IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JEAN M. PICON,

Respondent.
_____/

Supreme Court Case No:
SC15-385

The Florida Bar File No:
2014-30,657(18C)

RESPONDENT'S SECOND AMENDED BRIEF ON APPEAL FROM A REPORT OF REFEREE

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "The Bar" or "The Florida Bar." Jean Michele Picon, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the report of referee, and the symbol "TT" will be used to designate the transcript of the final hearing. It will be followed by the appropriate transcript page number(s) and line number, which will be designated by the symbol "L" followed by the appropriate number.

The symbol "RobertsT1" will be used to designate the transcript of the contempt proceeding, before Judge Charles Roberts, on February 22, 2013, and the symbol "RobertsT2" will be used to designate the transcript of the contempt proceeding, on February 27, 2013.

The symbol "KoonsT1" will be used to designate the transcript of the proceeding held before Judge Stephen Koons, on the morning of December 19, 2013, and "KoonsT2" will be used to designate the afternoon proceeding.

The symbol "DuganT" will be used to designate the transcript of the proceeding held before the Judge David Dugan, on December 16, 2013.

The Exhibits introduced by the parties at the final hearing will be designated as "TFB Exh" or "Resp Exh." The filings contained within the Record Index will be designated by the symbol "Index" followed by their corresponding tab numbers.

STATEMENT OF CASE AND FACTS

This case is a disciplinary proceeding initiated by the Florida Bar against the Respondent, Jean M. Picon. Respondent filed a Petition for Review, and this is her Initial Brief filed on appeal.

On December 16, 2013, the Honorable Judge W. David Dugan forwarded a cover letter and video recording to the ACAP of a court proceeding scheduled by Respondent, in reference to a previously filed Motion to Surrender, Recall Warrant, Dismiss Failure to Appear Charge, Set Aside Bond Estreature(s) and Reinstate Bond(s), in Brevard County Circuit Court Case No. 2013-CF-59079A, *State v. Bernard Jennings* (TFB Exh. 11). The motion had been filed as a result of a Bench Warrant issued for Mr. Jennings for failing to appear for a plea proceeding, on November 26, 2013 (TFB Exh. 18). The Respondent and her client had no prior knowledge of the plea proceeding, as it had been scheduled, in their absence on November 19, 2013, as reflected on the Notice to Appear and the State Attorney's testimony (TFB Exh. 13) (TT168, L10-14).

Upon receipt of Judge Dugan's letter, Bar Counsel, Patricia Savitz, contacted Shirley Coleman, the Staff Investigator, and asked her to contact Judge Dugan, as well as the Chief Judge and the State Attorney's Office, in Brevard

County, Florida to inquire as to whether there had been any other "incidents" involving the Respondent (TT24, L2-25).

On August 27, 2015, Ms. Coleman testified that only one Division Chief at the SAO had any input, Mr. William Respess (TT39, L1-5), and only one assistant state attorney responded to the inquiries as to whether there were any "incidents" regarding Respondent, Ms. Alexa Virgilio (TT39, L8-13).

On June 23, 2014, the Respondent cooperated with the Bar's investigation by providing sworn testimony (TFB Exh. 22) and producing requested documentation (TFB Exh. 23), in response to a Subpoena Duces Tecum for Deposition, in TFB File No. 2014-30,657(18C) and TFB File No. 2013-31-224(18C). The latter disciplinary file resulted in a Letter of Advice and Notice of No Probable Cause, after being reviewed by the Grievance Committee, after the deposition. This investigation stemmed from a Complaint filed by Johnny Lee Smith, and one of the allegations involved the conduct that was the subject of the contempt proceeding before Judge Roberts (RobertsT1,T2).

On February 27, 2015, The Florida Bar filed a complaint against Respondent, Jean Michele Picon, alleging that she engaged in unethical conduct, in violation of Rule(s) Regulating Fla. Bar 4-1.1, 4-1.3, 4-3.4(c) and 4-8.4(d) (Index-1).

More specifically, the Complaint alleges that, during 2012 and 2013, Respondent engaged in a "pattern of conduct" wherein she was frequently late to court and/or failed to appear for court proceeding(s) (Index–1).

The alleged "pattern of conduct" consists solely of the following:

i. In February 2013, in *State of Florida v. Johnny Lee Smith*, Case Number 05-2011-CF-048657A, it is alleged that Respondent appeared late during a scheduled Jury Trial and submitted a motion after a deadline imposed by the Honorable Judge Charles Roberts, which resulted in an Order to Show Cause and a finding of Indirect Criminal Contempt, in *State of Florida v. Jean Picon*, Case Number 05-2013-MM-046151 (Roberts T1,T2)

ii. On November 26, 2013, in *State of Florida v. Bernard Jennings*, Case Number 05-2013-CF-59079A, it is alleged that Respondent and her client failed to appear before Judge Dugan for a plea (Dugan T)

iii. On December 19, 2013, in *State v. Karen Richardson*, Case Number 05-2013-MM-58850A, it is alleged that Respondent appeared before Judge Koons in the morning to address a motion that had been scheduled for that afternoon (Koons T1). The client informed the court that afternoon that Respondent had failed to notify her about the earlier court proceeding (Koons T2).

iv. The Florida Bar alleges that, during this time period, Respondent failed to promptly respond to communications and that her voicemail was frequently full and would not accept messages (Index-1)

v. The only additional claim is that Respondent had more cases than she could competently handle, and the only evidence presented by the Bar was Respondent's 2012 and 2013 calendars (TFB Exh. 23). The Bar alleges that the calendars show that Respondent was routinely overbooked and was required to appear before more than one judge at the same date and time, on numerous occasions (TT387, L16-18).

On March 4, 2015, the Supreme Court of Florida required that the Chief Judge of the Nineteenth Judicial Circuit appoint a referee to the above styled cause (Index-2). On March 17, 2015, Judge Steven J. Levin appointed the Honorable Judge Robert Pegg to serve as Referee in this matter (Index-3).

On March 24, 2015, the Respondent filed her Answer and Motion to Dismiss, which was denied by the Referee without a hearing (Index-5,9)

On August 27 and 28, 2015, a final hearing was held in Brevard County, Florida before the assigned Referee, Judge Robert Pegg. (TT Vols. I-III).

The Referee heard testimony from the following witnesses called by the Florida Bar:

Circuit Court Judge John M. Harris (TT58-67)
Shirley Coleman, TFB Staff Investigator (TT22-57)
A.S.A. Alexis Virgilio (via telephone) (TT244-274)
A.S.A. William Scheiner (TT157-201)
Monica Gabbard, JA (TT202-223)
County Court Judge Stephen Koons (TT137-157)
Circuit Court Judge W. David Dugan (TT224-243)
Circuit Court Judge Charles Roberts (TT68-110, 133–135)
A.S.A William Respass (TT111-136)
Respondent (Bar Counsel was permitted to read excerpts of deposition, over objection of opposing Counsel, in lieu of direct examination) (TT274-282)

The Court heard testimony from the following witnesses called by Respondent:

County Court Judge David Silverman (TT287-298)
Respondent (TT299-365)

On August 27, 2015, Judge John M. Harris testified that Respondent had no cases before him, during the relevant time period, nor has she had any cases before him since 2011 or 2012 (TT64, L3-9).

Judge Harris testified as to his observations regarding Respondent's competency and diligence in representing her clients by stating, "My experiences with Ms. Picon is that she always did a fine job for her client . . . I never heard or gathered that there were any concerns with her representation, either from her clients or from the State. My only concerns were timeliness and being to court on time and communications" (TT67, L2-9).

Judge Harris further testified that Respondent never engaged in conduct that interfered with the administration of justice, in his courtroom, when she had cases before him (TT64, L17-25).

