IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court Case
No. SC14-1056

v.

ADAM ROBERT FILTHAUT,

The Florida Bar File
No. 2013-10,737 (13F)

Respondent.

APPEAL FROM REPORT OF REFEREE IN A DISCIPLINARY PROCEEDING

INITIAL BRIEF OF RESPONDENT ADAM ROBERT FILTHAUT

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STATEMENT OF THE CASE AND FACTS

Pursuant to the Rules Regulating The Florida Bar, Adam Robert Filthaut, respectfully petitions this Court for review of the report of Referee in this matter issued on or about August 27, 2015, and all orders of the Referee entered prior to the issuance of the report of the Referee, and his brief follows.

This Court has jurisdiction to review all orders of the Referee in this cause pursuant to Rule 3-7-7 of the rules regulating The Florida Bar. Further, this Court has authority to enter orders in reference to the disqualification of a referee pursuant to Rules 3-3.1 and 3-7.7(e) of the rules regulating The Florida Bar, as well as to issue extraordinary writs in attorney disciplinary proceedings pursuant to Fla. Bar Integr. Rule, art XI, Rule 11.-09(5). *The Florida Bar v. Rubin*, 362 So.2d 12 (Fla. 1978); *Ciravolo v. The Florida Bar*, 361 So.2d 121 (Fla. 1978); *The Florida Bar v. McCain*, 330 So.2d 712 (Fla. 1976); *Murrell v. The Florida Bar*, 122 So.2d 169 (Fla. 1960).

The relevant facts revolve around a three-day period from January 23-25, 2013. During the day on January 23, 2013, Philip Campbell ("Campbell") had been in trial representing the plaintiffs, Todd and Michelle Schnitt, in *Schnitt v. Clem*, Case No. 08-05738, in Hillsborough County, Florida. Final Hearing Transcript ("F.H.Tr.") at 306:20-23 R 433-I at 306:20-23. After trial ended for the day, unbeknownst to the Respondents, Campbell and his co-counsel, Jonathan Ellis

("Ellis"), decided to meet at Malio's Steakhouse for dinner and drinks. F.H.Tr. at 352:2-7 R 433-I at 352:2-7. Ellis arrived at Malio's at approximately 5:18p.m. and sat at the end of the bar. F.H.Tr. 544:7-15 R 433-I at 544:7-15; Florida Bar Exhibit ("FL Bar Ex.") 47 R 429-47. Campbell arrived at Malio's approximately 15 minutes after Ellis and sat next to him at the bar. F.H.Tr. 309:5-6 R 433-I at 309:5-6, 543:8-10 R 433-I at 543:8-10, & 544:7-15 R 433-I at 544:7-15.

Around the same time, in a separate area of Malio's, Melissa Personius ("Personius") and Vanessa Fykes ("Fykes") also met to have a drink. F.H.Tr. 471:1-13 R 433-I at 471:1-13; FL Bar Ex. 21 R 429-21 at ¶2. Personius and Fykes had remained friends after Fykes was fired from Adams & Diaco in 2010. F.H.Tr. 151:13 – 152:4 R 433-I at 151:13 – 152:4; 469:7-14 R 433-I at 469:7-14; 484:9-12 R 433-I at 484:9-12. After having two drinks Personius and Fykes left Malio's, but as they were leaving Personius recognized Campbell drinking at the bar. FL Bar Ex. 31 at 12:8-10 & 14:22 – 15:8 R 429-31 at 12:8-10 & 14:22 – 15:8.[1] At 6:20p.m., Personius sent a text message to her boss, Adams, informing him of what she saw because she was "shocked" that Campbell would drink during trial. F.H.Tr. 103:8 – 104:5 R 433-I at 103:8 – 104:5; FL Bar Ex. 31 at 16:18 – 17:4 R

[1] Although Personius asserted her Fifth Amendment privilege during the Final Hearing, the Bar offered as evidence Exhibit 31, which was a statement made by Personius to the Pinellas County State Attorney's Office ("SAO") on May 23, 2013. Personius was provided immunity prior to being questioned by the SAO.

429-31 at 16:18 – 17:4. After receiving Personius' text, Adams communicated with Diaco expressing surprise that Campbell was drinking at Malio's. F.H.Tr. 106:2-8 R 433-I at 106:2-8; FL Bar Ex. 50 R 429-50.[2] Diaco asked Adams to call Filthaut because Diaco did not have Filthaut's phone number. F.H.Tr. 106:9-12 & 160:1 R 433-I at 106:9-12 & 160:1. Adams and Diaco were two (2) of Filthaut's supervisors. F.H.Tr. 107:9-17 R 433-I at 107:9-17.

At approximately 6:30p.m., Adams had a fourteen (14) second phone call with Filthaut. FL Bar Ex. 52 R 429-52.[3] Although Adams did not ask Filthaut to call his friend at the Tampa Police Department ("TPD"), he assumed Filthaut would do so. F.H.Tr. 107:4-7 & 18-22 R 433-I at 107:4-7 & 18-22. Adams testified that he takes responsibility for his "lapse in judgment in not prohibiting Mr. Filthaut in calling Officer Fernandez that night. That's a mistake that I made that evening, an awful mistake, one of the worst mistakes that I have made in 46 years on this planet." F.H.Tr. 102:19-24 R 433-I at 102:19-24. Adams' last communication with Filthaut that evening was at 7:26p.m. F.H.Tr. 107:1-3 R 433-I at 107:1-3; FL Bar Ex. 50 R 429-50.

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[2] As the T-Mobile records custodian testified, Adams' phone records reflect telephone calls recorded in Eastern Time and text messages recorded in Pacific Time. F.H.Tr. 443:9-11 & 16-24 R 433-I at 443:9-11 & 16-24.

[3] As the AT&T records custodian testified, Filthaut's phone records reflect telephone calls and text messages are recorded in Greenwich Mean Time. F.H.Tr. 272:4-21 R 433-I at 272:4-21.

At 6:32p.m., Filthaut talked to Diaco for thirty-four (34) seconds. FL Bar Ex. 52 R 429-52. Sometime after 7:00p.m., Filthaut called his friend Raymond Fernandez, a sergeant in the TPD traffic enforcement unit. FL Bar Ex. 28 at 14:20 – 15:3 R 429-28 at 14:20 – 15:3; FL Bar Ex. 16 at 18:7-10 R 429-16 at 18:7-10.[4] According to Sergeant Fernandez, Filthaut told him that Campbell was at Malio's drinking and may drive drunk. FL Bar Ex. 28 at 26:11-15 R 429-28 at 26:11-15. Sergeant Fernandez also testified that Filthaut had called him to report potential drunk drivers on three to five other occasions. FL Bar Ex. 16 at 24:4-10 R 429-16 at 24:4-10. As for law enforcement's need for confidential information, the Bar's witness, Sergeant Larry Brass, testified that the "Tampa Police Department and all law enforcement depends on the citizenry to help them to fight crime." F.H.Tr. 912:6-9 R 433-I at 912:6-9.

After leaving Malio's, Personius and Fykes went to The Fly Bar. FL Bar Ex. 31 at 13:9-12 R 429-31 at 13:9-12; F.H.Tr. 471:19-24. While there, Personius had another glass of wine. FL Bar Ex. 31 at 29:12-14 R 429-31 at 29:12-14. Prior to returning to Malio's, Personius spoke to Adams on the telephone. FL Bar Ex. 31 at 18:10-15 R 429-31 at 18:10-15. Personius told Adams that she was going to

[4] Sergeant Fernandez asserted his Fifth Amendment privilege during the Final Hearing, however, the Bar introduced five (5) prior statements of Sergeant Fernandez. *See* FL Bar Exs. 14 R 429-14, 16 R 429-16, 18 R 429-18, 28 R 429-28 & 41 R 429-41. On each occasion he testified consistently to the events that occurred on January 23, 2013.

return to Malio's to confirm that it was Campbell. F.H.Tr. 103:17 – 104:9; FL Bar Ex. 31 at 16:25 – 17:4 & 25:2-9 R 429-31 at 16:25 – 17:4 & 25:2-9; FL Bar Ex. 14 at 53:18-21 R 429-14 at 53:18-21 ("Q: Did you instruct Ms. Personius to go to Malio's on the evening of Wednesday, January 23rd? Diaco: No."). Adams testified that not intervening in Personius' decision to return to Malio's along "with the conversation with Adam [Filthaut]…rank up there as the worst decision of my life." F.H.Tr. 160:14-17. Diaco, likewise, failed to tell Personius not to return to Malio's. However, at no time did anyone at the Adams & Diaco firm ask Personius to make contact or believe that Personius would make contact with Campbell, drink with him and get in a car with him. F.H.Tr. 104:22 - 105:7; FL Bar Ex. 43 at 1692 R 429-43 at 1692; FL Bar Ex. 44 at 1728 R 429-44 at 1728; FL Bar Ex. 45 at 1765 R 429-45 at 1765. In short, the Bar has presented no evidence to support the existence of a "set-up" designed to bring about the arrest of Campbell with the encouragement of Personius.

