IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

KELLEY ANDREA BOSECKER,

Respondent.

_____/

Supreme Court Case
No. SC16-1387

The Florida Bar File
No. 2016-10,959 (6C) (OSC)

ANSWER BRIEF

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SYMBOLS AND REFERENCES

Kelley Andrea Bosecker, Respondent, will be referred to as "Respondent." The Florida Bar, Complainant, will be referred to as "The Florida Bar" or as "the Bar." The referee will be referred to as "Referee." Additionally, "Rule" or "Rules" will refer to the Rules Regulating The Bar. "Standard" or "Standards" will refer to the Florida Standards for Imposing Lawyer Sanctions.

"RR" will refer to the Report of Referee entered on May 22, 2017, followed by the appropriate page number (e.g., RR 10). References to specific pleadings will be made by title.

"TR" will refer to the transcript of the final hearing before the Referee followed by the appropriate page number (e.g., TR 10). The transcript consists of four volumes. Volume I is pages 1-138; Volume II is pages 139-255; Volume III is pages 256-401; and Volume IV is pages 402-524.

"TFB Exh." will refer to The Florida Bar's exhibits admitted during the final hearing, followed by the appropriate exhibit number (e.g., TFB Exh. 1). "R. Exh." will refer to Respondent's exhibits admitted during the final hearing, followed by the appropriate exhibit designation (e.g., R. Exh. A).

"IR" will refer to the Index of Record followed by the tab number (e.g., IR 2). "IB" will refer to the Initial Brief filed by Respondent on October 30, 2017.

STATEMENT OF THE CASE AND OF THE FACTS

Statement of the Case

On August 1, 2016, the Bar filed its Petition for Contempt and Order to Show Cause, charging Respondent with violating her suspension order in *Florida Bar v. Bosecker*, SC15-1592, due to her failure to timely provide notice of her suspension to her clients, opposing counsel, and the courts; to properly notify the Bar that she was employed while suspended; and for continuing to engage in the practice of law while suspended. The Bar's petition requested that this Court enter an order directing Respondent to show cause as to why she should not be held in contempt of her suspension order and immediately disbarred. RR 1; IR 1. On August 3, 2016, this Court issued an Order to Show Cause directing Respondent to show cause as to why she should not be held in contempt. IR 3. On September 7, 2016, Respondent filed her response. IR 7. On November 18, 2016, this Court referred the matter for the appointment of a Referee to hear testimony and receive evidence. IR 10. The Referee was appointed on November 22, 2016. IR 11. The final hearing in this matter was held on April 27-28, 2017. RR 1.

After the presentation of evidence, the parties submitted written closing arguments, memoranda for sanctions, and responses thereto. RR 1, IR 38, 39, 41, 43, 44, 45. On May 5, 2017, Respondent filed a motion to re-open evidence for the

court to permit and accept two mitigation letters. IR 40. On May 10, 2017, the Bar filed an objection to Respondent's motion. IR 42. On May 17, 2017, the Referee denied Respondent's motion. IR 47. On May 18, 2017, Respondent filed a motion to consider a letter she wrote to the Referee as an additional allocution regarding sanctions. IR 48. The Bar filed a motion to strike on May 19, 2017. IR 49. By Order dated May 19, 2017, the Referee struck Respondent's motion. IR 50.

The Report of Referee was issued on May 22, 2017, finding Respondent in contempt of the Court's suspension order dated May 5, 2016, guilty of practicing law while suspended, and guilty of violating the following Rules: Rule 3-5.1(e); Rule 3-5.1(h); Rule 3-6.1(c); and Rule 4-8.4(c). RR 13. The Referee recommended that Respondent be disbarred and assessed the costs. RR 22. On August 23, 2017, Respondent filed notice seeking review of the findings of guilt and proposed sanction. Respondent filed her Initial Brief on October 30, 2017.

Statement of the Facts

By Order dated May 5, 2016, Respondent was suspended from the practice of law for forty-five (45) days in SC15-1592, to become effective thirty (30) days from the date of the Order so Respondent could protect the interests of her existing clients. The Order directed Respondent to accept no new business from the date of the Order and to fully comply with Rule 3-5.1(h). RR 3; TFB Exh. 1; TR 43-44.

On May 9, 2016, the Bar sent Respondent a letter advising her of the requirement to comply with Rule 3-5.1(h), and to review Rule 3-6.1 if she became employed while suspended. RR 6; TFB Exh. 6; TR 43-44, 57-58, 67, 70-71.

On June 1, 2016, Respondent notified this Court that she ceased practicing law as of midnight on May 26, 2016, and elected to commence her suspension on May 27, 2016. RR 3; TFB Exh. 3; TR 44-45, 72, 456. On June 1, 2016, the Court entered an Order making Respondent's suspension effective May 27, 2016. RR 3; TFB Exh. 4; TR 45-46. Thus, Respondent was suspended from May 27, 2016, to July 11, 2016. RR 3; TFB Exh. 4.

Respondent failed to comply with the requirements of Rule 3-5.1 by not immediately providing notice of her suspension in pending matters to all clients, opposing counsel, and courts before which Respondent was counsel of record. After Respondent's suspension had already begun, she furnished a letter to her clients, opposing counsel, and the courts, attaching her suspension order, inappropriately stating that she would monitor her clients' cases during her suspension, and encouraging her clients to contact her for legal assistance or additional information. RR 5; TFB Exh. 2; TR 74, 77-78, 280, 324. Respondent remained the named attorney of record with the courts in her clients' cases, and continued to receive copies of pleadings and orders. She also failed to furnish a

copy of the suspension order to at least one client.

From June 3, 2016, through June 13, 2016, Respondent requested extensions from the Bar to submit her required Rule 3-5.1(h) sworn affidavit. The Bar granted her first extension request, and allowed her to submit the affidavit by June 13, 2016. RR 3; TFB Exh. 5; TR 46, 71, 83, 459-460. On June 11, 2016, Respondent emailed the Bar and requested additional time to submit her affidavit, which was denied on June 13, 2016. RR 3; TFB Exh. 6; TR 47, 459-461. On June 13, 2016, Respondent filed a motion with this Court seeking an extension solely to submit her Rule 3-5.1(h) affidavit to the Bar by June 17, 2016. RR 3, 12; TFB Exh. 6; TR 47-49, 84, 461. In paragraph five (5) of the motion, Respondent misrepresented to the Court that she had "sent out the required suspension notices" and simply needed more time to finish the requisite list to be attached to the affidavit submitted to the Bar. TFB Exh. 6. Respondent made no mention, however, about needing additional time to notify the persons identified under Rule 3-5.1(h). RR 3, 12; TFB Exh. 6; TR 49, 84. Respondent neither requested nor was given an extension to submit her Suspension order to the necessary persons or entities. TFB Exh. 5, 6, 9; RR 3. Respondent was still providing notice of her suspension to clients, opposing counsel, and courts in mid-June 2016, and as late as June 16, 2016. RR 3, 4; TFB Exh. 7, 12d, 13f, 16d, 20e; TR 71-73, 85-86, 90, 104, 115,

131-132, 146, 159, 172-175, 202, 261, 265, 297, 315, 461-463, 468-469, 478, 504. Additionally, Respondent failed to notify at least one client, Daniel and Jill Baez, of her suspension. RR 4; TFB Exh. 8, 19a, 19b; TR 71-72, 85-87, 464-465. Respondent failed to correct the misrepresentation made in her June 13, 2016, motion. RR 12; TR 84-85, 465. Respondent never submitted a revised Rule 3-5.1(h) affidavit to the Bar of those notified after the fact. TR 86. Respondent has repeatedly asserted that the notice requirement was due at the same time her affidavit was due. RR 6; TR 72-73, 83, 462, 469-470. On June 16, 2016, Respondent furnished her required affidavit to the Bar, before she was granted an extension by the court on June 17, 2016. RR 3; TFB Exh. 8-9; TR 49-50, 85, 461.

