

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ADAM ROBERT FILTHAUT,

Respondent.

Supreme Court Case
No. SC14-1056

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

ANSWER BRIEF

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JEAC Op. 2012-0221

SYMBOLS AND REFERENCES

For the purpose of this brief, Adam Robert Filthaut, Respondent, will be referred to as “Respondent,” or as “Filthaut.” The Florida Bar, Complainant, will be referred to as “The Florida Bar” or as “the Bar.” The referee will be referred to as “Referee.” Additionally, “Rule” or “Rules” will refer to the Rules Regulating The Bar. “Standard” or “Standards” will refer to Florida Standards for Imposing Lawyer Sanctions.

“RR” will refer to the Report of Referee entered on August 27, 2015, followed by the appropriate page number (e.g., RR 10). References to specific pleadings will be made by title. “TR” will refer to the transcript of the trial before the Referee, followed by the volume, the appropriate page number, and line number (e.g., TR I, P 100, L 1). “SHTR” will refer to the transcript of the sanctions hearing held before the Referee, followed by the volume, the appropriate page number, and line number (e.g., SHTR I, P 100, L 1).

“TFB Exh.” will refer to The Florida Bar’s exhibits admitted during the final hearing, followed by the appropriate exhibit number (e.g., TFB Exh. 1). “SHTFB Exh.” will refer to The Florida Bar’s exhibits admitting during the sanctions hearing, followed by the appropriate exhibit number (e.g., SHTFB Exh. 1). “SHR

Exh.” will refer to Respondent’s exhibits admitted during the Sanctions Hearing, followed by the appropriate exhibit number (e.g., SHR Exh. 1).

“IR” will refer to the Index of Record.

“IB” will refer to the amended Initial Brief dated February 10, 2016, filed by Respondent.

STATEMENT OF THE CASE AND OF THE FACTS

I. Statement of the Case

This case arose out of a disciplinary proceeding against Adam Robert Filthaut, and is related to the following cases before this Court: Stephen Christopher Diaco, Supreme Court Case No. SC14-1052, and Robert D. Adams, Supreme Court Case No. SC14-1054. All three cases were assigned to The Honorable W. Douglas Baird, a retired circuit court judge who previously presided over cases in the Sixth Judicial Circuit, in Pinellas County. Respondent, Diaco and Adams were all represented by Gregory W. Kehoe, Danielle Susan Kemp, and Joseph Arnold Corsmeier during the disciplinary proceedings. The Referee consolidated the three cases.

The Respondent served a response to the Bar's Complaint on August 21, 2014, which the Referee treated as a general denial. (IR 110). The Bar served interrogatories to Respondent on September 17, 2014. (IR 155). Respondent served answers to the Bar's interrogatories on October 22, 2014. (IR 203). Respondent filed motions to disqualify the Referee on January 16, 2015, and April 6, 2015, which were both denied. (IR 286, 292, 337, 341). The Bar deposed Respondent on January 28, 2015, and May 4, 2015. Respondent invoked his Fifth Amendment privilege during both depositions and refused to answer any questions.

(RR 28). On April 21, 2015, Respondent filed a corrected motion for partial summary judgment, which was denied. (IR 355). On May 7, 2015, Mark Jon O'Brien filed a notice of appearance as co-counsel for Respondent. (IR 392).

The Referee conducted the final hearing to determine guilt on May 11 – 15, 2015, and on May 21, 2015. On the first day of the final hearing, Diaco advised the Referee that he had filed a petition for disciplinary revocation with this Court. (TR I, P 8, L 14-17; IR 331). When the Bar called Diaco to testify, he invoked the Fifth Amendment as he had previously done during his depositions. (TR I, P 64-92). When the Bar called Adams to testify, instead of invoking the Fifth Amendment as he had done in two prior depositions, he elected to testify. (TR I, P 95, L 12-22). The Bar called Respondent to testify on the second day of trial. Although Respondent had the opportunity to hear Adams' testimony the day before and to think about it overnight, Respondent elected not to testify and invoked his Fifth Amendment privilege to each question asked. (TR II, P 192-219). The Referee found Respondent guilty of violating the Rules Regulating The Florida Bar. (IR 407; RR 48-50). Based on the findings of guilt, the Referee conducted a sanctions hearing on August 6 – 7, 2015, at which time Respondent had the opportunity to present mitigating evidence. (RR 67; SHTR I, P 172, L 12-19; SHTR II, P 240-243, P 247, L 10-25, P 248-249, P 250, L 1-6; SHR Exh. 2, 3, 4).

The Referee filed his Report of Referee with this Court on August 27, 2015. The Referee found Respondent guilty of violating the following Rules Regulating Fla. Bar: 3-4.3 (Misconduct and Minor Misconduct); 4-3.4(a) (unlawfully obstruct another party's access to evidence); 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter); 4-3.5(c) (conduct intended to disrupt a tribunal); 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another); 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice). (RR 48-50). The Referee recommended that Respondent be permanently disbarred, and awarded costs to the Bar in the amount of \$14,178.28. (RR 51, 71).

Respondent filed a petition for review of the Report of Referee on October 23, 2015, a request for oral argument on January 22, 2016, and his initial brief on January 21, 2016. After the Court entered an order striking Respondent's initial brief, Respondent filed an amended Initial Brief on February 10, 2016. Respondent contests the Referee's findings of fact and rule violations, and the recommended discipline of permanent disbarment. (IB 24-25).

II. Statement of the Facts

Respondent was a non-equity partner in the law firm of Adams & Diaco, P.A., which was located in the Bank of America building in downtown Tampa. (RR 4; TR I, P 21, L 3-4, P 94, L 3-10, P 107, L 9-11, P 175, L 18-22; TFB Exh. 31, P 79, L 25, P 80, L 1-2; TFB Exh. 34). Diaco and Adams were equity partners/shareholders in Adams & Diaco, P.A. (RR 4; TR I, P 94, L 1-3, P 107, L 16-17; TFB Exh. 34). Respondent was supervised by Diaco and Adams. (TR I, P 107, L 12-17, P 174, L 23-25, P 175, L 1-3). The firm defended a local radio personality, Bubba Clem, and Bubba Radio Network in a years-long, contentious, and highly-publicized defamation suit. (RR 6; TR III, P 305, L 18-25, P 306, L 1; TR IV, P 563 L 13-15, P 567, L 17-20, P 570, L 4-6; TR VII, P 992, L 23-24, P 993, L 1-22; TFB Exh. 34, 38). Charles Philip Campbell, Jr. was the lead attorney for the Plaintiffs, Todd and Michele Schnitt. (RR 6; TR III, P 304, L 18-20, P 334, L 23-25; TR IV, P 541, L 3-5, P 552, L 17-24). Mr. Campbell was employed by Shumaker, Loop & Kendrick, LLP, which was also located in the Bank of America building in downtown Tampa. (RR 6; TR III, P 304, L 10-17; TR IV, P 540, L 24-25, P 541, L 1-2; TFB Exh. 14, P 65, L 21-23).

