IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JON DOUGLAS PARRISH,

Respondent.
_____/

Supreme Court Case
No. SC15-1988

The Florida Bar File
No. 2014-10,156 (20B)

RESPONDENT'S INITIAL BRIEF ON APPEAL FROM REPORT OF REFEREE

/s/ Donald G. Peterson, Esq.
Donald G. Peterson, Esq.
Florida Bar No. 711616
Jonathan M. Weirich, Esq.
Florida Bar. No. 118961
Parrish, White & Yarnell, P.A.
3431 Pine Ridge Rd. Suite 101
Naples, Florida 34109
Ph 239/566-2013; Fax 239/566-9561
donpeterson@napleslaw.us
jonathanweirich@napleslaw.us
Primary email: ply@napleslaw.us
Secondary emails: karlaschooley@napleslaw.us
angelakuenzle@napleslaw.us

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PRELIMINARY STATEMENT

The Florida Bar, Appellee/Complainant, shall be referred to as "the Bar" or "The Florida Bar." Jon Douglas Parrish, Respondent/Appellant, shall be referred to as "Respondent," and Respondent's firm shall be referred to as "PLY." The initial complainants and former clients of Respondent and PLY, Ben Bergaoui and one of his closely held companies, Spruce River Ventures, LLC, shall be referred to as "Bergaoui" and "Spruce" (collectively "Bergaoui" or "client(s)").

The Referee appointed in this matter, the Honorable Judge Scott M. Brownell shall be referred to as the "Referee." The Referee's Report and Recommendation shall be referred to as the "Report," and citations thereto shall be designated by the symbol "R.R.," followed by the page number being cited. Ex. "R.R. at p. 1."

The trial in this proceeding took place on October 13 – 14, 2016, and the Trial Transcript of that proceeding shall be designated by the symbol "T.T.," followed by the page number being cited, specific lines, and identification of the testifying witness, if applicable. Ex. "T.T. at p. 10:1 – 15 (Testimony of Respondent)." The Exhibits received into evidence at Trial shall be designated by the symbols "C.E." for the Complainant Florida Bar's Exhibits, and "R.E." for the Respondent's Exhibits, followed by the exhibit number. Ex. "C.E. 1."

Finally, other documents included within the index provided to the Court's file shall be referred to by their respective title.

STATEMENT OF THE CASE AND FACTS

This case involves Respondent's firm's representation of Bergaoui and Spruce in several matters, beginning in 2010. While many of the facts are not in dispute, several areas of conflict or error exist on the record.

The Lamborghini

On or about March of 2010, Bergaoui approached Respondent to discuss three ongoing litigation matters and to retain Respondent's firm to represent him and his company. T.T. at p. 110 – 112. Based on the complexity of the cases, Respondent required that his firm ("PLY") be paid a $10,000 retainer to commence work on the cases. *Id.* at pp. 397 – 398. In his complaint and at trial, Bergaoui misrepresented the amount of the initial retainer, claiming it was $30,000, when the retainer agreement itself clearly states otherwise. *Id.* at p. 114; C.E. 1. Bergaoui did not pay the retainer, although Respondent and PLY began work on his cases. Soon thereafter, Bergaoui offered to sell one of his Lamborghinis in order to pay for the legal fees incurred by PLY's representation of him in the cases. *Id.* To this end, on or about May 18, 2010, PLY and Bergaoui entered into a supplemental fee arrangement whereby Bergaoui would have 90 days to sell the vehicle, with $30,000 of the proceeds to go towards his legal bill. C.E. 2. If he failed to sell the vehicle, PLY would have the right to market and sell the vehicle and deduct the incurred amount of fees to date, or credit Bergaoui's account in the amount of $80,000 (which was established as a fair market

value by an expert). *Id.*; T.T. at 378:13 – 20 (Testimony of Rob Oteri). Ultimately, PLY did not enforce the sale provisions of the fee agreement, even though Bergaoui did not sell the vehicle within the 90 day period. T.T. at p. 408.

Bergaoui eventually sold the vehicle in June 2011, over a year after the agreement was signed. *Id.* PLY accepted $42,000 from the sale, even though Bergaoui had an outstanding bill of $54,000. R.R. at p. 4. Throughout this time, PLY and Respondent represented Bergaoui and Spruce for each of the three matters they had been retained, billing hourly. However, in January 2011, Bergaoui and PLY agreed to enter into a contingency agreement for the Cotton matter, as it was clear Bergaoui was not timely paying his legal bills. T.T. at p. 417:2 – 13.

The Cotton Matter

The first case, the Cotton matter, was a suit to enforce a contract for several parcels of land, which Bergaoui was trying to acquire in order to rezone and develop. *Id.* at pp. 112; 151 – 152. Bergaoui had considerable experience in acquiring and developing property in the past. *Id.* at pp. 142 – 146; 391 – 392. At the time Respondent's firm was retained to represent Spruce in the Cotton matter, the case had been ongoing for nearly five years. The central issue in the case was enforcement of a real estate sales contract between Spruce and numerous defendants who had varying degrees of interests in the parcels at issue. *Id.* at p. 418; R.R. at p. 6. At the time, Spruce had at least two counts in its complaint, one for specific performance,

and the other for breach of contract. T.T. at pp. 417 – 418. Prior to PLY representing Spruce, Bergaoui had a $2 million bond in place to maintain the suit for specific performance, although Respondent testified that at the time he began representing Spruce, the claim for specific performance was not necessarily viable due to other issues with the Contracts. *Id.* at p. 420. Earlier in the litigation, in 2011, the parties had conducted a mediation. *Id.* The case came close to settlement, with most of the parties agreeing to a general framework wherein Bergaoui, Defendants, and PLY would set up a limited liability company to take over the seven parcels, develop them, and sell them. *Id.* at pp. 444 – 448. Once sold, the members of the limited liability company would receive their portion of the proceeds. *Id.* This agreement would be favorable to all sides, as it would ensure that the bond would be reclaimed for Bergaoui and used to develop the parcels, and further that all parties would be compensated for the sale proceeds. *Id.* PLY was necessarily involved because of the Defendants' distrust of Bergaoui, and due to the unique nature of the case, PLY's membership in the LLC was the only means of securing its contingency fee. *Id.* at p. 450. One of the Defendants, represented by Attorney Skatoff, resisted the idea and the mediated settlement failed at that time. *Id.* at p. 448.

The Cotton Matter: McKamey

The Purchase Contract for the land at issue in the case was indivisible as to the seven parcels, there being no means for acquiring fewer than all seven parcels.

As a consequence, the inability to enforce it against one piece may have made the Contract unenforceable as to all the other pieces. This led to issues in the case when several of the beneficiaries of the Estate of Eudora Jones, began to pass away. T.T. at p. 427.

One of these beneficiaries, McKamey, passed away in 2011, and one of the other Defendants wrote a letter advising of her passing to the trial court on or about April 2011. *Id.* at p. 429; R.E. 43. At the time, Respondent had assigned an associate to monitor the case and handle any substitutions if a suggestion of death was filed. *Id.* at p. 428:19 – 24. Because the April 2011 letter was ***not*** recognized by intake staff as a proper suggestion of death, PLY did not docket it as such. *Id.* Respondent only became aware of the issue and the letter in May 2012, when one of the Defendants filed a motion to dismiss for failure to timely substitute. *Id.* at pp. 430 – 432; R.E. 87. Upon learning of the April 2011 letter, Respondent immediately addressed the motion by moving to substitute, and alternatively arguing that McKamey was not a necessary party, due to issues regarding Defendant Robert Jones' power of attorney to sign on behalf of the Estate of Eudora Jones. *Id.* at pp. 427, 433:11 – 13. Respondent's motion to substitute was denied, and ultimately the issue went up to the Second District Court of Appeal. *Id.* at pp. 435, 437. However, by that time Respondent and PLY had withdrawn from the case, and it settled prior to the Second District Court of Appeal deciding the issue of whether the dismissal

was proper. *Id.* Additionally, in an order reversing its prior summary judgment ruling, the Trial Court later found that McKamey was not an indispensable party, and consequently her dismissal had no impact on the case itself. *Id.* at p. 436; R.E. 54.

The Cotton Matter: Tax Sale

On or about June of 2012, Bergaoui learned that three of the parcels in the Cotton matter had over three years of past due taxes assessed against them, and would soon be foreclosed at a tax sale. T.T. at p. 123:8 – 17. Bergaoui informed Respondent, and asked that action be taken to prevent the sale from occurring. *Id.* The only way to do so was to pay the Defendants' tax bill for the properties. It became clear that the Defendant owners could not afford to pay off the taxes, as Respondent discovered from non-party David Alston II, the son and nephew of Defendants Alstons and Sheppards. *Id.* at pp. 460:22 – 25, 461:1 – 2. Bergaoui requested that Respondent loan the Defendants $150,000 by way of payment of the past due taxes. *Id.* at p. 463. As part of the arrangement, Respondent would obtain a mortgage on the three parcels, and a promissory note from the non-client Defendant owners, which had a payment term of six months.[1] *Id.* at pp. 462 – 464.

[1] Repayment was not tied to the outcome of the litigation or the continued representation of Bergaoui or Spruce.