Respondent failed to comply with the requirements of Rule 3-6.1 by failing to properly notify the Bar that she was employed while suspended. Respondent was allegedly employed as a volunteer while suspended by attorneys Ann Smith Pellegrino and Andrea Roebuck. RR 4-5; TR 79, 223, 347. The Bar did not receive any notice of employment pursuant to Rule 3-6.1(c) by Respondent, Ms. Pellegrino, or Ms. Roebuck, until after Respondent's suspension was over. RR 5, 6; TFB Exh. 10, 11; TR 50-54, 225-226, 352. Respondent did not fully review the requirements of Rule 3-6.1 regarding employment while suspended. RR 6; TR 122-123. Respondent also did not perform work in the same location as Ms.

Pellegrino or Ms. Roebuck. TR 79-80, 223, 348.

While suspended, Respondent improperly held herself out as an attorney eligible to practice of law, engaged in improper direct contact with clients, opposing counsels, and court personnel, and improperly assisted clients in several cases. Respondent represented Emanuel Rucker in a foreclosure case titled *U.S. Bank, Nat'l Ass'n v. Rucker*. RR 6; TFB Exh. 12a-e; TR 87-88. Respondent represented Lloyd and Karin Hodge in two matters. The first matter was a foreclosure case titled *Bank of New York Mellon v. Hodge*. RR 6; TFB Exh. 13a-f. The second matter was an appeal titled *Hodge v. Bank of New York Mellon*. RR 6; TFB 14a-d. Respondent represented Investor Trustee Services in two matters. The first was a foreclosure case titled *JP Morgan Chase Bank, Nat'l Ass'n v. Investor Trustee Services, LLC, et al*. RR 8; TFB Exh. 15a-e; TR 107. The second was an appeal titled *Investor Trustee Services, LLC v. PNC Bank Nat'l Ass'n*. RR 10; TFB 17a-c. Respondent represented Erica and Eduardo Deparedes in an appeal titled *Deparedes v. Green Tree Servicing, LLC*. RR 8; TFB Exh. 16a-i. Respondent represented Mealy and Betty Joe Reed in a foreclosure case titled *Wells Fargo Bank, N.A. v. Reed*. RR 10; TFB Exh. 20a-f. In these cases, Respondent asserted that the work she performed during her suspension period was supervised by other attorneys. TR 79, 81.

STANDARD OF REVIEW

The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *Florida Bar v. Nicnick*, 963 So. 2d 219, 221 (Fla. 2007). If the referee's findings are supported by competent, substantial evidence, then this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Florida Bar v. Porter*, 684 So. 2d 810, 813 (Fla. 1996). Where there are no disputed 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*. *Florida Bar v. Brownstein*, 953 So. 2d 502, 510 (Fla. 2007). The determination of whether the referee's finding of facts support a finding that Respondent violated Rules Regulating The Florida Bar is subject to *de novo* review.

This Court reviews the referee's actions regarding the admissibility of evidence using the abuse of discretion standard. *Florida Bar v. Rotstein*, 835 So. 2d 241, 244 (Fla. 2002). A referee's decisions about the admissibility of evidence will not be disturbed absent an abuse of discretion. *Id*. A referee's findings of mitigation and aggravation are presumed to be correct and are upheld unless they

are clearly erroneous or not supported by the record. *Florida Bar v. Del Pino*, 955 So. 2d 556, 560 (Fla. 2007). The same deference applies to a referee's determination that an aggravating factor or mitigating factor does not apply. *Florida Bar v. Herman*, 8 So. 3d 1100 (Fla. 2009).

As to discipline, a Referee's recommended sanction in an attorney disciplinary proceeding is persuasive, but this Court has the ultimate responsibility to determine the appropriate sanction. *Florida Bar v. Kossow*, 912 So. 2d 544, 546 (Fla. 2005). Generally speaking, this Court will not second-guess a Referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw or in the Florida Standards for Imposing Lawyer Sanctions. *Id*.

SUMMARY OF ARGUMENT

The Referee's recommended findings of fact and guilt should be upheld by this Court. The Referee properly found that Respondent was in contempt of this Court's prior disciplinary order, guilty of practicing law during the period of her suspension, and guilty of violating Rules 3-5.1(e), 3-5.1(h), 3-6.1(c), and 4-8.4(c). This Court should neither reweigh the evidence in the record nor substitute its judgment for that of the Referee, as there is competent, substantial evidence in the record to support the Referee's findings. Respondent failed to meet her burden of demonstrating that there is no evidence in the record to support the Referee's findings or that the evidence in the record clearly contradicts the conclusions.

The Referee properly considered uncharged conduct in this matter that was within the scope of the specific allegations in the Bar's Petition for Contempt. As Respondent was served with notice of the Bar's charges and was afforded an opportunity to be heard and defend herself, due process was satisfied in this case.

The Referee's recommended sanction of disbarment is well-supported by the Florida Standards for Imposing Lawyer Sanctions and relevant case law. The Referee's recommendation of disbarment does not deny Respondent equal protection of the law. The Referee properly denied Respondent's motion to re-open the evidence to allow the introduction of two additional mitigation exhibits.

ARGUMENT

I. THE REFEREE PROPERLY FOUND THAT RESPONDENT VIOLATED RULES AND PRACTICED LAW WHILE SUSPENDED

Respondent's argument that the Referee erred by determining that Respondent violated a number of ethical rules and practiced law while suspended is without merit. Respondent has failed to meet her burden of demonstrating that there is no evidence in the record to support the Referee's findings or that the evidence in the record clearly contradicts the conclusions. *Nicnick*, 963 So. 2d at 222, *Florida Bar v. Carlon*, 820 So. 2d 891, 898 (Fla. 2002).

The Referee properly found that Respondent violated Rule 3-5.1(h), which states:

> when the respondent is served with an order of … suspension …, the respondent must, **immediately** furnish a copy of her suspension order to: (1) all of Respondent's clients with matters pending in her practice; (2) all opposing counsel or co-counsel in the matters listed in (1), above; and (3) all courts, tribunals, or adjudicative agencies before which Respondent was counsel of record.

R. Regulating Fla. Bar 3-5.1(h) (emphasis added). The Rule also required Respondent to furnish Bar Counsel with a sworn affidavit within 30 days after service of the order listing the names and addresses of all persons and entities Respondent provided copies of the order. RR 2.

This Court issued an order dated May 5, 2016, in *Florida Bar v. Bosecker*, Case No. SC15-1592, suspending Respondent from the practice of law for forty-five (45) days. Respondent was ordered to fully comply with Rule 3-5.1(h). TFB Exh. 1; RR 3. On June 1, 2016, Respondent notified this Court that she elected to commence her suspension on May 27, 2016. TFB Exh. 3. On June 1, 2016, this Court entered an Order making the suspension effective May 27, 2016. TFB Exh. 4. Respondent was suspended from May 27, 2016, to July 11, 2016. RR 3.

From June 3, 2016, through June 13, 2016, Respondent requested extensions to submit her required Rule 3-5.1(h) sworn affidavit. The Bar granted her first extension request and allowed her to submit the affidavit by June 13, 2016. TFB Exh. 5. On the day the affidavit was due, Respondent asked for additional time from the Bar, which was denied. On June 13, 2016, Respondent filed a motion with this Court seeking an extension solely to submit her Rule 3-5.1(h) affidavit to the Bar by June 17, 2016. TFB Exh. 6. In her motion, Respondent stated she "has sent out the required suspension notices but needs additional time to finish the list of names and addresses required to be attached to the Affidavit before the Affidavit is submitted to the Bar." TFB Exh. 6. The Court entered an order on June 17, 2016, allowing Respondent until June 17, 2016, to provide the affidavit to the Bar. TFB Exh. 9. Respondent submitted the required affidavit to the Bar on June 16, 2016.

TFB Exh. 8. Respondent neither requested nor was given an extension to submit the suspension order to the necessary persons or entities. TFB Exh. 5, 6, 9; RR 3.

