IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JONATHAN STEPHEN SCHWARTZ,

Respondent.
_____/

Case No.: SC17-1391

Fl Bar File No.: 2016-70, 106 (11J)

THE FLORIDA BAR'S

INITIAL BRIEF

ON REVIEW OF RECOMMENDED SANCTION

Jennifer R. Falcone, Esq.
Fl. Bar No. 624284
Bar Counsel
The Florida Bar
444 Brickell Ave., Suite M100
Miami, FL 33131
(305) 377-4445
jfalcone@floridabar.org

Chris W. Altenbernd, Esq.
Fl. Bar No: 197394
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, FL 33602
(813) 221-1500
Fax No: (813) 222-3066
caltenbernd@bankerlopez.com

Patricia Ann Toro Savitz, Esq.
Fl. Bar No. 559547
Staff Counsel
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
(850) 561-5600
psavitz@floridabar.org

Joshua E. Doyle, Esq.
Fl. Bar No. 25902
Executive Director
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
(850) 561-5600
jdoyle@floridabar.org

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PRELIMINARY STATEMENT

A. Abbreviated Names

Jonathan Stephen Schwartz, the Respondent, will be referred to as Mr. Schwartz or the Respondent. The Florida Bar will be referred to as the Bar.

B. Citations to the Record

References to the first Report of Referee will be cited (ROR-1 p.**).

References to the second Report of Referee will be cited (ROR-2 p.**).

References to specific pleadings will be made by document number in the Amended Index of Record and, when appropriate, to a page or paragraph within the pleading. (Doc #1, ¶5).

The transcript of the sanction hearing will be cited as (TS. **)

The Bar's exhibits will be cited as (TFB-Ex. *).

Respondent's exhibits will be cited as (R-Ex. *).

The Bar provides an appendix of critical portions of the record to facilitate review. This brief cites to the appendix as (A. **).

NATURE OF THE CASE

The Bar seeks review of the second Report of Referee in this disciplinary proceeding in which Mr. Schwartz is the Respondent. The Report addresses only the recommended sanction.

This Court previously disapproved the first Report of Referee, which had recommended no violation of the rules. (ROR-1). This Court decided that Mr. Schwartz violated Rule 4-8.4(c) and Rule 3-4.3 in 2015 when he created a fake lineup photograph by altering the actual lineup photograph and then used it during the deposition of the victim of an armed robbery in an effort to obtain a misidentification. This Court remanded for a new determination of the recommended discipline by a new referee. *The Florida Bar v. Schwartz*, 284 So. 3d 393 (Fla. 2019)(A. 24).

The second Report of Referee recommends a non-rehabilitative sanction, a 90-day suspension, comparable to the sanction Mr. Schwartz received in 2012 for earlier dishonest or deceitful conduct. (ROR-2 p. 14)(A. 16). The Bar argues that the Referee's recommendation lacks a reasonable basis in the existing standards and case law. The Bar maintains that a rehabilitative sanction is appropriate in this case and suggests a three-year suspension.

STATEMENT OF THE CASE AND FACTS

Mr. Schwartz is 60 years old and has practiced primarily criminal law in Florida since he was licensed in 1986. (ROR-2 p. 14). This is his seventh disciplinary case, and arises from conduct on February 13, 2015, which this Court has already found to involve deception. (A. 35-57). In the seven years before the filing of this case, Mr. Schwartz was the respondent in three other disciplinary proceedings involving a total of nine violations for dishonest or deceitful conduct. (ROR-2, p. 17-18). In the first two proceedings, he received public reprimands. In the proceeding resolved in 2012, he received a 90-day suspension for creating altered or misleading notarizations. (ROR, p. 16-18)(A. 58).