Respondent had a close friend, Sergeant Raymond Fernandez, who worked in the Tampa Police Department DUI division. (RR 5; TR VII, P 1003, L 17-22; TFB

Exh. 16, P 22, L 15-23; TFB Exh. 18, P 67, L 6-11; TFB Exh. 28, P 2, L 12-22, P 5, L 5-18; TFB Exh. 34, 41). On the evening of November 29, 2012, Respondent called Sergeant Fernandez and told him that an attorney named “Phil Campbell” worked in the same office building, got drunk all the time, and drove home drunk. Respondent also told Sergeant Fernandez that Mr. Campbell was drinking at Malio’s, a restaurant located in downtown Tampa. (RR 7; TFB Exh. 16, P 21, 12-23; TFB Exh. 18, P 79, L 7-14, P 80, L 18-25, P 81, L 1-2, P 83, L 25, P 84, L 1-5, P 87, L 20-25, P 88, L 1-25, P 89, L 1-14; TFB Exh. 28, P 8, L 4-17, P 9, L 4-23). Respondent did not provide Mr. Campbell’s full name to Sergeant Fernandez. (TFB Exh. 16, P 22, 4-14; TFB Exh. 18, P 80, L 6-25, P 81, L 1-2, P 86, L 8-16; TFB Exh. 28, P 10, L 20-25, P 11, L 1-13). Respondent also failed to tell Sergeant Fernandez that Mr. Campbell was the opposing counsel in a case being handled by Respondent’s firm. (RR 7; TFB Exh. 16, P 22, 4-14; TFB Exh. 18, P 72, L 5-25, P 73, L 1-2, P 86, L 8-16; TFB Exh. 28, P 11, L 15-25, P 12, L 1-25, P 13, L 1, P 57, L 1-25). Based on Respondent’s tip, Sergeant Fernandez gave a DUI officer a general description of Mr. Campbell and his car, and sent the officer to stakeout Malio’s; however, no arrest was made that night. (RR 7; TR VII, P 916, L 23-25, P 917, L 1-25, P 918, L 1-5, P 919, L 3-20; TFB Exh. 28, P 9, L 21-25, P 10, L 1-19, P 11, L 11-13; TFB Exh. 42A; TFB Exh. 46S, P 28, L 20-25, P 29, L 1-25, P 30, L

1-25, P 31, L 1-16, P 32, L 1-8). A compilation of text communications from the Tampa Police Department corroborate the stakeout for Mr. Campbell. (RR 7; TR VII, P 918, L 6-19, P 930, L 1-11; TFB Exh. 42A).

The *Schnitt v. Clem* case went to a two-week jury trial starting January 14, 2013, before The Honorable James Arnold. (TR VII, P 992, L 20-22; TFB Exh. 38). After a full day of trial on January 23, 2013, Mr. Campbell walked to Malio's to meet his co-counsel, Jonathan Ellis, for dinner and drinks. (RR 8; TR III, P 308, L 5-16, P 310, L 6-10). Around the same time, Melissa Personius, a paralegal employed by Adams & Diaco who primarily worked for Adams, also went to Malio's to meet a friend, Vanessa Fykes. (RR 4, 8; TR I, P 94, L 11-13; TR IV, P 469, L 15-25, P 470, L 1-14; TFB Exh. 31, P 2, L 11-23; TFB Exh. 34).

Ms. Personius recognized Mr. Campbell at the bar as she was leaving Malio's. (RR 8; TR IV, P 473, L 9-14; TFB Exh. 31, P 5, L 22-25, P 6, L 1-18, P 14, L 22-25, P 15, L 1-8, P 16, L 16-22). Ms. Personius sent a text to Adams telling him that she had seen Mr. Campbell at Malio's. (RR 8; TR I, P 104, L 10-21; TFB Exh. 31, P 16, L 12-22)¹. Adams then contacted Diaco and disclosed the

¹ The phone records for Ms. Personius reflect telephone calls recorded in Eastern Time, and text messages recorded in Central Time, which is one hour behind Eastern Time. (TR II, P 221, L 24-25, P 222, L 19-25). The phone records for Adams reflect telephone calls recorded in Eastern Time, and text messages recorded in Pacific Time, which is three hours behind Eastern Time. (TR IV, P 442, L 5-8, P 443, L 9-24).

information to him². (RR 8; TR I, P 106, L 2-8, P 107, L 16-17; TFB Exh. 31, P 17, L 17-21, P 18, L 10-25; TFB Exh. 50, 51, 59). Adams then called Ms.

Personius back and questioned her about what she saw. (RR 8; TR I, P 103, L 13-25, P 104, L 1-9; TFB Exh. 31, P 17, L 17-25, P 18, L 1-7; TFB Exh. 50, 53, 59).

After speaking with Adams, Ms. Personius returned to Malio's to spy on Mr. Campbell. (RR 9; TFB Exh. 31, P 21, L 3-25).

Cell phone records show Adams called Respondent at 6:30 p.m. (TFB Exh. 50, 52, 59)³. Adams testified he told Respondent that Mr. Campbell was at Malio's so Respondent could contact his friend, Sergeant Fernandez. (RR 9; TR I, P 106, L 9-25). Respondent called Diaco at 6:32 p.m. (TFB Exh. 51, 52, 59). Then, Respondent called Sergeant Fernandez, as verified by the phone records, and this time told him "Charles Campbell" was drinking at Malio's and may drive. (RR 9; TFB Exh. 16, P 21, 5-11; TFB Exh. 18, P 86, L 8-16, P 87, L 14-19, P 88, L 2-22; TFB Exh. 28, P 16, L 12-24, P 17, L 14-22, P 18, L 16-25, P 19, L 1; IB 4; TFB Exh. 52, 59). Again, Respondent failed to tell his friend that Mr. Campbell was the opposing counsel in the highly-publicized *Schnitt v. Clem* trial. (RR 9; TFB Exh. 16, P 22, L 4-14; TFB Exh. 18, P 72, L 5-25, P 73, L 1-2, P 86, L 8-16; TFB Exh.

² The phone records for Diaco reflect telephone calls and text messages recorded in Eastern Time. (TR II, P 251, L 14-15, P 252, L 6-12).

³ The phone records for Filthaut reflect telephone calls and text messages recorded in UTC, or Greenwich Mean Time, which is five hours ahead of Eastern Time. (TR II, P 272, L 4-21).

28, P 11, L 15-25, P 12, L 1-25, P 13, L 1, P 14, L 1-9, P 17, L 14-22, P 18, L 16-25, P 19, L 1, P 57, L 1-16).