The Referee found that the evidence showed, and Respondent admitted, that she was still furnishing a copy of her suspension order to clients, opposing counsel, and courts in mid-June 2016, and as late as June 16, 2016. TFB Exh. 7, 12d, 13f, 16d, 20e; TR 71-73, 85-86, 90, 104, 115, 131-132, 146, 159, 172-175, 202, 261, 265, 297, 315, 461-463, 468-469, 478, 504; RR 3. Additionally, Respondent failed to provide a copy of the suspension order to at least one client, Daniel and Jill Baez. RR 3; TFB Exh. 8, 19 a-b; TR 71-72, 85-87, 464-465.

In *Florida Bar v. Norkin*, 183 So. 3d 1018, 1021-1022 (Fla. 2015), this Court, in discussing Rule 3-5.1(h), stated,

> [t]he purpose of the rule is to provide those who will be affected by the attorney's suspension with notice and an opportunity to take action to protect their interests. The rule and the effective date of the suspension go hand in hand, and the notice requirements must precede the effective date of the suspension. Otherwise, the purpose the rule would be entirely thwarted.

The Referee found that the Bar's petition, and the evidence presented at the final hearing, gave examples of Respondent's cases in which Respondent did not provide her clients with notice of her suspension until her suspension had already begun. RR 4. Respondent did not give those clients an opportunity to take action to

protect their interests. Additionally, opposing counsels, Ms. Whiting-Bozich, Ms. Anthousis, and Ms. Hopkins, testified that as of the dates Respondent contacted them regarding her clients' cases, the attorneys had not received notice from Respondent that she was suspended nor provided a copy of the suspension order. TR 145-146, 159-161, 261-262, 264-265. The Referee properly found that the purpose of Rule 3-5.1(h) was entirely thwarted in this case, as Respondent was still furnishing a copy of her suspension order to clients, opposing counsel, and courts several weeks after she started her suspension on May 27, 2016. RR 4.

Additionally, the Referee properly found that the evidence presented at the hearing established clearly and convincingly that Respondent violated Rule 3-5.1(e) by continuing to practice law while suspended, and Rule 3-6.1(c) by having direct client contact while suspended. RR 4. Respondent stated in the May 27, 2016, letter that she sent to her clients, opposing counsel, and the courts that she would monitor the clients' cases during the suspension period. Respondent's letter advised the clients to feel free to contact her if they had any questions or needed additional information. TFB Exh. 2; RR 5. The Referee found that Respondent's letters were "concerning and spoke volumes [as to] her intent to violate the Rules." RR 5. "Respondent should not have been monitoring her clients' cases during her suspension period." RR 5. Respondent received copies of pleadings and orders

filed in her clients' cases throughout her suspension because she remained the attorney of record in the cases, and did not promptly notify the courts or opposing counsel of her suspension. TFB Exh. 14c, 16c. Additionally, Respondent's May 27, 2016, letter was not provided to her clients until well after her suspension started. Respondent was prohibited from having contact with her clients and should not have welcomed them to contact her during her suspension. RR 5. The Referee properly found that each of these actions violated the Rules and supported a finding of contempt. RR 5.

The Bar presented several cases evidencing Respondent's misconduct. The Referee found that in each case, the evidence and testimony presented showed improper client contact, lack of employer supervision, and practicing law during the suspension period. RR 5. A running theme in all of these cases was Respondent's assertion and testimony that other attorneys supervised her, namely Ann Pellegrino and Andrea Roebuck. TR 79, 81. However, prior to and during Respondent's suspension, the Bar did not receive any notice from Ms. Pellegrino or Ms. Roebuck pursuant to Rule 3-6.1(c) indicating that Respondent was employed by them while suspended. TFB Exh. 10, 11; RR 5. In fact, no such notice was received until after the Bar filed its Petition in this case. Respondent, Ms. Pellegrino, and Ms. Roebuck each testified that they did not read Rule 3-6.1

regarding employment of suspended lawyers until about September 2016. However, the Bar sent Respondent a letter dated May 9, 2016, which she admitted receiving, advising her to review Rule 3-6.1 if she became employed while suspended. RR 6; TR 43-44, 67, 70-71, 122-123, 224-225, 353.

In *U.S. Bank v. Rucker*, Respondent represented Emanuel Rucker in a foreclosure matter. TFB 12a-e. Respondent admitted that on June 30, 2016, she sent an email to opposing counsel stating that Respondent had been in contact with Mr. Rucker and that they were compiling information in the case. TFB Exh. 12e; TR 91- 94, 470. In the same email, Respondent asked if opposing counsel would be agreeable to extending a discovery deadline and in granting an extension for filing a counterclaim. Respondent copied her client, Mr. Rucker, on the email. The testimony and evidence showed that Respondent was not supervised by an attorney on this case and another attorney did not direct her to email opposing counsel. RR 6; TR 95. The Referee correctly found that by emailing opposing counsel requesting an extension, Respondent provided a service to her client during her suspension. RR 6. Respondent's email provided the client with legal advice. The Referee also correctly found that by copying her client on the email to opposing counsel, Respondent had prohibited contact with her client. RR 6.

Respondent represented Lloyd and Karin Hodge in two matters. The first

matter was a foreclosure case in *Bank of New York Mellon v. Hodge*. RR 6; TFB Exh. 13a-f; TR 95-96. The second matter was an appeal in *Hodge v. Bank of New York Mellon*. RR 6; TFB 14a-d; TR 96. Respondent remained as counsel of record in the cases as she never filed a motion to withdraw. In the appeal, the clients filed a *pro se* emergency motion to stay application for writ of possession on June 1, 2016. TFB Exh. 14b. Respondent testified that she may have drafted and provided the Hodges with a sample motion prior to her suspension. RR 6; TR 99-100, 474. By order dated June 2, 2016, the Second DCA denied the motion. TFB Exh. 14c. The order also stated that future *pro se* filings would be stricken without further notice to the extent the Hodges remained represented by counsel. RR 7; TFB Exh. 14c; TR 101. It is clear that the court believed Respondent was counsel for the Hodges at the time its order was entered. RR 7. In the foreclosure case, on June 7, 2016, Respondent sent an email to the presiding judge's judicial assistant, with a copy to her client and opposing counsel, and indicated that the Hodges were requesting that the judge consider the motion for stay of the June 1, 2016, writ and requesting information regarding what the clients needed to do to get the Judge to make a determination on the *pro se* motion. TFB Exh. 13d; TR 102-103,174-176, 199-200, 204, 475. Respondent did not indicate in the email that she was suspended from the practice of law, or that she was not emailing the court as an

attorney. TFB Exh. 13d; TR 102-103, 176, 199-200. The Referee correctly found that by requesting information in the client's case, Respondent provided a service to her client during her suspension. By copying her clients on the email, Respondent had prohibited contact with her clients during her suspension. RR 7. Respondent testified that Ms. Pellegrino was supervising her work in the Hodges matter. TR 79, 81. However, Ms. Pellegrino did not notify the court or opposing counsel that she was handling the representation of this case until June 8, 2016, when she filed a notice of appearance. RR 7; TFB Exh. 13e; TR 79, 81, 97, 177, 339-341. At the time of Respondent's June 6, 2016, email, she had not yet furnished a copy of her suspension order to the clients, opposing counsel or the court. The notice of her suspension was not sent until June 10, 2016. TFB Exh. 13f; TR 104, 173-174. Thus, all involved believed Respondent was attorney of record, albeit unauthorized, until June 10, 2016. RR 7.