Personius and Fykes arrived back at Malio's around 7:00p.m. FL Bar Ex. 47 R 429-47; F.H.Tr. 515:23 - 516:4 R 433-I at 515:23 - 516:4. Fykes testified that by the time they returned to Malio's Personius was "tipsy." F.H.Tr. 510:17-20 R 433-I at 510:17-20. By this time, Campbell had already drank three (3) vodkas on the rocks, each containing two (2) ounces of vodka. FL Bar. Ex. 47 at 2880 R 429-47; F.H.Tr. 356:19-24; 756:10-12; 759:2-6 R 433-I at 356:19-24; 756:10-12;

759:2-6. When Personius and Fykes arrived, there were a couple of seats open at the bar, and they sat in the only two open seats, which happened to be next to Campbell. FL Bar Ex. 31 at 37:12-24 R 429-31 at 37:12-24; F.H.Tr. 511:18-25 R 433-I at 511:18-25. Personius attempted to get the bartender's attention to order a drink with little success, prompting Campbell to order and pay for two glasses of wine for Personius and Fykes. F.H.Tr. 545:15-23 R 433-I at 545-23; FL Bar Ex. 31 at 40:16-41:7 R 429-31 at 40:16-41:7; FL Bar Ex. 21 at ¶4 R 429-21 at ¶4. In addition to the glass of wine purchased by Campbell (Personius' fourth of the night), Personius had an additional glass of wine (also purchased by Campbell), a shot of Southern Comfort, and mozzarella sticks. FL Bar Ex. 47 at 2878-80 R 429-47 at 2878-80; FL Bar Ex. 31 at 44:14-20 R 429-31 at 44:14-20. Along with the three (3) vodkas on the rocks Campbell had by 7:00p.m., Campbell drank two (2) more vodkas on the rocks and a shot of Southern Comfort (purchased by Personius). FL Bar Ex. 47 at 2878-81; 355:3-17 R 429-47 at 2878-81; R 433-I at 355:3-17. Campbell testified that he voluntarily drank at Malio's that evening. F.H.Tr. 370:17-22 R 433-I at 370:17-22.

Over the next two and a half (2½) hours, Personius intermittingly engaged in conversation with Campbell, Ellis and Michael Trentalange ("Trentalange"). F.H.Tr. 548:2-11 & 549:1-16 & 550:18-20 R 433-I at 548:2-11 & 549:1-16 & 550:18-20. Campbell testified that Ellis was the person who mostly spoke with

Personius. F.H.Tr. 359:2-5 R 433-I at 359:2-5. Fykes testified that Personius was being flirtatious with both Campbell and Ellis. F.H.Tr. 514:19-22 R 433-I at 514:19-22. When Ellis asked where she worked, Personius lied and told him she was a paralegal at another Tampa firm. F.H.Tr. 547:16-18 R 433-I at 547:16-18. Personius testified that "[n]o one at Adams & Diaco instructed me to lie about where I worked to Jon Ellis and/or Phil Campbell." FL Bar Ex. 21 at ¶9 R 428-21 at ¶9. During the evening, Campbell googled himself and Ellis mentioned that Campbell was the attorney for the Schnitts. F.H.Tr. 359:18-23 & 547:4-8 R 433-I at 359:18-23 & 547:4-8. Campbell did not share any confidential information about the *Schnitt v. Clem* case with Personius. F.H.Tr. 361:15-24 R 433-I at 361:15-24; FL Bar Ex. 21 at ¶11 R 429-21 at ¶11. Ellis decided to leave sometime between 8:30p.m. and 9:00p.m. because he "had witnesses the next day." F.H.Tr. 550:13-16 R 433-I at 550:13-16. Soon after Ellis left, Fykes left Malio's and told Personius "to be careful and call a cab." F.H.Tr. 483:18-25 & 486:6-9 R 433-I at 483:18-25 & 486:6-9. After the others had departed, Campbell elected to stay at Malio's to converse with Personius. F.H.Tr. 317:22-24 R 433-I at 317:22-24.

While Personius was at Malio's bar, from 7:24p.m. to 9:27p.m., she contacted the Respondents only two (2) times, including one text to Diaco and one

text to Adams. FL Bar Ex. 53 R 429-53.[5] During this same time period, Filthaut exchanged 32 text messages with Sergeant Fernandez. FL Bar Ex. 52 R 429-52. Sergeant Fernandez testified that he and Filthaut "were texting back and forth. A lot of it – some of it was joking around about our wives and the cars they had. Some of it was just friendly banter." FL Bar Ex. 16 at 32:6-8 R 429-16 at 32:6-8. At other times during the night, Filthaut provided Sergeant Fernandez with information about Campbell buying drinks and leaving Malio's. *Id.* at 34:4-10 R 429-16 at 34:4-10.

At 9:29p.m., Personius texted Adams and informed him that Campbell had left Malio's. FL Bar Ex. 53 R 429-53; F.H.Tr. 113:3-4 R 433-I at 113:3-4. At approximately 9:32p.m. Campbell was videoed walking through the lobby of the Sykes Building, where Malio's is located. FL Bar Ex. 1 R 429-1. Soon thereafter, Campbell returned to Malio's, and took Personius' valet ticket because he "felt that she shouldn't drive." F.H.Tr. 317:25 – 318:3 & 319:15-19 R 433-I at 317:25 – 318:3 & 319:15-19. Campbell confirmed with the valet that Personius' car could be left overnight. F.H.Tr. 321:21-24 & 989:14-16 R 433-I at 321:21-24 & 989:14-16. Campbell's plan was to take Personius to his condo building, which was several blocks from Malio's. F.H.Tr. 325:21 – 326:1 R 433-I at 325:21 – 326:1.

[5] As the Sprint records custodian testified, Personius' phone records reflect telephone calls recorded in Eastern Time and text messages recorded in Central Time. F.H.Tr. 222:21-25 R 433-I at 222:21-25.

Personius insisted that she needed access to her car in a secure lot. F.H.Tr. 321:15-17 R 433-I at 321:15-17. Personius testified that she needed to her car because she had to take her children someplace the next morning. FL Bar Ex. 31 at 63:25 – 64:3 R 429-31 at 63:25 – 64:3. So, Campbell told the valet to retrieve Personius' car. F.H.Tr. 320:12-14 R 433-I at 320:12-14.

After speaking with Personius at 9:49p.m., and hearing how intoxicated she was, Adams told her not drive. F.H.Tr. 166:4-9 R 433-I at 166:4-9. Adams then called Diaco who said to make sure Personius did not drive, so Adams followed-up with a text to Personius and told her to take a cab home and offered to pay for it. F.H.Tr. 167:3-9 R 433-I at 167:3-9; FL Bar Ex. 50 R 429-50. Although Campbell had just met Personius less than three (3) hours before, Campbell maintains that he "took on the responsibility of trying to get her home safely." F.H.Tr. 423:21-22; 369:1-4 R 433-I at 423:21-22; 369:1-4. Personius testified that "[n]o one at Adams & Diaco, including Stephen Diaco, instructed me to get in a vehicle with Phil Campbell or have Phil Campbell drive my car. Phil Campbell insisted on driving and got into the driver's seat of the vehicle at the valet stand." FL Bar Ex. 21 at ¶¶8-9 R 429-21 at ¶¶8-9. Diaco testified that he did not instruct Personius to get Campbell to drive her car. FL Bar Ex. 14 at 69:6-8 R 429-14 at 69:6-8. Nor is there any evidence that Diaco, Adams or Filthaut knew that Personius was getting into a car with Campbell. Most importantly, Campbell testified that Personius

never asked him to drive her car. F.H.Tr. 370:8-11; 371:2-5 R 433-I at 370:8-11; 371:2-5. The fact is Campbell decided to take Personius back to his condo.