On or about July 5, 2012, Bergaoui went to see John P. White, a real estate attorney who had been Respondent's law partner seven years before, but was no longer affiliated with PLY. T.T. at pp. 123; 466. While Bergaoui testified that Respondent directed him to go to see White to sign paperwork, and further sat with him during the office visit, Respondent, White, and Ann White all testified that Bergaoui was alone with White for several hours. *Compare* T.T. at p. 126:9 – 10 (Testimony of Ben Bergaoui); *with* 96:1 – 14 (Testimony of John White); 466:17 – 25 (Testimony of Respondent); 372:8 – 12 (Testimony of Ann White). Further, contrary to Bergaoui's testimony, White advised him concerning the transaction, the effect of losing the three parcels to tax sale, and the effect of the Mortgage Subordination, which Respondent required in order to allow his mortgage on the three parcels to retain the same priority as the tax liens.[2] *Id.* at pp. 99:3 – 25; 100 – 105. Bergaoui was satisfied with the advice and the transaction and signed the subordination. *Id.* White also prepared a bill for his advice and legal work and sent it to Bergaoui, who did not pay it. *Id.* at p. 103:19 – 25.

After signing the necessary paperwork, Respondent and Bergaoui rode together to Port Charlotte, where Respondent paid the taxes on the three parcels, with Bergaoui present. *Id.* at p. 467:4 – 13. While on the road, Respondent and

[2] Indeed, the Subordination Agreement duly details the nature of transaction, which Bergaoui understood and signed.

Bergaoui spoke to David Alston II, and all three were enthusiastic about the transaction and the prospect of concluding the Cotton Matter favorably. *Id.* at p. 468: 1 – 12.

Around this same time Respondent had begun negotiating a similar settlement agreement as the one from the 2011 mediation. T.T. at pp. 448 – 449. Draft copies of the settlement were circulated to the Defendants, and all parties were actively discussing the prospect of settlement. *Id.* at p. 450. Bergaoui had already seen the new proposed settlement draft immediately after Respondent's repayment of the tax liens. *Id.* at p. 272:15 – 23.

Soon after Respondent repaid the tax liens, and the new proposed draft settlement agreement was being circulated, Attorney Skatoff discovered what had transpired and filed a motion to disqualify Respondent from representing Spruce in the litigation. T.T. at p. 453: 16 – 25. After initially inquiring as to whether the motion would succeed, Bergaoui expressed concern we would lose his counsel, but Respondent assured him that he believed the law was otherwise and that he would oppose the motion. *Id.* Shortly thereafter, after retaining different counsel, Bergaoui ceased substantively communicating with Respondent, and refused to meet with him to discuss the settlement agreement or the motion to disqualify. *Id.* at pp. 455 – 456. PLY sent Bergaoui a draft affidavit in opposition to the motion to disqualify, but Bergaoui refused to sign it, stating it was inaccurate. *Id.* at p. 455. Bergaoui did not

elucidate as to what the inaccuracies were, and since Respondent did not draft it, he remained unclear on what path to take. *Id.*

Rather than communicate with Respondent, Bergaoui hired new counsel who began to interfere with Respondent's ability represent Bergaoui, or to meet with him. T.T. at pp. 456 – 457. After several months, during which Respondent could not reach his client, he was forced to withdraw from the case.[3] *Id.* at 458. Later in 2013, PLY filed a charging lien to attempt to collect payment for the extensive legal work done in the case. Suspiciously, Bergaoui submitted the original Bar grievance in July 2013, soon after the charging lien was filed, now accusing Respondent of violating many of the Rules Governing the Florida Bar in connection with his actions described herein, despite having previously praised Respondent for his work. Bergaoui also claimed that ***Respondent*** had failed to communicate with him, and that Respondent had violated the Rule against lawyers communicating with represented parties in Respondent's negotiations with David Alston II, and the Alstons and Sheppards. *See* Florida Bar Complaint ¶ 42 – 47. As with many of Bergaoui's assessments, these allegations have been proven to be indisputably false, and Bargaoui affirmed at trial what he had already affirmed at his deposition: that these allegations were false and baseless. *See* T.T. at p. 270:18 – 20 (Bergaoui

[3] It became clear to PLY that Bergaoui had been told by his new counsel that if he settled the case with them he could avoid paying PLY any fees, including the contingency in the Cotton Matter.

Testimony) ("Q. The Sheppards and Alstons at that window of time weren't represented by attorneys, were they? A. ***No, they were not.***") (emphasis added).

The Ennex Matter

The Florida Bar's allegations against Respondent were dismissed entirely with regard to the Ennex matter, Count II of the Bar's Complaint. Bergaoui's claims that Respondent failed to communicate with him and diligently pursue the case, and intentionally used an incorrect address to serve him notice of PLY's withdrawal from the case, were demonstrated to be false by Bergaoui's own testimony at trial, and by the trial court itself in the Ennex matter.[4]

The Ennex matter was a suit against Bergaoui and Spruce for breach of contract and fraudulent inducement relating to a brokered deal to purchase a large quantity of urea from a foreign distributor. Central to Bergaoui's claims, and later the Florida Bar's Complaint, was that Respondent was not diligent in defending the action, although Bergaoui testified both at deposition and at trial that Respondent had represented him well. *See* T.T. at pp. 213 – 214; 258 – 259; R.E. 3. Further, Bergaoui contended that Respondent intentionally used his 544 Bay Villas address to prevent him from receiving notice of Respondent's Motion to Withdraw. This allegation was also demonstrably false at the filing of the initial July 2013 Bar

[4] In ruling on Bergaoui's Motion to Vacate the Default entered against him, the Trial Court specifically found that Bergaoui's assertions regarding his address were false. R.E. 41.

grievance, ***because Bergaoui himself designated the 544 Bay Villas address as his service address for Bar-related correspondence.*** T.T. at pp. 18:7 – 12; 167:23 – 25, 168:1 – 5 ("Q. All right. When you filed your grievance in July of 2013, am I correct, you were living at 544 Bay Villas? A. Which grievance? Q. The first grievance you filed against Mr. Parrish in July of 2013. A. July of 2000- -- July -- that's the time I was moving out of the villa. ***Yes.***").

Despite being aware of the trial court's order and that the very address on the Bar grievance was the same one Bergaoui accused Respondent of improperly using, the Florida Bar did not drop the charges against Respondent until it was forced to do so at the conclusion of its case-in-chief. R.R. at p. 5.

The Trial

The trial in this matter proceeded forward on October 13 – 14, 2016. Respondent had previously filed fourteen separate Motions for Partial Summary Judgment, and argued three of them prior to trial.[5] Despite two of the Motions touching on these same issues (Count II and communication with represented parties), the Referee refused to grant summary judgment and the Florida Bar refused to concede either point, even though at the close of the case Bar counsel readily admitted there was no evidence to support the allegations. T.T. at p. 315 (Couched as "not rising to clear and convincing"). The Florida Bar called three witnesses: Ben

[5] The remaining eleven were never addressed by the Referee in making his ultimate determination.

Bergaoui, John P. White, and Respondent, before resting its case. On Respondent's case in chief, Ann White, Respondent, David Alston II, and Robert Oteri were called, who all controverted Bergaoui's inconsistent versions of events. At the conclusion, the Referee gave no indication of his ultimate ruling.

STANDARD OF REVIEW

A referee's legal conclusions and determinations of guilt based undisputed facts are reviewed de novo. *The Florida B. v. Pape*, 918 So. 2d 240, 243 (Fla. 2005) ("where there are no genuine issues of material fact and the only disagreement is whether the undisputed facts constitute unethical conduct, the referee's findings present a question of law that the Court reviews de novo.") While the Supreme Court's review of a referee's findings of fact is limited, the findings must be supported by competent, substantial evidence on the record. *Fla. Bar v. Frederick*, 756 So.2d 79, 86 (Fla. 2000); *see also Fla. Bar v. Jordan*, 705 So.2d 1387, 1390 (Fla. 1998). It is this Court's responsibility to order an appropriate sanction, and if a Report has no reasonable basis in case law or the Standards for Imposing Lawyer Sanctions, this Court has broad discretion to disregard the report's recommendation. *See Fla. Bar v. Temmer*, 753 So.2d 555, 558 (Fla. 1999); *The Florida B. v. Picon*, 205 So. 3d 759, 765 (Fla. 2016).

SUMMARY OF THE ARGUMENT

The Report often bases its conclusions on unsupported facts and clearly erroneous holdings of law, and is topped off with recommendations of guilt without any discernible analysis of, or basis in, case law or the Standards for Imposing Lawyer Sanctions. Indeed, the entirety of the Report is copied and pasted verbatim from the proposed report and findings submitted by the Florida Bar. Unfortunately, it is readily apparent that the Referee extended no independent judgment or consideration of Respondent's case, denying the Respondent's right to an impartial tribunal. For all of these reasons, Respondent urges this Court to disregard the Report in its entirety and find him not guilty of violating the Rules Governing the Florida Bar. Notwithstanding these general infirmities, the following specific issues warrant this Court's disregard of the Report.

The first portion of the Report concerns the Florida Bar's allegations in Count I of its Complaint, concerning the circumstances of the Lamborghini Fee Agreement with Ben Bergaoui. In particular, the Report found that the Agreement violated Rule 4-1.8(a) as a business transaction with a client without proper written disclosures. Further, and without any supporting findings of fact, the Report concludes that Respondent's acceptance of $42,000 for over $54,000 in billed fees was excessive, in violation of Rule 4-1.5, and stranger still that Respondent's conduct violated Rule 3-4.3 (general misconduct), without identifying any behavior that ran afoul of the

Rule. It is patently clear that neither the evidence on the record nor the Report's findings of fact support these arbitrary conclusions. First, the arrangement with Bergaoui was a supplemental fee agreement. The evidence at trial demonstrated that he had used his exotic cars as collateral to finance litigation a number of times in the past, and he was no stranger to such agreements. More importantly, the fee agreement with the Lamborghini was ***solely*** designed to pay ***for already billed legal fees***, it was not a transaction designed to make money or otherwise engage in "business." Second, it is undisputed that Respondent accepted less than what was owed on Bergaoui's bill once the car was sold, and Bergaoui kept the remaining sale proceeds. Neither the Referee nor the Florida Bar can offer an explanation as to why these actions constituted general misconduct or excessive fees, and by definition they simply do not fit.[6]

The second portion of the Referee's Report deals with the Cotton Matter, and once again includes Rule violations which do not fit the evidence adduced at trial, nor is there any explanation for how Respondent could have violated them.