In *JP Morgan Chase Bank v. Investor Trustee Services*, Respondent represented Investor Trustee Services in a foreclosure matter. RR 8; TFB Exh. 15a-e; TR 107. In the foreclosure case, on or about June 14, 2016, Respondent left a voicemail message and sent an email to the presiding judge's judicial assistant indicating that the defendant would be filing a motion to cancel a foreclosure sale, and requesting information and hearing times. RR 8; TFB Exh. 15b; TR 107, 297-

298, 304-305, 480, 493-494. The Referee correctly found that by requesting information in the client's case, Respondent provided a service to her client during her suspension. RR 8. Respondent was allegedly being supervised by Ms. Pellegrino regarding this case during her suspension. Ms. Pellegrino was not copied on Respondent's email to the judicial assistant, and Respondent did not indicate in the voicemail or email that she was contacting the court on behalf of another attorney. RR 8; TFB Exh. 15b; TR 298-299, 305-306. On June 14, 2016, Respondent exchanged email communications with General Counsel for the Fifth Judicial Circuit, wherein Respondent indicated that she had contacted the court on behalf of Ms. Pellegrino, who would be filing a notice of appearance in the matter. RR 8; TFB Exh. 15c; TR 109, 305, 481. Respondent testified that Ms. Pellegrino supervised her handling of this matter; however, Ms. Pellegrino did not notify the court or opposing counsel that she was handling the representation of this case until late afternoon on June 14, 2016, when she filed her notice of appearance. RR 8; TFB Exh. 15d; TR 81, 110-111, 299-300, 344-345, 482.

In *Deparedes v. Green Tree Servicing, LLC*, Respondent represented Erika and Eduardo Deparedes in an appeal. RR 8; TFB Exh. 16a-i; TR 111, 314. Respondent admitted that she engaged in two instances of direct contact with her client, Erica Deparedes, during the suspension period. TR 112, 114-115, 485-488,

492-493, 506. On or about June 9, 2016, Respondent was served with the Appellee's Answer Brief as Respondent was counsel of record in the case, and failed to timely inform opposing counsel or the court of her suspension. RR 8; TFB Exh. 16b, 16c, 16d; TR 112, 115, 261-262, 270-271, 279-280. Respondent admitted that she contacted Ms. Deparedes on or about June 9, 2016, to advise that the answer brief was received and that a reply brief would need to be filed within 20 days. RR 8; TR 112, 114-115, 315-317, 485-488, 492-493, 506. Ms. Deparedes' testimony confirmed this conversation with Respondent. TR 315-317. On June 16, 2016, Respondent emailed opposing counsel, with a copy to Ms. Deparedes, and asked for an extension for filing a reply brief in the case; however, Respondent did not state that she was emailing opposing counsel on behalf of another attorney. RR 9; TFB Exh. 16e; TR 115-116, 262, 320. On June 20, 2016, Ms. Deparedes filed a *pro se* motion requesting an extension of time to file the reply brief and stating that the appellants had contacted bank counsel who did not object to the extension. Respondent, rather than Ms. Deparedes, contacted bank counsel to request the extension. RR 9; TFB Exh. 16e, 16f; TR 263, 319, 320. The Court's order was served upon Respondent, who again contacted Ms. Deparedes during the week of July 1, 2016, to advise that the order denying the *pro se* motion had been received. RR 8; R. Exh. C; TR 113-114. The Referee correctly found that Respondent

engaged in the practice of law during her suspension by giving legal advice to her client, and that Respondent had prohibited direct client contact with Ms. Deparedes during her suspension period. RR 8.

In this matter, Respondent was allegedly working for Ms. Roebuck, who had instructed Respondent to copy her on any emails to opposing counsel while performing work under Ms. Roebuck's supervision. TR 79, 115-117. Respondent did not copy Ms. Roebuck on the June 16, 2016, email. TFB Exh. 16e; TR 116, 233. Ms. Roebuck did not file her notice of appearance in this case until July 6, 2016. RR 9; TFB Exh. 16h; TR 116, 214, 231, 235-236, 247-249. Ms. Roebuck believed her "official" representation began when she filed her notice of appearance. RR 9; TFB Exh. 16h; TR 214, 236. The clients were unrepresented from May 27, 2016, to July 6, 2016, when Ms. Roebuck filed her notice of appearance. Respondent's testimony that Ms. Roebuck directed Respondent to send the email to opposing counsel on June 16, 2016, does not coincide with the fact that the clients filed a *pro se* motion on June 20, 2016, in the case. TR 115-117. Ms. Roebuck did not direct or authorize Respondent to contact the client, Ms. Deparedes, and was unaware that Respondent had contacted Ms. Deparedes directly. RR 10; TR 227, 232. Ms. Roebuck testified that she supervised Respondent only "intermittently," which contradicts her affidavit wherein she

stated that any work performed by Respondent was performed under her supervision. RR 9; R. Exh. E; TR 232. Further, Ms. Deparedes testified that, at Respondent's direction, she paid Ms. Roebuck $250 to act as co-counsel in her case, but she never communicated with Ms. Roebuck about the representation. RR 10; TR 321. The Referee correctly found that Ms. Roebuck's appearance and motion filed on July 6, 2016, were merely placeholders until Respondent's suspension ended. TFB Exh. 16a; RR 10.

Respondent admitted that on June 28, 2016, Joanne P. Simmons, Clerk of the Fifth District Court of Appeal, notified the Bar that the aforementioned *pro se* motion appeared to be in a very similar format, font, and style to a previous motion for extension of time filed by Respondent in the same matter. TFB Exh. 16g; TR 118. Judge Vincent G. Torpy, Jr. testified that he drafted the letter and directed Ms. Simmons to send it to the Bar. TR 281-284.

In *Wells Fargo Bank v. Reed*, Respondent represented Mealy and Betty Jo Reed in a foreclosure case. RR 10; TFB Exh. 20a-f; TR 125. During her suspension, Respondent rendered legal advice and assisted her clients in obtaining a loan modification on the same property that was the subject of their foreclosure case. RR 11; TR 129. The Referee correctly found that Respondent engaged in the practice of law during the period of her suspension by providing legal services to

her clients including representing the clients' interests in getting a loan modification. RR 10. On June 2, 2016, Respondent emailed opposing counsel and her assistant, with a copy to Mr. Reed, regarding Mr. Reed providing proof of delivery of his April payment to Wells Fargo that had not been cashed. RR 11; TFB Exh. 20c; TR 125-128, 156. On June 13, 2016, Respondent sent another email to opposing counsel and her assistant, with a copy to Mr. Reed, advising that the Reeds had not received a permanent loan modification agreement by the lender for execution, which Respondent and her client had been requesting for some time. RR 11; TFB Exh. 20d; TR 129, 130, 158. On June 15, 2016, opposing counsel's assistant forwarded loan modification documents to Respondent and Mr. Reed for execution, and in response, Respondent thanked the assistant. RR 11; TFB Exh. 20d; TR 130, 159. Respondent had not notified opposing counsel of her suspension when she sent the emails on June 2, 2016, June 13, 2016, and June 15, 2016. RR 11; TFB Exh. 20c, 20d, 20e; TR 131, 159. Opposing counsel believed Respondent was representing Mr. Reed when she received Respondent's emails. TR 156, 158, 161. Respondent never stated that she was not contacting opposing counsel as an attorney nor that she was ineligible to practice law in the foregoing email communications. TR 159, 160. On June 16, 2016, Respondent emailed Mr. Reed, opposing counsel, and the court notifying them of her suspension. RR 11; TFB

Exh. 20e; TR 131, 132, 159. On July 8, 2016, Respondent emailed opposing counsel and her assistant, with a copy to Mr. Reed, negotiating the terms and requirements of the client's loan modification. RR 11; TFB Exh. 20f; TR 132, 161. Respondent was not supervised by another attorney in this case. RR 11; TR 136. The Referee correctly found that Respondent provided a service to her client during her suspension and held herself out to be licensed to practice law; and by copying her client on the emails, Respondent had prohibited contact with her client during her suspension. RR 11. The Referee also correctly found that Respondent's testimony that she was handling the loan modification as a non-lawyer is not credible. RR 11; TR 128-130. Respondent represented the Reeds as their attorney, and was compensated as an attorney. Respondent's negotiation of the terms and requirements of the client's loan modification during the period of her suspension was not clerical or administrative. The Referee correctly found that Respondent practiced law during her suspension. RR 11.