When Ms. Personius and Ms. Fykes returned to Malio's, they took seats next to Mr. Campbell in the bar area. (RR 10; TR IV, P 475, L 8-14, P 545, L 9-14; TR V, P 714, L 24-25, P 715, L 1-6; TR VI, P 753, L 5-19, P 800, L 2-6; TFB Exh. 13, P 5, L 16-20; TFB Exh. 31, P 39, L 18-20, P 47, L 3-8; TFB Exh. 34; TFB Exh. 46R, P 20, L 12-17). Between 7:00 p.m. and 9:45 p.m., Ms. Personius socialized with Mr. Campbell, Mr. Ellis, and another attorney, Michael Trentalange. (RR 10; TR III, P 315, L 1-8; TR IV, P 546, L 12-15; TR V, P 715, L 16-22; P 716, L 1-25, P 717, L 1-25, P 718, L 1-25; TFB Exh. 13, P 5, L 16-22; TFB Exh. 31, P 41, L 17-25, P 45, L 1-7; TFB Exh. 34). Ms. Personius falsely stated that she worked as a paralegal for Nathan Carney, an attorney at Trenam Kemker. (RR 10, 20; TR III, P 315, L 6-13; TR IV, P 547, L 16-25; TR V, P 649, L 6-12; TFB Exh. 13, P 5, L 22-24; TFB Exh. 14, P 19, L 13-25). Ms. Personius was overly flirtatious with Mr. Campbell, bought drinks for him, and encouraged him to drink. (RR 10; TR IV, P 42, L 25, P 483, L 1-5, P 514, L 19-22; TR V, P 725, L 9-24, P 731, L 16-25, P 732, L 1-17; TR VI, P 755, L 13-17, P 761, L 9-14; TFB Exh. 31, P 50, L 2-21; TFB Exh. 46R, P 22, L 17-22; TFB Exh. 47).

After the call from Respondent, at approximately 8:15 p.m., Sergeant Fernandez dispatched a DUI officer to stakeout Malio's for Mr. Campbell's black BMW. (RR 10; TR VII, P 927, L 18-25, P 928, L 1-22, TFB Exh. 16, P 25, L 4-25, P 26, L 1-4, P 26, L 2-25, P 27, L 1-11; TFB Exh. 18, P 96, L 19-25, P 97, L 1; TFB Exh. 28, P 19, L 9-25, P 20, L 1-5; TFB Exh. 41, 42B; TFB Exh. 46S, P 33, L 5-25, P 34, L 1-5, P 35, L 7-25, P 36-37). Unbeknownst to Respondent, Mr. Campbell lived downtown, did not drive to Malio's, and intended to walk home that evening. (RR 8, 12; TR III, P 308, L 5-16; TR IV, P 555, L 19-25, P 556, L 1-6; TR V, P 721, L 10-18; TR VI, P 755, L 1-5; TFB Exh. 34). Throughout the evening, Ms. Personius exchanged text messages and phone calls with Respondent, Adams, and Diaco. (RR 10; TFB Exh. 31, P 19, L 8-13, P 88-89; TFB Exh. 50, 51, 52, 53, 59). Between 6:30 p.m. and 9:30 p.m., Ms. Personius exchanged 19 communications with Respondent; 17 communications with Adams; and 11 communications with Diaco. (RR 10-11; TFB Exh. 50, 51, 52, 53, 59). Respondent sent updates about Mr. Campbell to Sergeant Fernandez. (RR 10; TR VII, P 943, L 10-25, 944, L 1-10; TFB Exh. 16, P 28, L 16-25, P 29, L 1-16, P 30, L 13-17, P 31, L 14-25; P 32, L 1-9, P 34, L 4-22, P 56, L 12-25; TFB Exh. 18, P 42, L 11-15, P 97, L 9-12, P 101, L 11-15; TFB Exh. 28, P 21, L 25, P 22, L 1-22, P 32, L 16-25, P 33, L 5-11; TFB Exh. 41). The substance of the text messages is

unknown because Respondent, Adams, and Diaco erased the messages and got rid of their phones. (RR 11, 39, 64; TR I, P 134, L 8-25, P 135, L 1-4; TFB Exh. 34). Sergeant Fernandez gave sworn testimony that Respondent provided the information about Mr. Campbell to him. (RR 10; TR VII, P 943, L 10-25, 944, L 1-10; TFB Exh. 16, P 28, L 16-25, P 29, L 1-16, P 30, L 13-17, P 31, L 14-25; P 32, L 1-9, P 34, L 4-22, P 56, L 12-25; TFB Exh. 18, P 42, L 11-15, P 97, L 9-12, P 101, L 11-15; TFB Exh. 28, P 21, L 25, P 22, L 1-22, P 32, L 16-25, P 33, L 5-11; TFB Exh. 41). Sergeant Fernandez's testimony is corroborated by the Tampa Police MDT messages between patrol vehicles that show Sergeant Fernandez relayed information about Mr. Campbell to two DUI officers, Joseph Sustek and Timothy McGinnis. (RR 11; TR VII, P 943, L 18-25, P 944, L 1-10; TFB Exh. 28, P 26, L 1-9; TFB Exh. 41, 42B, 42C).

Ms. Fykes, Mr. Ellis, and Mr. Trentalange all left Malio's by around 9:30 p.m. (RR 12; TR IV, P 516, L 13-15, P 550, L 11-20; TR V, P 712, L 10-25, P 713, L 1-5). Ms. Fykes believed Ms. Personius was intoxicated and before leaving, advised her not to drive and to call a cab. (RR 12; TR IV, P 483, L 18-25). Mr. Campbell planned to walk home, to be in bed by 10:00 p.m., and to get up at 2:00 a.m. to prepare for the next day of trial. (RR 12; TR III, P 308, L 5-7; TR V, P 721, L 10-18). Mr. Campbell also thought Ms. Personius should not drive and offered

to call a cab for her. (RR 12; TR III, P 317, L 25, P 318, L 1-21, P 323, L 11-18, P 367, L 13-24). Ms. Personius told Mr. Campbell that her car was parked at the valet. (RR 12; TR III, P 318, L 11-13, P 321, L 20-24). At 9:28 p.m., Ms. Personius sent a text to Diaco. In turn, Diaco called Respondent, and Respondent sent a text to Sergeant Fernandez. (RR 13, 14; TFB Exh. 51, 52, 53, 59). At 9:29 p.m., Sergeant Fernandez sent an MDT message to Officer McGinnis, which read, “leaving bar now.” (RR 14, TFB Exh. 41, 42B).

The video of the Malio’s parking lot between 9:40 p.m. and 9:57 p.m. shows Mr. Campbell and Ms. Personius at the valet. (TFB Exh. 2). Mr. Campbell confirmed with the valet that Ms. Personius could leave her car overnight and have access to it the next day. (RR 13; TR III, P 319, L 15-19; TR VII, P 989, L 2-16). Mr. Campbell tried to convince Ms. Personius to leave her car overnight, but she refused. (RR 13; TR III, P 321, L 12-25, P 322, L 1-6, P 323, L 2-7). Ms. Personius insisted that her car be moved to a “secure public lot.” (RR 13, TR III, P 321 L 12-25, P 322, L 1-3, P 323, L 2-25, P 324, L 1-2). Out of frustration, Mr. Campbell planned to move the car to a parking lot a few blocks away and call a cab because he felt a responsibility to help a woman who appeared too impaired to drive. (RR 13; TR III, P 323, L 19-25, P 324, L 1-8, P 325, L 21-25, P 326, L 1, P 388, L 21-25, P 389, L 1-3, P 390, L 5-10). At 9:51 p.m., the MDT messages also

indicated that Mr. Campbell would be driving Ms. Personius' Nissan. (RR 14, 15; TFB Exh. 18, P 101, L 16-25, P 102, L 1-16; TFB Exh. 28, P 34, L 24-25, P 35, L 1-10, P 36, L 17-25; TFB Exh. 41, 42B, TFB Exh. 46S, P 49, L 15-25, P 50, L 1-25, P 51, L 1-6). Immediately after Mr. Campbell pulled out of the parking lot, Sergeant Fernandez, who was off-duty and in an unmarked car that evening, followed Mr. Campbell and pulled him over for allegedly making an improper right-hand turn and for violating the right-of-way of another vehicle. (RR 11, 16; TR III, P 326, L 2-7; TR VII, P 938, L 11-25, P L 1-6; TFB Exh. 16, P 44, L 20-24, P 45, L 5-25, P 46, L 1-25, P 66, L 12-22; TFB Exh. 18, P 112, L 1-17; TFB Exh. 28, P 37, L 9-25, P 38, L 1-25, P 39, L 1-25, P 40, L 1-23; TFB Exh. 3, 34, 39, 41).

