or her client is a terrible witness. The lawyer is simply expected to "take reasonable remedial measures" when that occurs.

Here, the Referee failed to even mention the uncontradicted testimony about the reasonable remedial measures taken by Mrs. Dupee after the Sept. 9 deposition testimony. First, the unopposed testimony of Mrs. Dupee is that after this faulty testimony at deposition, she informed Mr. Silverman that the information about the account and check was in the box of discovery he had not inspected or copied over the last 9 months. When Mr. Silverman was told this, he responded, "oh, that will be fine, I'll get that box from you and we'll take a look at it." Tr130:20-23. Mrs. Dupee provided the box for copying as soon as Bogin Munns released their lien on September 19. Then, on October 7, 2011, Mrs. Dupee filed Mrs. Steinberg's Pre-Trial Catalogue, which included an Updated Financial Affidavit and provided the very information promised at the deposition.

In other words, with regard to this obviously false testimony – nobody in the case testified that they actually believed Mrs. Steinberg did not remember the amount -- the only evidence in the case is that Mrs. Dupee immediately confirmed to Mr. Silverman that it was erroneous and pointed Mr. Silverman to two places to find the correct amount – (1) the box of disclosures Mr. Silverman never inspected or copied despite their availability and (2) the previously-disclosed Alarion account. The Referee's report never mentions, and certainly never discounts, this unopposed testimony.

C. Referee's Finding that Respondent is Guilty of Violating Rules Regulating the Bar 4-3.4(a)(b)(c)(d) is Clearly Erroneous and Lacks Evidentiary Support

Under 4-3.4(a) an attorney may not "unlawfully obstruct another party's access to evidence ... nor counsel or assist another person to do any such act." The Referee recommended that Mrs. Dupee violated this Rule by "conceal[ing] a document from disclosure" apparently referring to the Campus USA account information and the PECT check. As argued above, however, no evidence shows Mrs. Dupee knew the PECT check had not been negotiated until August of 2011. The evidence is uncontradicted that she took remedial measures upon that discovery. Also, as argued above, the Referee failed to mention, much less contradict, the testimony of Mrs. Steinberg, Ms. Boyd, and Mrs. Dupee that the check and the account information had been provided with discovery responses made available in December 2010. The Referee also failed to mention the testimony of Mrs. Boyd concerning her efforts to work out a reasonable plan for Mr. Silverman to inspect or copy the documents pursuant to the Rules. The Referee never discussed the testimony that it was Mr. Silverman's stubbornness or lack of diligence that truly caused the discovery to not be inspected or copied.

This analysis also applies to the Referee's findings under 4-3.4(c) and (d). Rule 4-3.4(d) prohibits failure to comply with a legally proper discovery request. The Referee recommends that because the box was not inspected or copied by Mr.

Silverman for nine months, Mrs. Dupee "knowingly disobey[ed] an obligation under the rules of a tribunal," Rule 4-3.4(c). The Referee fails to consider the second part of the Rule, however, which states, "except for an open refusal based on an assertion that no valid obligation exists." Here, the uncontradicted testimony of Ms. Boyd is that Mrs. Dupee's managing partner Mr. Towers asserted that they did not have the obligation to turn over originals to Mr. Silverman, make copies for him without his prepaying copy costs, or send staff members over to his office without him first giving them a time certain. Ms. Boyd's testimony, which was not even mentioned by the Referee, was clear that it was Mr. Silverman's and Mr. Towers' refusal to budge on these issues, not any resistance by Mrs. Dupee, that resulted in the nine months' delay.

The Referee also found Mrs. Dupee violated 4-3.4(b) which provides a lawyer should not "counsel or assist a witness to testify falsely." The Referee found that Mrs. Dupee "by inaction" assisted Mrs. Steinberg in filing a false financial affidavit and testifying falsely at her deposition. For the reasons given above, the Referee's finding is not supported by the evidence because he failed to mention the lack of any evidence that Mrs. Dupee knew the PECT check had not been negotiated by Mrs. Steinberg by December 2010; that Mrs. Steinberg disclosed the account and the check in her December 2010 disclosures which Mr. Silverman failed to inspect or copy; that Mrs. Dupee took remedial measures after

discovering the PECT check had not been negotiated and also after Mrs. Steinberg's testimony at her deposition. Thus, rather than assisting Mrs. Steinberg to testify falsely, Mrs. Dupee took steps to ensure complete disclosure.