First, the Report appears to lump together four separate Rule violations related to the suggestion of death issue, and provides no justification whatsoever as to how the various rules apply. It is plain from examining the facts that the Report conflates

[6] Notably, the Florida Bar presented no evidence of what the fees were for or whether they were unjustified.

possible civil liability with ethical violations. It is undisputed that Respondent took appropriate action as soon as he learned of the letter to the court, and took all necessary steps to rectify any potential problems, in keeping with the Rules. Further, it is a contested legal issue as to whether the letter qualified as a valid suggestion of death, or whether the deceased party was an indispensable party to the case at all. Thus, the Referee's recommendation is completely unjustified, as Respondent complied with the Rule and acted ethically and competently in addressing the letter once he discovered it. The Report provides no explanation as to how Respondent's actions warrant a violation of Rule 4-1.1, or the remaining purported violations (Rules 4-4.3, 4-1.2, 4-1.3).

The second significant issue involves the loan Respondent made to several of the Defendants in order to satisfy outstanding tax debts, thereby preventing the parcels at issue in the case from being sold at tax deed sale. In connection with the loan, Respondent was given a mortgage on the properties to securitize it. The Report arbitrarily concludes that these actions constituted acquiring a ***proprietary*** interest in the subject matter of litigation, despite the weight of authority both in this State and throughout the country that a mortgage is ***not*** a proprietary interest.

Further, the Referee's conclusion that this transaction amounted to providing financial assistance to a client ignores reality and the evidence. The loan to Defendants in the lawsuit provided no financial benefit to Spruce or Bergaoui at all.

The loan proceeds went to Charlotte County to pay the defendants' taxes they owed. Even if the term "financial" were ignored, the loan still should not fall under the purview of the Rule because the loan was not made in contemplation of continued representation, nor were its terms or repayment contingent on the outcome of the case. Finally, to the extent the Mortgage Subordination falls within the ambit of Rule 4-1.8(a), Respondent complied with the requirement that he advise Bergaoui to seek independent counsel because the record indisputably demonstrates that Bergaoui consulted with John White, an independent attorney, concerning the transactions.

The third issue arising from the Cotton matter is the Referee's nebulous assertions that a proposed settlement agreement, which was never fully executed or implemented, constituted a violation of one or more Rules. These conclusions ignore the fact that the terms of the settlement agreement including Respondent and his law firm as participants was merely acting as a means to secure the contingency fee agreement with Bergaoui, which was an unusually complex ordeal due to the specific performance nature of the underlying case.

Further, notwithstanding the Report's evidentiary and legal infirmities, the Report's conclusions as to imposition of sanctions are baseless or misapplied. It bears repeating that the Report was copied directly from the Florida Bar's proposed report and findings, and consequently there is a complete lack of analysis or justification as to how the Referee determined that a one year suspension is

warranted. Even more troubling is that the cited Standards for Imposing Lawyer Sanctions appear arbitrary and do not fit the facts of this case, even if the first portions of the Report are taken as true and correct. The case law purportedly considered is similarly inapposite to the facts and the proposed violations, and do not support the Report's recommended sanction.

Finally, and perhaps most significantly, the Report does not consider that the Florida Bar did not prove any measurable harm to the client, nor that any risk of that harm was caused by any of the alleged rule violations (indeed, such an assertion would be counterintuitive considering the allegations that financial assistance rendered). In sum, even if the Report's flawed findings of fact and legal conclusions were accepted, the imposition of a one year suspension is clearly unjustified in light of the lack of evidence of appreciable harm, or even allegations of such by the Florida Bar.

What is abundantly clear from the Referee's adoption of the Florida Bar's proposed order, is that Respondent was denied an independent evaluation of the facts and law. This is most clearly evidenced not merely from the Report itself, but in the Florida Bar's conduct in bringing demonstrably frivolous claims against Respondent. Notably, all of Count II and a portion of Count III were not only dismissed, but Bar counsel all but acknowledged they ***had no basis in fact.*** The Referee's wholesale adoption of the proposed order demonstrates that Respondent

was denied an unbiased adjudication in this matter. As such, this Court should not give the Report deference. This Court must disregard the Report in its entirety.

ARGUMENT

I. The Florida Bar Failed to Present Evidence to Support the Allegations of Count I, and the Referee Impermissibly Recommended Violations of the Florida Bar Rules Concerning Misconduct and Excessive Fees Without Making Any Supporting Findings of Fact.

A. The Lamborghini Sale Agreement with Ben Bergaoui Was a Fee Agreement, and Was Not Subject to the Requirements of Rule 4-1.8.

Nearly all of the Report dealing with Count I examines whether or not the Lamborghini Fee Agreement constituted a business transaction within the meaning of Rule 4-1.8(a). The Report concludes specifically that the "sale provision is the part of the agreement which requires compliance with Rule 4-1.8(a)." R.R. at p. 5. Ordinarily, Rule 4-1.8(a) requires specific actions be taken for an attorney to transact business with a client. However, the comment to the Rule very clearly states that "[i]t ***does not apply to ordinary fee arrangements*** between client and lawyer, which are governed by rule 4-1.5, although its requirements must be met when the lawyer ***accepts*** an interest in the client's business or other nonmonetary property as payment for all or part of a fee." Fla. Bar. R. 4-1.8 cmt. (emphasis added).[7]

There are two significant points overlooked by the Report which exclude the Lamborghini Fee Agreement from the requirements of Rule 4-1.8. First, it is

[7] PLY did never accepted such an interest.

undisputed that neither Respondent nor Respondent's firm ever took an ownership interest in the vehicle itself, nor did the Fee Agreement contemplate acceptance of non-monetary property in lieu of payment. Second, the Report definitively states that it is the "sale provision" of the Agreement that requires compliance with Rule 4-1.8, yet the Rule itself flatly rejects such a contention. Instead, the commentary interpreting the Rule declares that it does not apply to ordinary fee agreements, which are governed under 4-1.5, and the sole exception occurs when an agreement purports to accept non-monetary property in lieu of cash. There is no exception requiring fee agreements with "sale provisions" requiring compliance with Rule 4-1.8(a). The undisputed facts further illustrate this point.

The Agreement provided that PLY would hold title in blank to the car (not ownership) for a period of ninety (90) days while Bergaoui marketed and sold it to obtain funds to pay his bill. If sold, $30,000 of the proceeds would be paid to the firm for his past due legal fees. If the car did not sell during that time, PLY had the right to market and sell the car itself or, if it elected, to credit the fair market value of the car toward legal fees. At the time of the agreement, Bergaoui was in arrears on his obligation to pay his legal fees.

After the Agreement was executed, PLY held title in blank as security. It never took ownership of the car. Bergaoui did not sell the car in ninety (90) days and the car was delivered to Naples Motorsports, not PLY, for marketing. After

being with Naples Motorsports for a short time, Bergaoui requested the car be returned to him. The car was returned to Bergaoui, and ***he*** later sold it and voluntarily used $42,000 of the proceeds to partially pay his then past-due bill to PLY of approximately $54,000. PLY ***never*** took title to the car and, importantly, was never entitled to do so without paying its agreed fair market value.

The Report does not justify its assertion that the "sale provision" of the Fee Agreement moved it from the control of Rule 4-1.5 into Rule 4-1.8(a), nor can it. The Florida Bar (which drafted the Report) relies heavily on the supposed eccentricity of the arrangement, but this Court has not ruled that fee agreements that deal with sale of personal property are per se governed by Rule 4-1.8. *See, e.g., The Florida B. v. Thomson*, 344 So. 2d 552, 554 (Fla. 1976) (Boyd, J. dissenting) (Dissenting opinion noting that the proper procedure for ***following through*** with a sale provision would be to obtain consent of the owner and an agreement for sale.). In this case, of course, neither Respondent nor his firm actually sold the vehicle. Therefore, this Court must disregard the Report, and find Respondent not guilty of violating Rule 4-1.8(a) with respect to Count I.

B. The Florida Bar Presented No Evidence that the Fee Agreement Was Excessive or Otherwise Violated the Rule Concerning Excessive Fees.

The Rules Regulating the Florida Bar provide the Standards for determination of whether a fee is clearly excessive in violation of the rules. *See* Fla. Bar. R. 4-1.5(a):

> **(a) Illegal, Prohibited, or Clearly Excessive Fees and Costs.** An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost, or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. ***A fee or cost is clearly excessive when***:
> (1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or
> (2) the fee or cost is sought or secured by the attorney ***by means of intentional misrepresentation or fraud upon the client***, a nonclient party, or any court, as to either entitlement to, or amount of, the fee . . .

Id. (emphasis added). The Rule also provides a detailed framework to determine the "reasonableness" of a fee. *Id.* Here, the Referee failed to mention Rule 4-1.5 in the findings of fact, and the Report contains no findings or inferences that support a conclusion that the Agreement constituted an excessive fee. The evidence on the record demonstrates the exact opposite.