Mr. William Respess testified, on August 27, 2015, that Ms. Picon appeared late during a jury trial, before Judge Roberts, although on cross-examination, he admitted that she had provided explanations for her tardiness to the Court (TT114, L15-23).

William Scheiner, A.S.A, testified that, on November 26, 2013, the Respondent and her client, Mr. Bernard Jennings, failed to appear for a plea proceeding before Judge W. David Dugan. The Court issued a Bench Warrant for Respondent's client, and he was served with the warrant after being arrested, in

reference to unrelated new criminal offenses. Judge Dugan had set the bond amount at "none," and as a result, Mr. Jennings remained in custody for several days (TT174, L 9-23) (TT190, L 4-14).

Mr. Scheiner testified that the Respondent negotiated a very favorable resolution for Mr. Jennings (TT185, L13-20).

Mr. Scheiner, sent an email to Respondent, on the afternoon of November 19, 2013, advising her that a plea date had been set. The e-mail evidences the fact that the plea was set without coordinating the date with Respondent (TFB Exh. 16).

Numerous emails were exchanged between Mr. Scheiner and Respondent, prior to the plea date being set by the Court (Resp. Exh. 2) (TFB Exh. 15,16). The emails show that the Respondent had, in fact, responded to **all** of Mr. Scheiner's emails regarding this case, in an expedient manner, except for the one (1) email regarding the plea being scheduled for November 26, 2013. This supports Respondent's contention that she had no knowledge of the contents of the email regarding the plea date being set (TT355, L19-24).

Respondent testified that she had no prior knowledge of the proceeding scheduled on November 26, 2013, and she provided a copy of her schedule to evidence the fact that it had not been calendared (TT337-338) (Resp. Exh. 2).

The Respondent set a hearing for December 19, 2013, in reference to *State of Florida v. Karen Richardson.* The Respondent appeared that morning before

Judge Stephen Koons and explained to the Court that she was there early, in an abundance of caution, and was uncertain whether her client would show up that morning, or afternoon, due to a miscommunication in text messages exchanged regarding the time of the hearing (Koons T1) (TT142, L1-6, TT143, L10-12).

Judge Koons testified, on August 27, 2015, that the Court heard the motion when the Respondent appeared, and he denied it (TT142, L1-6, 24-25). Judge Koons stated that when the Respondent showed up early, it did not present a problem nor concern for the Court, and he handled the hearing (TT142, L 18-20).

He testified that he changed his mind later in the day when the client appeared by herself, due to the fact that she claimed to have done some of her community service hours. The Respondent was unaware that the client had done any community service hours (TT143, L19 - TT144, L17; TT331, L3-10).

Respondent testified and presented documentary evidence regarding extensive communications with her client, via text messages and phone calls, and stated that she simply was confused as to what time her client would appear in court (Resp. Exh. 4) (TT327-330).

Judge Koons testified that Respondent only appeared late to his courtroom, "Occasionally," and she has never failed to appear. Judge Koons stated that, on the occasion(s) where Respondent had arrived late, he was still working on his docket, and it did not cause any interference or delay the proceeding. (TT 140 L 4-9)

Judge Koons explained that, "Generally, at criminal proceedings or docket soundings, lawyers come in and out as they are going up and down the hallway to various courtrooms," and "Sometimes they have to be in Titusville and Melbourne, and if they are lucky, they have all of their hearings in Viera, and usually they have to be in various places at the same time" (TT139-140).

On February 27, 2013, the Honorable Judge Charles Roberts found Respondent in indirect criminal contempt, after issuing an Order to Show Cause, which alleged that Respondent appeared late on two (2) occasions during the course of a Jury Trial and filed a dispositive, pretrial motion several hours after a 5:00 p.m. deadline imposed by the Court (TFB Exh. 3).

On August 28, 2015, the Respondent testified that, on the morning of the jury trial where it has been alleged that she was approximately an hour late, she was on her way to court and had placed a call to the law library regarding an issue that she had been researching. She stated that she had to leave a voice mail message that exceeded 7 minutes, as no one at the library had answered her call. Due to the fact that she was so engrossed in the message she was leaving and preparation for the trial, she forgot to stop and put fuel in her vehicle. Respondent ran out of gas on the way to Court. Respondent testified that she was panicked on the side of the road, and attempted to seek assistance from anyone whom may have been able to help her. Eventually, a good Samaritan gave her enough gas to make

it to the closest convenient store. He followed her to make sure she made it there, without running out of gas again. The Respondent testified that running out of gas and arriving late to court that morning was unintentional (TT307-314).

Respondent provided the Court with a phone call log obtained from Metro Phone Service detailing the calls she made on the morning that she ran out of gas, until her battery died (Resp. Exh. 5) (TT310-314).

On August 27, 2015, Judge Charles Roberts testified regarding the aforementioned issues that occurred, in February 2013, as well as the progress and improvements that Respondent has made (TT68-110).

Judge Roberts testified that the respondent did a very good job in representing her client throughout the trial (TT87, L19-22). He also stated he felt that the respondent is a valuable member of the legal community (TT104, L8-20).

During the Bar's investigation, he advised Ms. Coleman that the problem he was experiencing with the Respondent stopped completely, after being publicly reprimanded and sanctioned for being late during the jury trial, and she did a 180-degree turnaround (TT43, L10-15; TT96, L14-24; TT104, L1-7). Judge Roberts testified that Respondent was completely rehabilitated, in his opinion, and she is a competent, bright and diligent attorney. He even went so far to say that Respondent is scrupulous in her pleadings and very creative to the point of almost putting too much effort into her research and motions (TT106-107).

Judge Roberts took additional time out of his schedule, on August 27, 2015, to come back to the disciplinary hearing, on his own initiative, and asked the Referee if he could be heard again. He stated that were some things that were left unsaid that must be heard. The Referee granted him the right to be heard again, without questioning. Judge Roberts stated that he has observed the Respondent closely, since the incident with him in 2013, and that she has made tremendous changes and improvements and should not be suspended or disbarred. He testified that when he asked the Respondent about fees charged for her services, he learned that she was grossly undercharging her clients. This resulted, by Judge Robert's calculations, in the Respondent working for about $8.00 per hour (TT133-135).

Judge David Silverman also testified that the Respondent provided a valuable service to a segment of the community that may not have such an effective voice any other way. He clearly stated that he has seen no problems with the Respondent. He also testified that when he was practicing as a Defense Attorney, he too ran out of gas on the way to a jury trial. He stated that the Court accepted his apology and moved on with the case (TT287-298).

Judge W. David Dugan's testified, on August 27, 2015, that his decision to write to the Bar was solely due to the fact that Respondent's failure to appear with her client, on November 26, 2013, resulted in his incarceration (TT228, L15-18).

Judge Dugan's response, when asked whether he has had any subsequent problems with Respondent, was that he "doesn't recall any facts of any specific problems before," nor does he "recall anything after" (TT240, L3-8).

Respondent testified that she has made efforts and taken affirmative steps to improve the way she manages her practice and handles her cases. Respondent stated that she has obtained a new phone plan and no longer has a problem with the voicemail being full. She also stated that she has invested in more reliable transportation and checks the court's schedule daily (TT315-316).

At the conclusion of the final hearing, the Referee made an oral pronouncement as to there being sufficient evidence to find Respondent guilty of violating Rule 4.8-4(d), and under no circumstances, did the conduct warrant a suspension in excess of 90 days (TT369, L4 - TT370, L11).

The Report of Referee was docketed and indexed with the Clerk of Court, on October 15, 2015 (Index–52,55). The Referee adopted the Florida Bar's proposed Report of Referee verbatim.