At approximately 9:53p.m., Officer Timothy McGinnis, a TPD officer drove by Malio's valet area and informed Sergeant Fernandez that a female was driving the car. FL Bar Ex. 55 at 3038 R 429-55 at 3038; F.H.Tr. 950:1-12 R 433-I at 950:1-12. At 9:54p.m., in an impaired condition, Campbell voluntarily drove Personius' car from Malio's headed to a "secure lot" directly across the street from his condominium building. FL Bar Ex. 2 R 429-2; F.H.Tr. 325:23-24 R 433-I at 325:23-24. On the way to the lot, Campbell was pulled over by Sergeant Fernandez for cutting off a SUV when making an illegal right hand turn from the middle lane. FL Bar Ex. 28 at 39:4-20 R 429-28 at 39:4-20. Sergeant Fernandez testified that he "didn't think Filthaut was -- he gave me information that got me to the area for the DUI, but first off, he -- it wasn't the basis for the stop. The basis for the stop was a traffic infraction." FL Bar Ex. 18 at 411:9-12 R 429-18 at 411:9-12. Officer McGinnis testified that if he had not determined that Campbell was driving impaired, he would not have arrested him even if Sergeant Fernandez requested that he do so. F.H.Tr. 967:2-11 R 433-I at 967:2-11.

Sergeant Fernandez was surprised to see a man emerge from the driver's side of the car because he believed it was going to be a female driver. F.H.Tr. 952:1-4 R 433-I at 952:1-4. In his report, Sergeant Fernandez stated, "[t]he

defendant exited the vehicle prior to me approaching and appeared to be unsteady. I approached the defendant and observed him to have glassy/bloodshot eyes (sic) and had the distinct odor of an alcoholic beverage on his breath. I asked how much he had to drink and he said 'zero.'" FL Bar Ex. 39 at 1618 R 429-39 at 1618. After Campbell lied about his alcohol consumption, Sergeant Fernandez called for a DUI officer to assist, and Officer McGinnis came to the scene. F.H.Tr. 936:2-11 R 433-I at 936:2-11. Officer McGinnis testified that Campbell exhibited the obvious clues of impairment also noted by Sergeant Fernandez, and Campbell acknowledged why he had been pulled over. F.H.Tr. 955:6-10 & 956:24 – 957:7 R 433-I at 955:6-10 & 956:24 – 957:7. Officer McGinnis then asked Campbell to complete the field sobriety exercises. F.H.Tr. 958:6-10 R 433-I at 958:6-10. After providing additional false information regarding an undiagnosed speech impediment, Campbell refused to complete the field sobriety exercises and was arrested at 10:08p.m. F.H.Tr. 388:6-10 & 963:11 – 964:8 R 433-I at 388:6-10 & 963:11 – 964:8; FL Bar Ex. 39 at 1617 R 429-39 at 1617; FL Bar Ex. 3 R 429-3.

At 9:55p.m., Personius sent a text to Adams and told him that she "got pulled over." F.H.Tr. 168:8-15 R 433-I at 168:8-15; FL Bar Ex. 53 R 429-53. At 9:57p.m., Personius called Adams and talked to him for twenty (20) seconds, reiterating that she got pulled over. F.H.Tr. 168:17-19 R 433-I at 168:17-19; FL Bar Ex. 53 R 429-53. At 9:58p.m., Personius called Fykes and during the one

hundred five (105) second call told Fykes that she had been pulled over. F.H.Tr. 525:3-14 R 433-I at 525:3-14; FL Bar Ex. 53 R 429-53. At 10:01p.m., Personius called Adams again and for the first time explained that Campbell had been driving her car when it was pulled over. F.H.Tr. 168:24 – 169:1 & 170:4-13 R 433-I at 168:24 – 169:1 & 170:4-13; FL Bar Ex. 53 R 429-53. Again, there was no evidence to support the Bar's theory of a "set up." To the contrary, Adams testified that he was stunned to learn that Campbell was arrested for a DUI while driving Personius' car. F.H.Tr. 169:2-11 R 433-I at 169:2-11. Once Campbell had been arrested, Officer Fernandez told Personius that she needed to have someone come get her. FL Bar Ex. 28 at 44:8-9 R 429-28 at 44:8-9. Personius called a number of people to find a ride home. FL Bar Ex. 31 at 74:19 – 75:17 R 429-31 at 74:19 – 75:17; FL Bar Ex. 53 R 429-53. Brian Motroni ("Motroni"), an associate with Adams & Diaco firm, agreed to pick-up Personius. FL Bar Ex. 31 at 75:9-17 R 429-31 at 75:9-17.

On the morning of January 24, 2013, after Ellis picked Campbell up from jail, Campbell falsely informed Ellis that Personius had asked Campbell to her car. F.H.Tr. 622:3-15 R 433-I at 622:3-15. He also informed Ellis that he had left his trial bag in the car when he was arrested. F.H.Tr. 556:15-16 & 557:12-14 R 433-I at 556:15-16 & 557:12-14. Ellis took responsibility for locating Campbell's bag, but he was unable to locate it before the *Schnitt* trial resumed that morning. F.H.Tr.

557:18-19 R 433-I at 557:18-19; F.H.Tr. 560:3-5 R 433-I at 560:3-5. The trial had previously been scheduled to only go for half the day because of a robing scheduled that afternoon, so the parties agreed to continue the morning session until the next day so the parties could work on jury instructions and the verdict form. F.H.Tr. 1014:20 – 1015:17 R 433-I at 1014:20 – 1015:17.

On January 24, 2013, Diaco was questioned by a TV reporter about Campbell's arrest. FL Bar Ex. 5 R 429-5. Diaco responded that he was disappointed that the trial was continued and that he hopes Campbell gets help for his alcohol-related issues. *Id.* The jurors of the *Schnitt v. Clem* trial had been sequestered from reading, watching or discussing any news coverage of the trial, and Judge Arnold repeatedly reminded the jurors of their restrictions. FL Bar Ex. 13 at 20:2-10 & 28:1-6 R 429-13 at 20:2-10 & 28:1-6. With that knowledge, Diaco spoke freely about his opinion regarding Campbell's second DUI arrest. F.H.Tr. 564:6-9 R 433-I at 564:6-9. The following day, Judge Arnold questioned each juror to determine if they had been exposed to the news coverage about Campbell's arrest. F.H.Tr. 1005:7-16 R 433-I at 1005:7-16. Only one juror had seen a few seconds of a news reporter regarding Campbell's arrest. F.H.Tr. 997:6-11 R 433-I at 997:6-11. On behalf of the Schnitts, Ellis did not move to strike that juror, and Judge Arnold did not think that such exposure would render that juror unable to render a fair verdict. F.H.Tr. 1015:22 – 1016:5 R 433-I at 1015:22 – 1016:5.

None of the jurors saw or read Diaco's comments. F.H.Tr. 997:12-15 & 1016:6-13 R 433-I at 997:12-15 & 1016:6-13. Therefore, Judge Arnold determined that the jurors had not been affected by the media coverage of Campbell's DUI. F.H.Tr. 1005:7-13 R 433-I at 1005:7-13. In fact, Judge Arnold ruled that nothing that took place on the evening of January 23, 2013 prevented the jurors from rendering a verdict pursuant to his instructions. F.H.Tr. 1015:22 – 1016:5 R 433-I at 1015:22 – 1016:5.