D. Referee's Finding that Respondent is Guilty of Violating Rules Regulating The Bar 4-4.1 is Clearly Erroneous and Lacks Evidentiary Support

Under Florida Bar 4-4.1, a lawyer "shall not knowingly ...make a false statement of material fact or law to a third person; or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." The Referee found that Mrs. Dupee violated this Rule by "concealing a relevant document," meaning the PECT check. For the reasons given above, the Referee failed to consider or mention in any way Ms. Boyd's exculpatory testimony that Mrs. Dupee did, in fact, require Mrs. Steinberg to disclose the PECT check and the Campus USA account in the box of discovery and that it was the conflict between Mr. Silverman and Mr. Towers or the stubbornness or lack of diligence of Mr. Silverman that prevented Mr. Silverman from inspecting and copying the box in a timely manner. The Referee also failed to mention the reasonable remedial measures taken by Mrs. Dupee once she learned that the PECT check had not been negotiated by Mrs. Steinberg.

E. Referee's Finding that Respondent is Guilty of Violating Rules Regulating the Bar 4-8.4(a) and (c) is Clearly Erroneous and Lacks Evidentiary Support

Rule 4-8.4(a) prohibits a lawyer from violating the Rules of Professional Conduct. In order to find an attorney acted with dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c), The Bar must prove intent. The Fla. Bar v. Burke, 578 So.2d 1099, 1102 (Fla.1991). Further, in The Bar v. Dougherty, 541 So.2d 610 (Fla.1989), and The Bar v. Lumley, 517 So.2d 13 (Fla.1987), the Florida Supreme Court found that an attorney's lack of intent to defraud supported a finding that the attorney's conduct did not constitute dishonesty, misrepresentation, deceit or fraud. Here, no evidence in the record directly shows that Mrs. Dupee intended to defraud anyone. Moreover, the undisputed testimony of the actions of Mrs. Dupee in disclosing the Campus USA accounts in the December 2010 Notice to the court and her actions in immediately requiring deposit of the PECT check into a known account in August, 2011, demonstrate a desire to prevent fraud, not to engage in it. The Referee failed to mention this testimony in any part of his Report.

F. Referee's Finding that Respondent is Guilty of Violating Rules Regulating the Bar 5-1.1(e) and (f) is Clearly Erroneous and Lacks Evidentiary Support

Rule 5-1.1(e) and (f) requires a lawyer to give notice to a third party if the lawyer is holding their property in trust, and if 2 people are making claim to the same property, it shall be treated as trust property. The Referee never discussed the fact that the Final Judgment referred to two coin collections. One was included

on the husband's list of non-marital assets and was described as being kept in a fireproof safe. The other was described in Mrs. Steinberg's list of non-marital assets and was listed as being kept with her jewelry. The Referee also never discussed the fact that by awarding each spouse the items on each spouse's list, the order envisioned two coin collections. Thus, when Mrs. Steinberg gave Mrs. Dupee one coin collection – not two -- it was completely reasonable that she believed that this was the one Judge Monaco awarded to Mrs. Steinberg. Additionally, the Referee never discussed the undisputed testimony that Mr. Steinberg claimed his coin collection was from his youth, and many of the coins in Mrs. Steinberg's collection were dated well after Mr. Steinberg's 18th birthday. It was reasonable for Mrs. Dupee to believe that the coins Mrs. Steinberg gave her were the ones awarded to the Wife by the Final Judgment while the coins sought by Mr. Steinberg were in a separate collection awarded Mr. Steinberg by the Final Judgment. It was not until the hearing itself that Mrs. Dupee became aware the Mr. Steinberg was making the claim that the coins he claims to have collected in his childhood were the same collection of coins which contained many coins dated well after his childhood. Upon receipt of this knowledge, Mrs. Dupee immediately described the exact location of the coin collection to the family law court and Mr. Steinberg. Judge Monaco refused to determine who was lying about the coins and simply divided them between the spouses.

