IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JONATHAN STEPHEN SCHWARTZ,

Respondent.

_____/

Supreme Court Case No. SC17-1391

The Florida Bar File No. 2016-70,106(11J)

THE FLORIDA BAR'S REPLY BRIEF

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ARGUMENT

Respondent's answer brief largely rests on a restatement of the Report of Referee's findings and conclusions. This reliance, however, fails to adequately respond to the central argument raised in the Bar's initial brief: that the Referee's findings and conclusions, regardless of their detail and specificity, are clearly erroneous in light of the record evidence.

The undisputed material facts—Respondent's creation and use of altered photo line-ups in a criminal discovery deposition, which depict an event that never occurred (namely, a witness's identification of an alternate suspect as the perpetrator)—warrant a recommendation of guilt under Rules 3-4.3 and 4-8.4(c). By encouraging the Court to only "accept the facts in evidence which are most favorable to the party who prevailed below" (Resp. Br. at 25), the answer brief fails to honestly confront the totality of the evidence. An earnest review of the record compels a finding that Respondent acted deceptively, dishonestly, and in violation of the Rules Regulating The Florida Bar as charged.

I. THE BAR'S STATEMENT OF THE CASE AND OF THE FACTS WAS NEITHER IMPROPER NOR UNDULY ARGUMENTATIVE.

The answer brief begins by accusing the Bar of failing to comply with "prevailing appellate standards" requiring parties to state the factual record in the

light most favorable to the party who prevailed below. (Resp. Br. at 3). But nowhere in the case the answer brief cites for this proposition, *Amjad Munim, M.D., P.A. v. Azar, M.D.*, 648 So. 2d 145, 148-49 (Fla. 4th DCA 1994), could the Bar discern a holding requiring an appellant's initial brief to state the facts in such a manner.[1]

This is because an appellant is not required to state the facts in the light most favorable to prevailing party. Rather, an appellant's obligation is to ensure that the statement of the case and of the facts is presented fully, fairly and accurately to assist the appellate court it is review. *See Sabawi v. Carpentier*, 767 So. 2d 585, 586 (Fla. 5th DCA 2000) ("[T]he purpose of providing a statement of the case and of the facts is not to color the facts in one's favor…but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute."); *see generally* Fla. R. App. P. 9.210(b)(3).

While the answer brief charges the Bar with drafting an argumentative statement of facts, this accusation is inapposite. For instance, Respondent criticizes the Bar for using the word "altered" to describe the photo line-ups at issue. (Resp. Br. at 3-4). But in the context of this case, "altered" is a fair and accurate adjective to describe the line-ups Respondent fashioned by modifying photograph no. 5 of the

[1] Instead, the opinion states that the *appellate court*, in reviewing whether substantial, competent evidence exists to support a verdict, must disregard conflicting evidence and accept the facts most favorable to the prevailing party. *Id*.

State-provided line-up. *See, e.g.*, *The American Heritage College Dictionary*, (3rd ed. 2000) (defining "altered" as "[t]o change or make different; modify"); *Merriam-Webster Dictionary* (online ed.) (defining "altered" as "made different in some way"); *Oxford Advanced Learner's Dictionary* (online ed.) (defining "altered" as "to become different; to make somebody/something different.").

Whether one labels Respondent's line-ups as "altered," "modified" or "changed," the fact remains that he materially transformed the meaning and significance of the document originally provided by the State. Respondent and his associate pasted over Virgil Woodson's image (pictured in photograph no. 5) with a photograph of Fritzlan Joseph (Tr. III: 359, 364-65, 371, 425-426; ROR: 6, 10). This resulted in two line-ups, both of which retained the original markings from the State's line-up (such as the signature of the detective, the signature of the witness, and the circle she drew around photograph no. 5, signaling a positive identification). (Tr. III: 364-365; ROR: 7, 10). But, instead of reflecting an identification of Woodson, the modified line-ups suggested that the witness, Gerdie Tellisma, had previously identified Joseph (or an individual with Joseph's face and Woodson's hair) as the perpetrator. While comparatively small, Respondent's alteration to the State-provided produced a significant result.

Throughout the answer brief, Respondent describes the line-ups as "defense-created" or "constructed." The Bar would contend that this description is inaccurate. Had Respondent fashioned a photo line-up from scratch, without including the unduly suggestive markings of the State-provided line-up, this would be a very different case. But instead, Respondent selectively modified the State-provided line-up by superimposing Joseph's image in such a way as to suggest Tellisma had previously identified him as the perpetrator. Under these facts, "altered" is an entirely fair and accurate adjective.