On January 24, 2013, around noon Personius went out to her car and saw Campbell's bag. FL Bar Ex. 31 at 68:12-25 R 429-31 at 68:12-25. At 12:16p.m., Personius called Adams and informed him that Campbell left some things in her car. F.H.Tr. 126:22 – 127:2 R 433-I at 126:22 – 127:2; FL Bar Ex. 53 R 429-53. Adams was in a meeting, so he contacted Diaco and asked him to retrieve Campbell's personal affects. F.H.Tr. 127:4-7 & 13-25 R 433-I at 127:4-7 & 13-25. Diaco sent Motroni to retrieve Campbell's personal effects from Personius' house. FL Bar Ex. 14 at 54:21- 55:11 R 429-14 at 54:21 – 55:11.

Filthaut did not participate in or even know about Motroni and Diaco's adventures with the briefcase on January 24, 2013. Filthaut did not participate in, and was not aware of, Diaco's testimony before Judge Arnold two days after the arrest of Campbell. R 433-I at 129:12-16.

The Bar Trial

During the trial of the Respondents, The Bar called numerous witnesses in an attempt to prove its case. A few of the important witnesses are discussed in this section. The Bar called Mr. Campbell. He admitted that the Malio's bill shows that he was buying another drink for Personius and himself, at the time Personius was drunk. R 433-I at 366. He testified that she was flirtatious generally, but he did not feel she had singled him out for flirtation. R 433-I at 367. He testified that he intended to call a car service for Personius, so ignored the taxicab that they were shown walking past on the security video. R 433-I at 368. Thereafter he drove her car voluntarily, although she did not ask him to drive her car. R 433-I at 370, 371 & 396. He later testified he was "induced" to drive because Personius asked to have her car moved to a place where she would have access to it, although she did not ask Campbell to drive it. R 433-I at 403; 404 & 409. He admitted that he did not tell the State's Attorney about Personius' driving inducement, but told the State's Attorney she did not ask him to drive. R 433-I at 404 & 405.

Campbell testified that the half-day continuance the morning after his arrest was used for jury instruction, and from his perspective, no time was wasted due to the continuance. R 433-I at 392. He never recalled seeing Filthaut participate in the Schnitt case, a case that stretched five years. Further he has never had an unkind word to say about Mr. Filthaut and vice versa. R 433-I at 416.

With respect to January 23, 2013, Campbell also testified that there was a valet stand and a cab as he and Personius left Malio's on January 23, 2013. R 433-I at 420. Campbell testified that he did not notice it the night of January 23, 2013 despite it driving directly in front of him. R 433-I at 419. Campbell said he could not answer whether he felt a responsibility to enable Personius to get home safely because he bought drinks for her. R 433-I at 420. In denying a question that he had 6 double vodka tonics despite a credit card receipt showing otherwise, Campbell stated often, up to and including January 23, 2013, purchased drinks at establishments that he did not actually drink. R 433-I at 421-22. Campbell stated that he knew what the phrase "signs of impairment" means in a DUI context. R 433-I at 424. Campbell denied leaving his cell phone flashlight on in the middle of a well-lit parking lot was a sign of impairment. R 433-I at 425. Campbell denied being able properly make a turn in the parking lot was a sign of impairment. R 433-I at 427-28. Campbell initially denied knowing what a hangover means in the context of drinking to excess. R 433-I at 430.

The Bar later presented Personius' estranged husband, Kristopher Personius, to testify about what Personius stated after arriving home the night of Campbell's arrest. R 433-I at 773. Kristopher Personius violated the Referee's rule of witness sequestration by receiving from his parent's information from the televised "live-streamed" Bar trial. Personius became aware of trial events preceding his

testimony before the Referee. He stated that Mr. Adams' testimony "slandered" him when Adams related in response to Bar questions at the hearing that Ms. Personius was a victim of physical spousal abuse at her husband's hand. Mr. Personius stated that his father relayed to him what was going on in the courtroom and Personius agreed that "Like a good parent, he is trying to protect his son," saying "Listen, this is what these lawyers are saying about you. Be prepared for it." R 433-I at 784. Adams' counsel proffered to the Court that Personius now evinced a more-focused bias against Adams (post-Rule violation) than in a prior deposition and affidavit. The Referee did not sanction Mr. Personius for this obvious violation of witness sequestration, but stated he would consider the matter in assessment of the witness. R 433-I at 786.

Mr. Personius showed significant bias against Respondents throughout his testimony. He referred to them as "scumbags" and "crooked." R 433-I at 820 & 854. One of the associates at Adams & Diaco was having an affair with his wife. R 433-I at 820. Relevant only to his bias while being televised at the hearing, Mr. Personius blurted out inflammatory, irrelevant statements about Mr. Adams personally. R 433-I at 820.

Mr. Personius owed his wife $76,034 in back child support. R 433-I at 847. He stated he became "upset and angry" against his wife because she used an Adams & Diaco law firm letterhead to send a wage garnishment order to his

employer for back child support owed. R 433-I at 838 & 839. R 429- 65 at 3111. Mr. Personius left an angry voicemail message in response, noting that the garnishment of his wages for support was "ridiculous" and he may go see Campbell in response. R 433 at 844 & 845.

Two months after the wife sent the wage garnishment letter on Adams & Diaco letterhead, Mr. Personius took the surreptitious tape of his wife to Mr. Campbell, in May, 2014. R 433-I at 848 & 849. He first testified falsely, that he went to Campbell out of altruism, because "it was wrong what they did... it's the right thing to do...." R 433-I at 850, 851, 852 & 853. He then conceded he took this surreptitious tape Campbell because "if she would have just left me alone and let me see my kids, we wouldn't be here right now." R 433-I at 853. His testimony makes fairly clear, despite false denials, the act of visiting Campbell with the surreptitious tape was for revenge against his estranged wife pursuing back child support. R 433-I at 852, 853-54.

The Bar's case included calling Mr. Personius' lawyer. She related what Mr. Personius had told her concerning his ex-wife's statements. R 433-I at 870, 871 & 872. He informed her of the surreptitious tape he had made of his wife, and the lawyer informed Mr. Personius that it could be a felony under Florida law. R 433-I at 873. The lawyer concluded that the tape did constitute a felony, as she

understood the facts. R 433-I at 880, 881& 883. She did not listen to the tape, and stated that Mr. Personius' testimony otherwise was incorrect. R 433-I at 881.

The Bar called a series of police officers. Officer McGinnis' testimony established probable cause for the arrest of Mr. Campbell, which was independent of any pre-existing misconduct. R 433-I at 957. At the time the car was stopped for a bad turn, the police officers thought a female was driving and were surprised to then learn that Campbell was the driver. R 433-I at 952. Officer McGinnis testified that he has made over 100,000 traffic stops in his career and made approximately 600 DUI arrests. R. 433-I at 969. Officer McGinnis testified that Campbell refused a Breathalyzer test run by a police agency (Hillsborough County Sheriff Office) that is separate and apart from the Tampa Police Department. R 433-I at 972. Officer McGinnis testified that Campbell did provide a breath sample during his first DUI. R 433-I at 972.

The Bar called the presiding Circuit Court Judge in the underlying trial, Hon. James Arnold. R 433-I at 991. Upon his polling the jury about the events and Mr. Diaco's public statements, Judge Arnold testified, "Everybody agreed that we did not have a problem with the jury," R 433-I at 1005, and there was "no problem with the jury and that the case would go forward." R 433-I at 1006.

At conclusion of testimony in the underlying trial, Judge Arnold found, "totally insufficient evidence in front of me to make any determination as to

whether [the activities] would have constituted a mistrial. So I decided to take it under advisement R 433-I at 998. It [the mistrial motion by Campbell's firm] turned into a motion for new trial." Judge Arnold confirmed that Adams' name was never mentioned in the proceedings. R 433-I at 1011 & 1012. Judge Arnold stated he called a status conference four days after verdict in the Schnitt trial, at which time he stated he was going to have a hearing on the motion for new trial, based upon the allegations of misconduct. An attorney for the Diaco firm, Lee Gunn, appeared on the case and requested mediation. R 433- I at 1006. The case was then settled shortly thereafter. R 433-I at 1007.