The facts of this violation are presented in the Bar's earlier brief that was filed in this case on August 22, 2018. An appendix to that brief provides copies of the doctored line-up photographs that Mr. Schwartz created and used in the victim's deposition. The Bar will not reargue the guilt phase in light of the Court's prior opinion. The underlying facts in this case are well summarized by this Court's prior opinion, which is quoted in the Report of Referee:

> Accordingly, the narrative summary of the case is taken directly from the factual and legal findings made by the Florida Supreme Court in its November 7, 2019, Opinion:

> Schwartz is primarily a criminal defense attorney who was admitted to The Florida Bar (Bar) in 1986. He became the subject of these Bar proceedings based upon his use of two defense exhibits during a pretrial deposition conducted on February 13, 2015, while representing the defendant in the case of *State v. Virgil Woodson*, Circuit Case No. 13-2013-CF-012946-0001-XX (Miami-Dade County, Florida). The exhibits at issue included two photocopied versions of black and white police photo lineups in which the victim had originally signed her name and identified the defendant by circling both the defendant's photograph and the designation below it of subject number five. The exhibits also included the signature of the police officer who conducted the photo lineup. The disciplinary issue here centers on the fact that Schwartz altered the photo lineup by replacing his client's image in one exhibit with the image of an alternate suspect whom witnesses other than the victim had identified as the perpetrator and by changing the client's image in the other exhibit by imposing the alternate subject's hairstyle on the client's image. Although the images in the exhibits were altered in this manner, they nonetheless retained the circle around subject number five and the signatures of the victim and police officer below the photographs.

Id. at 395. In discussing the prior Referee's findings and recommendations, the Court noted the undisputed facts that Respondent "knowingly and deliberately created the defense exhibits by altering photocopies of the police lineups and showing them to the victim at the deposition." *Id.* at 396.

Accordingly, the Court held:

> Our consideration of the defense-altered exhibits leads to the inevitable conclusion that they are deceptive on their face . . . . The exhibits retained the witness's circle identifying subject number five in the lineup as the perpetrator and the victim's and detective's signatures. By their very nature, they conveyed the false message

> that the substituted photograph was the photograph that had been previously identified by the victim.

(ROR-2, p. 3-4)(A. 5-6).

This Court found Mr. Schwartz guilty of two violations: (1) Rule 3-4.3 Misconduct and Minor Misconduct; and (2) Rule 4-8.4(c) Misconduct. The case was remanded for a recommendation only as to the sanction by a new referee.

On remand, County Judge Lizzet Martinez was appointed to be the new referee on November 25, 2019. (Doc. #2). The sanctions hearing, which ultimately was conducted as a video hearing, occurred on August 21, 2020. The two-volume transcript of that hearing is a little disjointed because the hearing included both this sanction hearing and a full hearing on a newer disciplinary case for an advertising violation. (TS. 1-307).[1]

This sanction hearing begins on page 70 of the first volume of the transcript. (TS. 70). Mr. Schwartz presented character evidence from twelve witnesses, as well as more than thirty letters and documents describing his character. (TS. 88-187; R-Ex. 1-41).

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[1] The newer case, Case No. 19-983, resulted in a Report of Referee recommending a 10-day suspension for Mr. Schwartz concurrent with the suspension in this case. The Bar is not seeking review in that case, and the sanction is stayed pending this review. *See SC19-983, Order dated 12/17/2020*).

Two of the witnesses were his employees. First, Michelle Clark was a non-lawyer legal assistant who played no role in creating the doctored line-up photographs. (TS. 178-179). She believes the firm is more cautious now in handling cases. (TS. 180). Second, Crystal Beale was another young employee, whose family has known Mr. Schwartz for many years. (TS. 143). She handled calendaring for the firm. (TS. 144-145). She was also studying oriental medicine because of Mr. Schwartz's encouragement of her personal development. (TS. 150-51). She considered Mr. Schwartz "more than dedicated" to his clients. (TS. 153).

His wife testified. At the time of the hearing, she had been married to him for two years, and she had known him for six years. (TS. 184). She explained that he is a professional 24/7 with a pure heart. (TS. 185). He is also "kind of therapist" or "healer" and he is looking to heal himself. (TS. 186).