The Referee found Respondent guilty of violating Bar Rules 4.1-1, 4.1.3, 4.3-4(c) and 4.8-4(d) (ROR 7-13), and he recommended a 91-day suspension requiring proof of rehabilitation, without being required to take any portion of the bar exam prior to reinstatement (ROR 16, 23).

This appeal follows.

SUMMARY OF THE ARGUMENT

The Referee's findings as to facts and guilt, as contained in the Report of Referee must be disregarded. The Referee's Report, regarding there being substantial and competent evidence to find Respondent guilty of violating Rules 4-1.1, 4-1.3, 4-3.4(c) and 4-8.4(d), does not comport with his oral pronouncements, at the conclusion of the final hearing, nor do they reflect the Referee's independent decisions based on the evidence and issues before him, as stated on the record.

The Referee requested that Bar Counsel state on the record what she believed the specific conduct to be that would evidence a violation of the rules, as specifically alleged in the Complaint (TT370, L14-21).

During Bar Counsel's argumentative recitation of her proposed findings of fact and guilt, she improperly advised the Referee as to Respondent's prior disciplinary history, in violation of Bar Rule 3.7-6(m)(1)(D), which requires the Referee to make specific findings as to guilt, prior to any evidence or argument regarding prior disciplinary sanctions (TT390-391).

It is Respondent's contention that the Referee's decisions as to guilt and an appropriate disciplinary sanction, as reflected in his Report, are contrary to his oral decisions made on the record, as a direct result of Bar Counsel's misrepresentations of the law and its applicability coupled with the fact that she intertwined facts regarding what conduct would constitute an ethical violation of

the rule(s) with improper comments regarding Respondent's prior discipline, prior to the Referee making a specific finding as to guilt of each alleged rule violation.

The Referee's 91-day suspension recommendation cannot stand, because there is no precedential support for the sanction, under the facts of this case, especially when the evidence showed that Respondent has been rehabilitated since the alleged incidents that gave rise to this claim.

Respondent's right to due process and a fair trial was violated by the Referee not affording Respondent's Counsel an opportunity for rebuttal argument(s), in response to Bar Counsel's proposed finding(s) of fact and guilt, nor was Respondent given an opportunity to respond to the Bar's improper and premature comments regarding prior disciplinary sanctions. Furthermore, the Referee erred when evidence of Respondent's prior disciplinary records were admitted without requiring proper authentication of same.

There was substantial, competent evidence of additional mitigating factors that were not properly considered by the Referee. Additionally, the Referee improperly increased the severity of the sanction recommended and gave greater weight to prior disciplinary sanctions than he should have, due to his mistaken belief that the prior disciplinary actions all involved similar misconduct.

ARGUMENT

I. THE REFEREE'S FINDINGS AS TO GUILT MUST BE DISREGARDED, AND THIS CASE REMANDED FOR A NEW HEARING, BASED ON THE FACT THAT THE FINDINGS IN HIS REPORT DO NOT COMPORT WITH HIS ORAL PRONOUNCEMENTS MADE AT THE CONCLUSION OF THE FINAL HEARING, NOR DO THEY REFLECT THE JUDGE'S INDEPENDENT DECISIONS BASED ON THE EVIDENCE AND ISSUES BEFORE HIM

At the conclusion of the final hearing, the Referee orally pronounced that the evidence was sufficient to prove Respondent's guilt as to violating Rule 4-8.4(d) (Conduct Prejudicial to the Administration of Justice). The Referee stated that he was not going to make any specific findings of fact on the record, as to what specific evidence of Respondent's conduct led to this decision. (TT369, L11-18)

The Referee then advised that he did not wish to hear argument regarding whether Respondent should be found guilty of violating any other sections of the rule or what the sanction(s) should be. (TT369, L4–19).

Immediately thereafter, he announces that the evidence is insufficient to justify a sanction in excess of 90 days (TT370, L1–6). The Referee then states that he is ready to consider argument from both sides as to what they believe an appropriate sanction should be, implying that he has found Respondent guilty of no other violation(s) of the rules (TT370, L6-13). However, it appears that he is

uncertain as to whether this would be an appropriate time to do so, procedurally, because he then asks Counsel, "Is that alright?" (TT370, L13)

Then, it is as if the Referee suddenly recalls that, procedurally, he must make specific findings of fact, on the record, as to whether the evidence was sufficient to find guilt as to each and every alleged rule violation. However, HE then instructs BAR COUNSEL to make the specific findings of fact for him, essentially, when he requests BAR COUNSEL to state, on the record, what SHE "believes the evidence showed that would show that she [Respondent] violated each and every one [of the Bar Rules]" or the rules that SHE thinks Respondent has, IN FACT, violated and what conduct in each part of the allegation caused that violation (TT370, L14-21).

The Referee's findings of fact and guilt were then improperly influenced by Bar Counsel's representations as to how she wished the Judge to apply the law to the allegations of rule violations as contained in the Complaint.

Bar Counsel then proceeds to state what she proposes the Referee's findings of fact and guilt should be as to each and every one of the Bar's allegations and how the alleged conduct should apply to each and every alleged rule violation. Bar Counsel began with her proposed findings of fact and guilt as to Rule 4-1.1, then 4.1-3 and finally 4-3.4(c) (TT372, L12 - TT389, L3).

The trial transcript evidences the fact that the REFEREE never made any oral pronouncement as to HIS specific finding(s) of fact and guilt as to whether the Respondent violated Rules 4-1.1, 4-1.3 and/or 4-3,4(c), after Bar Counsel stated her proposed findings of fact and guilt, nor did the REFEREE ever make specific findings as to what conduct constituted a violation of 4-8.4(d) (TT388-416).

Furthermore, the Referee never announced, on the record, that he intended to adopt the Bar's proposed findings of fact and guilt, prior to adopting Bar Counsel's proposed Report of Referee verbatim. However, that is in fact, what happened.

The trial transcript evidences the fact that the Referee's independent decisions expressed immediately after the hearing is wholly inconsistent with the written Report. Rather, Judge Pegg allowed the Bar, without appropriate guiding instructions, make findings of fact, guilt and even rulings of law that the court, without such prompting, would never have considered.

The Third District Court of Appeal in footnote 4 of its opinion in *Waldman v. Waldman*, 520 So.2d 87, 88 (Fla. 3d DCA 1988), stated:

> "At the conclusion of the proceeding, and without indicating what its judgment would be, the trial court requested counsel for both parties to submit written final argument and orders. Thereafter, and without a hearing, the trial court adopted verbatim the final judgment drafted by counsel for Mrs. Waldman. We condemn this practice. We admonish the bench and the bar that, particularly in domestic relations cases, *findings of fact and conclusions based thereon are of critical importance."* (Emphasis added.)

The *Walden* Court further noted that when an interested party is permitted to draft a judicial order without response by the opposing side, the temptation to overreach and exaggerate is overwhelming, citing *Colony Square Company v. Prudential Insurance Company of America*, 819 F.2d 272 (11th Cir. 1987).

Finally, in *Walden*, the Third DCA held that the better practice, indeed the preferred practice, is for the trial court to indicate on the record its findings and conclusions, because the reviewing Court deserves the assurance that the trial court has reviewed, considered and weighed irreconcilable conflicts in evidence and extracted factual finding(s) therefrom.

The Respondent in this disciplinary action is no less deserving of such assurances. In the case at the bar, the Referee indicated on the record his findings and conclusions. Thereafter, he adopted the Bar's proposed findings of fact and guilt, mitigation and aggravation, and he changed his oral pronouncement as to recommended discipline from less than 90 days to a 91-day suspension. Under these circumstances, this court cannot be convinced that the Referee distilled his findings of fact as to guilt, independently and without improper influence and bias in the Bar's favor, nor could he have recommended a fair and appropriate disciplinary sanction, under the circumstances, which is apparent, especially in light of the fact that the record reflects his decision that "under no circumstances" would the recommended sanction require proof of rehabilitation (TT370-371).