The Referee found that in each of these cases, Respondent's suspension prohibited her from providing legal services and legal advice. An attorney is not allowed to assist a client while suspended. In *Florida Bar v. Golden*, 563 So. 2d 81, 82 (Fla. 1990), this Court held that counselling and attempting to assist a client in requesting two continuances, while the attorney was suspended, constituted the

unauthorized practice of law. Additionally, in *Florida Bar v. Greene*, 589 So. 2d 281, 282 (Fla. 1991), this Court found that the fact that the attorney did not charge a fee for his services and was a personal friend of those for whom he performed services was not relevant to the determination that he engaged in the practice of law while suspended. The Referee correctly found that Respondent assisted her clients during her suspension in violation of her suspension order. RR 11-12.

Furthermore, in *Florida Bar v. Thomson*, 310 So. 2d 300, 300-303 (Fla. 1975), this Court held that a suspended attorney may be permitted to work for a law firm as a law clerk or investigator during the attorney's suspension so long as functions are limited exclusively to work of a preparatory nature under the direct supervision of an attorney, and do not involve client contact. In this instant matter, the Referee correctly found that the evidence and testimony presented clearly and convincingly shows that many actions taken by Respondent during her suspension were not under the direct supervision of an attorney. Also, unlike Thomson, Respondent gave legal advice to her clients and had direct contact with her clients in writing and by phone. RR 12. This Court held that written correspondence and telephone conversations amount to "'direct contact'" in violation of Rule 3-6.1. *Florida Bar v. Frederick*, 756 So. 2d 79, 88 (Fla. 2000).

Lastly, the Referee correctly found that the evidence presented at the hearing

established clearly and convincingly that Respondent violated Rule 4-8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. RR 12. To prove a violation of Rule 4-8.4(c), the Bar must prove intent only by showing that Respondent's "conduct was deliberate or knowing." *Florida Bar v. Fredericks*, 731 So. 2d 1249 (Fla. 1999). Respondent admitted that on June 13, 2016, she filed a motion seeking an extension to file her affidavit, stating that she had sent out the required suspension notices but needed additional time to finish the list of names and addresses required to be attached to the affidavit. TFB Exh. 6; TR 84. However, on June 14, 2016, and June 16, 2016, Respondent sent out the required suspension notice in at least two (2) cases. TFB Exh. 7, 20e; TR 131-132, 159. Respondent misrepresented in her motion that she had sent out the required suspension notices. The Referee correctly found that Respondent knowingly made a misrepresentation in her motion, which was never corrected, and engaged in deception by failing to timely provide the required suspension notices. RR 12.

Respondent's argument that she notified all of her clients by telephone or email of the suspension prior to May 27, 2016, is false and without any support in the record. IB 14. Similarly, Respondent's argument that, "[i]n all communications… after the date of the suspension, the first sentence out of Respondent's mouth or in the email was 'I am currently suspended by The Bar,'"

is also false and without any support in the record. IB 14-15. The Referee properly found that Respondent was in contempt of this Court's prior disciplinary order; guilty of practicing law during her suspension; and guilty of violating Rules 3-5.1(e), 3-5.1(h), 3-6.1(c), and 4-8.4(c). RR 2; 13. This Court should neither reweigh the evidence in the record nor substitute its judgment for that of the referee, as there is competent, substantial evidence in the record to support the referee's findings. *Nicnick*, 963 So. 2d at 224.

II. THE REFEREE PROPERLY MADE FINDINGS OF FACT CONCERNING CONDUCT NOT CHARGED IN THE BAR'S PETITION FOR CONTEMPT AND ORDER TO SHOW CAUSE

After hearing argument from the parties, the Referee properly considered uncharged conduct in this matter that was within the scope of the specific allegations in the Bar's Petition. This Court has held that a Referee may consider instances of attorney misconduct not specifically pled in the Bar's complaint and violations of rules not charged in the complaint "where the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint." *Fredericks*, 731 So. 2d at 1253. In other words, when the complaint put the attorney on notice of the misconduct at issue the attorney may be found guilty of conduct and Rule violations not specifically charged. *Florida Bar v. Townsend*, 145 So. 3d 775 (Fla. 2014), *Florida Bar v. Nowacki*, 697

So. 2d 828, 832 (Fla. 1997), *Florida Bar v. Vaughn*, 608 So. 2d 18, 20 (Fla. 1992). The Bar's Petition in this case put Respondent on notice that the Bar was seeking contempt and her disbarment because Respondent engaged in the practice of law while suspended, and had inappropriate prohibited contact with clients, opposing counsel, and the courts. IR 1; TR 10.

The parties engaged in discovery through April 3, 2017, which was the deadline pursuant to the Case Management Order. IR 14. On April 6, 2017, the Bar filed its Final Witness List disclosing Julie Anthousis, Esq. as a witness in this case, and filed its Final Exhibit List showing several documents related to the case of *Wells Fargo Bank v. Reed*, as the Bar's Exhibit 20a-f. IR 26, 27. Copies of the Bar's Exhibit 20a-f were also provided to Respondent's counsel the same day. At the final hearing, Respondent's counsel objected to the introduction of Bar Exhibits 20a-f, and argued that the exhibits were outside the scope of the pleadings. TR 9. The Referee heard arguments from the parties regarding this additional misconduct. The Bar argued that pursuant to Florida case law, due process is satisfied where the attorney is served with notice of the Bar's charges and is afforded an opportunity in the disciplinary hearing to be heard and defend themselves. TR 9. *See Townsend*, 145 So. 3d at 781; Florida *Bar v. Tipler*, 8 So. 3d 1109, 1118 (Fla. 2009); *Florida Bar v. Committe*, 916 So. 2d 741, 745 (Fla. 2005).

In *Townsend,* this Court reiterated that it "… has held that a referee may consider instances of misconduct not specifically pled in the Bar's complaint is such misconduct is 'within the scope of the Bar's accusations' and the attorney was 'clearly notified of the nature and extent of the charges pending against [him or her].'" *Townsend*, 145 So. 3d at 781 (citations omitted).

The Bar further argued that the evidence concerning the *Reed* matter was relevant to the guilt phase. TR 10. The Bar sought to call Ms. Anthousis as a witness to testify about Respondent's conduct in the *Reed* matter while suspended, which included evidence that Respondent practiced law and had inappropriate prohibited contact while suspended. Additionally, the Bar sought to admit Bar Exhibits 20a-f, which likewise included evidence that Respondent practiced law while suspended and had inappropriate prohibited contact with clients, opposing counsel, or the courts while suspended. Respondent's conduct in the *Reed* case was within the scope of the Bar's allegations in the Bar's Petition. The evidence in the *Reed* case further supported that Respondent engaged in the practice of law while suspended in contempt of this Court's suspension order. Based on well-established case law, the Referee properly overruled the Respondent's objection. TR 12.

Respondent's argument that the Referee improperly denied Respondent's request to submit evidence in response to the Bar's *Reed* case allegations is

likewise without merit. On April 28, 2017, after all testimony had concluded, Respondent sought to submit evidence never disclosed to the Bar, which consisted of a letter dated April 26, 2017, purportedly from Mr. Reed establishing the timing of when Respondent provided notice to him about the suspension. TR 514. The Bar objected as the letter was not sworn to and the Bar did not have an opportunity to cross-examine the witness. TR 514-516. The Referee sustained the objection, and the letter was not admitted. TR 516. As Respondent was put on notice on April 6, 2017, that the Bar would be calling Ms. Anthousis and would seek to introduce documents relating to the Reed's case, she had ample opportunity to address and defend these allegations prior to and during the final hearing. Mr. Reed was not disclosed as a witness on Respondent's witness list, nor was the April 26, 2017, letter disclosed on Respondent's exhibit list. Respondent's attempt to introduce new evidence in the form of unauthenticated and unsworn letter at the conclusion of the final hearing was properly excluded by the Referee.

III. THE REFEREE PROPERLY DENIED RESPONDENT'S MOTION TO RE-OPEN EVIDENCE TO ALLOW INTRODUCTION OF TWO MITIGATION EXHIBITS

Respondent makes a blanket statement that the Referee erred in denying her motion to re-open evidence to allow her to introduce two additional mitigation exhibits. Respondent produces no evidence to support her argument. Assuming she

had, this Court reviews a Referee's decision on the admissibility of evidence based on an abuse of discretion standard. The Referee did not abuse her discretion in denying Respondent's motion to re-open evidence to allow additional mitigation.