Virgil Woodson's mother, Pamela Barrett, testified. (TS. 88). She was satisfied with the work his firm had performed for her son, and happy that her son was now at Strayer University studying business. (TS. 90-91). Virgil's father had been in prison a few times and she was happy that Virgil did not receive the ten-year prison sentence that the State had wanted. (TS. 91-93). She explained that he only served about 3½ years, including his time in

jail. (TS. 96). Despite her son's plea to the three felonies, she still believed that he did not commit the crimes and that "Fritz," who had been an acquaintance of her son, was the robber.[2] (TS. 93-94).

Judge Alberto Milian testified under subpoena. (TS. 121). He had known Mr. Schwartz before he went on the bench, and Mr. Schwartz had appeared before him since he had become a judge. (TS. 122). In his opinion, Mr. Schwartz is hard-working, diligent, and fully professional. (TS. 123-125). He testified that Mr. Schwartz provides "outstanding assistance to his clients." (TS. 140).

Mr. Schwartz has been very involved in yoga and related eastern spiritualism. Several witnesses testified about their respect and admiration for him stemming from those activities. (TS. 157-162, 163-167). Richard and Nancy Browne own an acupuncture and massage therapy college, and they have known Mr. Schwartz for more than 30 years. (TS. 100-102). They have also known him in a professional relationship, and Mr. Browne described him as a "warrior of the justice." (TS. 107).

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[2] "Fritz" apparently died about two months after the robbery according to Mr. Schwartz's questions during the victim's deposition. (Vol. II of the final hearing on guilt, April 4, 2018, p. 200).

Thus, the Bar does not dispute that many people think very highly of Mr. Schwartz and believe that he is dedicated to his clients.

Mr. Schwartz was the final witness. (TS. 188-221). Mr. Schwartz tried to portray to the new referee that the first referee and this Court agreed on matters, which the Bar believes may not be the actual understanding of this Court. The transcript reflects:

> Q. Now, you know that Judge Muir found as a result of your testimony that you did not intend to act deceptively, right?
>
> A. That is correct.
>
> Q. And that your motivation for using the created lineup was what you thought necessary and appropriate for challenging a witness identification issue under the constitution, right?
>
> A. That's correct.
>
> Q. And Judge Muir found that to be credible and valid?
>
> A. That's what both she and the Supreme Court said.
>
> Q. But the Supreme Court determined that what you did is just wrong no matter what your motivation and intention was, you should not have created and presented to a witness your own version of a lineup, particularly one that was crafted from the actual lineup, right?
>
> A. Absolutely.
>
> Q. And you understand that?
>
> A. My intent is irrelevant. It is clear that it was deceptive on its face, according to the Supreme Court. I acknowledge their authority and I understand neither me nor any other attorney in

> the future can craft a lineup in this way, and obviously, we've taken corrective measures and I'm pretty sure neither me nor any attorney will ever attempt to do so.
>
> Q. And you accept the Supreme Court's determination that you did wrong?
>
> A. One thousand percent. Just like I accept every judge's decision regardless of whether I think it's right or wrong. This is our system.

Mr. Schwartz explained that he has proactively obtained therapy from Dr. Scott Weinstein at FLA since this proceeding began. (TS. 192-195). Dr. Scott's evaluation letter is one of Mr. Schwartz's exhibits. (R-Ex. 1)(A. 34). Dr. Weinstein found Mr. Schwartz to be a very willing patient and believed that Mr. Schwartz would benefit from continuing their relationship. The short letter states, in part:

> As he told the story of the case in question, he demonstrated both a deep commitment to a determined advocacy of his then client while also accepting the idea that he challenged the limits of the profession. **While he admitted to pushing the boundaries, he firmly believes they were never crossed.**
>
> . . . . Further, he is willing to actively examine his practice strategies, **recognizing his enthusiastic advocacy for his clients may be seen by some as overly zealous.**

(R-Ex. 1)(A. 34) (emphasis supplied).