This Court relies on a dispassionate consideration of the facts in making decisions in these important disciplinary proceedings. It is therefore essential that a referee fairly and dispassionately weigh all of the evidence in an effort to come up with the facts and determination as to guilt and discipline. When, as here, the Referee rules against one party on every single disputed fact and issue, some of which are only shown by circumstantial evidence, this Court cannot rely on what amounts to inconsistent and improperly influenced findings of guilt and recommendation as to discipline.

In *White v. White,* 686 So.2d 762 (5 DCA 1997), the Fifth District discussed the problems created when a judge delegates his decisionmaking responsibility to lawyers. The Appellate Court noted that the trial court's method of resolving the case was not unusual. However, the Court acknowledged that it is the trial court's unique responsibility to make decisions on the issues of the case based on the pleadings and its view of the evidence. The court further stated that a judge does not fulfill this responsibility by merely choosing the better proposed judgment or option contained in competing proposed judgments presented by the attorneys.

Subsequently, in *Rykiel v. Rykiel,* 795 So.2d 90 (5 DCA 2000), the Appellate Court held that, although a trial court may request that counsel for both parties submit a proposed Final Order, the court may not adopt it verbatim, blindly or

without making in-court findings. Review of the findings and conclusions of such a judgment is hampered, or made impossible, by the trial court's lack of participation.

The Referee's Report, in this cause, should not be adopted. It is nothing more than Bar Counsel's argumentative proposed findings. In proceedings of such import, where a lawyer's career is in jeopardy, this Court must not accept the Bar's arguments as gospel, as did the Referee. The Referee's findings of fact should be disregarded and the record should be reviewed *de novo* by this Court or the case should be remanded for a new disciplinary hearing before a different referee.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT AS TO RULES 4.1-1 AND 4-3.4(c)

Rule 4-1.1 of the Rules Regulating the Florida Bar provides:

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

Bar Counsel's statements, on the record, regarding the Bar's proposed findings of fact and guilt as to each rule violation alleged in its Complaint, began with a recitation of Rule 4-1.1 (TT372, L12-16).

It is apparent that the Referee did not believe that the evidence presented by the Bar was sufficient to support a finding of guilt, based on the plain language of the aforementioned rule. It is also obvious that the Referee would not have found Respondent guilty of violating Rule 4-1.1, if it were not for Bar Counsel's false

representations made to the Court as to what conduct is "also" considered a violation of the rule. Specifically, Counsel stated that Rule 4-1.1, "*also* refers to, in the body of the rule, as well as the Comment, caseload competence."

Bar Counsel should have reasonably known that the rule she had just recited did *not*, in fact, refer to caseload competence. But rather than disclose to the tribunal the correct legal authority, as required by the Bar's own rules, Counsel further states, "It's left vague, your Honor, because an attorney can have 30 cases and that would be too many; an attorney such as an Assistant Public Defender could have 150 cases and . . ." (TT372, L16-22).

The Referee interrupts Bar Counsel and states, "I didn't know that. I thought that Rule, what they were talking about, is she sufficiently knowledgeable; let's say in Criminal Law, and the Rules of Procedure to represent criminal clients. I didn't realize that having too many cases would violate that Rule, if you can't take care of all those people" (TT372, L23 - TT373, L5).

In fact, the Comment does not mention "caseload competence," nor that the "number of cases" an attorney handles could be considered a violation of the Rule. Florida Courts have addressed this interpretation of Rule 4-1.1, and the Rules required Bar Counsel's disclosure of legal precedent known to be adverse to its position, especially if unknown to opposing Counsel and Referee.

Apparently realizing that the Referee may not be "buying into" this argument, Bar Counsel then makes further misrepresentations as to the applicability and interpretation of the second section of the Comment pertaining to "thoroughness and preparation reasonably necessary for representation."

More specifically, she incorrectly states that the "ability to be thorough and to be reasonably prepared enough for the representation" means "knowing where you are supposed to be, what client, what motion" (TT373, L11-15). To the contrary, this is not the intended application of the Rule, nor does case law support any such interpretation. Rather, the Comment provides as follows:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Testimony elicited at trial, in this cause, shows that Respondent is, in fact, competent in representing her clients, knowledgeable, thorough in researching issues and defenses and prepared in handling clients' cases.

William Scheiner stated, "she did a good job," when asked if Respondent competently represented Mr. Jennings (TT185, L16-20) (TT191-192 L24-2).

When asked whether Respondent represented Mr. Smith in a competent manner, Mr. William Respess also responded in the affirmative (TT123, L6-9).

Judge Koons testified on cross-examination that Respondent was a competent attorney. (TT154, L11-17)

Judge Roberts testified that Respondent did a good job at every proceeding, and she also did a very good job in representing Mr. Smith during the jury trial, in February 2013 (TT87, L16-22) (TT101, L4-7). He also testified that Respondent was thorough in the representation of her client's matters and prepared for court. He stated that previous Motions to Suppress filed in his court by Respondent showed that she was knowledgeable in the law, creative, thought "out of the box" and a good lawyer (TT101, L16-20) (TT102, L1-2) (TT107, L6-18).

Judge David Silverman testified that, whenever Respondent appeared before him, she represented her clients well. He similarly mentioned a "particularly good Motion to Suppress" filed on behalf of a client (TT294, L5-9).

Rule 4-3.4(c), The Rules Regulating The Florida Bar, provides:

> A lawyer must not *knowingly* disobey an obligation under the rules of a tribunal except for an open refusal based on assertion that no valid obligation exists. (Emphasis added.)

As to the Bar's allegation that that Respondent violated Rule 4-3.4(c), the Referee began discussing his thoughts regarding this allegation, when he announced on the record, "I don't think there is any evidence on the second part

there at all. About open refusal that she didn't think that she was . . ." at which time the Referee's independent decision-making process was interrupted by Bar Counsel stating her position as to how the Court should apply the Rule, so as to make the Bar's proposed finding, rather than his own findings (TT379, L7-20).

Judge Roberts stated, "My perception was that none of it was intentional" (TT102, L14-15). In order for there to be a finding of guilt as to a violation of this rule, the lawyer must "knowingly" disobey an obligation under the rules of a tribunal. There was no evidence presented from which the Referee could conclude Respondent "knowingly disobeyed" an Order or Rule of the tribunal. When a lawyer has no knowledge of a court proceeding, or misunderstood the Court's directive, then she cannot be found to "knowingly disobey" that Court's Order.

Judge Dugan also testified that he has no reason to believe that Respondent intentionally failed to appear for a mandatory court proceeding (TT240, L15-16).

The Court, in The Florida Bar v. Abramson, 34 Fla. L. Weekly S30 (Fla. 2009), discussed the applicability of Standard 6.22, which states that a lawyer should be suspended when that lawyer "knowingly violates a court order or rule, and causes injury or potential injury to a client or party, or causes interference or potential interference with a legal proceeding." In the instant case, there was no abuse or embarrassment of any judicial officer or third person involved in the judicial process.

III THE REFEREE'S RECOMMENDED DISCIPLINARY SANCTION SHOULD BE DISREGARDED, BECAUSE IT DOES NOT REFLECT HIS INDEPENDENT DECISION BASED ON THE EVIDENCE AND IS INCONSISTENT WITH HIS ORAL PRONOUNCEMENTS, ON THE RECORD; RATHER, IT IS THE DIRECT RESULT OF BEING IMPROPERLY INFLUENCED BY BAR COUNSEL'S FALSE REPRESENTATIONS MADE IN VIOLATION OF RULE 3-7.6(m)(1)(D) REGARDING PRIOR DISCIPLINARY MEASURES AND CONDUCT

The trial transcript evidences the fact that the Referee made a decision as to what he believes an appropriate disciplinary sanction should be, at the conclusion of the disciplinary trial, and he makes it very clear that he is not considering a suspension that exceeds 90 days, under any circumstances (TT369, L23-370).