It is undisputed that Respondent's firm was retained to handle three separate matters, all of which were already ongoing cases and involved large sums of money and complex legal issues. *See, e.g.*, T.T. at pp. 112:20 – 25. Bergaoui signed an initial retainer agreement that called for $10,000 retainer (which Bergaoui contends

without evidence that it later increased to $30,000), which he never paid. *Id.* at pp. 114:16 – 23; 160:22 – 25, 161:1 – 3 (Mr. Bergaoui testifying he did not believe the retainers were unreasonable). It was his idea to offer to sell his Lamborghini to pay his legal bills, which he had done in the past. *Id.* at pp. 114; 170 – 171 (Bergaoui testifying about using his Lamborghinis in the past to pay legal bills). The fee arrangement at issue here is clearly ***not*** excessive because it provided that Respondent's firm would receive $30,000 towards fees in the first 90 days, or if longer the firm would be able to market and sell the car and credit Bergaoui's current bill from the sale proceeds up to $80,000. The Florida Bar presented no evidence that Respondent's firm did not reasonably accrue those amounts of fees nor that it was unreasonable that Bergaoui's legal bills would not accumulate to these amounts over the course of Respondent's representation of him in three separate lawsuits. Further, the Report completely overlooks the fact that the retainer agreement provided that excess credited funds would be refunded to the client. *See* C.E. 1.

The fee arrangement was ***never*** an acceptance of non-monetary property in lieu of payment, such that valuation of the property may have become a factor. Rather, the purpose of the agreement was to ensure that the vehicle was timely sold and that Respondent would be compensated for the legal work expended on Bergaoui's cases. Significantly, the Report notes that after Bergaoui finally sold the

car, Respondent's firm accepted a much lower amount ($42,000) from the proceeds of sale than what was actually due ($54,000). *See* R.R. at p. 4.

The Report fails to provide any findings of fact or conclusions of law with regard to these issues, and instead focuses on whether the fee arrangement constituted a business transaction. The only paragraph addressing an actual amount collected for fees definitively states that Respondent accepted far less than his firm was owed, not the other way around. Moreover, the Florida Bar did not present any competent evidence that Respondent's actions violated Rule 4-1.5(a), irrespective of the Report's contents. Therefore, this Court should disregard the Report with respect to the purported violation of Rule 4-1.5 in Count I, and find Respondent not guilty.

C. The Florida Bar Presented no Evidence that the Respondent's Actions Amounted to Misconduct, and the Referee Made No Findings of Fact to Support the Corresponding Recommended Violation of Rule 3-4.3.

It is readily apparent that the Report with regard to Count I focuses solely on the alleged violation of Rule 4-1.8(a). *See* RR at pp. 3 – 5. As previously discussed, the Report makes no findings necessary to support a violation of the Rule proscribing excessive fees, see *supra* Sec. I.B, and similarly it makes no findings necessary to support a violation of Rule 3-4.3 (General Misconduct). While Rule 3-4.3 is generally considered a "catch-all" rule of conduct, it nevertheless requires findings that Respondent committed an act that is either a) "unlawful," or b) "contrary to honesty and justice." *See, e.g., The Florida B. v. Swann*, 116 So. 3d 1225, 1235 (Fla.

2013) (Attorney violated Rule 3-4.3 for testifying falsely under oath, failing to repay obligations, concealing information regarding an estate's funds, structuring transactions to conceal the ownership of funds, and failing to notify appropriate parties subsequent to the sale of estate property).

Here, the Report does not identify any conduct in Count I that constitutes either an unlawful act, or one that is dishonest and contrary to justice. The terms of the Fee Agreement were disclosed and negotiated and ultimately agreed to. Further, Respondent did not ultimately enforce the Fee Agreement, and allowed considerable deference and latitude to Bergaoui to sell the Lamborghini on his own terms and timing. Once the car was sold, Respondent only received $42,000 for payment towards a past- due bill totaling $54,000. Neither the Report nor the evidence support any allegation of dishonesty or unfairness. The record demonstrates exactly the opposite.

Therefore, because the Report's conclusion of a violation of Rule 3-4.3 is not supported by competent evidence or even the Report's own findings, this Court should disregard it entirely and find Respondent not guilty of violating Rule 3-4.3 as to Count I.

II. The Report Is Unsupported by Competent Evidence and Clearly Erroneous with Regard to Count III because the Respondent's Handling of the Letter Regarding the Death of a Defendant in the Spruce River v. Cotton, et al. Matter Was Competent and Diligent; the Mortgage Interest Respondent Acquired Was Not a Proprietary Interest in the Subject

Matter of Litigation; Respondent Did Not Provide Financial Assistance to Bergaoui by Paying Taxes on Opposing Parties' Property; Respondent Complied with the Rules Governing Business Transactions when Bergaoui Consulted with John White, as Independent Counsel; and Finally Respondent Did Not Engage in Misconduct Regarding the Unexecuted Settlement Agreement.

A. Respondent Fully Complied With the Rule Requirements for a Supervising Attorney by Immediately Taking Appropriate Action when He Was Made Aware of the Letter Regarding the Death of a Defendant in the Spruce River v. Cotton, et al. Matter.

The first portion of the Report in relation to the Cotton matter relates to the Florida Bar's contentions that Respondent violated Rules of competence and diligence with regard to the substitution of a Defendant who passed away. The central premise of the Report's recommendation is that Respondent violated Rules 4-1.1 and 4-1.3 as a supervisory attorney, by failing to take action with respect to the letter written to the court informing it that one of the Defendants had passed away.[8] The critical flaws in the Report's analysis is that it conflates ethical violations with ordinary civil liability, and it fails to recognize Respondent's role as a supervisory attorney.

First, the Report erroneously finds that the entire Cotton Matter had been assigned to an associate, and further that Respondent believed he was not responsible to respond to the letter. R.R. at p. 8. However, Respondent's testimony was that ***the***

[8] The Florida Bar Complaint actually alleges that these were direct violations of the Rules, despite the uncontroverted evidence presented by Respondent that he was not personally handling those aspects of the case.

specific issues relating to suggestions of death were being monitored by an associate:

> 16 Q. And -- and how did you address that
> 17 particular issue, the fact that people were starting to
> 18 die in this case?
> 19 A. I actually had -- I actually had to assign
> 20 one of my staff attorneys to -- to follow through when a
> 21 suggestion of death was filed and follow through in
> 22 getting the estate substituted.

T.T. at p. 428:16 – 22. Respondent further testified that the associate had followed up with actual suggestions of death (in contrast to the pro se letter sent to the court). *Id.* at p. 429; C.E. 43 (Copy of April 2011 letter). As noted by the Report itself, when Respondent did learn of the April 2011 letter, he took immediate action to address it. R.R. at p. 8; T.T. at p. 432. It must also be noted that the legal significance of the letter, and whether or not the deceased party was in fact a necessary party to the action were always in question:

> 8 Q. As the lawyer handling this case, when you
> 9 reviewed that letter, what conclusions did you reach as
> 10 to how to react to that letter or respond to that letter?
> 11 A. Okay. Well, at the time that I was
> 12 introduced to the motion and the letter all at once, in
> 13 an abundance of caution I decided to treat it both as a
> 14 suggestion of death and to argue that it wasn't.

T.T. at p. 433:8 – 14. Part of Respondent's actions were to challenge the legal sufficiency of the letter as a valid suggestion of death. *Id.* The motion to substitute was ultimately denied, and an appeal was taken, although a final resolution was

never made because the case settled. *Id.* Here, the Report takes the position that Respondent's failure to act when the April 2011 letter was received by the firm constituted violations of Rule 4-1.1 and 4-1.3, premised on a theory of liability as a supervising attorney. *See* R.R. at p. 8 ("Having accepted primary responsibility for the representation, Respondent is responsible for the action or inaction of those he utilized to assist him.") However, Rule 4-5.1 clearly shows that such a statement is erroneous:

> **(c) Responsibility for Rules Violations.** A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
> (1) the lawyer orders the specific conduct or, with knowledge thereof, ratifies the conduct involved; or
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Fla. Bar. R. 4-5.1(c). Here, it is undisputable that the Rule does not impose liability on Respondent for his associates' actions or inactions with respect to the April 2011 letter. Pertinent here, the Rule imposes liability on a supervising attorney ***only if the attorney has knowledge of the conduct and fails to take appropriate remedial steps.*** Here, Respondent immediately took action when he learned of the letter, and took every possible action to avoid negative consequences to the case, including challenging the sufficiency of the letter as a valid suggestion of death. As it turned out later, the issue of whether McKamey was indispensable party to the action was

decided in the negative by the Trial Court, and the net effect of the dismissal made no impact on the case. *Id.* at 436; R.E. 54.

Contrary to the Referee's conclusion, no supervisory attorney is vicariously liable for possible ethics violations of associates, if the supervisory attorney has no knowledge of the infringing conduct. Indeed, Rule 4-5.1 clearly distinguishes ethical responsibility from civil liability, to avoid results similar to this matter:

> Apart from this rule and rule 4-8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, shareholder, member of a limited liability company, officer, director, manager, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

Fla. Bar R. 4-5.1 cmt. The Report's conclusion is directly contrary to the Rules, as it conflates civil liability with ethical responsibility.