The Sentencing Phase

At the sentencing phase, the Respondent offered numerous mitigating factors. R 433-J-2:215. The Respondent has zero prior disciplinary record in the State of Florida (or any other State for that matter). R 418:1. This is significant. To begin, the Respondent was an assistant public defender in Hillsborough County, Florida from 2001 to 2003 who handled thousands of criminal cases. R 418:3. The sheer number of indigent people the Respondent represented during this time frame surpasses that of most lawyers over their entire careers. R 418:4. And to anyone who has practiced criminal law it is well known that not all criminal cases end with satisfied clients, particularly those indigent clients who were not able to select their own lawyer and often look for someone to blame for the end result. And once the

Respondent moved into private practice his caseload did not change all that much. PIP law practice too is based upon a high number of clients. R 418:4. Therefore, based upon the sheer number of people he has represented, the potential for the Respondent to commit an error or face an allegation of misconduct resulting in discipline was much greater than the typical lawyer. R 418:4. Yet the Respondent has never made a professional error in over 15 years of practicing law. R 418:4. The Respondent did not act in a dishonest or selfish manner on January 23, 2013. R 418:4. The Respondent had no personal, professional or financial interest in the *Schnitt* outcome. R 418:4. The manner in which the Respondent acted on January 23, 2013 was consistent with a value system that was shaped by his upbringing. R 418:4. Furthermore, Respondent was directed to act by his supervisors. While it may be argued that other participants in this cause acted with for different reasons, the same cannot be said for the Respondent. R 418:4. One can do something for entirely different reasons than another even though that person did the same thing. Motivations may differ though the end result may be the same. R 418:4.

As discussed throughout this pleading, for professional and personal reasons, the Respondent was the perfect person to be thrust into the perfect storm that was January 23, 2013. R 418:5. Given the Respondent's personal familial history with alcohol and substance abuse, the Respondent has a low tolerance for this type of behavior. R 418:5. Prior to trial, The Florida Bar proposed a resolution to the

Respondent that consisted of a 91-day suspension (i.e., an indefinite suspension). The Respondent accepted this proposed resolution. The Referee then rejected this plea agreement. Thereafter, The Florida Bar conducted no further plea negotiations and a trial was held. The Respondent did not want to proceed to trial. There was simply no other choice. Once the Referee refused to allow the agreed upon resolution proposed by The Florida Bar, all negotiations ceased and there was no other option. During the second phase of the bifurcated trial in the above styled manner, the Referee heard powerful testimony regarding the Respondent's ethics, professionalism and reputation for decency and kindness from the Honorable Denise Pomponio, Circuit Court Judge, in and for the Thirteenth Judicial Circuit (R 433-J-2:226), mediator/attorney James Murman (R 433-J-2:165), paralegal Sharon Engert (R-433-J-2:172), and plaintiff's attorney Michael Reiss. (R 433-J-2:239). This testimony is part of the record and easily accessible for review.

Further, a multitude of lawyers reiterated this same sentiment in the form of sworn affidavits, which are now in evidence(R 432-2:1). Attorney Philip Friedman submitted an affidavit on behalf of the Respondent (R 432-2:1). Mr. Friedman knows the Respondent professionally and estimates that he has opposed the Respondent on hundreds, and possibly thousands of cases (R 432-2:1). Mr. Friedman has always found the Respondent to be a professional, fair, and honest attorney (R 432-2:1). Attorney Mark Mohammed also submitted an affidavit on

behalf of the Respondent (R 432-3:3). Mr. Mohammed has known the Respondent both personally and professionally for over seven years. (R 432-3:3). The Respondent helped Mr. Mohammed start his law practice after he left the Hillsborough County Public Defender's Office. (R 432-3:3). Mr. Mohammed wrote that the Respondent went above and beyond what was asked of him. (R 432-3:3). Further he stated that the Respondent mentored Mr. Mohammed in civil litigation matters. (R 432-3:3). Mr. Mohammed has personally witnessed the Respondent providing for those in needs and knows that the Respondent participates in various community activities, volunteers with his church and he also coaches youth basketball. (R 432-3:3). Attorney Roberto Alayon submitted an affidavit on behalf of the Respondent. (R 432-4:2). Mr. Alayon knows the Respondent personally and professionally. (R 432-4:2). He believes the Respondent to be an upmost professional, who conducts himself in the highest ethical manner. (R 432-4:2). These affidavits are also part of the record and are also easily accessible for review. (R 432-4:2).

SUMMARY OF THE ARGUMENT

First, the Respondent was denied due process when the Referee erred in denying his motion to disqualify the Referee. The Respondent showed that he feared that he would not receive a fair trial or hearing because of the specifically described prejudice or bias of the Referee and that some person related to said Referee by consanguinity or affinity within the third degree (the Referee's son), is a party thereto (subordinate attorney of Pinellas County Assistant State Attorney Loughery) or is interested in the result thereof (Assistant State Attorney Loughery wrote the faulty report which the Referee relied on in making his decision).

Second, the Referee improperly denied the Respondent's motion for summary judgment without a written order and based his denial on documents that were not properly maintained in the court file at the time of the Respondent's filing, including an affidavit from Kristopher Personius.

Third, the record shows the Referee did his own research with respect to witnesses Doctor Frankl and James Murman. The Referee refused to provide this research to the Respondent. The refusal to provide this information to the Respondent is a violation of due process because in turn the Respondent could not cross examine and/or challenge all of the evidence used by the Referee to find him guilty.

Fourth, there was not clear and convincing evidence that the Respondent conspired with Stephen Diaco and Robert Adams, along with Melissa Personious and Sergeant Raymond Fernandez of the Tampa Police Department, to improperly effect the arrest of C. Philip Campbell, Esquire and then attempt to cover up or otherwise destroy evidence of his participation in that conspiracy by destroying his cellular phone.

Fifth, permanent disbarment of the Respondent is not supported by the facts of this case and by the applicable law of this Honorable Court regarding attorney discipline.

ARGUMENT

The Respondent should not be permanently disbarred. Permanent disbarment is warranted only where the conduct of a respondent indicates that he is beyond redemption. *The Florida Bar v. Carlson*, 183 So.2d 541 (Fla. 1966). In a referee trial for prosecution for professional misconduct, The Florida Bar has the burden of proving its accusations by clear and convincing evidence. *See The Florida Bar v. Niles,* 644 So.2d 504 (Fla. 1994); *The Florida Bar v. Rayman* 238 So.2d 594 (Fla. 1970); *The Florida Bar v. Hooper,* 509 So.2d 289 (Fla. 1987). Generally, the referee's findings should not be overturned unless 1) clearly erroneous or 2) lacking in evidentiary support. *See The Florida Bar v, Wagner.* 212 So.2d 770 (Fla. 1968); *The Florida Bar v. Neely,* 502 So.2d 1237 (Fla. 1987).

Although the responsibility for findings facts and resolving conflicts in the evidence is placed with the referee, *see The Florida Bar v. Bajocy,* 558 So.2d 1022 (Fla. 1990); *The Florida Bar v. Hoffer,* 383 So.2d 639 (Fla. 1980), where the record is devoid of competent and substantial evidence to support the referee's finding, or where the evidence is insufficient to support conclusions, the findings and conclusions of the referee must be overturned. *See. e.g., The Florida Bar v. Catalano,* 644 So.2d 86 (Fla. 1994); *The Florida Bar v. Bariton,* 583 So.2d 334 (Fla. 1991).

However, the standard of review of the referee's recommendations for

discipline is broader than the scope of review for findings of fact because it is the responsibility of the Supreme Court to order the appropriate sanction. *The Florida Bar v. Berman,* 659 So.2d 1049 (Fla. 1995); *The Florida Bar v. Niles,* 644 So.2d 504, (Fla. 1994). While a referee's recommendation for attorney discipline is persuasive, it is ultimately the Supreme Court's task to determine the appropriate sanction, *The Florida Bar v. Reed,* 644 So.2d 1355 (Fla. 1994).