As such, the Referee's decision was not to impose a sanction that would require rehabilitation. That is, until Bar Counsel violated Rule 3-7.6(m)(1)(D) by improperly advising the Referee that the Respondent had a prior disciplinary history, prior to the Referee making specific findings of fact and guilt (TT390, L4-10) (TT391, L7-17) (TT395, L15-25).

Rule 3-7.6(m)(1)(D) provides, in pertinent part, that a Referee's Report shall include:

> A statement of any prior disciplinary measures as to the Respondent that are on record with The Florida Bar, or that otherwise becomes known to the Referee through evidence properly admitted by the Referee during the course of the proceedings (***after a finding of guilt***, all evidence of prior discipline measures may be offered by bar counsel, subject to appropriate objection or explanation by Respondent). *(Emphasis added.)*

Furthermore, Bar Counsel made misrepresentations regarding prior opportunities Respondent has had for rehabilitation, and assistance with managing her law practice, in prior disciplinary actions (TT408-409). Respondent has entered into a rehabilitative contract with FLA on only **one** occasion, and any and all recommendations were successfully completed. She has never been given the opportunity of enrolling in LOMAS or the Practicing with Professional Program, nor a Time Management Program, which is what the Respondent would most benefit from. These misstatements as to relevant facts regarding prior disciplinary actions and measures were the primary reason that the Referee changed his mind regarding imposing a lesser sanction (TT390-394) (TT395 L19-21).

Bar Counsel tries to pretend that she is concerned regarding Respondent's inability to afford the costs associated with such conditions of probation, and stated she would not want to "set a practitioner up for failure," because the Bar would have to bear the cost of the disciplinary proceeding (TT409, L19 - TT410, L5).

Bar Counsel then made additional improper statements regarding prior disciplinary sanctions in making an argument against "creative sanctions" being imposed, rather than a 91-day suspension, by stating that Respondent violated probation in prior cases for being unable to pay costs associated with certain conditions of probation (TT410, L6-15) (TT390, L4-10). In actuality, Respondent was only $625 delinquent in monitoring fees, which resulted in a violation of

probation on one (1) occasion, which was promptly resolved with a Conditional Guilty Plea and payment in full, as agreed (SC13-918).

The Referee's recommendation as to discipline must be disregarded and this case remanded for a new hearing to determine an appropriate sanction, after assigning a new Referee.

IV RESPONDENT'S RIGHT TO DUE PROCESS AND A FAIR AND IMPARTIAL TRIAL WERE VIOLATED, AND AS SUCH, THE REFEREE'S REPORT SHOULD BE DISREGARDED AND THIS CASE REMANDED FOR A NEW TRIAL

Respondent's right to a fair trial and due process was violated when the Referee did not afford her Counsel an opportunity to respond to the Bar's proposed finding(s) of fact and guilt, which were adopted by the Referee, nor rebut any of the allegation(s) of prior misconduct and disciplinary sanctions (TT388-389).

Florida Courts have repeatedly expressed concern about judges blindly accepting proposed findings, i.e., abdicating their duty to impartially, to thoroughly and fairly evaluate the factual disputes before them. The practice has been condemned for two reasons: 1) It denies the reviewing court an unbiased and detached finding of fact to draw upon; 2) It demeans the entire fact-finding process in that it gives one party the feeling that the court was biased from the beginning of the proceeding because it found for the opposite party on every disputed issue.

This was clearly a due process violation, especially in light of the fact that Bar Counsel improperly interjected and intertwined arguments and statements regarding Respondent's disciplinary history, prior to the Referee concluding the guilt phase of the final hearing, and having been specifically instructed that it was not time to hear any argument as to what the sanction should be (TT369, L20-23).

Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments. See, *Hanson v. Hanson*, 678 So.2d 522 (5 DCA 1996).

In *Hanson*, the Appellate Court, in citing *State ex rel. Davis v. Parks*, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939), reaffirmed the well-established principle that, "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge . . . The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice . . . The attitude of the judge and

the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this."

In *Scull v. State*, 569 So.2d 1251, 1252 (Fla.1990), the Supreme Court held, "One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I,§ 9, Fla. Const. While we often have said that "due process" is capable of no precise definition, e.g. *Gilmer v. Bird*, 15 Fla. 410 (1875), there nevertheless are certain well-defined rights clearly subsumed within the meaning of the term."

As the Appellate Court held, in *Hanson*, the essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. See, *State ex rel. Munch v. Davis*, 143 Fla. 236, 244, 196 So. 491, 494 (1940).

Reversal is required when the signed judgment or a finding is inconsistent with an earlier pronouncement of the trial judge, as held in *Ford Motor Co. v.Starling*, 721 So.2d 335 (Fla. 5th DCA 1998), where the "appearance of

impropriety so permeated the proceeding below as to justify a suspicion of unfairness," or where the record establishes that the final judgment does not "reflect the trial judge's independent decision on the issues of a case." See, *Hanson,* 678 So.2d at 525.

In *Flint v. Fortson,* 744 So.2d 1217, 1220 (Fla. 4th DCA), the Fourth District agreed with the Fifth District Court of Appeal, and recognized that it is critical for a reviewing court that a final judgment reflect the trial judge's independent decision on the issues of a case and that the judge not use words drafted by one of the parties to express that decision.

The Report of Referee in this case presents the indicia of an order that does not embody the actual decisions of the court. The findings and recommendation contained within the Referee's Report diverge "from the court's oral findings and rulings." See, *Viera v. Viera,* 698 So.2d 1308, 1310 (Fla. 5th DCA 1997). The record reflects that oral findings and pronoucements as to guilt and appropriate disciplinary sanction(s) of the referee made at the conclusion of the trial are inconsistent with his findings and recommendation contained within his Report.

The Referee's lack of knowledge as to evidentiary and procedural rules of quasi-judicial and disciplinary proceedings violated Respondent's right to a fair and impartial trial, especially in light of the fact that the Bar's misstatements of the

law, rules of procedure and facts went unquestioned and were assumed to be correct and true by the Referee.

V THE RECOMMENDED SANCTION IS EXCESSIVE AND UNSUPPORTED BY EXISTING CASE LAW AND THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

The sanction recommended by the Referee is extremely excessive and unsupported by existing case law and the Florida Standards for Imposing Lawyer Sanctions. Similar actions by attorneys have resulted in a public reprimand or less than a 90-day suspension and/or probation. The Referee in this case seeks to suspend the Respondent for 91 days with proof of rehabilitation. This recommendation cannot be allowed to stand as it clearly violates all of the standards for imposing a disciplinary sanction by being unduly harsh and depriving the public of an otherwise good and ethical attorney.

Moreover, the Referee completely ignored the fact that the evidence presented showed that Respondent has rehabilitated herself, since the alleged incidents that gave rise to this disciplinary action.

This Court has consistently held that it has a broader discretion when reviewing a disciplinary recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. *The Florida Bar v. Thomas*, 698 So2d 530 (Fla. 1997). The Court should exercise its discretion in finding the Referee's proposed sanction is too harsh under the facts of this case.

The Supreme Court, in *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), stated that, in selecting an appropriate discipline, certain fundamental issues must be addressed: 1) fairness to both the public and the accused; 2) sufficient harshness in the sanction to punish the violation and encourage reformation and 3) the severity must be appropriate to function as a deterrent to others who might be tempted to engage in similar misconduct. *See*, Section 1.1, Florida Standards for Imposing Lawyer Sanctions. The Referee's sanction proposal does not meet these criteria.