It is undisputable that Respondent acted immediately and prudently when he discovered the April 2011 letter, and took all available steps to address it. He did so promptly, and directly. Further, because the Estate of Eudora Jones was properly the record title holder of the parcels, the dismissal had no effect on the case. T.T. at p. 436. It is entirely outside the scope of the Rules to impose professional liability on Respondent for failing to act on something he was unaware of, and had even assigned an associate with the responsibility to monitor and address suggestions of death and related matters. Therefore, the Report is clearly erroneous to the extent it ascribes liability to Respondent for his actions in connection to the April 2011 letter. This

Court should disregard the Report in this regard and find Respond not guilty of violating Rules 4-1.1 and 4-1.3.

B. Respondent's Mortgage on the Parcels of Land Is Not a Proprietary Interest in Subject Matter of Litigation.

The remainder of the purported violations in the Cotton Matter focus on Respondent's loan to several of the Defendants, and the proposed, unexecuted Settlement Agreement. The Report found that Respondent violated Rule 4-1.8(i) by obtaining a mortgage on three of the parcels at issue in the case, after Respondent had loaned $150,000 to the Defendant (non-client) owners of the parcels. R.R. at p. 12. Without offering any basis or analysis, the Report concludes that the mortgage transaction "constituted the acquisition of a proprietary interest in the subject matter of the litigation." *Id.* The Report's conclusion is clearly contrary to the law and must be disregarded by this Court.

First, Rule 4-1.8(i) very specifically forbids the acquisition of ***proprietary*** interests, in contrast to simply "interests." The term proprietary has a specific definition; it means ***ownership***. *See* INTEREST, Black's Law Dictionary (10th ed. 2014) ("- **proprietary interest** (17c) A property right; specif., the interest held by a property owner together with all appurtenant rights, such as a stockholder's right to vote the shares. • Contingent fees and attorney's liens are exceptions to the rule that a lawyer may not have a proprietary interest in a client's claim or the subject matter of the litigation."). By contrast, a mortgage is defined as:

> **2.** A lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms.

MORTGAGE, Black's Law Dictionary (10th ed. 2014); *Pinellas County v. Clearwater Fed. Sav. & Loan Ass'n*, 214 So. 2d 525, 527 (Fla. 2d DCA 1968) ("It is elementary that a mortgage is a lien upon Specific property, real or personal."); *Watson v. Vafides*, 212 So. 2d 358, 360 (Fla. 1st DCA 1968) (Noting that Florida law had abrogated the common-law definition of a mortgage as being a conveyance of title, and is now considered to be a lien or security interest). It follows then that a mortgage, as with other liens, is not evidence of ownership in property, proprietary or otherwise, as this Court has directly concluded in the past. *See Shavers v. Duval County*, 73 So. 2d 684, 687 (Fla. 1954) ("Under our holdings, ***a mortgagee does not have an estate or interest in mortgaged lands, by virtue of his mortgage***, but is merely the owner of a chose in action creating a lien on the property.") (*citing Evins v. Gainesville National Bank*, 80 Fla. 84, 85 So. 659; *Waldock v. Iba*, 114 Fla. 786, 150 So. 231, 803, 153 So. 915.). Therefore, the acquisition of the mortgage cannot fall under the Rule prohibiting acquisition of proprietary interests, because by definition a mortgage is not a proprietary interest.

Secondarily, this point is reinforced by the structure of Rule 4-1.8 itself. Part (a) of the rule includes the general prohibition that:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless . . .

Fl. Bar R. 4-1.8(a). Of significance here is that the Rule very specifically enumerates four different kinds of interests: ownership, possessory, security, or pecuniary. Each of these interests are distinct and distinguishable from the other. A security interest, like a mortgage, is not synonymous with "ownership," as evidenced by its separate inclusion in the Rule. It follows then that it cannot be simultaneously equated with ownership, or a "proprietary interest," further in Rule 4-1.8(i). Mortgage interests, as with other forms of security interests, are not among the specific ownership interests forbidden in Rule 4-1.8(i).[9] Therefore, the Report's conclusion is directly contrary to the Rules and well-established law in this State. This Court must disregard the Report and find Respondent not guilty of violating Rule 4-1.8(i) in connection with the mortgage transaction.

C. Respondent Did Not Provide Financial Assistance to His Clients by Paying the Defendant's Taxes on Parcels of Property Owned by Defendants and Securing Repayment Through a Note and Mortgage Against the Defendants.

The Report found that Respondent's payment of delinquent taxes on three of the parcels was also in violation of the Rule prohibiting a lawyer from providing financial assistance to a client. R.R. at p. 12. This conclusion is similarly contrary to

[9] The mortgage and compliance with the exceptions of Rule 4-1.8(a) are discussed *infra*.

the law and facts at trial, because the tax payment was a loan to the Defendants evidenced by a promissory note and secured by a mortgage on the three parcels. Further, repayment of the loan was never conditioned upon the outcome of the case, nor was it made in order improperly influence Bergaoui to proceed with the lawsuit or continue with Respondent's representation.

Rule 4-1.8(e) prohibits an attorney from rendering financial assistance to a client, with limited exceptions not relevant to this case. The loan in question does not fall under the auspices of the Rule, because Respondent did not provide ***any financial assistance to Bergaoui.*** The Report contends that the Respondent "expended funds" to benefit Bergaoui's case without evaluating the transaction on its merits. The loan benefitted the non-client defendants only in the sense that the tax liens on the properties would be converted into a mortgage to Respondent. As to Bergaoui, the loan is of no direct or indirect benefit (financial or otherwise), because the properties are still encumbered by a superior lien.

Further, the goal of Rule 4-1.8(e) is to prevent financial assistance to clients where "to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation." Fla. Bar R. 4-1.8 cmt. E. This prohibition focuses on preventing a conflict between the lawyer's interest in recovery and the client's recovery or interest in maintaining the suit. *See, e.g., The Florida B. v. Patrick*, 67 So. 3d 1009 (Fla.

2011) (Attorney offering to pay appellate fees to pursue case against client's best interests in violation of Rule 4-1.8(e)). Here, while the loan had the effect of keeping the status quo in an existing case so that it could be favorably settled, it had no connection to the ultimate outcome of the case. Repayment was not conditioned on the success or failure of Bergaoui's claims, and further there is no evidence that Respondent made the loan to non-clients in an attempt to induce continued representation. At best, the entire transaction was financially neutral to Bergaoui, and tangentially affected the case only by giving the parties more time to settle.

Therefore, this Court should reject the Report and find Respondent not guilty of violating Rule 4-1.8(e) with respect to the loan to Defendants.

D. The Mortgage Subordination Complied with the Rules Because Bergaoui Met with Independent Counsel Prior to Its Execution.

The Report concluded that the Subordination Agreement, signed by Bergaoui, constituted an improper business transaction because Respondent did not provide written disclosures to the client, or advise him in writing of the opportunity to seek independent counsel. R.R. at p. 10. However, Bergaoui's consultation with attorney John White satisfied the Rule's requirements. *See* T.T. at p. 304.

This case is analogous to and controlled by *Florida Bar v. Nesmith*, 642 So.2d 1357 (Fla. 1994). In that case, the Supreme Court of Florida held that an express writing was not required by Rule 4-1.8(a) where the purpose of that requirement was met without one. The Court stated that "the obvious purpose of the writing

requirement in Rule 4-1.8 is to avoid a conflict of interest wherein a client is inadequately apprised of the nature and terms of a business transaction with his or her lawyer. This was never an issue in the present case. All parties are in agreement that the entire amount of the loan, $4,500, was due with no interest one month after the loan was made. This was spelled out clearly in the promissory note prepared by Nesmith and signed by both Nesmith and Pappas." *Id.* As in *Nesmith*, all parties were in agreement that the tax deeds and the loan to pay them off would need to have equal priority over the *lis pendens*. This was spelled out clearly in the Subordination Agreement itself.

In order to escape this obvious conclusion, the Florida Bar and the Report relied on several factors in making the determination that John White was not independent counsel, none of which actually support that finding. R.R. at p. 10 – 11. While "Independent Counsel" is not specifically defined within Rule 4-1.8, other jurisdictions considering this issue have reached conclusions opposite to the Report. In a recent case, *Young v. Lagasse*, 143 A.3d 131 (Me. 2016), the Maine Supreme Court was called upon to decide, among other things, whether an attorney was properly found to be "independent counsel" within the meaning of Maine's statute concerning validity of estate transfers made by the elderly. *Young*, 143 A.3d at 134 – 135. There, appellant Young contended that her consultation with attorney Juskewitch did not constitute a consultation with independent counsel, and that the

transfer of her home to Lagasse, her former foster child, was voidable under the statute. *Id.* at 133. The circumstances surrounding her consultation are substantially analogous to Respondent's case. Young visited Juskewitch twice, and on the second time, was accompanied by Lagasse and his wife to Juskewitch's office when the transfer documents were created and executed. *Id.* Juskewitch had previously represented Lagasse in two separate matters. *Id.* Young and Juskewitch met for approximately one hour, wherein the attorney and his paralegal explained the documents and the effect of the transfer, and answered any questions Young had. *Id.* Juskewitch testified that Young appeared to understand the transaction and approved of it before execution. *Id.* The trial court found that Juskewitch was in fact independent counsel, based on these facts, and Young appealed. *Id.*

On appeal, Young argued that Juskewitch was not independent counsel because she did not pay him, he previously represented Lagasse, and further was not representing her interests in the transaction. *Id.* at 134. The Maine Supreme Court disagreed, and noted that while "[w]e have not identified with specificity factors for determining whether an attorney was acting as "independent counsel" within the meaning of the Act . . ." the facts of the case clearly showed that Juskewitch was independent. *Id.* at 135. Significantly, the Court noted that "Juskewitch testified that he met twice with Young before completing the transfer, including once for over an hour; that he advised her of the consequences and the finality of her decision; and

that he believed she was aware of what she was doing." *Id.* Further, the Court noted that Young had indeed retained Juskewitch, even though she did not pay him, because she "authorized him to represent her in the property transfer. *See Black's Law Dictionary* 1509 (10th ed. 2014) (providing a definition of "retainer" as "[a] client's authorization for a lawyer to act in a case"). *Id.* (Internal citations included).