Officer McGinnis was called to the scene and began his DUI investigation of Mr. Campbell. (RR 16; TR III, P 378-388; TR VII, P 936, L 2-11; TFB Exh. 16, P 49, L 16-25, P 50, L 1-7, P 65, L 5-18, P 66, L 12-25, P 67, L 1-25, P 68, L 1-20, TFB Exh. 18, P 117, L 2-5; TFB Exh. 28, P 41, L 4-6; TFB Exh. 39). Officer McGinnis arrested Mr. Campbell for DUI, and took him to the county jail. (RR 16; TR III, P 326, L 8-15, P 377, L 15-17; TR VII, P 936, L 12-16; TFB Exh. 3; TFB Exh. 16, P 68, L 4-20; TFB Exh. 18, P 117, L 2-5; TFB Exh. 28, P 42, L 2-7, P 43, L 13-25; TFB Exh. 34, 39). During this time period, Ms. Personius exchanged an additional twelve (12) communications with Respondent; seven (7)

communications with Adams; and two (2) communications with Diaco. (RR 10-11; TFB Exh. 50, 51, 52, 53, 59).

After Mr. Campbell was arrested, Sergeant Fernandez advised Respondent that he could not release the car to Ms. Personius because her license was suspended. (RR 16; TFB Exh. 16, L 18-22; TFB Exh. 28, P 45, L 15-23, P 48, L 1-8, P 49, L 5-12, P 51, L 23-25, P 52, L 1-6). Ms. Personius called Adams and then called Brian Motroni, an associate at Adams & Diaco, P.A., who picked up Ms. Personius, drove her home in her car, and then took a cab home. (RR 16-17; TR I, P 117, L 25, P 118, L 1-4; TR VI, P 892, L 2-22, P 893, L 3-5; TFB Exh. 16, P 50, L 25, P 51, L 1-16; TFB Exh. 28, P 48, L 7-22, P 49, L 5-20; TFB Exh. 31, P 75, L 6-25, P 76, L 1-7; TFB Exh. 50, 53, 54, 59). When Ms. Personius arrived at home, she disclosed the events of the evening to her ex-husband and roommate, Kristopher Personius. (RR 17; TR VI, P 797, L 11-25, P 798, L 1-15). Ms. Personius told Mr. Personius that Adams had instructed her to return to Malio's to spy on Mr. Campbell and to "get him to stay longer and drink more" (RR 17; TR VI, P 799, L 13-25, P 800, L 1-25, P 801, L 16-23). Then, Adams and Diaco contacted the Respondent "to get the cop in place." (RR 17; TR VI, P 800, L 15-24). Ms. Personius also told Mr. Personius that she made Mr. Campbell drive her car. (RR 17; TR VI, P 801, L 15-21, P 872, L 14-25, P 873, L 1-19). She also told

him that Diaco would give her a large bonus, and that she would be the best-paid paralegal. (RR 17; TR VI, P 803, L 15-20). Phone records show that at 11:35 p.m., Ms. Personius sent a text to Respondent. (TFB Exh. 52, 53, 59).

Mr. Campbell was released from jail at around 6:30 a.m. the next morning and Mr. Ellis picked him up. (RR 32; TR III, P 326, L 16-21; TR IV, P 556, L 6-16). When Mr. Campbell was arrested, he left his trial briefcase containing his trial notes and witness preparation documents for the morning's testimony in Ms. Personius' car. (RR 29; TR III, P 324, L 9-15; TR IV, P 557, L 6-14; TR V, P 649, L 13-19; TFB Exh. 13, P 5, L 4-7, P 6, L 21-25). By 8:00 a.m., Mr. Ellis had contacted the law office of Trenam Kemker to find "Melissa," but was unsuccessful. (RR 32; TR III, P 330, L 4-6, TR IV, P 558, L 1-25, P 559, L 1-18; TR V, P 649, L 6-12; TFB Exh. 13, P 6, L 5-17). At 9:00 a.m., the *Schnitt v. Clem* trial reconvened, but Mr. Campbell had not yet found his trial bag. (RR 32; TR IV, P 559, L 7-15, P 560, L 3-5; TFB Exh. 17). Mr. Ellis disclosed the DUI arrest to Judge Arnold and, as a professional courtesy, all parties agreed to a recess and to resume testimony on the next day. (RR 30, 32-33; TR III, P 391, L 1-7; TR IV, P 560, L 22-25, P 561, L 1-13, P 568, L 13-20; TR VII, P 994, L 21-25, P 995, L 1-15; TFB Exh. 13, P 7, L 4-17, P 12, L 21-25, P 13, L 1-2).

Mr. Campbell's colleagues continued to search for his trial bag. (RR 30, 33; TR III, P 329, L 15-22, P 330, L 7-12; TR IV, 557, L 18-23, P 574, L 9-25, P 575, L 1-3; TR V, P 649, L 6-19). At approximately 4:00 p.m., Mr. Ellis and Mr. Campbell discovered Melissa's true identity. (RR 33; TR IV, P 574, L 9-25, P 575-578, P 579, L 1-6; TFB Exh. 58, 64). At the direction of Diaco, Ms. Personius took a cab back to the Bank of America building to return the trial briefcase. Video from Bank of America shows that at about 5:15 p.m. Ms. Personius brought the trial briefcase into the lobby, then left the lobby with the trial briefcase, and then a cab driver returned to the lobby with the trial briefcase and delivered it to Shumaker, Loop & Kendrick, LLP. (RR 36; TR V, P 649, L 20-25, P 650, L 1-25, P 651, L 1-13, P 652, L 4-7, P 662, L 1-6, P 663, L 7-21; TFB Exh. 14, P 43, L 1-25, P 44, L 1; TFB Exh. 4, 12).