When an appeal "involves both factual and legal issues," an appellate court "will review a trial court's findings for competent, substantial evidence, while the legal question is reviewed *de novo*." *Scott v. Williams*, 107 So.3d 379, 384 (Fla. 2013).

I. THE REFEREE ERRED IN DENYING THE RESPONDENT'S MOTION TO DISQUALIFY THE REFEREE.

The Respondent was denied due process when the Referee erred in denying his motion to disqualify the Referee. Rule 2.160(d) sets forth the following bases for a disqualification motion, at least one of which must be shown in the motion:

1. that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge, or

2. that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof.

Pursuant to *Dougan v. State*, 105 So. 3d 519 (Fla. 2012), as revised on denial of reh'g (Nov. 30, 2012):

> *"Florida Rule of Judicial Administration* 2.330 governs the disqualification of trial judges. The rule provides that '[t]he judge against whom an initial motion to disqualify ... is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged.' Fla. R. Jud. Admin. 2.330(f). 'Whether the motion is legally sufficient requires a determination as to whether the alleged facts would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.' *Rodriguez v. State,* 919 So.2d 1252, 1274 (Fla.2005)."

It is a canon of American Jurisprudence that an independent judiciary should maintain the dignity of the judicial office at times. Further, a judge shall avoid even the appearance of an impropriety at all times, and where the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired, a judge shall disqualify himself or herself where his or her impartiality might reasonably be questioned. See *Fla. Code. Canon 3, ABA Model Code of Judicial Conduct 1 and Canon 2* (2007) (emphasis added).

Therefore the only reason a judge can properly give for denying a disqualification motion other than a procedural deficiency is that the motion is "legally insufficient." *See* Fla. R. Jud. Admin. 2.160(f). In the event a trial judge expresses another reason for denying the motion or "takes issue" with the motion either personally or through counsel, the judge is required to disqualify himself

regardless of the insufficiency of the motion. *See Fabber v. Wessel,* 604 So. 2d 533, 534 (Fla. 4th D.C.A. 1992) (written response to litigant's petition for writ of prohibition filed by assistant attorney general on behalf of the judge had effect of creating an intolerable adversary atmosphere between the judge and the movant so as to require the granting of the writ); *accord Ellis v. Henning,* 678 So.2d 825, 827 (Fla. 4th D.C.A. 1996). As observed by the Supreme Court in *Bundy v. Rudd,* 366 So.2d 440, 442 (Fla. 1978), the purpose of this prohibition is to prevent the creation of an "intolerable adversary atmosphere" between the trial judge and the litigant. Some appellate courts have broadly interpreted the phrase "passing on the truth of the facts" so as to strictly enforce the prohibition against disputing the facts alleged in the motion. For example, in *Rowe-Linn v. Berman*, 601 So.2d 618 (Fla. 4th DCA 1992), the Fourth District held that since it "feared" that the trial judge "stepped over the line" by attempting to justify the denial of a disqualification motion on grounds other than legal sufficiency, disqualification was required.

The Respondent made two motions to disqualify the Referee, both of which should have been granted pursuant to Florida Rule of Judicial Administration 2.330 and Florida Statutes Section 38.10. In this case, as discussed earlier, Judge Baird's son is "related" and "interested in the result thereof." In the first motion, the Respondent clearly demonstrated that the Pinellas County State Attorney's Office did not properly calculate the number of text messages in from the night of January

23, 2013 because of double counting. R 286:6. Further the Respondent provided proof that Campbell lied to the Pinellas SAO about what occurred on January 23, 2013. R. 286:7. The Respondent presented evidence that the Referee's son, Greg Baird, is a prosecutor with the Pinellas SAO who was supervised by the lead prosecutor who exonerated Campbell and wrote a faulty report in which the Referee relied upon in reaching its decision in this case. R 286:8.

In the second motion to recuse, the Respondent set forth facts that further showed the Referee's bias. R 337:4. After the Respondent and The Florida Bar reached a fair and equitable resolution in this case, the Referee rejected the consent judgment. This is problematic on two accounts. First, the Referee rejected a fairly reached settlement by all of the parties, which resulted in the conclusion that at that exact moment in time he had unfairly prejudged the Respondent's case before hearing any facts. This conclusion is supported by the Referee's ultimate conclusion of permanent disbarment without leave to reapply for the Respondent at the end of this case. The Referee could not have issued a harsher penalty. One must conclude that the harshest penalty was what the Referee desired from the moment he was appointed to referee this case. R 337:5. Second, in reaching his conclusion, the Referee relied once again on a faulty report generated by the Pinellas SAO. R 337:5-10. And once again in this motion, the Respondent pointed out that the Referee's son, Greg Baird, is a assistant prosecutor at the Pinellas State Attorney's

Office who works under Assistant State Attorney Loughery, the lead prosecutor who dismissed the Campbell DUI and wrote an erroneous report justifying his decision that the Referee based his ultimate conclusion upon. R 337:10.

II. THE REFEREE ERRED WHEN IT DID NOT GRANT THE RESPONDENT'S SUMMARY JUDGMENT MOTION.

The Referee denied the Respondent's motion for summary judgment. He did so without an order, instead just announcing in open court that it was denied. Prior to doing so however, he allowed the Bar to submit documents that were not properly maintained in the court file at the time of the Respondent's filing. This included an affidavit from Kristopher Personius.

Pursuant to 3-7.6(f)(1), Rules Regulating The Florida Bar, the Florida Rules of Civil Procedure apply to disciplinary proceedings unless otherwise noted. Florida Rules of Civil Procedure 1.510(c) provides that summary judgment is appropriate where…it is shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Summary Judgment can be for all or part of the matters raised. Fla. R. Civ. P. 1.510(b). In Bar proceedings, the referee has the authority to enter summary judgment. *The Florida Bar v. Miravalle*, 761. So.2d 1049 (Fla. 2000).

Florida courts repeatedly have held that a trial court should not enter summary judgment unless a movant conclusively demonstrates the absence of any genuine issue of material fact. *See, e.g.*, *Moore v. Morris,* 475 So.2d 666 (Fla.

1985) (a trial court must always deny a summary judgment motion unless the facts are crystallized); *Underwriters at Lloyds, London v VIP Distribs., Inc.*, 629 So.2d 291 (Fla. 3d DCA 1993) (on a motion for summary judgment, the movant bears the burden of demonstrating the non-existence of any disputed issue of material fact). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions on file and affidavits conclusively show that there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510.

It is well-established law in Florida that a party moving for summary judgment has "the burden of proving a negative, i.e., the nonexistence of a genuine issue of material fact," and that it must do so conclusively. *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). Florida courts have construed this principle to require a movant to demonstrate that the undisputed facts conclusively establish that the opposing party cannot prevail. *Florida E. Coast R.. Co. v. Metropolitan Dade County*, 438 So.2d 978 (Fla. 3d DCA 1983). *See also Archie v. State Farm & Cas. Co.*, 603 So. 2d 126 (Fla. 2d DCA 1992). To meet this burden, a movant must "overcome all reasonable inferences which may be drawn in favor of the opposing party." *Star Lakes Estates Ass'n, Inc. v. Auerbach*, 656 So. 2d 271, 274 (Fla. 3d DCA 1995) (citations omitted). *See also Holl v. Tolcott*, 191 So. 2d 40, 43 (Fla. 966) (moving party must demonstrate the absence of all reasonable inferences

which may be drawn in favor of the moving party); *Albelo v. Southern Bell*, 682 So. 2d 1126, 1129 ("even where the facts are uncontroverted, the remedy of summary judgment is not available if different inferences can be reasonably drawn from the uncontroverted facts"). However, once the movant tenders competent evidence to support the motion, the party against whom the judgment is sought must present contrary evidence to reveal a genuine issue of material fact. It is not enough for the party opposing summary judgment merely to assert that an issue exists. *Buitrago v. Rohr*, 672 So. 2d 646, 648 (Fla. 4th DCA 1996).

The allegations raised by The Florida Bar in their Complaint against the Respondent are not supported by facts or law and partial summary judgment is appropriate as discussed in the original motion. R 349:1.