In this case, the facts and evidence indisputably support only one conclusion: John White was independent counsel representing Bergaoui in the Subordination Agreement. The testimony from Respondent, John White, and Ann White all agreed that Bergaoui met with White for approximately three (3) hours, during which White spoke with Bergaoui and advised him regarding the subordination agreement. *See, e.g.*, T.T. at pp. 96:1 – 14 (Testimony of John White); 466:17 – 25 (Testimony of Respondent); 372:8 – 12 (Testimony of Ann White) ("Q. Do you know who was in that meeting? A. My husband and Mr. Bergaoui. Q. And do you know approximately how long that conference lasted? A. A few hours."). White testified that although he received some information regarding the case and the purpose of Bergaoui's visit from Respondent, he considered himself to be Bergaoui's lawyer and spent considerable time reviewing the documents, the proposed transaction, and explaining the consequences of the tax deed sale on the three parcels. *Id.* at p. 96:15 – 25; 99; 100:7 – 18 ("7 Q. Did he seem to have an understanding of how the priority would work, the tax deeds -- the tax certificates versus his lis pendens? A.

Yes. Q. Tell -- A. I -- I informed him, and he was already aware, that in the event that the properties were sold at the tax sale, that the substance of the lawsuit would -- would go away, that there would be nothing to pursue with respect to whatever the claim was that John Parrish was pursuing on his behalf."). White even prepared a bill for Bergaoui for the consultation. *Id.* at pp. 103:19 – 24 ("19 A. Yes. We had a discussion that I was representing him with respect to that subordination agreement, and he agreed to pay a fee of what I ended up quoting him to be $1500. Q. Did he actually pay it? A. No, he did not.").

The issues raised by the Florida Bar in the Report to support its conclusions are simply not determinative of whether an attorney is independent. As illustrated by *Young*, what is determinative is both the client's authorization to act and the whether the independent attorney's advice and service were uninfluenced by some outside force. Here, both of those determinative factors are clearly met. Bergaoui discussed the transactions at length with White, acknowledged that he understood the legal effect of the subordination, and authorized White to prepare the subordination, which Bergaoui then signed. The Florida Bar presented no evidence, and the Report contains no finding, that White's advice was affected by Respondent or any other means. White's advice was precisely in line with the facts before him, as relayed by both Bergaoui and Respondent, and there is nothing to indicate that he altered his advice or compromised his own independent professional judgment.

Further, the Florida Bar presented no evidence that the terms of the Mortgage Subordination were unfair to Bergaoui. Indeed, the only effect of the documents was to defer foreclosure and replace the tax liens with a private mortgage interest. *See supra* sec. II.C. The Report attempts to discredit both Respondent's and John White's testimony regarding the events leading up to the execution of the subordination by turning to an unsigned affidavit (which was not drafted by Respondent), and Bergaoui's testimony, even though Bergaoui had repeatedly lied from the inception of the case, particularly regarding his claims that Respondent's firm failed to communicate with him and intentionally sent mail to the wrong address. Coupled with Bergaoui's extensive experience in real estate development and in subordinations, it is clear that the Rule was complied with in substance, and Respondent should not be penalized for not creating a written notice to seek independent counsel.

Therefore, this Court should reject the Report, and find Respondent not guilty of violating Rule 4-1.8(a) with regard to the mortgage subordination agreement.

E. The Unexecuted Settlement Agreement Was Not an Attempt to Violate the Rules Regulating the Florida Bar, and Instead Was Structured to Further the Contingency Agreement With Ben Bergaoui.

The Report concludes by finding that Respondent engaged in misconduct in handling the unexecuted Settlement Agreement, in violation of Rule 3-4.3. *See* C.E. 23. While the Report goes on to great length to describe items in the Settlement

Agreement it considered to implicate several of the Rules, there are no findings of behavior or actions that violated Rule 3-4.3 in connection with Respondent's handling of the proposed, ***unexecuted*** Settlement Agreement.[10]

As noted previously *supra*, while Rule 3-4.3 is generally considered a "catch-all" rule of conduct, it nevertheless requires findings that Respondent committed an act that is either a) "unlawful," or b) "contrary to honesty and justice." *See, e.g., The Florida B. v. Swann*, 116 So. 3d 1225 (Fla. 2013). Here, while the Report is critical of the substance of the draft Settlement Agreement, there are no findings that Respondent acted dishonestly or committed unlawful acts. In fact, the Florida Bar's own Complaint failed to adequately allege a violation of the Rule, and even erroneously alleged that the Settlement Agreement was executed by the parties. *See* The Florida Bar Complaint ¶ 61. It is clear from the record and the undisputed facts that Respondent did not engage in conduct violating Rule 3-4.3, and the Report makes no findings to justify a violation of this Rule.

Further, the Report appears to contain a violation of Rule 4-1.2, but similarly does not contain findings of what conduct allegedly violated the Rule. Respondent filed a Motion for Summary Judgement as to this issue, and contended the claim was

[10] The term "unexecuted" cannot be stressed enough. The Settlement Agreement was never in final form, and it was never executed by Bergaoui or the all of the necessary Defendants. The evidence at trial conclusively establishes that it was a draft being circulated. Thus, the Report's attacks on the proposed Settlement Agreement are nothing more than hypothecation and conjecture. The real issue before this Court is whether the Report justifiably found Respondent's conduct to violate Rule 3-4.3.

made in error due to the absence of supporting allegations. *See* Respondent's Thirteenth Motion for Summary Judgment. Rule 4-1.2 governs four areas which are not reconciled to the facts in this matter or to Respondent's alleged conduct: "Lawyer to abide by Client's Decisions . . .; No endorsement of client's views or activities . . .; Limitation of objectives and scope of Representation . . .; Criminal or Fraudulent Conduct . . .". Fla. Bar R. 4-1.2. The Complaint and Report vaguely refer to Respondent's duty to disclose his role in the Mortgage Subordination, but make no mention of how Rule 4-1.2 is implicated. Part c) deals with limitations on scope of representation, but by its own terms applies "[i]f not prohibited by law or rule, a lawyer and client ***may*** agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing." *Id.*

Neither the Report nor the Florida Bar provide any basis for imposing a mandatory duty on Respondent, independent of the other Rules, to enter into a limitation on the scope of representation, and the Rule itself explicitly states that such an agreement is optional.

Therefore, this Court should disregard the Report, and find Respondent not guilty of misconduct in connection with the proposed, unexecuted Settlement Agreement.

III. The Referee Did Not Properly Identify Which Standards for Imposing Lawyer Sanctions He Relied upon to Recommend a One- Year

Suspension, and Even if the Findings of Fact Were Supported by Competent Evidence, Neither the Standards Nor the Case Law Purportedly Considered Support a Suspension, and Further Respondent Was Denied the Right to an Independent Adjudication Due to the Referee Using the Florida Bar's Proposed Order Verbatim.

A. The Standards Listed in the Report Do Not Fit the Facts of this Case, and the Referee Does Not Reconcile the Standards with the Recommended Sanction.

The Report provides no legitimate basis for recommending a one year suspension, nor does the evidence support such a drastic sanction. The Report lists five portions of the Standards for Imposing Lawyer Sanctions as being considered in recommending the proposed suspension: §§ 4.31(a)(disbarment); 4.32(suspension); 4.43(Public Reprimand); 4.53(Public Reprimand); 7.0(Public Reprimand). However, the Report does nothing to reconcile the standards with the recommended sanction, and it does not elaborate as to why it considered §4.31(a), nor does it justify its shifting away from public reprimand. It is entirely unclear what was considered and what weight was given to a particular Standard, or if the Referee independently evaluated other factors, since the Report is simply an endorsed copy of the Florida Bar's proposed order.

Notwithstanding these procedural infirmities, the facts of the case in no way support a one year suspension. It has already been demonstrated that the Report's conclusions are either unsupported by the evidence or the law, and even if its findings were taken as correct, they do not support suspension. Even the Report

disregards § 4.31(a) without comment, as it clearly was unsupported to impose such a sanction. The remaining Standards ***all*** recommend Public Reprimand, with the sole basis provided for suspension being § 4.32. This Standard is also inapplicable to this case.

1. Standard 4.32 Is Inapplicable to the Facts, or the Findings in the Report.

Standard 4.32 applies ***solely*** to rule violations stemming from the ***failure to avoid conflicts of interest.*** To the extent the Report considered this Standard in conjunction with violations of other rules, it is contrary to the law and must be disregarded. The only claimed violations that are appropriate for consideration under this standard are Count I, Rule 4-1.8(a) (Lamborghini Fee Agreement), and Count III, Rule 4-1.8(a) (Mortgage Subordination), Rule 4-1.8(e) (Loan to Defendants being financial assistance to client), and Rule 4-1.8(i)(Mortgage constituting proprietary interest).