Mr. Schwartz testified that he thinks he has "the eternal soul of a public defender." (TS. 199). He explained that his father was convicted of a crime when Mr. Schwartz was a teenager. He believed his father was innocent,

and this event caused him to want to be a lawyer like Perry Mason. (TS. 199).

Mr. Schwartz confirmed that he is a practitioner of eastern religions and has been very involved in training prisoners and other people in yoga and meditation. (TS. 199-202).

Concerning his own remorse for this event, Mr. Schwartz explained:

> Q. Do you have remorse over what you did even though your testimony 100 percent accepted by Judge – by the referee was that you certainly didn't intend to be deceptive. Do you have any remorse for having done the act?
>
> A. Of course.
>
> Q. And how would or how have you expressed that remorse?
>
> A. Well, I've expressed that remorse by just having to humble myself, frankly, before the Lord. By going to – in addition to Tuesday night, as you know, I have engaged in therapy not once, but twice a week now. So I'm actually doing therapy three times a week to really look really carefully and understand how did I – how was it that I created a lineup which the Supreme Court, and I fully accept what was inherently deceptive, and how did I make this terrible mistake. I've had to humble myself tremendously to see how did it come about, why did I make this mistake. It's a terrible, terrible error which has now put not just me but everybody involved in my life in peril. So I've had to really look as deeply as I possibly could as to why I created that and why I created something which was inherently deceptive.
>
> And I think I've looked at it very, very deeply and I'm confident at this point right now I've looked at it so deeply that I'm very confident that nothing anywhere close to coming to the line of an ethical violation will ever happen again in my life.

(TS. 204).

Later, in more fully explaining his motivation for creating and using the doctored line-up photographs and his remorse for this action, he explained:

> Q. Mr. Schwartz, I've mentioned it already but let me just finalize this particular point: The Supreme Court acknowledged and Judge Muir, Referee, found as a matter of fact that your motivation was to preserve the constitutional integrity of effective representation of your client; right? You acknowledge that?
>
> A. That's right.
>
> Q. And did you do that work with the lineup, creating that fake lineup, for any reason of dishonesty or try to deceive anyone, including the state attorney or that witness in the case?
>
> A. I believe the proper answer is, no, but it doesn't change the fact that I agree and I acknowledge and I am impacted that the Supreme Court did find it's inherently deceptive. Like they have said, even though it might be a mitigating factor, my intent in order to test the constitutionality and to take what I had already filed was a suggestive lineup and already made a motion to suppress and dismiss the case based on this very lineup which was the primary evidence, and yes, I think that I had the right intent to test the witness. And no, I didn't intend to deceive her, and of course, she wasn't deceived. And the way that I asked the questions was not in an attempt to deceive, but frankly, it's irrelevant because the Supreme Court and I agree that the exhibit in itself was inherently deceptive and that's wrong and I acknowledge that 1,000 percent.
>
> Q. Did your misconduct in that case get weeded out against your client? Did your client, Mr. Woodson, get harmed because of your misconduct?
>
> A. Well, I think quite the contrary. As a result of showing, frankly, any lineup, whether it was this or any lineup, the answers that were provided which was, I couldn't see his face, most importantly. Regardless of frankly, whatever lineup or just to

> show any lineup and to construct a lineup wound up with a witness saying that she didn't ever see his face and/or it looked too dark, it might be someone completely irrelevant in picture number one. That resulted in a fairly quick resolution of the case where we ended up working out a plea to probation and four months in boot camp.

(TS. 208).

The Bar encourages this Court to read Mr. Schwartz's full testimony at the sanctions hearing. (TS. 188-221).

The Bar did not present witnesses at this hearing. It did, however, submit exhibits from his five prior disciplinary proceedings. (TFB-Ex. 2-7)(A. 35-68). Those proceedings are discussed in the argument section of this brief.

Following the presentation of the evidence, both sides presented their legal arguments, which are presented in volume two of the transcript. (TS. 225-307). Those arguments are discussed in the argument section of this brief.