Next, the answer brief takes issue with the inclusion of prosecutor Cristina Cabrera's testimony at the final hearing, claiming the Bar presented it as "credible" or "relevant." (Resp. Br. at 4). But at no point in the Bar's initial brief does it challenge the Referee's credibility determination with respect to Cabrera's testimony. In fact, following the recitation of Cabrera's testimony, the Bar immediately included the competing testimony of Respondent and his witnesses. (Initial Br. at 7-8, 11, 12). Further, the Bar acknowledged the Referee's dim view of her testimony. (Initial Br. at 16). Contrary to the answer brief's suggestion, Cabrera's testimony was included in order to present the Court with a full portrait of the facts and proceedings below, not to color the facts in the Bar's favor.

II. RESPONDENT'S ANSWER BRIEF URGES AN IMPROPER STANDARD OF REVIEW IN THIS DISCIPLINARY PROCEEDING.

The answer brief wrongly encourages the Court to only accept facts in evidence that are favorable to Respondent as the prevailing party below. (Resp. Br. at 25). While this may be an accurate statement of the competent, substantial evidence standard of review in the civil cases cited in the answer brief, it does not fully account for the Court's standard of review in attorney disciplinary proceedings.

When a party challenges a referee's findings of fact, it is well-settled that the Court's review is limited, and if those findings of fact are supported by competent, substantial record evidence, the Court will not reweigh it and substitute its judgment for that of the referee. *See The Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000); *The Florida Bar v. Jordan*, 705 So. 2d 1387, 1390 (Fla. 1998). Indeed, a party seeking to show that a referee's findings of fact are not supported by competent substantial evidence cannot do so simply by pointing to contradictory evidence in the record. *See The Florida Bar v. Committee*, 916 So. 2d 746 (Fla. 2005).

But, contrary to the answer brief's suggestion, the Bar is not merely pointing to contradictory evidence; rather, the Bar is arguing that the referee's factual findings are clearly erroneous in view of the totality of the evidence, favorable or not. In such instances "where a referee's failure to make a particular factual finding is clearly

erroneous in light of the evidence before her, this Court can make such a finding." *The Florida Bar v. Alters*, 43 Fla. Weekly S582a (Fla. Nov. 21, 2018) (citing to *The Florida Bar v. Sweeney*, 730 So. 2d 1269, 1271 (Fla. 1998) ("[W]e find that the referee's factual finding that the Bar failed to prove an intent to defraud is clearly erroneous.")).

The Court should decline Respondent's invitation to view the evidence narrowly in the light in the light most favorable to him, and instead review the Referee's Report and the record in the same manner as any other disciplinary proceeding to determine whether the factual findings are sufficient under the applicable rules to support the recommendations as to guilt. *See The Florida Bar v. Shoureas*, 913 So. 2d 554, 557-558 (Fla. 2005); *The Florida Bar v. Spear*, 887 So. 2d 1242, 1245 (Fla. 2004).

III. THE RECORD EVIDENCE DEMONSTRATES MISREPRESENTATION AND DISHONESTY.

The material facts of this case are simple, straightforward, and have been repeated at length: Respondent, along with his associate, took the photo line-up provided by the State in discovery and created two altered versions of it: the first contained a superimposed image of Joseph's head over Woodson's; the second version preserved Woodson's hair, but superimposed Joseph's face. (Tr. III: 359, 364-65, 425-426; ROR: 7, 10). These line-ups, created at Respondent's direction,

still contained all the information present on the original police line-up: Tellisma's name and signature, the name and signature of the detective administering the identification; and a hand-drawn circle around the individual depicted in photograph no. 5 indicating a positive identification. (Tr. III: 364-365; ROR: 7, 10). During Tellisma's deposition, Respondent asked the witness if she could identify the individual who robbed her from these altered line-ups. (TFB Ex. 1: 27, 30-31).

The Report of Referee concludes that such actions do not run afoul of Rules 3-4.3 and 4-8.4(c) because the line-ups themselves were not misleading; Respondent's use of them was not misleading; and Respondent acted in good faith and did not possess the requisite intent. These findings are not supported by the record evidence. Each is addressed in turn.

I.