## ISSUE II

## THE REFEREE ERRED IN THE APPLICATION OF FACTS IN THE INSTANT CASE TO THE LAW BECAUSE THE UNCONTRADICTED TESTIMONY REGARDING MRS. DUPEE'S REACTION TO HER CLIENT'S MISSTATEMENTS OF FACT SUPPORTS A FINDING THAT SHE DID NOT INTEND TO DEFRAUD, DECEIVE, OR ACT CONTRARY TO HONESTY OR JUSTICE

The facts as found by the Referee do not support a finding of a violation of any of Rules mentioned by the Bar in this complaint. Indeed, the legal theory alleged by the Bar and Mr. Steinberg makes no sense. First, Mrs. Steinberg and Mrs. Dupee -- in her first contested divorce trial of this magnitude [Tr142:19-24] -- would have to believe they could hide a Campus USA account of this size from an attorney of Mr. Silverman's experience (between 200 and 400 divorces, Tr14:12-14) and a Husband like Mr. Steinberg, who had an intense interest in the financial aspects of this case. Tr47: 2-5.

In August of 2011, Mrs. Dupee first learned that Mrs. Steinberg had not negotiated the PECT check and thus that the original financial affidavit was not accurate. The uncontradicted testimony regarding her reaction to that discovery supports a finding that she did not intend to defraud, deceive, or act contrary to honesty or justice. Instead, she required Mrs. Steinberg to put the PECT funds into an already-reported bank account at Alarion Bank, which she knew would have to be updated in the Updated Financial Affidavit due October 7, 2011. Anyone in Mrs. Dupee's position who intended to defraud, deceive, or act contrary to honesty

or justice would have done just the opposite and directed the funds be put in an unknown account.

By directing Mrs. Steinberg to put the PECT check funds into a disclosed account, Mrs. Dupee – well before the issue had even appeared on Mr. Silverman's radar – ensured that there was no way Mrs. Steinberg's failure to create the trust could deceive anyone. Thus, the only evidence in the case relating to Mrs. Dupee's mindset with regard to the PECT check contradicts the conclusion that she was being deceitful, fraudulent or dishonest.

The conclusion that Mrs. Dupee failed to include the Campus USA account statements and the copy of the PECT check in the box she delivered on September 19, 2011, is also not supported by the evidence and simply makes no sense. By that date, Mrs. Steinberg had already deposited the PECT funds into a previously disclosed Alarion account (on August 18, 2011). She had also already disclosed the Campus USA account, the cashier's check, and her lack of follow through in creating the charitable trust at her deposition (on September 9, 2011). Mrs. Dupee told Mr. Silverman at the Sept. 9 deposition the check and the Campus USA account were in the documents noticed to the Court in December 2010. Tr130:12-20. The unopposed testimony of Mrs. Dupee is that when she told this to Mr. Silverman, he responded, "[O]h, that will be fine, I'll get that box from you and we'll take a look at it." Tr130:21. Thus, opposing counsel, completely aware of

the controversy, deemed this a reasonable remedial measure. The Referee never references this evidence in any way, either for or against Mrs. Dupee.

When Mrs. Dupee got the box from Bogin Munns on September 19, 2011, and drove the box over to Mr. Silverman's office, she had complete and sole control of the box and all other documents from the case. Thus, she had every opportunity to put a copy of the PECT check and the Campus USA account information in the box, if it had truly not been there in the first place. Thus, Mr. Silverman's allegation that the documents were not in the box because Mrs. Dupee or her staff actually did not put the documents in the box makes no sense.