However, the opening portion of Mr. Schwartz's argument warrants explanation as a factual matter influencing the Referee. At the beginning of the argument, counsel for Mr. Schwartz asks the Referee to read the entire transcript of the guilt phase in this case as well as this Court's earlier opinion. (TS. 252). The Bar objected to this argument. (TS. 253). The Referee agreed to reread the transcript.

Then counsel asks the Referee to read this Court's opinion. He explains the need for this as follows:

> Mr. Kuehne: And the second item as a preliminary is my best statement that obviously the Court has to read the Supreme Court's ten-page decision because – and I will be very clear on this – it is not accurate. Not accurate that the Supreme Court made any determination, that it rejected the findings of fact of Judge Muir.
>
> In fact, as stated in the Supreme Court decision, the Supreme Court accepted, completely accepted, the tested and found fact that Mr. Schwartz did not act with an intent to deceive and acted with good motivation. The Court said that doesn't matter in the determination of liability. Those are issues which are – and the Court makes clear on Pages 5 through 6, those are matters that are expected to be applied by the referee at the sentencing stage of the case. But the rule that was violated is a matter of law rule. And it is 100 percent accurate, Your Honor, that the Florida Supreme Court accepted without any controversy every finding of fact made by the Judge as to Mr. Schwartz's conduct and intentions and for the Bar to case the record in another light is simply not accurate.
>
> So, why are we here? We're here because the Supreme Court determined that the law does not allow, despite of good and honest motive, despite no intention to deceive, despite having tried to apply the law, Mr. Schwartz did in fact violate the law by using a lineup that he created, and this particular lineup, and that is a violation of the Bar rules. Mr. Schwartz 100 percent accepts that. I know the Bar has suggested that he doesn't, but every fiber of his testimony is absolutely accurate. He did wrong, he didn't know he was doing wrong at the time, and the Supreme Court essentially acknowledges that, and he did not do wrong for any improper purpose. He just did wrong because the law says you can't – in the defense function that defense can't confront a witness in a deposition with a defense-created lineup in an effort to create an effort for a misidentification.

(TS. 254-256).

At the conclusion of the arguments, the court requested proposed reports from both sides. (TS. 300-301).

The Referee issued the Report of Referee on October 15, 2020. It recommends a 90-day suspension, followed by a one-year term of probation with special conditions of probation requiring continued counseling with Dr. Weinstein, completion of The Florida Bar's Ethics School and Professionalism School, and ten additional hours of ethics CLE. (ROR p. 13-14)(A. 15-16).

The Report finds three aggravating factors: (1) prior disciplinary offenses, (2) a pattern of misconduct, and (3) substantial experience in the practice of law. (ROR p. 17-19)(A. 19-21). Although the Bar asked the Referee to make findings of fact and rely upon the aggravating factor of refusal to acknowledge the wrongful nature of the conduct, the Referee made no reference to this aggravating factor in the Report.

The Report finds four mitigating factors: (1) Character or reputation, (2) full and free disclosure, (3) "length of time this disciplinary proceeding has been pending," and (4) "Respondent testified that he is trying to limit the number of cases and kind of cases as well attempting solve problems before they arise." (sic).

The Bar timely sought review of this Report in order to question the Referee's recommendation a non-rehabilitative sanction when the Standards appear to recommend a longer rehabilitative sanction or even disbarment and the mix of aggravating factors and mitigating factors do not appear to provide reasonable support for a second 90-day suspension following that same sanction in 2012 for a previous violation involving a knowing false statement.

SUMMARY OF THE ARGUMENT

Mr. Schwartz is a 30-year, criminal defense lawyer with six prior disciplinary proceedings. In 2012, this Court suspended Mr. Schwartz's license for 90 days as a non-rehabilitative sanction for submitting notarized documents where the notarization was fake. Three years later, he created this doctored lineup photograph to try to get a victim of a robbery, who does not speak English, to misidentify the robber. This Court has already determined that creating and using these fake exhibits was contrary to honesty and justice. But the Referee nevertheless recommends that a repeat 90-day suspension is the appropriate sanction supported by a reasonable basis in the Standards and the case law.