On May 5, 2017, Respondent filed a motion to re-open evidence for the court to permit and accept two mitigation letters. IR 40. On May 10, 2017, the Bar filed an objection to Respondent's motion. IR 42. The Referee denied Respondent's motion by order dated May 17, 2017. IR 47. In her motion, but not argued in the Initial Brief, Respondent argued that she received the additional mitigation letters after the April 27-28, 2017, final hearing. The Case Management Order in this matter, entered on January 3, 2017, clearly identified April 7, 2017, as the deadline for the disclosure of witnesses and exhibits in this matter. IR 14. Respondent and her counsel were aware of the deadline months in advance, and had ample time to gather witnesses and exhibits to be presented during the final hearing. Notwithstanding the ordered deadlines, the Bar was amenable to Respondent adding additional exhibits prior to and even during the final hearing. However, the Bar was not amenable to Respondent adding additional exhibits after the parties had rested and the evidence had closed. IR 42; TR 514-516. There was no basis provided by Respondent in her motion or in her Initial Brief that the additional documents should have been admitted after the close of evidence. The

Referee properly denied Respondent's motion by order dated May 17, 2017. IR 47.

Respondent implied in her Initial Brief that the documents were not admitted because the Referee did not like her and was biased against her. At no point during the proceedings did Respondent move to disqualify Judge Cook as Referee in this matter. If she had made such an argument based on an adverse ruling, such argument should be discarded. Prior adverse rulings are not legally sufficient grounds upon which to base a motion to disqualify. *Ardis v. Ardis*, 130 So. 3d 791, 795 (Fla. 1st DCA 2014). Respondent has not offered any evidence to support her statements that the Referee was biased against her or made decisions contrary to applicable law. The Referee, in fact, made all decisions in this case based on the applicable law. Simply because Respondent disagrees with the outcome and recommendations by the Referee, does not equate to the Referee being biased or that she improperly denied Respondent's motion. The Referee's decision to deny Respondent's motion to allow additional mitigation exhibits was not an abuse of discretion and should be upheld by this Court.

IV. DISBARMENT IS THE APPROPRIATE SANCTION

Respondent argues that the recommended sanction of disbarment is too "extreme" and that a non-rehabilitative suspension is the appropriate discipline. Respondent provided no case law to support her argument that a non-rehabilitative

suspension is the appropriate discipline. Instead, Respondent attempts to distinguish her conduct from the case law and Standards considered by the Referee in recommending disbarment. Disbarment is the presumptive sanction for her misconduct. *Florida Bar v. Brown*, 635 So. 2d 13 (Fla. 1994). The Referee correctly recommended disbarment, which has a reasonable basis in the applicable Standards and the applicable case law and should be approved.

Respondent's sole basis for arguing that her conduct is not worthy of disbarment is predicated on the notion that any violations were unintentional and that her conduct was simply a "mistake" in not knowing the applicable Rules. IB 8, 10-12, 14-15, 22, 28, 37. She states that she did not intend to violate the Rules and that she was unaware of the requirements of Rule 3-5.1 and 3-6.1. Ignorance of the Rules is no defense for Respondent's misconduct. Rule 3-4.1 provides that, "[e]very member of The Florida Bar ... is charged with notice and held to know ... the standards of ethical and professional conduct prescribed by this court." R. Regulating Fla. Bar 3-4.1. Respondent's assertion of negligence due to a lack of knowledge of the Rules is not well-founded. Respondent did not need to know, as she asserts, her actions specifically violated a Rule.

A. <u>Standards require disbarment</u>

In recommending disbarment, the Referee relied and considered the

following applicable Standards: Standard 3.0 (Generally), Standard 4.61 (Lack of Candor), Standard 6.11 (False Statement, Fraud, and Misrepresentation), Standard 7.1 (Violations of Other Duties Owed as a Professional), Standard 8.1 (Prior Discipline Orders), Standard 9.2 (Aggravation), and Standard 9.3 (Mitigation). RR 13-18. The Standards found are supported by competent, substantial evidence in the record. In her Initial Brief, Respondent only challenges the applicability of Standards 3.0, 4.6, 6.1, 8.0, and certain aggravating and mitigating factors under Standards 9.2 and 9.3. IB 25-36. The Bar's Answer Brief will only address the Standards specifically challenged by Respondent in her Initial Brief.

Standard 3.0 is applicable and states that certain factors should be considered when imposing a sanction after finding lawyer misconduct, which are: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating circumstances." Fla. Stds. Imposing Law. Sancs. 3.0. In this case, Respondent had a duty to comply with her prior disciplinary order, to not engage in the practice of law while suspended, and to follow the Rules. There is no evidence that Respondent suffered from any mental or emotional impairment. The record evidence supports that Respondent was warned during the prior disciplinary proceeding that she was to have no involvement with her clients. TR 43-44, 57-58,

67, 226. Respondent's conduct showed her intention to violate the prior disciplinary order. In her Initial Brief, Respondent argues that there was no harm due to her misconduct, which she calls a mistake. The Rules are geared to protect the public; actual harm, although present in this case, is not a requirement for this protection to be invoked. In this case, however, Respondent's misconduct caused injury to the legal system and potentially could have injured her clients by her failure to immediately notify the required persons of her suspension.

Disbarment is appropriate under Standard 4.61, "when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the client." Fla. Stds. Imposing Law. Sancs. 4.61. Respondent failed to present evidence to support that the Referee's finding of the applicability of Standard 4.61 is erroneous and should be reversed. Rather, Respondent asserts in her Initial Brief that Standard 4.61 is limited to situations involving deception of a client, and that the Bar failed to offer any evidence in its Memorandum of Law for Sanctions to support that she deceived a client. IB 27. Respondent is mistaken. The Bar clearly stated in its Memorandum of Law for Sanctions that "Respondent lacked candor by failing to timely notify the courts, opposing counsel and her clients about her suspension. She engaged in deception by waiting until weeks into her suspension to provide notice in some

cases." IR 38. Respondent further argues that her failure to timely notify clients was not done "knowingly or intentionally" as required by Standard 4.61. The Standards define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Fla. Stds. Imposing Law. Sancs. Definitions. The record has ample evidence to support that Respondent knowingly failed to timely notify her clients, opposing counsel, and the courts of her suspension. RR 3-5, 7-8, 11-12; TFB Exh. 7, 12d, 13f, 16b, 16d, 19a-b, 20e; TR 71-73, 85-86, 90, 104, 115, 131-132, 146, 159, 172-175, 202, 261, 265, 297, 315, 461-463, 468-469, 478, 504. Respondent's notification letters were far from "immediate" as Rule 3-5.1(h) requires. Although Respondent's earliest letter is dated May 27, 2017, the letters were not sent on this date. RR 3, 5; TFB Exh. 2, 3; TR 74-75. Some were sent out weeks into her suspension. RR 3-5, 7-8, 11-12; TFB Exh. 7, 12d, 13f, 16d, 20e; TR 71, 73, 85-86, 90, 104, 115, 131-132, 146, 159, 172-174, 261, 265, 297, 315, 461-463, 468-469, 478, 504. Respondent claims that there is "no evidence" that she had "the intent to benefit the lawyer or another." IB 27. The record evidence shows that Respondent intended to monitor her client's cases during her suspension and intended to work on the cases under the guise of being supervised by other attorneys. RR 5; TFB Exh. 2; TR 77-78, 324.

Disbarment is appropriate under Standard 6.11, "when a lawyer (a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or, (b) improperly withholds material information, and causes serious or potentially serious injury to a party or causes a significant or potentially significant adverse effect on the legal proceeding. Fla. Stds. Imposing Law. Sancs. 6.11. In this case, Respondent misrepresented to the Court in her motion seeking more time to file her Rule 3-5.1(h) sworn affidavit that the required notices had been sent, when in fact, they had not, and she never corrected her misrepresentation to the Court. RR 12; TFB Exh. 6; TR 84-85, 465.