After Shumaker, Loop & Kendrick, LLP pieced together what had happened to Mr. Campbell, they filed a motion for mistrial and disqualification of the Adams & Diaco law firm on behalf of the Schnitts. On the morning of January 25, 2013, Judge Arnold held an evidentiary hearing on the plaintiffs' motions. (RR 37-38; TR III, P 331, L 15-19; TR IV, P 584, L 10-22, P 585, L 1-19, P 593, L 1-23; TR V, P 665, L 18-25, P 666-667; TR VII, P 995, L 20-25, P 996, L 1-21, P 1005, L 17-25; TFB Exh. 13, P 4-12; TFB Exh. 5, 6, 34). Judge Arnold was primarily

concerned that the jury may have been contaminated by the extensive media coverage and felt bound to delay the trial and question each juror regarding whether they had heard anything about Mr. Campbell's arrest. (RR 31; TR VII, P 996, L 7-17, P 997, L 2-5; TFB Exh. 13, P 20, L 2-19). After determining that the jury had not been contaminated, Judge Arnold allowed the trial to proceed. (RR 31; TR III, P 331, L 6-7; TR V, P 703, L 15-23; TR VII, P 997, L 6-18; TFB Exh. 13, P 47-51, 57). Judge Arnold reserved ruling on the motion for mistrial and placed a temporary ban on performing discovery. (RR 39; TR V, P 677, L 18-25, P 678, L 1-3; TR VII, P 999, L 1-5, P 1004, L 12-25, P 1005, L 11-16, P 1006, L 1-25, P 1007, L 1-17; TFB Exh. 14, P 153, L 5-15, P 160, L 17-22; TFB Exh. 15).

On January 30, 2013, Shumaker, Loop & Kendrick, LLP served preservation letters on Respondent, Adams, and Diaco to preserve their cell phone records and data. (RR 39; TR V, P 675, L 20-25, P 676, L 1-25, P 677, L 1-17; TR VII, P 12-17; TFB Exh. 34, 37). Respondent, Adams, and Diaco had already erased their cell phone messages. (RR 39; TFB Exh. 45). Respondent, Adams, Diaco, and Ms. Personius' cell phones were relinquished to attorney Lee D. Gunn, IV. (TR I, P 132, L 21-25, P 133, L 1-7). When asked questions about his phone at the final hearing, Respondent invoked the Fifth Amendment. (TR II, P 199-200).

The *Schnitt v. Clem* jury trial resulted in a verdict for the defendants. (RR 42; TR IV, P 592, L 18-25, P 593, L 13-17, P 636, L 4-8; TR V, P 671, L 3-6; TR VII, P 1005, L 4-16). On February 4, 2013, Judge Arnold lifted the ban on the discovery for the allegations of misconduct, and the plaintiff's motion for mistrial was converted into a motion for new trial. (RR 42; TR IV, P 593, L 1-17; TFB Exh. 15, P 4, L 15-18, P 5, L 1-16). The parties went to mediation and agreed to settle the case before an evidentiary hearing on the misconduct was held. (RR 42; TR VII, P 1007, L 1-17; TFB Exh. 38).

SUMMARY OF ARGUMENT

The Referee's findings of fact support the findings of guilt as to R. Regulating Fla. Bar 3-4.3 (Misconduct and Minor Misconduct); Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence); Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter); Rule 4-3.5(c) (conduct intended to disrupt a tribunal); Rule 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another); Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice).

The Referee correctly concluded that Respondent's vast misconduct and aggravating factors warrant permanent disbarment. The Referee's findings of fact and guilt support permanent disbarment. The case law and the applicable Florida Standards for Imposing Lawyer Discipline support permanent disbarment when an attorney is beyond rehabilitation. Respondent's conduct warrants a harsher sanction than disbarment with leave to reapply for admission, in order to protect the public and to discourage others from engaging in similar misconduct.

STANDARD OF REVIEW

A referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support. *Florida Bar v. Forrester*, 656 So. 2d 1273 (Fla. 1995) (quoting *Florida Bar v. Marable*, 645 So. 2d 438 (Fla. 1994)). On review, this Court neither reweighs the evidence in the record nor substitutes its judgment for that of the referee so long as there is competent, substantial evidence in the record to support the referee's findings. *Id.* at 42. The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no record evidence to support those findings or that the evidence in the record clearly contradicts the conclusions. *Florida Bar v. Feinberg*, 760 So. 2d 933 (Fla. 2000) (quoting *Florida Bar v. Sweeney*, 730 So. 2d 1269, 1271 (Fla. 1998)).

If a referee's findings of fact and conclusions of guilt are supported by competent, substantial evidence in the record, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000). The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the evidence in the record clearly contradicts the conclusions.

Florida Bar v. Nicnick, 963 So. 2d 219, 222 (Fla. 2007) (citing *Florida Bar v. Carlon*, 820 So. 2d 891, 898 (Fla. 2002); and *Florida Bar v. Vining*, 761 So. 2d 1044, 1047 (Fla. 2000)).

A referee's recommended sanction in an attorney disciplinary proceeding is persuasive, but this Court has the ultimate responsibility to determine the appropriate sanction. *Florida Bar v. Kossow*, 912 So. 2d 544, 546 (Fla. 2005). A referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. *Florida Bar v. Sweeney*, 730 So. 2d 1269 (Fla. 1998); *Florida Bar v. Lecznar*, 690 So. 2d 1284 (Fla. 1997). A referee's findings of mitigation and aggravation are presumed to be correct and are upheld unless they are clearly erroneous or not supported by the record. *Florida Bar v. Del Pino*, 955 So. 2d 556, 560 (Fla. 2007). Finally, this Court will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law. *Florida Bar v. Kossow*, 912 So. 2d 544, 546 (Fla. 2005) (citing *Florida Bar v. Temmer*, 753 So. 2d 555, 558 (Fla. 1999)).

ARGUMENT

I. The Referee Properly Denied Respondent's Motions to Disqualify the Referee

Respondent, Diaco, and Adams filed two motions to disqualify the referee in the disciplinary matter. In the first motion filed on January 16, 2015, Respondent alleged he feared he would not receive a fair trial because the Referee would be unable to be impartial regarding errors in the state attorney's report regarding its investigation of Mr. Campbell's arrest for DUI because the Referee's son was employed as an assistant state attorney in the Sixth Judicial Circuit. (IR 286; IB 29-30). The Referee properly denied the motion on the basis that it was legally insufficient, citing JEAC Op. 2012-02, which states that a judge is not disqualified merely because the judge's relative is employed by the State Attorney's Office, Public Defender's Office, or Legal Aid. (IR 292). Further, a judge's familiarity with the parties and evidence from earlier proceedings does not warrant disqualification. See e.g., *Ardis v. Ardis*, 130 So. 3d 791, 795 (Fla. 1st DCA 2014).

Respondent filed a renewed motion to disqualify the Referee on April 6, 2015, and alleged the Referee demonstrated bias against the Respondent by ruling against him and rejecting the proposed consent judgment. (IR 337; IB 30-31). The Referee properly denied the renewed motion to disqualify on the basis that it was legally insufficient. (IR 292, 341). Prior adverse rulings are not legally sufficient

sufficient grounds upon which to base a motion to disqualify. *Id.* at 795 (see also e.g., *Letterese v. Brody*, 985 So. 2d 597, 599 (Fla. 4th DCA 2008); *Winburn v. Earl's Well Drilling & Pump Serv.*, 939 So. 2d 199, 200 (Fla. 5th DCA 2006)). Additionally, Rule 3-7.9(b) (Consent Judgment After Filing of Formal Complaint) requires a referee to review proposed consent judgments in Bar disciplinary matters and to accept or reject them.