As the Bar demonstrates in this brief, there are four appropriate Standards applicable in this case. The Referee determined that the

appropriate sanction under each of those Standards was either disbarment or a suspension. The Referee never articulated her reasoning for selecting another non-rehabilitative sanction in light of these Standards at the hearing or in the Report. Although the Standards do not create specific tests for shorter, non-rehabilitative suspensions and for longer terms of rehabilitative suspension, the Bar submits that the length of the suspension as recommended by the Standards, prior to the application of the aggravating and mitigating factors, is determined by an objective analysis of the circumstances of the violations. When these four Standards are analyzed under the facts in this case, they all suggest that a longer rehabilitative suspension or even disbarment is appropriate in this case.

These Standards, of course, are further adjusted by the application of the aggravating and mitigating factors. The Report identified three aggravating factors and four mitigating factors, but it fails to explain how those factors are balanced to give a net adjustment to the recommendation contained in the Standards that would reasonably justify reducing the appropriate sanction to a non-rehabilitative penalty.

The Bar submits that the aggravating factors of multiple prior disciplinary proceedings – including a 90-day suspension in the recent past – and a pattern of misconduct in those proceedings demonstrating multiple

prior offenses involving dishonest or deceitful misconduct, far outweigh the evidence of mitigation. His character, his cooperation in this contested proceeding, the unavoidable delays in this proceeding, and his incomplete mental health treatment simply are not factors that can reasonably reduce what should be a major sanction to a repeat of his last non-rehabilitative sanction.

Moreover, the Referee should have made findings and relied upon Mr. Schwartz's refusal to acknowledge the wrongful nature of his conduct, which is clearly demonstrated in his testimony and confirmed by Dr. Weinstein's report.

When the Referee turned to a consideration of the prior precedent, she rejected useful precedent, describing it as not "analogous" based on distinctions that do not render the precedent unimportant in determining a sanction that is appropriate in this case. The Referee appeared to be looking for a case that was "on all fours" with this case. Given the complexity of the sanction process and the unique facts of each disciplinary proceeding, such a case rarely exits.

The Bar submits the recent decision in *The Florida Bar v. Dunne,* SC18-1880, 2020 WL 257785, and the older decision in *The Florida Bar v. Cox,* 794 So. 2d 1278 (Fla. 2001), allow for substantial

comparison and they do not support a 90-day suspension as the reasonable sanction for this intentional conduct involving misrepresentation and deceit. When the other cases, which explain a strong policy consistently punishing misrepresentation and deceit more harshly than other violations, are considered Mr. Schwartz was on fair notice that a longer suspension would be appropriate in this case, especially following his 2012 proceeding.

The three purposes for sanctions described in *The Florida Bar v. Pahules,* 233 So. 2d 130, 132 (Fla. 1970) are not fulfilled in this case by another 90-day suspension, coupled with a year of probation. That sanction is not reasonable for society; it will not force Mr. Schwartz to achieve genuine rehabilitation; and it will send all the wrong messages to other lawyers who unfortunately need stronger deterrents in today's society.

While the Bar believes disbarment is not an appropriate sanction for Mr. Schwartz at this time, a longer term of suspension is appropriate. Mr. Schwartz needs a longer rehabilitative suspension to actually come to terms with the fact that zealous representation does not override the rules of professional conduct even when he personally believes his client has a meritorious case.

The Bar suggests a three-year suspension.

THE DECISION-MAKING PROCESS IN THIS SANCTION PHASE OF A DISCIPLINARY PROCEEDING

In a typical review of an opinion from a district court of appeal, the parties are obligated to discuss the standard of review in their briefs. But this is an original proceeding filed under this Court's exclusive jurisdiction to "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const.