Disbarment is appropriate under Standard 8.1, "when a lawyer (a) intentionally violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system, or the profession." Fla. Stds. Imposing Law. Sancs. 8.1. In this case, Respondent intentionally violated her prior disciplinary order and caused injury to her clients, the public, and the legal system. Some clients went unrepresented while Respondent was suspended. She also clearly engaged in the practice of law while suspended, to include negotiating the terms of a loan modification for a client. RR 11; TFB Exh. 20f; TR 132-133, 161.

Respondent argues that all of the aggravating factors found by the Referee are inapplicable. Respondent has the burden to show that the Referee's findings

were erroneous and not supported by substantial, competent record evidence. Respondent has failed to meet her burden. The Bar submits that the Referee properly found each cited aggravating factor, and that the Referee's finding should be upheld for the reasons stated below.

Standard 9.22(a) (prior disciplinary offenses) applies as Respondent's disciplinary history consists of a grievance committee admonishment in May 2014, and a 45-day suspension, effective May 27, 2016, with probation for two years. Respondent argues that her prior discipline should not be treated as an aggravating factor or compel her disbarment. IB 29. She further argues that using the 45-day suspension is double-dipping since this contempt proceeding is based on her violation of that suspension order, and that the admonishment was already used as an enhancement for the 45-day suspension. Respondent's arguments are without merit and have no reasonable basis in existing case law. The finding of this aggravating factor is not limited to a one-time-usage policy. The only limitation in Standard 9.22(a) regarding prior discipline relates to an admonishment that was administered more than 7 years prior. Respondent's admonishment falls within the 7 years; thus, the single exception is not applicable.

Standard 9.22(b) (dishonest or selfish motive) is applicable because Respondent failed to immediately notify her clients, opposing counsel and the

courts of her suspension as required by the Rules. RR 3-4; TFB Exh. 7, 8, 12d, 13f, 16d, 19a-b , 20e; TR 71-73, 85-86, 90, 104, 115, 131-132, 146, 159, 172-175, 202, 261, 265, 297, 315, 461-463, 468-469, 478, 504. She also misrepresented in her motion seeking more time to file her Rule 3-5.1(h) affidavit that she had sent out the required suspension notices, and she never corrected her misrepresentation. RR 12; TFB Exh. 6; TR 84-85, 465. Respondent argues that her "motive" was not shown during the final hearing, yet failed to show any evidence that contradicts this conclusion other than her position that she "mistakenly advis[ed] the Court that all clients had been timely notified." IB 31. The Referee found that the notice letters "are concerning and speak volumes regarding her intent to violate the Rules." RR 5; TFB Exh. 14c, 16c. The notification letters invited her clients to contact her, which she was prohibited from doing and did despite the prohibition.

Standard 9.22(d) (multiple offenses) is applicable because she was found in contempt of her prior suspension order, practiced law while suspended, and violated Rules 3-5.1(e), 3-5.1(h), 3-6.1(c), and 4-8.4(c). RR 13, 15-16. Respondent argues that the misconduct that forms the basis for the violation of her prior suspension order "should not be double counted" to establish the actual violation and as an aggravator. Respondent's position is unsupported by any case law.

Standard 9.22(g) (refusal to acknowledge wrongful nature of conduct) is

applicable for the reasons stated in the Report of Referee. RR 16. Respondent argues that this aggravating factor should not have been found because she testified that her conduct was unintentional, she engaged in permitted activities, and believed she was in timely compliance with the suspension order. IB 31-32. She further states that by the time of the final hearing she now knew her client contact crossed the line. IB 32. During the final hearing, and in her Initial Brief, Respondent refused to accept that suspended attorneys are prohibited from direct client contact and believes her contact was an appropriate "non-lawyer activity." RR 16; IB 31-32, 40, 43-45, 47. She also refused to acknowledge that the Rules required notice letters be sent "immediately," and has continuously that the deadline to provide the notices was the same deadline to submit the Rule 3-5.1(h) affidavit. RR 6; TR 72-73, 83, 462, 469-470.

Standard 9.22(i) (substantial experience in the practice of law) is applicable because Respondent has been practicing law in Florida for approximately 32 years. RR 16; TR 447. At the time of the conduct, she had been a sole practitioner for about 6 years. RR 16; TR 448. Respondent's contention that she has less experience as a litigation attorney, considering she spent most of her time as a tax attorney at a large firm, was found by the Referee to be not credible. RR 16. She has shown no evidence to support that the Referee's finding was erroneous.

The Referee considered specific mitigating factors, Standards 9.32(b), 9.32(d), 9.32(e), 9.32(g), and 9.32(l), and found that no mitigating factors applied that would justify a reduction from disbarment. RR 17-18. Respondent argues that the Referee should have found certain mitigating factors as applicable: full and free disclosure/cooperative attitude (Standard 9.32(e)), character or reputation (Standard 9.32(g)), and remorse (Standard 9.32(l)). With the exception of character or reputation, Respondent fails to point to any record evidence to support her assertion. The record evidence supports the inapplicability of each of these factors. Respondent has the burden on review to show that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *Nicnick*, 963 So. 2d at 221. She has not met this burden.

For Standard 9.32(e), Respondent argues that she was cooperative in the disciplinary proceedings because she did not object to any discovery taken by the Bar, waived objections to discovery, and proceeded openly in the proceedings. IB 33. This Court explained in *Florida Bar v. Herman*, that "[t]he mitigating factor of cooperation in the Bar discipline process contemplates something above and beyond the normal cooperation expected of every member of the Bar." *Herman*, 8 So. 3d at 1107. Respondent must show "facts to demonstrate exceptional disclosure or cooperation" on her part. *Id.* at 1106. Respondent has not provided

evidence of anything more than the expected normal cooperation. The facts admitted by Respondent could have easily been established by the Bar without her cooperation. The Referee properly found this mitigating factor was not applicable.

For Standard 9.32(g), Respondent argues that the character evidence she provided from clients, business professionals, and other lawyers support the finding of mitigation for character and reputation. IB 23. The Referee was in the best position to determine the credibility of the statements and evidence presented. In this case, the Referee found Judge Torpy's statements concerning Respondent's character and reputation to be more credible than the character evidence presented by Respondent who knew nothing about the conduct at issue. The Referee specifically found that "Respondent does not have the reputation or character that is expected of members of the Bar." RR 18. The Referee found Judge Torpy's testimony to be "very telling with respect to Respondent's reputation." Thus, there is competent, substantial evidence in the record to support the inapplicability of this mitigating factor. Even if this Court were to find that Standard 9.32(g) should be considered in mitigation, the Bar submits that this mitigating factor is minor and is not enough to support a reduction in discipline from disbarment.

For Standard 9.32(l), Respondent argues that she was remorseful in that she "broke down crying" during the proceedings. Respondent fails to point to any

evidence in the record, to support that this mitigating factor is applicable. TR 495-497. The record is replete with evidence supporting that Respondent denied her wrongdoing. Respondent testified that "it was a mistake to settle with The Florida Bar" regarding her prior suspension in SC15-1592, because "I don't believe that I was guilty of filing frivolous lawsuits… I don't believe I would have ever been suspended." TR 498. She further testified that the day before she elected to start her suspension, she filed a notice of appearance in the Rucker matter and asked for all pleadings and correspondence to be directed to her, rather than being sent to her client, having full knowledge she was being suspended. TR 499-500. The Referee properly found this mitigating factor was not applicable.

B. <u>Case law requires disbarment</u>

The relevant case law supports disbarment as the appropriate sanction for Respondent's misconduct. Respondent has demonstrated that she is unworthy of practicing law and should be disbarred. Disbarment is necessary to protect the public from Respondent's incompetent and unethical representation. *Florida Bar v. Korones*, 752 So. 2d 586 (Fla. 2000). The Court has disbarred attorneys with conduct similar to Respondent's. It is well-established that the presumptive penalty for violating prior disciplinary orders is disbarment, in the absence of strong extenuating circumstances. *Brown,* 635 So. 2d at 13-14. This Court has disbarred

attorneys for violating the suspension notification rules and continuing to practice law while suspended.