As in many disciplinary matters, there is no direct precedent that governs this dispute. However, there are similar fact patterns resolved by the Court, which may provide guidance in resolving this case.

The facts in the cases below are similar to those in the instant case, as are the alleged rule violation(s) and misconduct. The recommended discipline in the following cases vary, however, they all involve less than a 91-day suspension.

In *The Florida Bar v. Glick*, 693 So.2d 550 (Fla. 1997), this Court found that a ten-day suspension was an appropriate disciplinary sanction for violating Rule 4-1.1 (competent representation); Rule 4-1.3 (diligent representation); Rule 4-1.4(a) (keeping a client informed); Rule 4-1.4(b) (failing to explain a matter); Rule 4-1.2, 4-1.4(a) and 4-1.4(b) (failing to aide by a client's decision as to settlement); Rule 3-4.3 (dishonest conduct); Rule 4-1.8(b) (failing to disclose a fact necessary to

correct a misapprehension in a disciplinary matter) and Rule 4-8.4(c) (dishonesty, fraud, deceit or misrepresentation).

In *The Florida Bar v. Maier*, 784 So.2d 411 (Fla. 2000), the Supreme Court disagreed with the Referee's recommended disciplinary sanction of 91 days followed by three (3) years probation after reinstatement. Instead this Court found that the record evidence and findings warranted a 60-day suspension followed by three years of probation with conditions. Maier was found guilty of violating Rule 4-1.3 (diligence); Rule 4-1.4 (keeping a client reasonably informed) and Rule 4-8.4(g) (failing to respond to a bar inquiry). The Referee found as an aggravating factor Maier's prior disciplinary history. Despite the fact that this was Maier's fourth disciplinary proceeding involving the same type of misconduct, within seven (7) years, this Court held that the mitigating factors, coupled with the amount of time that passed since the prior violations, warranted a less severe discipline than the 91-day suspension recommended.

In *The Florida Bar v. Barcus*, 797 So.2d 71 (Fla. 1997), the Supreme Court found that the record evidence did not support a suspension of 6 months, as recommended by the Bar, nor 30 days, as recommended by the referee. On review, the Supreme Court entered an Order that Barcus receive a Public Reprimand and successfully complete the Bar's Practice and Professionalism Program. Barcus was found guilty of violating Rules 4-1.3 (diligence) and 4-

1.4(b) (failing to explain a matter) for failing to attend a deposition and failing to move for rehearing to set aside a judgment; and Rule 4-8.4(d) (conduct prejudicial to the administration of justice) for filing an appeal for the purpose of delay. The Supreme Court held that this case did not require a suspension, under Section 4.42 of The Florida Standards for Imposing Lawyer Sanctions, because there was no evidence that Barcus purposely neglected case(s) or knowingly tried to disadvantage client(s). This Court recognized that it deals more harshly with cumulative misconduct that it does with isolated acts. However, on appeal this Court did not find that Barcus' acts constituted a "pattern of negligence," under Section 4.42. Rather, this Court held that the instances and pattern of neglect, lack of diligence and conduct prejudicial to the administration of justice were isolated acts of negligence and misconduct, rather than cumulative misconduct.

In *The Florida Bar v. Morse*, 582 So.2d 1178 (Fla. 1991), this Court disapproved the Referee's recommended sanction of a 30-day suspension. Rather this Court concluded that case law supported a 10-day suspension for Morse's misconduct. He had failed to properly file a claim for life insurance proceeds on behalf of a deceased client's estate for nearly one year and failed to close the client's estate for six months. The Referee found Morse guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence). The Court noted that a distinction had to be made as to whether Morse's neglect of the legal matter was negligent or

knowing, before determining whether suspension is the presumed sanction under Standard 4.42 ("Suspension is appropriate when . . . a lawyer knowingly fails to perform services for a client . . ."), or a public reprimand is presumed, under Standards 4.43 ("Public Reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client . . .") and 4.53 ("Public Reprimand is appropriate when , , , a lawyer is negligent in determining whether the lawyer is competent to handle a legal matter . . ."). This Court concluded that a suspension was appropriate, due to the fact that Morse's neglect of the client's legal matter was knowing based on evidence of the client's repeated contact with Morse and assurances that the matter would be resolved.

VI CASE LAW CONSIDERED BY THE REFEREE IS INAPPLICABLE TO THE INSTANT CASE, AS THE FACTS AND CIRCUMSTANCES ARE DISTINGUISHABE AND THE MISCONDUCT FAR MORE EGREGIOUS

In *The Florida Bar v. Gass,* 153 So.3d 886 (Fla. 2014), this Court approved the Referee's finding of guilt as to violations of Rules 4-1.3 (Diligence), 4-1.4(a)(3) (Keeping a Client Informed); 4-1.4(a)(4) (Complying with Reasonable Requests for Information) and 4-8.4(d) (Conduct Prejudicial to the Administration of Justice). The Referee states that, in *Gass*, the attorney was suspended for one year for advising his clients not to attend a deposition, repeatedly failing to inform them of the court's OTSC hearings, and failing to attend depositions and hearings on his clients' behalf, which resulted in his clients'

being held in contempt (ROR 17-18). The Referee fails to mention that Gass failed to inform his clients regarding several renewed OTSC regarding their noncompliance with Requests for Production and that the Court intended to incarcerate them a second time if they failed to comply. As a direct result of Gass' failure to properly inform his clients as to the OTSC, the Court issued warrants for contempt, his clients were arrested and incarcerated for 3 days.

The Referee also fails to mention that Gass' testimony at the disciplinary trial was found to be "completely lacking in credibility," his inaction and misconduct resulted in his clients' case being delayed for months and the clients testified at the disciplinary hearing regarding their incarceration being a traumatic experience that caused severe emotional anguish. The referee, in *Gass,* initially recommended a 60-day suspension, and the bar appealed and this Court imposed a one-year suspension. On appeal, the Court held that Gass' inaction caused serious harm to his clients, which warrants a more severe suspension than 60 days.

In *Gass*, Section 4.42, Fla. Stds. Imposing Law. Sanc. was applied, in determining that suspension is appropriate when "a lawyer knowingly fails to perform services for a client and cause injury or potential injury to a client" or "engages in a pattern of neglect and causes injury or potential injury to a client."

The facts, in the instant case, are distinguishable from those, in *Gass,* in several important respects. First, the injuries caused to the clients in Gass are

far more serious than those in *State v. Jennings,* where it is alleged that the Respondent's client was harmed as a result of being arrested and held in custody 5 days on the FTA Warrant, prior to Respondent's hearing on December 16, 2013, at which time a plea was entered and the FTA charge dismissed. Mr. Jennings was arrested on other unrelated charges, one of which was a felony possession of a controlled substance, and it was not until he had been taken into custody that he was served with the FTA Warrant. Additionally, Mr. Jennings was no stranger to the county jail, as he had been previously arrested and incarcerated, unlike the married couple in *Gass* who had never been in jail before and were traumatized by the event. More importantly, the incarceration of the clients, in *Gass,* was the direct result of the attorney advising them not to appear for their deposition, knowingly failing to inform them as to scheduled hearings, production requests, OTSC and warrants for contempt being issued. Whereas, in the instant case, the Respondent did not knowingly fail to inform Mr. Jennings regarding the plea proceeding, on November 26, 2013, nor did she advise him not to appear. Rather, the record evidence reflects that this proceeding had been scheduled, in Respondent's absence, and she testified that she had no prior knowledge of the plea date (TT189, L7-23). Granted, there was evidence presented

regarding a Notice to Appear being mailed to Respondent and an email being sent by Mr. Scheiner regarding the plea date. However, Respondent testified that she had not noticed that a new email was in her Inbox, prior to the hearing, and although she testified that the Notice to Appear may have been mailed, it had not yet been reviewed and calendared, which is evidenced by the fact that it was not written on her 2013 Calendar, which Respondent testified was her sole method of keeping track of court proceedings. (TT337-338) (TT355-358) (Resp. Exh. 2). Furthermore, the record is devoid of any evidence that the Respondent, in the instant case, *knowingly* or *intentionally* failed to act on behalf of her client, nor is there any evidence that she *deliberately* delayed any proceeding or *knowingly* disobeyed a Court Order, which is required before suspension is presumed an appropriate sanction.