Standard 4.32 states: "Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and ***causes*** injury or potential injury to a client." (emphasis added). Critical to consideration of this requirement is that a lawyer ***must know*** of a conflict of interest, and its corollary is that the Bar must prove such knowledge. The Report fails to contain any such finding. Indeed, the actions taken afterwards, which the Report describes as "post hoc" efforts to re-characterize John White as independent

counsel, or the affidavit of August 10, 2012, demonstrate that at worst, Respondent was ***unaware*** of any potential conflicts in the transactions, until the Motion to Disqualify was filed. *See* R.R. at pp. 10 – 14. The Report inadvertently concludes that Respondent ***did not*** consider the transactions at issue to be a conflict, and therefore it cannot simultaneously consider § 4.32, which requires ***actual knowledge***. Furthermore, with respect to the Lamborghini Fee Agreement, the Report notes that Respondent never considered it to be a conflict transaction under Rule 4-1.8(a), but rather genuinely maintained it was a fee agreement in compliance with 4-1.5. *See* R.R. at p. 4 ("Both Bergaoui and Respondent testified that the requirements of Rule 4-1.8(a) were not met. Respondent testified that he ***did not believe*** the Lamborghini agreement required compliance with Rule 4-1.8(a).").

In these circumstances, assuming the Report's findings as correct, Standard 4.34 would have been the appropriate standard to consider: "Admonishment is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no injury or potential injury to a client." This is especially the case with the Lamborghini Fee Agreement, as there was never any injury or potential injury to the client, nor was there any alleged by the Florida Bar.

The remaining claims pertaining to the Mortgage Subordination and the unexecuted settlement similarly fall under Standard 4.34. The Florida Bar did not prove Respondent's knowledge of a potential conflict, and subsequent intent to act despite knowing the conflict. Indeed, substantial evidence was presented that Respondent believed that the Rule was complied with because of Bergaoui's meeting with Attorney John White. *See* T.T. at pp. 304; 465. Notwithstanding, the Florida Bar did not nothing to demonstrate that the transactions caused any injury to the client, and the Report does not conclude that they did. Indeed, the Report's determination that the loan to the Defendants was ***financial assistance*** to Bergaoui forecloses any possibility that it simultaneously caused injury to him, potential or otherwise.

The inescapable conclusion from examining the Report's findings is that at worst, Respondent was negligent in discovering potential conflicts, and that the four transactions at issue caused no injury to Bergaoui. In fact, one of the claims is that Respondent improperly provided financial assistance to the client. Under such circumstances, the Report failed to justify why consideration of § 4.32 was appropriate, because at worst Respondent's conduct should have fallen under § 4.34 or § 4.33 (Public Reprimand).

2. <u>The Remaining Claims and Standards do not Support Suspension.</u>

The remaining standards (4.43, 4.53, and 7.0) all recommend Public Reprimand as sanctions for the remaining claims (Count I, Rule 3-4.3 (General misconduct), Rule 4-1.5 (Excessive fee); Count III, Rule 3-4.3 (General misconduct), Rule 4-1.1(lack of competence) 4-1.2 (failure to limit objectives and scope of representation), Rule 4-1.3 (lack of diligence)). It has already been demonstrated *supra* Sec. I, II, that these claims are largely unsupported by the evidence or the Report's own findings. Nevertheless, none of the claims or the purported Standards relied upon by the Report support a suspension. The Report provides no basis for recommending anything above a public reprimand for these claims, and therefore a suspension cannot be upheld. Indeed, the Report's consideration of these standards reinforces Respondent's position that at worst, if there were Rule violations they negligent and did not result in any harm. Thus, taking *arguendo* the Report's findings and conclusions of liability as correct, Respondent should receive no more than a Public Reprimand. This Court should disregard the Report to the extent it significantly deviates from its own proposed Standards, and inexplicably recommends a one year suspension.

B. The Cases Relied Upon Do Not Support a One-Year Suspension.

It is clear that the Standards for Imposing Lawyer Sanctions do not allow for any more than a public reprimand for Respondent's conduct, even if the Report is taken as correct. The case law cited by the Report does not alter this conclusion, or

provide precedent for the recommended suspension. Rather, each case is significantly distinguishable and involves adjudications of different alleged Rule violations.

1. The Florida B. v. Herman, 8 So. 3d 1100 (Fla. 2009)

The first case, *The Florida B. v. Herman*, 8 So. 3d 1100 (Fla. 2009), on its face involves conduct far different and much more egregious than even the Florida Bar's allegations against Respondent. In *Herman*, the attorney in question represented a company called Aero Controls in a contract dispute and subsequent litigation, as well as a leasing negotiation of Triple J Leasing, a closely related company. *Id.* at 1102. Shortly after, Herman met with Aero Control's top salesman, Thomas Bristow, and several other investors to form a new aviation leasing company called Nation Aviation. *Id.* at 1103. Once Nation Aviation was formed, and while Herman still represented Aero Controls, Bristow contacted him and expressed a desire to work for the new company. *Id.* A falling out occurred with several investors, and Herman was faced with the choice of losing his investment or putting Bristow in charge of Nation Aviation and directly competing with Aero Controls, which he still represented. Herman chose the latter. *Id.* The Referee noted that "Herman, who was still representing Aero Controls, should have called Titus at that point to disclose the conflict and request a waiver, but did not, because of monetary concerns. His failure to disclose was dishonest and deceitful." *Id.*

The Referee ultimately found Herman had violated Rule 4-1.7(a) (prohibiting representation of a client if the representation will be directly adverse to the interests of another client, unless each client consents after consultation), Rule 4-1.8(a) (The only violation analogous to the present case), and 4-8.4(a) (prohibiting violations or attempts to violate the Rules of Professional Conduct); and 4-8.4(c) (prohibiting engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). *Id.* at 1103 - 1104. This Court ultimately determined that the proper punishment was a suspension for 18 months. *Id.* at 1109.

Herman is simply not analogous to the present case, for two distinct overarching reasons. First, the rule violations were premised ultimately upon Herman's dishonesty: by going behind his client's back, forming a company to directly compete with a client, recruiting his client's top employee, and intentionally not disclosing the new business to save his own financial stake. In this case, there is no evidence that Respondent acted intentionally to compete with Bergaoui or otherwise harm him. The Report does not find that Respondent acted deceitfully or dishonestly; indeed the Florida Bar has not alleged that Bergaoui was unaware of any of the purported transactions in this case. Secondly, Herman's principle violations were Rule 4-1.7(a) (prohibiting representation of a client if the representation will be directly adverse to the interests of another client, unless each client consents after consultation) and 4-8.4(c) (prohibiting engaging in conduct

involving dishonesty, fraud, deceit, or misrepresentation), neither of which are applicable to Respondent's case. The potential harm to Herman's clients for violations of these duties was markedly different, as could be expected.

Therefore, this Court must disregard the Report to the extent it relies upon *The Florida B. v. Herman*, 8 So. 3d 1100 (Fla. 2009) to justify suspension.

2. The Florida B. v. Patrick, 67 So. 3d 1009 (Fla. 2011)

In *The Florida B. v. Patrick*, 67 So. 3d 1009 (Fla. 2011), the Florida Bar brought claims against attorney Patrick, who represented a client in PIP action against Progressive Insurance. *Id.* at 1010. Of significance to the case, the Referee ultimately found that the most that the client could receive would have been $48. *Id.* at 1011. At mediation, Progressive offered $2500 to settle, and the only reason that the client did not accept was because attorney Patrick insisted that he take the claim forward so that he could recover for the 60 plus hours he had already billed on the case. *Id.* The case was lost on appeal, and the client ended up being liable for Progressive's attorney's fees. *Id.* The referee also determined that Patrick had improperly agreed to pay his client's appellate fees. *Id.* Of significance to the Referee's findings was the fact that "Respondent's conduct, which includes placing his personal interest above the interests of his client, inducing his client to reject an offer that could subject his client to significant liability and his refusal to abide by

his representations to Newman significantly damaged his client." *Id.* at 1013. Ultimately, the Referee recommended a one year suspension. *Id.*

Patrick does not support a one year suspension in this case. Most significantly, attorney Patrick "manipulated his client into proceeding with the case, which was detrimental to Newman, merely so Respondent could have an opportunity to collect attorney's fees and costs." *Id.* at 1018. This is diametrically different than what occurred in this case. The Report contains no findings that Respondent urged or manipulated Bergaoui to proceed forward with a case to his detriment. Even if the loan is considered financial assistance, it did nothing to add liability or cost to Bergaoui, and in fact likely preserved the case so that Bergaoui would be able to favorably settle the matter. The loan was never tied to continued representation or to the outcome of the case, such that Respondent would be in a position to have competing interests with Bergaoui. The Mortgage Subordination agreement put Bergaoui in no worse of a position than he had been before, since the tax certificates would have taken priority of the land had they not been paid. Further, there are no allegations that Respondent concealed his motives or acted with deceitful intent. Finally, unlike in *Patrick*, Mr. Bergaoui did not suffer adverse consequences from Respondent's loan, nor was he put in any danger of such consequences.

An additional consideration must be noted by this Court. In *Patrick*, a significant aggravating factor was present that warranted a more severe punishment:

prior disciplinary history. In fact, Patrick had been disciplined twice, one of which involved similar circumstances of elevating his interests above his client's, to their detriment. By contrast, Respondent has no disciplinary history, and the facts of this case are inapposite to those in *Patrick*. In sum, the facts in Patrick demonstrate deceit and substantial harm to the client, as well as prior disciplinary history, in adjudicating a suspension. None of these factors are present in this case, and *Patrick* does not support the Report's recommended sanction.