## ISSUE III
## THE REFEREE'S RECOMMENDATION OF GUILT IS NOT SUPPORTED BY THE EVIDENCE

The Referee's recommendations of guilt rely entirely on inference. In this regard, two other inferences more reasonably explain Mr. Silverman's testimony that he did not find the documents among his copies. First, Mr. Silverman became involved in a squabble over $400 in copy costs preventing him from picking up – for nine months – a box that he was told contained Mrs. Steinberg's financial records in this multi-million-dollar case and which Mrs. Dupee noticed the court was ready for copying in December 2010. Even after his suspicions were aroused at the September 9th deposition, he still failed to pay for copies and went to mediation still without obtaining the documents. Nowhere in the record does Mr.

Silverman testify that he asked his client to just prepay the copy costs so that he could get the copies.

Between September 19, 2011, when Mrs. Dupee brought the discovery over for copying, and the Sept. 28 deposition, the record is bare of any attempt by Mr. Silverman to contact Mrs. Dupee to report that documents that she had said would be there were missing.

Moreover, on October 13, 2011, Mr. Silverman had to rely on Mr. Steinberg's analysis of the tax returns – rather than his own review of the discovery -- to finally investigate the PECT check/Alarion account, even though Mrs. Dupee had already set out the exact account balance a week earlier, in her October 7 Pretrial Catalogue, which was served on Mr. Silverman. Mr. Silverman also failed throughout the case to answer any discovery requests of the wife except by inaccurately mirroring the wife's prior disclosures; he failed to file any pretrial catalogue whatsoever; and was forced to seek a continuance at the beginning of trial, which the family law judge denied.

The second inference occurrence in the record evidence in this case shows a clear break in the chain of custody regarding the box of documents. Mr. Silverman admitted he was not present when they were copied and cannot dispute Mrs. Dupee's testimony that parts of the documents were mislaid during the copying. It is reasonable to infer that Mr. Silverman's staff may have simply failed to copy

some of the documents, including the pages at issue. To make matters worse, during his testimony, Mr. Silverman acted as if the box he brought to the September 28th deposition was the very same box Mrs. Dupee brought for copying. However, the box he presented at the deposition was a banker's box, while the box brought over by Mrs. Dupee was a Christmas card box. Also, common sense dictates that if one's staff copies the documents from opposing counsel, they are not the very same documents in the very same box, but copies put into one's office's own box.

These competing and more reasonable inferences prevent the evidence from clearly and convincingly showing that Mrs. Dupee failed to do exactly what the Referee said was the honest thing to do – fully disclose the facts surrounding the PECT check and Campus USA account. Also, the referee failed to acknowledge and discount Ms. Boyd's testimony, Mrs. Dupee's testimony, or these competing inferences. Instead, he simply made no reference at all to these exculpatory facts and inferences. Thus, his recommendation of guilt is not supported by, or even reflective of, the evidence in the record.

## ISSUE IV
## THE REFEREE'S RECOMMENDATION FOR SANCTIONS IS NOT SUPPORTED BY THE FINDINGS OF FACT AND APPLICABLE LAW

This Court's scope of review on discipline recommendations is broader than that afforded to a Referee's fact findings. Fla. Bar v. Langston, 540 So.2d 118,

120-21 (Fla. 1989). A Referee's recommended discipline is persuasive. The Court does not pay the same deference to this recommendation as to the guilt recommendation. The Court has the ultimate responsibility to determine the appropriate sanction. Fla. Bar v. Temmer, 753 So.2d 555, 558 (Fla. 1999). However, this Court will not second-guess the Referee's recommended discipline when it has a reasonable basis in case law and the Florida Standards for Imposing Lawyer Sanctions. Fla. Bar v. Herman, 8 So. 3d 1100 (Fla. 2009); Fla. Bar v. Fredericks, 731 So. 2d 1249, 1254 (Fla. 1999). Here, the recommendation of a 90-day suspension lacks a reasonable basis and should not be followed.

A Referee's findings of mitigation and aggravation are presumed correct. The Court will uphold them unless clearly erroneous or without support in the record. The Court gives the same deference to a Referee's failure to find that an aggravating factor or mitigating factor applies. Fla. Bar v. Germain, 957 So.2d 613, 621 (Fla. 2007). Here, the Referee found no aggravating factors, and held that Respondent's lack of a prior disciplinary history and her reputation in the legal profession were mitigating factors to consider.