Rule 4-3.4

There is simply no record evidence that Respondent presented, participated in presenting or threatened to present criminal charges against Campbell. In fact, the record evidence is quite the opposite. While Respondent may have provided information to Sergeant Fernandez that Campbell was at Malio's consuming alcohol on the evening of January 23, 2013, Campbell has testified that he voluntarily consumed alcohol and voluntarily drove without Personius or any other person asking him to drive. Campbell's voluntary actions resulted in his arrest. Furthermore, if Campbell truly felt that he was not intoxicated, he could have

avoided being arrested and charged with driving under the influence if he had cooperated with law enforcement. Instead, Campbell again, on his own volition, decided to lie to law enforcement about whether he consumed any alcohol that evening, lied about the number of alcoholic drinks he consumed, lied about being infirm, lied about having a speech impediment, he refused field sobriety exercises and refused to take a breathalyzer. He refused because he knew he was intoxicated and he would fail those exercises. In fact, Officer McGinnis testified that, in his opinion, Campbell was impaired under the law.

Additionally, the Bar has failed to provide a single piece of evidence that suggests that any alleged report Respondent may have made to law enforcement was for the "*sole"* purpose of gaining an advantage in a civil matter. It is undisputed that while Respondent's firm was engaged in a trial in which Campbell and his firm were opposing counsel, Respondent had no involvement in the trial. Furthermore, to meet their burden in proving this allegation, it is incumbent upon The Florida Bar to exclude all other possibilities. In fact, Sgt. Fernandez testified that he has known Filthaut was against drunk drivers. As The Florida Bar is unable to present any evidence that the "sole" purpose of Respondent informing law enforcement that Campbell may drink and drive was to gain an advantage in a civil matter, summary judgment must be granted as a matter of law.

Rule 4-3-5(c)

The Florida Bar alleged, "by relaying information to the Tampa Police Department, Respondent engaged in conduct intended to disrupt a tribunal." Other than the fact that Respondent may have provided information to law enforcement that Campbell may drink or drive, the discovery failed to reveal any evidence that Respondent intended to disrupt the tribunal. To prove intent, the Bar must provide evidence that the conduct was deliberate and knowing. *The Florida Bar v. Fredericks*, 731 So.2d 1249 (Fla. 1999). There is no evidence that Respondent acted deliberately and knowingly such that any action he might have taken would almost certainly result in the disruption of the tribunal. In fact, the evidence suggests otherwise. Campbell testified that he was ready to proceed with trial the following morning and present Michelle Schnitt as a witness. The only reason trial did not proceed the following morning was based upon stipulation of the parties and they agreed they would work on jury instructions.

As stated above, the element of intent requires a showing that the conduct was deliberate and knowing. To meet its burden, the Bar must advance evidence that Respondent was aware that it was certain that providing information to law enforcement about Campbell drinking at Malio's would result in a disruption of the tribunal. The Bar has failed to do so. It was not even certain that Campbell would drive while intoxicated, make an illegal right hand turn warranting a traffic stop, lie to Officer McGinnis repeatedly, refuse field sobriety tests, refuse a breathalyzer

test and have the parties stipulate to a continuance when Campbell has testified he was prepared to proceed forward with trial and witness testimony.

Because there is no evidence that Respondent was aware that it was a certainty that reporting a potential drunk driver to law enforcement would result in a disruption of the tribunal, summary judgment must be granted as a matter of law.

Rule 4-4.4(a)

To be found in violation of this particular Rule Regulating the Florida Bar, it must be shown, through evidence, that Respondent represented Bubba Clem or Bubba Radio Network during this trial and there simply is no evidence of this. While Respondent is a member of the law firm of Adams & Diaco, P.A., he did not personally represent Bubba Clem nor did he represent Bubba Radio Network. Furthermore, there is no evidence that Respondent had any decision-making authority regarding the case or that he ever consulted with Bubba Clem or Bubba Radio Network regarding this case. Furthermore, the trial record is clear that Respondent was not involved in this trial nor made appearance at the trial as counsel of record.

Additionally, there is no evidence that Respondent knowingly used methods of obtaining evidence that violate the legal rights of such a person. The only potential inference here is that Respondent allegedly engaged in conduct to obtain access to Campbell's trial briefcase. There is not a single allegation in the Bar's

Complaint that Respondent was involved in the situation with the trial briefcase or that he even knew that there was a trial briefcase.

As the Bar is unable to present any evidence that Respondent represented Bubba Clem or Bubba Radio Network or that Respondent knowingly used methods of obtaining evidence, summary judgment must be granted as a matter of law as it relates to this allegation.

Rule 4-8.4

The general rule of attorney conduct is stated in 3-4.3 Rules Regulating the Florida Bar which provides that "[t]he commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise. . . may constitute a cause for discipline." *The Florida Bar v. Brake*, 767 So.2d 1163 (Fla. 2000). The exception to this general rule is 4-8.4(d) and applies only when a lawyer engages in misconduct while employed in a legal capacity. *Id.*

To the extent that Respondent may have provided information to law enforcement that Campbell was going to drink and drive, there is no evidence that this was done while employed in a legal capacity.

Respondent was not was not employed as Mr. Clem's attorney nor did he participate in or attend the trial as counsel. As this rule, by its express nature, requires that Respondent be engaged in a legal capacity at the time of the alleged

misconduct and there is no evidence of such, summary judgment should have been entered as a matter of law.

III. THE REFEREE IMPOROPERLY RELIED ON FACTS NOT IN EVIDENCE.

The Respondent filed a motion for the Referee to disclose all information obtained by independent fact research during the trial. R 415:1. The record shows that the Referee did his own research with respect to witnesses Doctor Frankl. R 415:2. The record also shows that the Referee did his own research with respect to James Murman. R 415:2-3. The Referee refused to advise Respondent what research he conducted. R 415:1.

This is unfair. The Respondent was not privy to all of the evidence used against him and, thus, was unable to subject the evidence obtained by the Referee's independent investigation to a rigorous cross-examination.

IV. THE REFEREE'S FINDINGS AND CONCLUSIONS ARE NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

The Referee found the Respondent guilty of violating Rule 3-4.3 by clear and convincing evidence that he conspired with Stephen Diaco and Robert Adams along with Melissa Personious and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esquire and then attempt to cover up otherwise destroy evidence of his participation in that conspiracy.

There is zero evidence that Respondent destroyed or otherwise consented to the destruction of the cellular phone he used on January 23, 2013. While Mr. Adams, Ms. Personious and Sergeant Fernandez have all admitted at various points under oath to deleting information from their respective cellular phones the Respondent has not. Since there is no evidence on the record supporting his finding, the Referee relies solely on the adverse inference that the Respondent deliberately destroyed his cell phone.

A respondent's silence may be used against him or her in a disciplinary proceeding but it should not be the only piece of "evidence" used to convict him of a particular rule violation. In similar cases involving other professions, the Supreme Court of the United States has held that a teacher who invokes the Fifth Amendment privilege against self-incrimination cannot be discharged from employment. In *Slochhower v. Board of Education*, 350 U.S. 551 (1956), the Court wrote:

> "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilty or a conclusive presumption of perjury… The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Id*., at 557-558.

Several states have statutes or rules of evidence that forbid courts from drawing an adverse inference after a party asserts a testimonial privilege. See, e.g., Alaska R. Evid. 512(c); Ark. R. Evid. 512; Cal. Evid. Code § 913(a); Del. R. Evid.

512; Haw. Rev. Stat. § 626-1, R. 513; Idaho R. Evid. 512; Ky. R. Evid. 511; N.D. R. Evid. 512; Nev. Rev. Stat. § 27-513; Nev. Rev. Stat 49.405; N.J. R. Evid. 532; N.M. R. Evid. 11-513; Okla. Stat. Ann. §2513; Or. Rev. Stat. § 40.290; Vt. R. Evid. 512. In those states, the court has to tell the jury to not use the silence against the party. The State of Florida should follow suit.