3. The Florida B. v. Doherty, 94 So. 3d 443 (Fla. 2012).

The facts in *Doherty* are also dissimilar to the present case. In that case, attorney Doherty was involved in selling investment products and insurance to his client, without disclosing he had a significant financial interest in the products he sold. *Doherty*, 94 So. 3d at 450. Significant to this Court's analysis was the fact that Doherty failed to disclose his financial interests to the client, and the fact that he had been disciplined twice in the past, including a prior two-year suspension. *Id.* at 451.

By contrast, in this case there are no allegations or findings that Respondent withheld information from Bergaoui, or otherwise induced him to act for Respondent's personal benefit. For instance, the Loan itself was made in response to Bergaoui's concern over the properties being lost to tax sale, and he was aware of the settlement negotiations. T.T. at p. 174 (Bergaoui testifying he had seen the settlement agreement around the same time the tax certificates were repaid); R.R. at

p. 9 – 10 (Report finding that no written disclosures outside of the loan documents were made, but not that Bergaoui was unaware of what was occurring or Respondent's role). There was simply no downside to Bergaoui in this transaction. Further, as noted, repayment of the loan was not conditioned on the outcome of Bergaoui's case, nor was it made to induce continued representation of the client.

Finally, the harsh penalty imposed in *Doherty* reflected the prior disciplinary history that attorney Doherty had, which is absent from this case. Accordingly, *Doherty* has no bearing on this matter and does not support the recommended sanction.

4. The Florida B. v. Ticktin, 14 So. 3d 928 (Fla. 2009).

The *Ticktin* matter is a complex case wherein the respondent was accused of taking over a publically traded company as CEO, where his client was the former CEO and had become embroiled in fraud charges which ultimately sent him to prison. While serving as CEO, Ticktin failed to make necessary disclosures concerning the conflicts arising from his representation of the company and of his client, as well as disclosures related to the exchange of millions of shares of stock in the company with a different company also owned by Ticktin's client. Notably, the referee found that Ticktin's involvement with the companies resulted in violations of Rule 4-1.7(a) – (c) (Representing Adverse Clients). *Ticktin*, 14 So. 3d at 935.

With regard to the proposed sanctions, despite the numerous serious conflicts and substantial injury Ticktin's client suffered through the cancellation of his shares, the Referee recommended only an admonishment. *Id.* at 939. This Court disagreed, and noted that the violations were "egregious" and warranted a 91 day suspension, stating:

> Regarding client injury, Ticktin caused injury or potential injury to Johnson when he did nothing to stop the cancellation of Johnson's LWL stock certificates, which Ticktin perceived would benefit Silver State. The actual injury (or potential injury) Ticktin caused is that he, as Johnson's lawyer, actively worked against Johnson's ownership interests, even while Johnson was in jail and remained his client.
> We find that Ticktin's misdeeds are egregious and constitute serious violations of the rules governing every Florida lawyer's professional conduct. Ticktin's misconduct warrants a ninety-one-day suspension.

Id. at 940. In this case, by contrast, Respondent is not accused of representing adverse interests, nor of violating the Rules in a manner which implicated the financial condition of publically traded companies. Respondent caused no harm to Bergaoui. Further, there is nothing within the Report that characterizes Respondent's purported violations as anything other than improvident decisions. Thus, it is clear that a one-year suspension is unsupported by *Ticktin*, since in that case attorney Ticktin was found to have caused actual injury and committed far more serious violations, and was still only recommended an admonishment, later upgraded by this Court to a 91 day suspension.

5. The Florida B. v. Rotstein, 835 So. 2d 241 (Fla. 2002)

The final case purportedly relied upon by the Report, *Rotstein*, is substantially dissimilar from this case both factually and with regard to the violations Rotstein was charged with. Significantly, the basis for Rotstein's charges and resulting suspension stemmed from repeated dishonesty, fraudulent conduct, and fraudulent misrepresentations leading to violations "of rules 3-4.3, 4-1.4(a), 4-8.1(a), 4-8.4(c), and 4-8.4(d) . . ." which this Court noted "raise[d] Rotstein's misconduct to an extremely serious level." *Rotstein*, 835 So. 2d at 246. In light of the serious violations and implicating dishonesty, this Court recommended a one-year sanction. *Id.* at 248.

In this case, the Report does not allege Respondent acted dishonestly or in any way similar to attorney Rotstein. None of the recommended violations in the Report rise to the level of egregious behavior engaged in by attorney Rotstein. Therefore, *Rotstein* does support a one-year suspension in this case, where Respondent did not act dishonestly or lack of candor.

C. The Report Is Copied Verbatim from the Florida Bar's Proposed Order, and Is Tainted by the Bar's Unfair and Prejudiced View Towards Respondent, and Respondent Was Denied an Independent Adjudication.

This Court should disregard the Report because it clearly demonstrates that the Referee did not exercise independent judgment in rendering a decision. As has been noted numerous times previously, the Report is nothing more than an endorsed copy of the Florida Bar's proposed order. This is especially disconcerting in light of

the number of contested issues and the evaluation of witness testimony that was necessary to reach a fair and accurate conclusion. Instead of an impartial decision, the Report is purely the viewpoint of the Florida Bar, the same entity which brought admittedly baseless claims against Respondent, as evidenced by the dismissal of Count II in its entirety, and the allegation that Respondent communicated with represented parties, despite unequivocal testimony to the contrary by Bergaoui.

This Court has reiterated several times that a Referee must exercise independent judgment in rendering a decision. *See The Florida B. v. Picon,* 205 So. 3d 759, 763 (Fla. 2016) ("As a general rule, a referee's findings and recommendations must demonstrate independent decision-making."); *The Florida B. v. Barrett*, 897 So. 2d 1269 (Fla. 2005); *The Florida B. v. Cramer*, 678 So. 2d 1278 (Fla. 1996). Significantly, in this matter the Referee made no pronouncements of his ruling at the close of trial, to give either side any indicia of his ultimate decision. *Cf. Barrett*, 897 So.2d at 1273; T.T. at p. 500:1 – 7:

> 1 THE COURT: All right. Okay. That being the
> 2 case, any -- any questions? Anything left unsaid?
> 3 (No response.)
> 4 THE COURT: All right. Thank you.
> 5 MR. LOMBARDO: No questions.
> 6 THE COURT: And we'll be in recess. I'll
> 7 look forward to seeing what you guys say.

Id. The Referee's failure to make an independent adjudication, and to wholesale approve the Florida Bar's recommendation, clearly prejudiced Respondent,

especially where sensitive testimony and weighing of evidence was indispensable, i.e. Respondent's and John White's testimony. The Report demonstrates that Respondent was not given a fair opportunity to be heard or present his case. As this Court has stated:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

State ex rel. Davis v. Parks, 194 So. 613, 615 (Fla. 1939); *see also Hanson v. Hanson*, 678 So. 2d 522, 524 (Fla. 5th DCA 1996) ("[T]he appearance of irregularity so permeates these proceedings as to justify suspicion of unfairness. This, we believe, is as much a violation of due process as actual bias would be.") This Court should disregard the Report in its entirety, as it is clearly tainted by the Florida Bar's subjective determinations of fact and law.

CONCLUSION

For all these reasons, this Court should find Respondent not guilty of violating the Rules governing the Florida Bar. Furthermore, even if this Court accepts the Report's findings and conclusions, the recommended sanction is unsupported by either the Standards for Imposing Lawyer Sanctions or case law, and this Court should impose no more than an Admonishment upon Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, I hereby certify that this computer generated document is submitted in Times New Roman 14 point font, in black and distinct type, and margins of no less than one inch. As such, this document is in compliance with Fla. R. App. Pro. 9.210(a)(2).

/s/ Donald G. Peterson, Esq.
Donald G. Peterson, Esq.
Florida Bar No. 711616
Jonathan M. Weirich, Esq.
Florida Bar No. 118961

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document was electronically transmitted to the Clerk of the Court using The Florida Courts E-Filing Portal ("FCEP") for filing and transmittal of electronic mailing to the following FCEP registrants(s) and/or by registered e-mail: Troy Matthew Lovell, Esq. [tlovell@flabar.org] [dheimburger@flabar.org] [tampaoffice@flabar.org], The Florida Bar, Tampa Branch Office, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607-1496; Adria E. Quintela, Staff Counsel [aquintel@flabar.org], The Florida Bar, Lakeshore Plaza II, Suite 130, 1300 Concord Terrace, Sunrise, Florida 33323; J. Christopher Lombardo, Esq. [clombardo@wpl-legal.com] [lbrakefield@wpl-legal.com] [jcoleman@wpl-legal.com] [asenicola@wpl-legal.com] [service@wpl-legal.com], Woodward, Pires

& Lombardo, P.A., 3200 Tamiami Trail N., Suite 200, Naples, Florida 34103; and The Honorable Scott M. Brownell [sbrownell@jud12.flcourts.org] [vshawvan@jud12.flcourts.org], Manatee County Judicial Center, 1051 Manatee Ave. West, Bradenton, Florida 34206 on this 21st day of March, 2017.

/s/ Donald G. Peterson, Esq.
Donald G. Peterson, Esq.
Florida Bar No. 711616
Jonathan M. Weirich, Esq.
Florida Bar No. 118961
Parrish, White & Yarnell, P.A.
3431 Pine Ridge Rd. Suite 101
Naples, Florida 34109
Ph 239/566-2013; Fax 239/566-9561
donpeterson@napleslaw.us
jonathanweirich@napleslaw.us
Primary email: ply@napleslaw.us
Secondary emails: karlaschooley@napleslaw.us
angelakuenzle@napleslaw.us