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

The purpose of attorney discipline is to be fair to society, to be fair to the attorney, and to serve as a deterrent to other attorneys. Fla. Bar v. Wasserman, 654 So.2d 905, 907 (Fla. 1995). Fairness to society entails protecting the public from unethical conduct, while simultaneously ensuring that a qualified lawyer not be taken away from the public because of "undue harshness in imposing a penalty." Fla. Bar v. Stein, 916 So.2d 774, 777 (Fla. 2005).

Under the Florida Standards for Imposing Lawyer Sanctions, suspension is only appropriate in a case like the instant one when the attorney "knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action." Fla. Stds. Imposing Law. Sancs. 6.12. Instead, if the attorney is merely negligent, or the attorney took remedial measures but did so negligently, then a Public Reprimand under 6.13 or admonishment under 6.14 is more appropriate.

Here, as discussed above, there is no evidence that Mrs. Dupee knew that the PECT check had not been negotiated when the initial Financial Affidavit was filed. Additionally, the testimony of Mrs. Boyd, Mrs. Steinberg, and Mrs. Dupee is undisputed that Mrs. Dupee and Mrs. Steinberg took remedial action once Mrs. Dupee discovered that Mrs. Steinberg had not negotiated the check and also after Mrs. Steinberg's deposition testimony. The Referee recommended suspension without discussing this exculpatory testimony in any way.

Accordingly, Respondent's actions do not warrant any discipline, and certainly do not warrant a 90-day suspension. In Fla. Bar v. Riskin, 594 So. 2d 178 (Fla. 1989), Respondent received a public reprimand for neglect of a legal matter and incompetence in allowing the statute of limitations to expire. Riskin had prior discipline and still only received a public reprimand. Clearly, a 90-day suspension is excessive and unwarranted where Respondent has no disciplinary history.

Additionally, in Fla. Bar v. Forrester, 818 So.2d 477 (Fla. 2002), the Referee found the attorney "knowingly and intentionally" removed and concealed evidence. Forrester was given more than one opportunity to return an exhibit, but did not do so until she was actually confronted by opposing counsel. Forrester also made an intentional misrepresentation concerning the location of the exhibit. Based on the evidence, the attorney's prior disciplinary history, her dishonest or selfish motive, and substantial experience in the practice of law, the Court adopted the Referee's recommendation and suspended Forrester from the practice of law for 60 days followed by probation for a year.

In contrast here, Mrs. Dupee did not intentionally conceal any evidence or important information, nor did she act with a selfish or dishonest motive. Additionally, Mrs. Dupee took active remedial steps to ensure her client's misrepresentation was known to the court and opposing counsel and rectified the situation in which she was placed.

Lastly, Forrester also had prior disciplinary history that was considered in the Referee's recommendation, whereas here, Mrs. Dupee has never before been a Respondent to a Florida Bar Complaint. Considering Forrester was suspended for 60 days in light of the above egregious conduct and the Referee recommended a 90-day suspension for Mrs. Dupee, it is clear that the Referee's Recommendations for sanctions are excessive and indisputably unwarranted.

## CONCLUSION

Respondent respectfully requests that this Court find her not guilty of the Bar's complaints. The Florida Bar has failed to prove by clear and convincing evidence that Mrs. Dupee knowingly engaged in dishonest conduct in an effort to conceal assets from a sophisticated, multimillionaire husband of her client and his very experienced legal counsel.

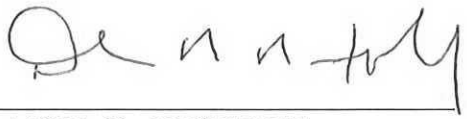
## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that the original of the foregoing Notice of Hearing has been furnished to THE HONORABLE JOHN A. TOMASINO, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32301 and at e-file@flcourts.org, and that copies were e-mailed to James Watson, Bar Counsel, The Florida Bar, Tallahassee Branch office, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, jwatson@flabar.org, and ldaughton@flabar.org, and to Adria E. Quintela, Staff Counsel, at aquintela@flabar.org , this 28 day of February, 2014.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,



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