Respondent's line-ups were inherently misleading, and this fact is evidenced on their face. Both line-ups suggest that, on May 11, 2013, Tellisma identified a photograph of Joseph as the perpetrator. This event never happened. Not unlike the attorney in *The Florida Bar v. Head*, 84 So. 3d 292 (Fla. 2012), who authored a letter falsely claiming a lawsuit had been filed, Respondent created a document falsely claiming Tellisma had identified Joseph as the perpetrator. The line-ups, which still contained all of the original information from the State-provided line-up, constituted

a misrepresentation. The Referee's finding to the contrary is without competent, substantial evidentiary support.

II.

Just as importantly, Respondent's use of the line-ups was misleading. While the Referee found that Respondent's questions during the deposition carefully identified his line-ups without the slightest misrepresentation, the transcript tells another story. By asking whether the first altered line-up was "like" the line-up shown to Tellisma by the police, and securing an affirmative response from her (TFB Ex. 1: 5), Respondent led Tellisma to believe that she was reviewing the original line-up. Similarly, when asking Tellisma to review the photos in the second altered line-up "as if you've never seen them before, because I don't know whether you have or not" (TFB Ex. 1: 31), Respondent engaged in deception. He knew that Tellisma had never seen this line-up, which contained a photo of Joseph's face with Woodson's hairline. By infusing his question with ambiguity, Respondent created the potential for Tellisma to believe she had previously seen it.

This potential for confusion, even if never realized, risked prejudicing the administration of justice in the underlying case. The Referee's finding that Respondent's use of the line-ups was open and transparent is without support.

III.

Both the Referee's Report and the answer brief praise Respondent's good faith in conducting the deposition. Because Respondent's purpose was to "effectuate justice," the Referee found that he "acted without any purpose or intention to deceive." (ROR: 4). Setting aside a debate over what "effectuating justice" might have meant in the underlying case, whether Respondent subjectively acted in good faith is not dispositive of the element of intent. The relevant question is whether Respondent deliberately or knowingly engaged in the conduct in question. *See The Florida Bar v. Smith*, 866 So. 2d 41, 46 (Fla. 2004); *The Florida Bar v. Barley*, 831 So. 2d 163, 169 (Fla. 2002); *The Florida Bar v. Fredericks*, 731 So. 2d 1249 (Fla. 1999).

The question in this case is, therefore, whether Respondent deliberately or knowingly engaged in the creation and use of the misleading altered line-ups. The answer is, yes. Respondent knew that he was questioning Tellisma with line-ups suggesting a false event (a prior identification of Joseph). And there is no question that it was deliberate. According to the Referee, Respondent's goal in substituting Woodson's photo "was to redirect the state's attention to an alternate suspect." (ROR: 7). Respondent's conduct was knowing and deliberate and satisfies the element of intent necessary to find a violation of 4-8.4(c). *See The Florida Bar v.*

Watson, 76 So. 3d 915 (Fla. 2011) (attorney's drafting and signing of letters on his firm letterhead addressed to investors indicating that the investors had invested money in client's development project, when attorney knew that was not true and that others would rely on these fraudulent letters, satisfied intent element). Consequently, the Referee's finding to the contrary is clearly erroneous.

IV. RESPONDENT IS NOT ENTITLED TO COSTS.

Even though Respondent has not filed a notice of intent seeking review of the Referee's recommendation that each party bear its own costs, the answer brief asks the Court to remand the case for a determination of reasonable costs to be assessed against the Bar. The Court should deny this improper request on both procedural and substantive grounds.

In attorney discipline cases, Rule 3-7.7(c)(1) allows a party to seek review of any portion of a report of referee by filing either a notice of intent to seek review or a notice of intent to seek cross-review. The failure to raise a challenge to a specific portion of a report of referee in a notice or cross notice constitutes a waiver. *See The Florida Bar v. Cueto,* 834 So. 2d 152, 155 (Fla. 2002) (the Bar's failure to specify that it was challenging the referee's finding of guilt in its petition for review waived its challenge).

Although the Court has previously exercised its discretion and treated a party's defective challenge to a referee's recommendation as a late-filed notice, it cautioned that strict compliance with Rule 3-7.7(c) was expected in the future. *Id.* (treating the Bar's waived challenge as if it had been raised in a late-filed notice of review; but warning future parties to "fully comply" with Rule 3-7.7). This is because a party's failure "to specify a challenge to a particular portion of the report in the petition for review, followed by its raising that challenge in its brief, whether intentional or not, could result in a tactical ambush of the opposing party because that party would not be informed that such a challenge would be raised." *Id.*

Such is the case here. Respondent has not simply raised an issue beyond those challenges specific to his notice or cross notice of review—he has failed to submit any notice of review whatsoever. This constitutes not only a waiver of Respondent's right to seek review of the Referee's recommendation as to costs, but the kind of "tactical ambush" the Court has cautioned against. Under these circumstances, the Court should decline to exercise its discretion to contemplate his challenge.