Finally, Respondent asserts that the Referee improperly rejected the proposed consent judgment as a result of the media attention surrounding this disciplinary matter. (IR 333; IB 46). Respondent has failed to offer any evidence to show that the media attention effected the Referee's consideration and/or rejection of the proposed consent judgment. As a result, Respondent's argument should be rejected.

II. The Referee Properly Denied Respondent's Motion for Summary Judgment

Disciplinary proceedings before a referee are administrative in character. The proceedings are neither civil nor criminal but are quasi-judicial administrative proceedings. R. Regulating Fla. Bar 3-7.6(f)(1). This Court reviews summary judgment orders *de novo* with all of the facts and inferences resolved in favor of the party opposing summary judgment. *Florida Bar v. Cosnow*, 797 So. 2d 1255, 1258 (Fla. 2001). Florida Rule of Civil Procedure 1.510(c) provides for the entry of

summary judgment in cases where it is shown that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. (IB 33-34). However, if the record raises even the slightest doubt that an issue might exist, summary judgment is improper. See e.g., *Competelli v. City of Bellaire Bluffs*, 113 So. 3d 92, 92–93 (Fla. 2d DCA 2013) (quoting *Snyder v. Cheezem Dev. Corp.*, 373 So. 2d 719, 720 (Fla. 2d DCA 1979)). Further, the movant must conclusively demonstrate that no issues of material fact exist, and include proof that is sufficient enough to overcome all inferences drawn in favor of the opposing party. The burden, therefore, is on the movant to demonstrate that the nonmoving party cannot prevail. See e.g., *Jackson-Jester v. Aziz*, 48 So. 3d 88, 90 (Fla. 2d DCA 2010). Respondent failed to meet his burden.

First, Respondent contends there is no evidence to show that he either participated in presenting or threatened to present criminal charges against Mr. Campbell and, therefore, he should not be found guilty of violating Rule 4-3.4(g) (A lawyer must not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter). To support his position, Respondent argues that Mr. Campbell made the decision to drink and to drive Ms. Personius' car that evening, and that Respondent should not be held responsible for Mr. Campbell's decision. (RR 40; TR I, P 24, L 14-25, P 25, L 1-2, P 29, L 5-10;

TFB Exh. 43, 44, 45; IB 33-34). The Referee correctly found Respondent's argument had no merit because Mr. Campbell's decision to drive was not "an intervening independent event that broke the chain of causation leading from their actions to his arrest." (RR 40-41). The Referee further stated that Respondent's acts were unethical, not because they resulted in Mr. Campbell's arrest, but because the acts were forbidden and willfully committed. (RR 41). As a result, the evidence supports that Respondent violated Rule 4-3.4(g).

Second, Respondent argues that he should not be found guilty of violating Rule 4-3.5(c) (Conduct intended to disrupt a tribunal) because he was merely providing information to law enforcement and did not deliberately intend to disrupt the ongoing *Schnitt v. Clem* trial. (IB 34-36). The Referee was not persuaded by Respondent's argument. To the contrary, the Referee found by clear and convincing evidence that Respondent deliberately targeted Mr. Campbell solely to gain an advantage in the *Schnitt* case. (RR 69). The Referee's finding is supported by the fact that Respondent twice reported Mr. Campbell to Sergeant Fernandez. (RR 7, 9; TFB Exh. 16, P 21, 12-23; TFB Exh. 18, P 79, L 7-14, P 80, L 18-25, P 81, L 1-2, P 83, L 25, P 84, L 1-5, P 87, L 20-25, P 88, L 1-25, P 89, L 1-14; TFB Exh. 28, P 8, L 4-17, P 9, L 4-23, 16, L 17-18). Further, Sergeant Fernandez told the State Attorney's Office during their investigation that it was his intent to follow

Mr. Campbell to see if there was any reason to stop him. (TFB Exh. 16, P 32, L 16-25, P 33, L 1-24, P 41, L 6-11; TFB Exh. 28, P 30, L 5-10). Respondent also failed to provide any explanation as to why he twice withheld from Sergeant Fernandez that Mr. Campbell was the opposing trial counsel in the highly-publicized and contested case which Adams & Diaco, P.A. was defending. (RR 7, 27; TFB Exh. 16, P 22, 4-14; TFB Exh. 18, P 72, L 5-25, P 73, L 1-2, P 86, L 8-16; TFB Exh. 28, P 11, L 15-25, P 12, L 1-25, P 13, L 1, P 57, L 1-25). Sergeant Fernandez did not learn about Mr. Campbell's position until the next morning on January 24, 2013, when the arrest made the news. (RR 27; TFB Exh. 18, P 69, L 21-25, P 70, 1-10). Respondent also failed to advise Sergeant Fernandez that a paralegal employed by Adams & Diaco, P.A. was operating under false pretenses, buying drinks for Mr. Campbell, and providing information to Respondent, Diaco, and Adams. (RR 27, 68-69; TFB Exh. 16, P 34, L 11-25, P 35, L 1-3; TFB Exh. 18, P 91, L 19-25, P 92, L 1-5). Therefore, the evidence supports that Respondent violated Rule 4-3.5(c).

Third, Respondent argues that he should not be found guilty of violating Rule 4-4.4(a) (In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person) because he did not represent the defendants in the *Schnitt* case, and he did not have any decision-making authority at Adams & Diaco, P.A. (IB 36-37). The Referee

did not find Respondent guilty of this rule violation. Therefore, Filthaut improperly argues in his amended brief that the facts in this case do not support a violation of Rule 4-4.4(a).

Finally, Respondent argues that the Referee erred in denying summary judgment and that Respondent should not be found guilty of violating Rule 4-8.4 (Misconduct) because his conduct was not committed while acting as an attorney. (IB 37-38). However, an attorney's personal conduct can be the subject of disciplinary proceedings. Rule 3-4.3 specifically states, "The 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 case for discipline." This Court has also stated that even in personal transactions, attorneys must avoid tarnishing the legal profession's image or damaging the public. *Florida Bar v. Della-Donna*, 583 So. 2d 307, 310 (Fla. 1989). In this case, Respondent's conduct not only tarnished the image of the legal profession, it damaged the public by eroding confidence in law enforcement and the judicial system. Respondent failed to meet his burden of showing that no genuine issues of fact existed and the Referee properly denied summary judgment. The allegations contained in the Bar's complaint were substantiated by the evidence at

trial and the Referee properly found Respondent guilty of violating Rule 4-8.4 (a), (c), and (d).

III. The Referee Properly Relied on All Facts

Respondent argues that the Referee improperly conducted independent research with respect to two witnesses, Dr. Robert Frankl and James Murman. (SHTR II, P 281, L 18-25, P 282-283; IB 38). In a Bar proceeding, the referee may consider any evidence deemed relevant in resolving factual issues, even if the evidence is outside the record. *Florida Bar v. Jasperson*, 625 So. 2d 459, 463 (Fla. 1993). The record shows that during the sanctions hearing, the Referee ascertained information pertaining to Mr. Murman's testimony involving a case in which Diaco represented a pro bono client. (SHTR II, P 281, L 18-25, P 282-283). The Referee's independent research for this information was properly obtained and considered.