In her Initial Brief, Respondent attempts to distinguish her conduct from the cases the Referee properly relied upon in recommending disbarment. IB 18-21. She further states that she had "strong extenuating circumstances," as recognized in *Florida Bar v. Brown*, *infra*, and in *Florida Bar v. Lobasz*, 64 So. 3d 1167 (Fla. 2011), to support a deviation from the presumption of disbarment. IB 21. Not only does Respondent fail to provide any evidence of "strong extenuating circumstances" or any case law to support discipline less than disbarment, she misconstrues the findings in *Brown* and *Lobasz*. In both cases, this Court did not find that strong extenuating circumstances existed and both attorneys were disbarred. Respondent's attempt to distinguish her prior discipline of a 45-day suspension as being less egregious than Lobasz's prior discipline of a 3-year suspension misses the point. The point is that Respondent, like Lobasz, violated her prior suspension order and was found in contempt.

In *Florida Bar v. Norkin*, an attorney was disbarred for violating the suspension notification rule and continuing to practice law while suspended, among other misconduct. *Norkin*, 183 So. 3d at 1023. Respondent claims her conduct is distinguishable from the conduct in *Norkin* because she misconstrued

the deadline for providing the suspension notices and timely submitted her affidavit, which she calls a technical violation not worth disbarment. IB 19. She further argues that it was reasonable for her to believe the deadline for the notices was the same as the affidavit. IB 19. Respondent's affidavit was submitted after requesting multiple extensions, but the suspension notices were not timely sent and no extensions were requested or granted. She further explained she was unaware of the decision in *Norkin* wherein this Court unequivocally stated, "the notice requirements must precede the effective date of the suspension. Otherwise, the purpose of the rule would be entirely thwarted." *Id.* at 1021-22. IB 19.

In *Florida Bar v. Greene*, an attorney was disbarred for continuing to practice law while suspended. *Greene*, 589 So. 2d 281, 282-283 (Fla. 1991). The Court held that practicing law while under suspension warrants disbarment. Greene had completely disregarded lesser forms of discipline imposed upon him by the Court, and had prior discipline. The Court agreed with the Bar's argument "that further suspension of Greene would be fruitless." *Id.* at 282. Respondent makes no argument distinguishing her conduct from the conduct in *Greene*; therefore, this case properly supports disbarment as the appropriate discipline.

In *Florida Bar v. Forrester*, 916 So. 2d 647 (Fla. 2005), an attorney was disbarred, in part, for continuing to practice law while serving a 60-day suspension.

Forrester had notified most clients of the suspension and referred their cases to other attorneys; however, as the effective date of the suspension approached, Forrester realized that a few cases had not been resolved or referred to other attorneys for handling. As a result, Forrester hired an inexperienced associate to handle the cases, she improperly and actively directed and supervised the associate's legal work, and spoke with one existing client over the phone several times. Once Forrester realized that the Bar was investigating her actions, she asked her associate to sign a letter verifying that Forrester was employed as a paralegal by the associate. The associate refused to sign the letter and terminated his employment. Respondent claims her conduct is distinguishable from the conduct in *Forrester* because she associated with experienced attorneys rather than an inexperience attorney. This argument fails because the experience of the associated attorneys is irrelevant. The key similarity is that Respondent, like Forrester, waited to provide all of the notices and told the Bar she was employed by other attorneys after the Bar learned she had violated her suspension order.

Respondent's conduct is similar to the conduct of each attorney in the above-cited cases. Respondent failed to immediately provide notice of her suspension as required under Rule 3-5.1(h). Respondent's argument that she thought she had the same amount of time to provide notice as she did her affidavit

is faulty and in total contradiction with the rules. On numerous occasions, Respondent provided notice of her suspension after the effective date of the suspension, which she elected to begin early. The evidence clearly showed that Respondent thwarted the purpose of the suspension Rule. Like *Greene*, anything short of disbarring Respondent would be fruitless. She went into the suspension with the intention to monitor her clients' cases, she continued to receive documents submitted through the e-portal system, and she farmed cases to attorneys purportedly for them to handle, when in fact, Respondent continued working on the cases. Respondent continued to practice law while she was suspended, had direct contact with clients, advised clients of deadlines, and asked for continuances and hearing times in cases with persons who had not been notified of her suspension. She also continued negotiating terms of a client's loan modification.

Based on the applicable Standards and case law, this Court should impose the Referee's recommended sanction of disbarment and assess costs for the Bar.

V. THE REFEREE'S RECOMMENDED SANCTION DOES NOT DENY RESPONDENT EQUAL PROTECTION UNDER THE LAW

Respondent argues that she was denied equal protection under the law as disbarment is being recommended for performing services that a non-lawyer can provide, which is disparate treatment. Respondent's argument is without merit. The Referee's recommended sanction does not deny Respondent equal protection.

Without directly stating her point, Respondent's argument centers around the restrictions under Rule 3-6.1(d), regarding the prohibited conduct of suspended attorneys who are employed during their suspension. Rule 3-6.1(d)(1) prohibits a suspended attorney from engaging in direct client contact. R. Regulating Fla. Bar 3-6.1(d)(1). Respondent is not an nonlawyer, and remained subject to the Bar's Rules during her suspension. In this case, Respondent engaged in prohibited direct client contact, hid her employment during her suspension with other attorneys until after her suspension had concluded, and practiced law while suspended.

She further contends that the practice of law should be likened to the practice of medicine and that "the right to practice one's profession is a valuable property right protected by the due process clause." IB 46. This argument is also without merit. In Florida, the "… practice of the law is not an inherent right. It is a privilege or franchise granted by the state, and, being so, its exercise may be regulated in the interest of the public." *Petition of Florida State Bar Ass'n*, 186 So. 280 (Fla. 1938). Rule 3-1.1, specifically states, "[a] license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause." R. Regulating Fla. Bar 3-1.1. Based on the foregoing, Respondent's equal protection argument fails under Rule 3-6.1(d) and Rule 3-1.1.

Pursuant to the Florida Constitution, this Court has the exclusive jurisdiction

to regulate those admitted to practice law in Florida. Art. V, § 15, Fla. Const. In exercising this exclusive jurisdiction, this Court promulgated the Rules Regulating The Florida Bar and its amendments thereto. Rule 3-1.2, states

> The Supreme Court of Florida has the inherent power and duty to prescribe standards of conduct for lawyers, to determine what constitutes grounds for discipline of lawyers, to discipline for cause attorneys admitted to practice law in Florida, and to revoke the license of every lawyer whose unfitness to practice law has been duly established.

R. Regulating Fla. Bar 3-1.2. In this case, the Bar duly established by clear and convincing evidence that Respondent is unfit to practice law as she violated this Court's prior disciplinary order in SC15-1592 and practiced law while suspended. Given this Court's inherent powers and duties, there is no equal protection or due process violation by prohibiting a suspended attorney from having direct client contact as outlined in Rule 3-6.1(d). Thus, the Referee's recommendation of disbarment does not violate Respondent's right to equal protection.

CONCLUSION

The Bar submits that this Court should adopt the Referee's findings of fact and recommended rule violations. The Bar urges this Court to impose the Referee's recommended sanction of disbarment, which has a reasonable basis in existing case law and aligns with the Standards for Imposing Lawyer Sanctions, and affirm the taxation of costs against Respondent.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer Brief has been electronically filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal; and that true and correct copies have been furnished via U.S. Certified Mail, Return Receipt Requested No. 7016 0750 0000 7021 0512, to Kelley Andrea Bosecker, Respondent, to her official Bar address of 1400 Gandy Boulevard N., #706, St. Petersburg, Florida 33702-2124, and via electronic mail to her official Bar email address of kelley@boseckerlaw.com and to her alternate email addresses of sbosecker@tampabay.rr.com and kbosecker@tmo.blackberry.net; and via electronic mail to Adria E. Quintela, Staff Counsel, The Florida Bar, to her designated email address of aquintel@floridabar.org, on this 1st day of December, 2017.

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

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

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