V. PERMANENT DISBARMENT OF THE RESPONDENT IS NOT SUPPORTED BY THE FACTS AND THE LAW.

Discipline must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. *Florida Bar v. Brake,* 767 So.2d 1163, 1169 (Fla. 2000) (quoting *Florida Bar v. Cibula,* 725 So.2d 360, 363 (Fla. 1998)). This Court deals more severely with cumulative misconduct than with isolated misconduct." *Florida Bar v. Greenspahn,* 386 So.2d 523, 525 (Fla. 1980); *see also Florida Bar v. Spann,* 682 So.2d 1070, 1073 (Fla. 1996).

Permanent disbarment of the Respondent is inappropriate. Assuming this Court accepts the Referee's factual findings as accurate, coupled with the adverse

inferences (imposed only after Respondent exercised his constitutional right to remain silent), this is one act of misconduct over a 15-year career practicing law. In this case, unlike others, the actions of the Respondent took place over a four-hour period on January 23, 2013. Thus this mistake was isolated and not cumulative in nature. In addition, up to this case, the Respondent has had no other issues with the bar over the span of his entire legal career.

In the following five instances of permanent disbarment, this Court has looked to a pattern of egregious and cumulative misconduct, and the absence of any mitigating factors, to conclude that disbarment is not only appropriate but also necessary to fulfill the threefold purpose of attorney discipline. In *Thompson*, the Court ruled that disbarment was necessary because he made material factual false statements to the court, communicated with clients of opposing counsel, engaged in ex parte communications, sent numerous negative correspondence to parties, targeted an uninvolved individual for a negative publicity campaign, accused a judge of fixing cases, sent inappropriate materials to parties, accused other lawyers of crimes, harassed former clients of opposing attorneys, negatively retaliated against former opposing counsel who reported him to the Bar, and made other egregious public allegations about former clients and opposing lawyers and parties. *The Florida Bar v. Thompson*, 994 So.2d 306 (Fla. 2008). In *Stahl*, the respondent was disbarred permanently because he was convicted of committing a lewd and

lascivious act upon a child and sentenced to six years in prison. *The Florida Bar v. Stahl*, 963 So.2d 228 (Fla. 2007). In *Massari*, the respondent was permanently disbarred because he stole client money. *The Florida Bar v. Massari*, 832 So.2d 701 (Fla. 2002). In *Kandekore*, the Respondent was permanently disbarred because he was suspended for assaulting a police officer and then continued to practice law without a license. *The Florida Bar v. Kandekore*, 932 So.2d 1005 (Fla. 2006). In *Bailey*, the respondent was permanently disbarred for stealing client funds. *The Florida Bar v. Bailey*, 803 So.2d 683 (Fla. 2001).

It is true this Honorable Court has moved toward imposing stronger sanctions for unethical and unprofessional conduct. *The Florida Bar v. Adler*, 126 So. 3d 244, 247 (Fla. 2013) (noting that "this Court has moved towards stronger sanctions for attorney misconduct"). However, a review of this Honorable Court's most recent opinions and sanctions reveals that conduct more egregious than Respondent's and which resulted in more rule violations than Respondent still did not warrant disbarment.

In *The Florida Bar v. Dupee*, the respondent represented the wife in dissolution of marriage matter. *The Florida Bar v. Dupree*, No. SC13-921 (Fla. 2015). The respondent was found to have known about $482,980.46 that was being withheld by the wife from the dissolution proceedings and, in fact, intentionally perpetuated a fraud upon the court by filing a financial affidavit of the

wife failing to disclose the $482,980.46. Additionally, the respondent served inaccurate discovery responses to facilitate the fraud upon the court and knowingly permitted her client to give false deposition testimony, under oath, that she knew to be false. The Court found that the *Dupee* respondent had violated eight (8) separate rules, (including two of the same rules that Respondent Filthaut is charged with violating; to wit: Rule 4-3.4 and Rule 4-8.4). Notwithstanding, this Court only gave *Dupee* a one-year suspension (increasing from 90 day recommendation).

While in recent years this Court has made efforts to discipline attorneys more harshly, a comparative analysis of the Court's recent findings in the *Dupee* case reveals that the Referee's disciplinary recommendations in this case as to Respondent are excessive and unjust. Ms. Dupee's actions were done of her own volition with the intent of personally benefiting from those actions and yet this Court determined that a one-year suspension was sufficient to discipline and rehabilitate Dupee.

The Respondent's case does not rise to the level of permanent disbarment. This Court has repeatedly stated that the referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt. *The Florida Bar v. Shoureas*, 913 So. 2d 554, 557-58 (Fla. 2005). Here, the

referee's recommendations are without support. Thus, the Court must conclude that the facts do not support the referee's recommendation.

The Respondent has no prior disciplinary record. The Respondent was doing what he was directed to do by his superior. The Respondent exhibited a cooperative attitude during the disciplinary proceeding The Respondent demonstrated good character and reputation. The Respondent showed remorse. The Referee's recommended discipline has no reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Temmer*, 753 So. 2d 555, 558 (Fla. 1999).

Further, based on simple fairness, Respondent is more similarly situated to Brian Motroni than he is to his supervisors Robert Adams and Stephen Diaco. Both Mr. Motroni and Respondent were employees of the law firm. Both Mr. Motroni and Respondent acted upon orders from their supervisors. Yet, the Bar did not persecute Mr. Motroni. To punish Respondent in the same manner as Mr. Adams and Mr. Diaco is unfair under the law and unsupported by the facts and the evidence. While the Respondent should not proportionately receive the same punishment as Mr. Motroni it therefore follows that he should not receive the same punishment as Mr. Diaco and Mr. Adams. Additionally, the Respondent points out that he had zero involvement in the allegations in this case beyond the several hour period on January 23, 2013. The Respondent did not testify before Judge Arnold

nor did he discuss this case with the media (as did respondent Stephen Diaco). Further, the Respondent has no other allegations of similar or related misconduct (as does respondent Robert Adams). Yet the Respondent is receiving the same punishment. This is unfair.

The judgment in the Respondent's case must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment in the Respondent's case must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment in the Respondent's case must be severe enough to deter others who might be prone or tempted to become involved in like violations. *The Florida Bar v. Brake,* 767 So.2d 1163, 1169 (Fla. 2000) (quoting *The Florida Bar v. Cibula,* 725 So.2d 360, 363 (Fla. 1998)).

Permanent disbarment is unjust, disproportionate, and thus unnecessary. The Bar's initial agreement of a 91-day suspension was appropriate and fair to society, fair to the respondent, and severe enough to deter others who might be prone or tempted to become involved in like violations. *Florida Bar v. Brake,* 767 So.2d 1163, 1169 (Fla. 2000) (quoting *Florida Bar v. Cibula,* 725 So.2d 360, 363 (Fla. 1998)). A sentence less than the recommended permanent disbarment would also

be fair to society, fair to the respondent, and severe enough to deter others who might be prone or tempted to become involved in like violations. *Id*.

It should be noted that the Respondent did not wish to proceed to trial in this case. The Respondent wanted to resolve this case, as evident by his entering into an agreement that was ultimately rejected by the Referee before he heard any testimony under oath or examined one piece of evidence. The Referee's decision to reject an agreed upon (by all parties, including The Florida Bar) resolution begat a well-publicized media spectacle. The very public nature of this case, and this Court's suspension, has severely punished Respondent because it has destroyed his career and devastated his family. "Judges rule on the basis of law, not public opinion, and they should be totally indifferent to the pressures of the times," Chief Justice, former Chief Justice of the Supreme Court of the United States, *Christian Science Monitor,* (February 11, 1987). In closing the Respondent remains amenable to further rehabilitation, as this Court deems fair and appropriate, including up to disbarment not permanent, in accordance with the law.

CONCLUSION

WHEREFORE, the Respondent, ADAM ROBERT FILTHAUT, by and through his undersigned counsel, respectfully petitions this Honorable Court to overturn the recommendations contained in the Report of the Referee.

Date: February 10, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2016, a copy of the foregoing was served on the following by registered e-mail via the electronic docket of this Honorable Court for service to all counsel of record:

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CERTIFICATON OF TYPE SIZE AND STYLE

Undersigned counsel certifies that this brief is typed in proportionally spaced Times New Roman 14 point font.

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