The Referee, in the instant case, considered *The Florida Bar v. Broome,* 932 So.2d 1036 (Fla. 2006) (ROR 18-19). The Referee's brief summary of the *Broome* case fails to take into account the seriousness of the misconduct for which Broome was found guilty and renders this Court unable to determine whether the facts can be distinguished to those in the instant case. As such, this Court is unable to determine based on the Report of Referee whether this case was properly considered, in recommending a sanction. It is the

Respondent's contention that the *Broome* case is not applicable and can be distinguished in numerous ways.

For one, the *Broome* case consisted of 6 consolidated disciplinary actions arising from 9 different Florida Bar investigations into the attorney's misconduct. Furthermore, Broome was found guilty of 33 separate violations of 18 different Bar Rules, which spanned a period of approximately 7 years. The instant case involves only 4 alleged Bar Rule violations that stems from conduct during one trial, in February 2013; one court proceeding, on November 26, 2013 and one court proceeding, on December 19, 2013.

In *Broome*, the following findings as to guilt were far more egregious than those in the instant case: 1) Lack of diligence (numerous continuances were granted for depositions but were never scheduled and client was not informed); 2) An appeal was not timely filed, and Broome failed to respond to inquiries of the Court resulting in two OTSC; 3) Failure to respond to a Bar inquiry; 4) Failure to forward a client's file to a new attorney or reimburse him as agreed, resulting in a judgment; 5) Held in contempt for failing to obey a Court Order; 6) Excessive fees charged in 2 cases where she failed to diligently represent the client, failed to communicate or inform him as to status of his case, nor advise him during critical stages of proceedings; 7) Failed to

competently and diligently represent a client by failing to file motion for post-conviction relief, until it was time-barred, and then failing to respond to the Bar inquiry; 8) Failed to respond to a Bar inquiry regarding legal representation in 5 criminal cases; 9) Failed to respond to a Bar inquiry regarding a complaint filed by a client; 10) Failed to file a motion in a criminal matter, for which she was hired, failed to advise her client and failed to respond to a Bar inquiry.

The Referee states in his Report that he considered *The Florida Bar v. Cimbler,* 840 So.2d 955 (Fla. 2002), in recommending the rehabilitative suspension, in the instant case (ROR 19). However, the Referee minimizes the severity of Cimbler's misconduct, which was far more egregious than that alleged in the instant case, and resulted in a 90-day recommended sanction being disregarded and increased to a year suspension and 3 years probation.

More specifically, the Referee makes no mention that Cimbler's client, in the first case, was unable to contact him for more than a year regarding his failure to record a deed or pay real estate taxes, after closing on a property sale.

Furthermore, the Referee fails to mention that, in the second case, after the opposing counsel's Motions to Dismiss and for Summary Judgment were granted and judgment entered against his clients, due to Cimbler's failure to appear at the hearing, Cimbler then filed a Motion to Set Aside the Judgment,

and failed to appear at that hearing. This resulted in a second Judgment against his clients for more than $7,000.00. Cimbler then failed to remit funds to his clients, which resulted in a lien against their property.

In a third case, Cimbler failed to notify clients, in another civil matter, that they were required to appear for a deposition. As a result, the Court entered an Order requiring the clients to be available for depositions, or sanctions would be imposed. Cimbler's failure to notify his clients again resulted in a Judgment being entered against them in the amount of approximately $75,000.00. A Writ of Garnishment was subsequently entered and attached to their bank account(s).

The misconduct, in *Cimbler*, is far more serious than merely "neglecting client matters," as the Referee and Florida Bar apparently would like this Court to believe. Cimbler's prior disciplinary history for similar misconduct included a 90-day suspension followed by 3 years probation and a long-standing pattern of neglecting client matters.

The only similarity between *Cimbler* and the instant case is that they both involve a violation of Rule 4-1.3, and the Referees both considered Section 4.22 of the Florida Standards for Imposing Lawyer Sanctions.

The misconduct, neglect, injury and harm caused to the clients, in *Cimbler*, is certainly not comparable to the allegations, in the instant case. As

such, it is Respondent's contention that *Cimbler* is inapplicable and should not have been considered by the Referee, in recommending a disciplinary sanction.

The Report of Referee indicates that he considered *The Florida Bar v. Summers,* 728 So.2d 739 (Fla. 1999), in deciding an appropriate sanction, in the instant case (ROR 19-20). In *Summers*, the attorney was suspended for 91 days and ordered to attend Ethics School for failing to comply with numerous directives of a federal judge, for neglecting to respond to the bar's inquiries, and for failing to appear at the final disciplinary hearing, which resulted in the allegations in the Bar's Complaint being deemed admitted.

Importantly, the Report of Referee fails to mention that Summers was an Assistant US Attorney representing the government in a forfeiture case, and as a direct result of her noncompliance with the federal court's directives, a judgment was entered and the case dismissed.

Additionally, in *Summers*, the Referee recommended disbarment and this Court disapproved this extreme sanction and found a 91-day suspension to be appropriate. This Court specifically noted that it has consistently held that a rehabilitative suspension is appropriate, where neglect of clients or their legal matters is coupled with ignoring inquiries of the Bar or failing to cooperate in disciplinary proceedings, which were considered in aggravation.

The legal reasoning and analysis of this Court, in *Summers*, is inapplicable to the instant case. In the instant case, Respondent fully cooperated with the Bar's 1 ½-year investigation, responded to all of the Bar's inquiries, appeared for a deposition *duces tecum* and provided requested documentation, responded to the Bar's Requests to Produce and Interrogatories, appeared at the final hearing and provided copies of transcripts and documentation to the Bar without seeking reimbursement for costs.

The Referee, in the instant case, also considered *The Florida Bar v. Polk,* 126 So.3d 240 (Fla. 2013) (ROR 20-21), prior to recommending a disciplinary sanction, where this Court disagreed with the recommended 10-day suspension followed by 3 years probation and found that a 90-day suspension followed by 3 years probation, with a condition that he be evaluated by FLA, Inc., was deemed more appropriate. Polk was found guilty of violating Rules 4-1.3 (Diligence); 4-1.4 (Communication); 4-1.16(d) (Protection of Client's Interest) and 4-8.4(g) (Failure to Respond in Writing to the Florida Bar), in reference to neglecting matters in post-conviction proceedings.

The Report of Referee fails to mention, that Polk only submitted two of three mental health reports provided by the client to the Court and failed to cooperate with the Bar during the disciplinary proceeding. Additionally, Polk

failed to respond to the Bar's Complaint, a Request for Admissions and Motion for Summary Judgment and failed to appear at a motion hearing.

Polk is also distinguishable in that the misconduct and neglect continued for two years. Additionally, as in *Summers*, Polk's failure to respond to Bar inquiries and cooperate in the disciplinary proceeding was not taken lightly by this Court and was an important factor in its decision to increase the severity of the recommended sanction. In the instant case, this type of misconduct, failure to respond and cooperate with the Bar does not exist.