IV. The Referee's Findings of Fact and Recommendations as to Guilt Are Supported by Competent, Substantial Evidence and Should Be Upheld

Respondent argues that he should not be found guilty of violating Rule 3-4.3. (IB 38-40). The Referee, however, found that Respondent played an active role in orchestrating the events on the evening of January 23, 2013. (RR 27). Sergeant Fernandez's testimony in prior proceedings corroborated Respondent's active participation in the scheme. (RR 28; TFB Exh. 16, 18, L 2-21, P 28, L 16-25). As

shown by the number of text messages and phone calls, Respondent maintained regular contact with Diaco, Adams, Ms. Personius, and Sergeant Fernandez. (RR 27; TFB Exh. 50, 51, 52, 53, 59).

Further, Mr. Campbell's arrest was not possible without the existence of Respondent's close relationship with Sergeant Fernandez, allowing Respondent access to the Tampa Police Department DUI Squad. (RR 5, 26, 68; TR VII, P 1003, L 17-22; TFB Exh. 16, P 22, L 15-23; TFB Exh. 28, P 5, L 5-18; TFB Exh. 34, 41). Respondent's connection with Sergeant Fernandez facilitated Respondent in coordinating Mr. Campbell's arrest. (RR 27-28). Respondent exploited Sergeant Fernandez's trust and friendship twice to involve the Tampa Police Department in staking out Malio's to look for an intoxicated driver based on unverified tips of a citizen. (RR 26). Respondent was able to exert influence over Sergeant Fernandez and the Tampa Police Department to the extent that the DUI squad targeted Mr. Campbell twice. (RR 26). Updates from Ms. Personius allowed Respondent to keep Sergeant Fernandez immediately informed and updated on what was occurring inside Malio's, when Mr. Campbell left the bar, and which vehicle he would be driving. (RR 68).

Although Respondent complains that he was denied due process, Respondent had ample opportunity to defend himself throughout the entire disciplinary

proceeding. Respondent was vigorously defended by a team of lawyers. The Bar attempted to depose Respondent twice, but he asserted his Fifth Amendment privilege and refused to answer any questions. (IR 399). Respondent also refused to testify at the final hearing and invoked his Fifth Amendment privilege to each question asked. (RR 28; TR II, P 191-219). Respondent refused to respond to a question regarding whether he erased his cell phone communications about the events, which would have verified his involvement in the scheme to effectuate Mr. Campbell's arrest. (RR 28; TR II, P 199, L 25, P 200, L 1-12). The Referee found that such evidence would have either exonerated or incriminated Respondent, and the fact that he erased and/or destroyed such crucial evidence only infers that the evidence would have implicated him. (RR 39-40). In properly drawing an adverse inference that Respondent deliberately destroyed the evidence, the Referee relied upon the following case law holding that a court may draw an adverse inference against a party in a civil action who invokes the Fifth Amendment: *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251 (Fla. 4th DCA 2003); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Atlas v. Atlas*, 708 So. 2d 296, 299 (Fla. 4th DCA 1998); *Fraser v. Security and Investment Corp.*, 615 So. 2d 841 (Fla. 4th DCA 1993); and *New Hampshire Ins. Co. v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990). (RR 28, 39-40).

V. The Standards for Imposing Lawyer Sanctions and Case Law Support Permanent Disbarment as the Appropriate Sanction

The Standards for Imposing Lawyer Sanctions serve as guidelines for the referee in determining the appropriate sanction. The Standards do not distinguish between permanent disbarment versus disbarments of varying lengths of time. In recommending permanent disbarment, the Referee considered the duties violated to the public and the legal system, and the potential or actual injury caused by the Respondent's misconduct. (RR 65-66). The Referee properly considered the following Standards:

Standard 5.1 Failure to Maintain Personal Integrity

5.11 Disbarment is appropriate when:

- (f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice;

Standard 6.1 False Statements, Fraud, and Misrepresentation

6.11 Disbarment is appropriate when a lawyer:

- (a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
- (b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding;

Standard 7.0 Violations of Other Duties Owed as a Professional

7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system; and

Standard 9.0 Aggravation and Mitigation

Standard 9.1 After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

Standard 9.22 outlines the aggravating factors that may be considered in imposing discipline. The Referee found the following five aggravating factors applied to the Respondent: (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (f) false evidence, false statements, or other deceptive practices during the disciplinary process; and (i) substantial experience in practicing law. Fla. Stds. Imposing Law. Sancs. 9.22. (RR 66).

Standard 9.32 outlines the mitigating factors that may be considered in imposing discipline. Respondent presented affidavits and witnesses at the sanctions hearing who testified about Respondent's loyalty and professional competence. Respondent argued that the following additional mitigating factors applied: absence of a dishonest or selfish motive; personal or emotional problems; cooperative attitude toward proceedings; and remorse. (IR 418). The Referee, however, rejected Respondent's argument, finding that these mitigating factors were not supported by any evidence. (RR 67). The Referee found only two mitigating factors applied to Respondent: (a) absence of a prior disciplinary record; and (g) character or reputation. (RR 67; SHTR I, P 172, L 12-19; SHTR II, P 240-243, P 247, L 10-25, P 248-249, P 250, L 1-6; SHR Exh. 2, 3, 4).

The Referee also considered the potential or actual injury caused by Respondent's misconduct, including the: (1) wrongful arrest and incarceration of Mr. Campbell; (2) public humiliation of Mr. Campbell and the damage to his professional reputation; (3) disruption of an ongoing jury trial and tainting of the jury; (4) discharge of Sergeant Fernandez from the Tampa Police Department; (5) removal of Officer McGinnis from the DUI Squad; (6) dismissal of a significant number of pending DUI cases; (7) public loss of confidence in lawyers and the legal system; and (8) public loss of confidence in law enforcement. (RR 66). The Respondent's aggravating factors far outweigh the mitigating factors and support the Referee's recommendation of permanent disbarment.

VI. The Referee's Findings of Fact and Guilt Support Permanent Disbarment as the Appropriate Sanction

Permanent disbarment is warranted where the conduct of a respondent indicates that he is beyond redemption. *Florida Bar v. Norkin*, 2015 WL 5853915 (Fla. 2015) (unpublished table decision) (citing *Florida Bar v. Carlson*, 183 So. 2d 541, 542 (Fla. 1966)). In this case, the Referee found five aggravating factors that applied, and only two mitigating factors: the absence of a prior disciplinary record; and good character or reputation. (RR 67). This Court has held that an attorney's good works cannot be used as a "credit" to overcome a pattern of severe misconduct. *Florida Bar v. Travis*, 765 So. 2d 689, 691 (Fla. 2000).