But even if the Court does consider Respondent's request, it should be denied on the merits. Under Rule 3-7.5(q)(4), a referee may assess a respondent's costs against the Bar if "there was no justiciable issue of either law or fact raised by the bar." The answer brief invites the Court to make this determination because of the

Bar's "concession" that it had no case or disciplinary matter "even remotely on point" and because the Referee found Respondent acted in a "good faith, professional manner." (Resp. Br. at 37).

First, the Bar did not concede, as the answer brief suggests, that there was no case law "even remotely on point." What the Bar stated during the final hearing was that there was no case law directly addressing "defense-created photographic line-ups in the context of the [charged] rule violations." (Tr. III: 498). In other words, the Bar acknowledged that there is no reported case law expressly discussing the alteration of photo line-ups in the context of Rule 3-4.3 or 4-8.4(c). However, the Bar immediately noted that there are numerous cases sanctioning lawyers for engaging in deception and misrepresentation during the discovery process. (Tr. III: 498-505); *see, e.g., The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002) (lawyer suspended for concealing an exhibit during a deposition); *The Florida Bar v. Miller*, 863 So. 2d 231 (Fla. 2003) (lawyer suspended for concealing the existence of certain documentary evidence during client's deposition); *The Florida Bar v. Dupee*, 160 So. 3d 838 (Fla. 2015) (lawyer suspended for failing to disclose the existence of certain evidence and allowing client to present an inaccurate financial affidavit.

Deception and misrepresentation during a discovery deposition form the central allegations against Respondent. While Respondent may not have hid an

exhibit or encouraged a client to present misleading evidence, the question of whether his alteration of the State-provided violated Rules 3-4.3 and 4-8.4(c) presented a viable issue. Accordingly, the answer brief's suggestion that the Bar conceded the lack of a justiciable issue is without merit.

Second, even though the Referee concluded that Respondent acted in good faith in creating and using the altered photo line-ups, such a determination is not tantamount to a finding that that there was no justiciable issue. Indeed, the Referee denied Respondent's motion for a directed verdict, implicitly acknowledging that there was no lawful view of the evidence such that the Bar could never prevail. (cite) This alone indicates that the Bar presented a judiciable issue of law or fact.

Finally, even if the Court approves the Report's findings and conclusions, because the Bar raised a justiciable issue, the Court should order each party to bear its own costs—a recommendation typically approved when the Bar is unsuccessful in its lower prosecution. *See The Florida Bar v. Martocci*, 699 So. 2d 1357, 1360 (Fla. 1997); *The Florida Bar v. Lanford*, 691 So. 2d 480, 481 (Fla. 1997); *cf. The Florida Bar v. Williams*, 734 So. 2d 417 (Fla. 1999) (disapproving a referee's recommendation to award the Bar half its costs when it was unsuccessful below, instead ordering each party to bear its own costs).

CONCLUSION

The Referee's findings of facts and conclusions as to guilt lack competent, substantial support in the record. Respondent knowingly and deliberately created and used the altered photo line-ups which suggested Tellisma had previously identified Joseph as the perpetrator. The Referee's conclusion that Respondent is not guilty of violating Rules 3-4.3 and 4-8.4(c) is clearly erroneous and should be disapproved by this Court.

But even if the Court approves the Report of Referee, the facts of this case establish—at a minimum—a justiciable issue of fact and law. The Court should deny Respondent's request to remand the case to the Referee for a determination of reasonable costs to be assessed against the Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document has been Efiled with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal; and that a copy has been furnished using the E-Filing Portal to Benedict P. Kuehne, Attorney for Respondent, via email to ben.kuehne@kuehnelaw.com and efiling@kuehnelaw.com and to Michael T. Davis, Attorney for Respondent, via email to mdavis@kuehnelaw.com and to Adria E. Quintela, Staff Counsel, The Florida Bar, via email at aquintel@floridabar.org on this 29 day of November, 2018.

Thomas Allen Kroeger
Bar Counsel

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

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

Thomas Allen Kroeger, Bar Counsel