The Referee, in the instant case, considered this Court's reasoning and legal analysis, in *The Florida Bar v. Erlenbach,* 138 So.3d 369 (Fla. 2014), prior to recommending a sanction (ROR 21-22). In *Erlenbach*, this Court issued an OTSC as to why it should not disapprove the Referee's recommendation of an 89-day suspension followed by 2 years probation and a harsher sanction be imposed. This Court subsequently disapproved the recommended sanction and suspended Erlenbach for a year followed by 2-years probation.

The Referee, in the instant case, again fails to mention several relevant facts that distinguish the two cases. In *Erlenbach*, the lawyer was found guilty of violating Rules 3-4.3 (Committing act that is unlawful or contrary to honesty and

justice) and 4-8.4(c) (Dishonesty, fraud, deceit or misrepresentation).

Furthermore, the misconduct and rule violations, in *Erlenbach,* are far more serious than those alleged, in the instant case, and warrant a much harsher disciplinary sanction.

The only similarity between the instant case and *Erlenbach* is that there is evidence of significant mitigation and a prior disciplinary history was considered in aggravation. However, Erlenbach had 3 prior disciplinary cases that involved far more serious misconduct and ethical violations.

Absent any other similar facts or circumstances, the Referee should not have considered *Erlenbach,* in making a determination as to an appropriate sanction, in the instant case.

Finally, the Report of Referee indicates that a harsher sanction was recommended, in the instant case, based on this Court's reasoning and legal analysis in *The Florida Bar v. Norkin,* 132 So.3d 77 (Fla. 2013). In *Norkin*, this Court held that, in rendering discipline, the lawyer's disciplinary history should be considered and the sanction increased where appropriate for cumulative misconduct, which is dealt with more harshly than isolated misconduct (ROR 22).

There is an important reason as to why the instant case should be distinguished from *Norkin* and not applied as a basis to increase the severity of Respondent's disciplinary sanction.

Namely, contrary to Bar Counsel's representations made at the conclusion of the final hearing, the Respondent was only previously disciplined ONCE for similar misconduct, in SC06-2298.

Bar Counsel stated, "I can argue to the Court and present the Court with all the different conditions that can be imposed with a 90-day or less suspension. In the interest of full disclosure, which as a member of the Bar I am duty bound to tell Your Honor, there are cases out there from the Supreme Court where they don't accept such a creative recommendation when there are THREE prior discipline histories." The Referee then states, "I TAKE YOUR WORD regarding the cases. I was not aware of prior discipline on Ms. Picon's behalf" (TT 396 L 3-11).

The Referee took the WORD of Bar Counsel regarding Respondent's prior disciplinary sanctions and applicable case law, without allowing Respondent to respond or any rebuttal argument being made by Respondent's Counsel.

The Referee stated, "I have to admit that I am pretty disturbed by the fact that I came in and said that about the 90 days," referring to his initial decision that no more severe sanction than a 90 day suspension would be recommended. The

Referee continued, "**I had no idea she had** been - - had **two prior suspensions and a public reprimand and all over the same type of thing**" (TT410, L16-20).

In SC06-2298, Respondent was found guilty by default of violating Rules 4-3.4(c), 4-8.4(d) and 4-8.4(g), and a 10-day suspension followed by 2-years probation was deemed an appropriate sanction. The alleged misconduct, in SC06-2298, occurred in 2005 and 2006 (approximately 10 years ago). There have been **no** disciplinary actions based on allegations of similar misconduct, nor disciplinary sanctions imposed for similar misconduct or rule violation(s), until 2013, in the instant disciplinary action.

In fact, the two (2) most recent disciplinary sanctions were **NOT** the result of being found guilty of the same misconduct, yet Bar Counsel stood silent and intentionally failed to correct any misrepresentations that may have been made, nor did she make any attempt to remedy the situation by setting the record straight.

In SC10-350, a 30-day suspension and 3 years probation was imposed (with a requirement to enter into a Contract with FLA), as the sole result of Respondent's failure to comply with the terms of probation ordered in the 2006 disciplinary case, to-wit: her failure to execute the FLA Contract. No allegations of similar misconduct, nor rule violations, were made in this second disciplinary case.

The Respondent successfully completed her 3-year term of probation, in Case Number SC10-350, without any alleged noncompliance of any term(s) or condition(s) of the FLA Contract.

The only violation alleged during Respondent's 3-year term of probation imposed in Case Number SC10-350, was a monitoring fee delinquency, in the amount of $625.00, which resulted in the 2013 disciplinary proceeding.

The 2013 disciplinary case (SC13-918) was filed as a result of Respondent's failure to respond to the Bar's correspondence regarding the above-mentioned $625.00 delinquency in monitoring fees. The Bar filed a Petition for Contempt and Order to Show Cause, and a Consent Judgment was entered providing for a Public Reprimand and payment of administrative costs and the $625.00, within 30 days. The Consent Judgment acknowledges the fact that Respondent had recently relocated her office, which caused her not to receive correspondence from the Bar regarding the delinquency. It further states that Respondent's financial situation had been in turmoil since 2005, and she had undergone significant financial setbacks and hardships.

As such, the Referee erred in considering the 2010 and 2013 disciplinary actions, in aggravation and improperly gave them more weight, due to his mistaken belief that they involved prior disciplinary sanctions for the "same misconduct."

The Referee erred in increasing his recommended sanction to a 91-day suspension, because but for his mistaken belief that the allegations in the instant proceeding were based on the same misconduct as that alleged in Respondent's THREE prior disciplinary cases, rather than ON, a rehabilitative suspension likely would not have been recommended.

Even taking into consideration the Respondent's prior disciplinary history, the events alleged in the instant case do not warrant a 91-day suspension, nor does prior case law support a rehabilitative suspension.

VII THE REFEREE IMPROPERLY FAILED TO CONSIDER MITIGATING FACTORS

Section 9.32, Florida Standards for Imposing Lawyer Sanctions, sets forth potential mitigating factors that may be considered by the Referee, prior to making a recommendation as to an appropriate disciplinary sanction. There are five (53) mitigating factors that the Referee failed to consider that are evident on the record.

e) Full and free disclosure to disciplinary board and cooperative attitude toward proceedings

j) Interim rehabilitation

g) Character or reputation;

h) Physical or mental disability or impairment

m) Remoteness of prior offenses

CONCLUSION

WHEREFORE, in this matter, Respondent prays this Honorable Court disregard the Referee's Report and that this case be remanded for a new trial before a different referee; the recommended sanction be disapproved and that a period of probation be imposed with a Time Management Class as a condition of probation, OR if this Court deems a period of suspension to be a more appropriate sanction, then Respondent requests a suspension of less than 90 days, so that proof of rehabilitation will not be required, prior to reinstatement, in light of the fact that there was substantial, competent evidence presented that Respondent has already been completely rehabilitated; and that Costs be waived or made payable in monthly installments of no more than $100.00 per month, which is all that Respondent can afford to pay; and that this Court grant any other relief that is deemed reasonable and just.

Respectfully submitted,

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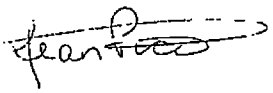
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document has been e-filed using the e-filing portal with the Clerk of the Supreme Court of Florida and a copy furnished via e-service to Patricia Ann Toro Savitz, Bar Counsel at psavitz@flabar.org and Adria E. Quintela, Staff Counsel at aquintela@flabar.org on this 1ST day of March, 2016.

Respectfully submitted,



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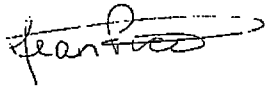
CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTIVIRUS SCAN

Respondent does hereby certify that this Amended Brief is submitted in 14 point Times New Roman font and that it has been scanned and found to be free of viruses by Norton 360 Premium.



By: _____
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