Respondent also attempts to limit his responsibility by arguing through counsel that he was directed to act by his superiors, Diaco and Adams, and that he was merely following their orders. (IB 21, 44, 48; RR 29; TR I, P 20, L 24-25, P 21, L 1-25, P 27, L 14-18). The Referee, however, found that Respondent was just as culpable as Diaco and Adams. (RR 29). Further, Respondent's defense that he was simply following orders from his superiors was not a persuasive argument for evading his professional and ethical responsibilities. (RR 29, 69).

As previously stated, Mr. Campbell's arrest was not possible without the existence of Respondent's close relationship with Sergeant Fernandez, allowing Respondent access to the Tampa Police Department DUI Squad. (RR 5, 68; TR VII, P 1003, L 17-22; TFB Exh. 16, P 22, L 15-23; TFB Exh. 28, P 5, L 5-18; TFB Exh. 34, 41). Respondent's updates from Ms. Personius allowed him to keep Sergeant Fernandez immediately informed and updated on what was occurring inside Malio's, when Mr. Campbell left the bar, and which vehicle he would be driving. (RR 68).

The facts show that Respondent exhibited a pattern of deceitful behavior. Respondent had weeks to contemplate the first failed arrest attempt on the evening of November 29, 2012, yet he failed to put a stop to the operation on the evening of January 23, 2013. (RR 69). Respondent was deceitful in his representations to

Sergeant Fernandez by failing to provide the important fact that Mr. Campbell was the opposing attorney in the *Schnitt v. Clem* trial. (RR 7, 27, 68-69; RR 7, 27; TFB Exh. 16, P 22, 4-14; TFB Exh. 18, P 72, L 5-25, P 73, L 1-2, P 86, L 8-16; TFB Exh. 28, P 11, L 15-25, P 12, L 1-25, P 13, L 1, P 57, L 1-25). Respondent also failed to advise Sergeant Fernandez that Ms. Personius, an employee of Adams & Diaco, P.A., was operating under false pretenses. (RR 27, 69; TFB Exh. 16, P 34, L 11-25, P 35, L 1-3; TFB Exh. 18, P 91, L 19-25, P 92, L 1-5). Respondent failed to disclose that Ms. Personius was buying drinks for Mr. Campbell, and providing information to Respondent, Adams, and Diaco. (RR 27; TFB Exh. 16, P 34, L 11-25, P 35, L 1-3; TFB Exh. 18, P 91, L 19-25, P 92, L 1-5). Even more disturbing is that Respondent failed to realize the gravity of his misrepresentations. When Sergeant Fernandez confronted Respondent on January 24, 2013, as to why he did not reveal that Mr. Campbell was the lead attorney in the *Schnitt v. Clem* trial, Respondent responded, “Well, Ray, what’s the big deal?” (RR 27; TFB Exh. 18, P 70, L 18-25, P 71, L 1-25, P 72, 1-25, P 76, 1-12; TFB Exh. 28, P 56, L 4-25, P 57, L 1-25, P 58, L 1-5). Respondent also stated to Sergeant Fernandez, “your arrest made the news.” (TFB Exh. 18, P 69, L 21-25, P 70, L 1-4).

Respondent was also deceitful in his representation of Mr. Campbell’s drinking habits. Respondent previously stated to Sergeant Fernandez that Mr.

Campbell “gets drunk all the time. He goes to Malio’s and drinks it up and then he drives home drunk.” (RR 7, 26; TFB Exh. 16, P 21, 12-23; TFB Exh. 18, P 79, L 7-14, P 80, L 18-25, P 81, L 1-2, P 83, L 25, P 84, L 1-5, P 87, L 20-25, P 88, L 1-25, P 89, L 1-14; TFB Exh. 28, P 8, L 4-17, P 9, L 4-23). To the contrary, the Referee found that there was no evidence presented at trial to indicate that Mr. Campbell intended to drink and drive, or had a habit of doing so. (RR 55-56). Ms. DiPietro, a Malio’s bartender, testified that Mr. Campbell frequented Malio’s several times a month, would have a couple of drinks, and then walk home. Ms. Kuchkuda, a manager at Malio’s, confirmed the same in her deposition on May 7, 2015. (RR 26-27; TR VI; P 752, L 9-18; TFB Exh. 46R, P 16, L 13-19, P 17, L 7-11).

Additionally, Filthaut failed to disclose Mr. Personius as a key witness in response to The Bar’s interrogatories. (RR 18, 64, 67-68; IR 196). Mr. Personius’ knowledge of the events was apparently important enough for Adams & Diaco, P.A. to pay \$2,500 to a criminal defense attorney to represent Mr. Personius with regard to the FBI investigation. (RR 18; TR VI, P 867, L 17-19, P 868, L 7-23, P 869, L 18-25, P 870, L 1-4; TFB Exh. 65). In *Florida Bar v. Williams*, 604 So. 2d 447 (Fla. 1992), the Court disbarred Williams for making false and misleading statements, and for failing to maintain personal integrity. The Court stated that

dishonesty and a lack candor cannot be tolerated in a profession that is built upon trust and respect for the law. *Id* at 451. Respondent's conduct shows that he lacks personal integrity and respect for the law.

Respondent could have prevented the whole sordid encounter by refraining from contacting Sergeant Fernandez and coordinating the stakeout at Malio's with the intent of arresting Mr. Campbell. Instead, Respondent maintained frequent contact with Sergeant Fernandez, Diaco, Adams, and Ms. Personius throughout the evening, and failed to do anything to stop Mr. Campbell's arrest. Respondent's conduct shows that he will use any means to gain an advantage. Respondent is willing to resort to underhanded and unethical methods in order to accomplish an objective. Respondent's pattern of misconduct shows behavior that is not amenable to change. Based on Respondent's misconduct, the evidence presented, and the testimony at trial, the Referee properly concluded that Respondent be permanently disbarred.

As set forth above and in detail in the Report of Referee, the record contains substantial, competent evidence that clearly and convincingly supports the Referee's recommended discipline of permanent disbarment. This Court has stated, "if the discipline does not measure up to the gravity of the offense, the whole

disciplinary process becomes a sham to the attorneys who are regulated by it.”

Florida Bar v. Wilson, 425 So. 2d 2, 4 (Fla. 1983).

CONCLUSION


This Court should adopt the Referee's findings of fact and rule violations, and recommendation of discipline. The recommendation of permanent disbarment and payment of The Bar's costs is consistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions.



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CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal and that copies have been furnished via electronic mail to Mark Jon Brien, Counsel for Respondent, to his record Bar e-mail address of mjo@markjobrien.com; via electronic mail to Gregory W. Kehoe and Danielle S. Kemp to their official Bar e-mail addresses of kehoeg@gtlaw.com and kempd@gtlaw.com, and to meyerp@gtlaw.com, rechtinh@gtlaw.com, and flservice@gtlaw.com; via electronic mail to Joseph A. Corsmeier, to his record Bar email address of jcorsmeier@jac-law.com; via electronic mail to William F. Jung, to his record Bar email address of wjung@jungandsisco.com; and via electronic mail to Adria E. Quintela, Staff Counsel, The Bar, to her designated email address of aquintel@floridabar.org on this 1st day of March, 2016.



Jodi Anderson Thompson, Bar Counsel

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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.



Jodi Anderson Thompson, Bar Counsel