Nevertheless, it is still useful to begin a review of the referee's report with a consideration of the decision-making process and the applicable rules governing this Court's ultimate determination on the issues presented, which in this review are only the issues necessary to determine an appropriate sanction.

Findings of Fact

As this Court explained in *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016): "This Court's review of a referee's findings of fact is limited. If a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *The Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000)." *See also The Florida Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019); *The Florida Bar v. Parrish*, 241 So. 3d 66, 72 (Fla. 2018); *The Florida Bar v. Vining*, 721 So. 2d 1164, 1167 (Fla. 1998); *The Florida*

Bar v. Jordan, 705 So. 2d 1387, 1390 (Fla. 1998); *The Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996).

Recommendation of the Disciplinary Sanction

The Referee's recommended sanction in a disciplinary proceeding is subjected to greater review by this Court because of this Court's ultimate responsibility to make that decision:

> In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See The Florida Bar v. Picon*, 205 So. 3d 759, 765 (Fla. 2016) (citing *The Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989)). At the same time, this Court will generally not second-guess the referee's recommended discipline, as long as it has a reasonable basis in existing case law and the standards. *See The Florida Bar v. Alters*, 260 So. 3d 72, 83 (Fla. 2018); *The Florida Bar v. De La Torre*, 994 So. 2d 1032 (Fla. 2008).

The Florida Bar v. Altman, 294 So. 3d 844, 847 (Fla. 2020).

It is also important to consider that this Court has given notice to the members of the Bar that it is moving toward harsher sanctions than in the past. *See The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015). In *Rosenberg*, this Court explained that since the decision in *The Florida Bar v. Bloom*, 632 So. 2d 1016 (Fla. 1994), the Court has moved toward imposing

stricter sanctions for unethical and unprofessional conduct. *See also Altman* at 847. As a result, case law prior to 2015 needs to be examined carefully to make certain that the application of sanctions in these earlier cases comports with current standards.

Consideration of Mitigating and Aggravating Factors – Both as Findings of Fact and as a Mixed Question of Law and Fact during the Decision to Select the Appropriate Sanction.

A Referee's findings on mitigating and aggravating factors are treated essentially like any other finding of fact:

> [A] referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See The Florida Bar v. Summers*, 728 So. 2d 739, 741 (Fla. 1999). This standard applies in reviewing a referee's findings of mitigation and aggravation. *See, e.g., The Florida Bar v. Wolis*, 783 So. 2d 1057, 1059 (Fla. 2001); *The Florida Bar v. Hecker*, 475 So. 2d 1240, 1242 (Fla. 1985).

The Florida Bar v. Arcia, 848 So. 2d 296, 299 (Fla. 2003).

"[A] referee's findings of mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record." *The Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007). The burden of demonstrating that the findings in aggravation or mitigation are clearly erroneous lies with the party challenging the findings. *See The Florida Bar v. Glick*, 693 So. 2d 550, 552 (Fla. 1997) (holding that

the burden of disproving a referee's findings of fact or recommendations as to guilt is upon the party challenging those findings). *The Florida Bar v. Marcellus*, 249 So. 3d 538, 544 (Fla. 2018).

In this case, except for the Referee's failure to make a finding on Mr. Schwartz's refusal to acknowledge the wrongful nature of his conduct, the issue is not whether the Referee's findings of fact concerning mitigation and aggravation are supported by evidence. They are. But the factors of aggravation and mitigation are used to "justify" an increase or a decrease in the "degree of discipline to be imposed." *Florida Standards 3.2(a), 3.3(a).* This process of balancing the positive and negative factors is a mixed question of fact and law. It is part of the ultimate decision to impose a sanction.

Thus, when this Court makes the final decision to impose a sanction, the balancing of the mitigating and aggravating factors to justify a sanction is ultimately for this Court to decide. This Court is not second-guessing the referee's findings of fact by concluding that the facts, as found by the referee, do not reasonably justify using mitigating factors or aggravating factors to adjust the sanction. Likewise, when the aggravating factors, objectively applied to the facts, either corroborate the sanction recommended by the standards or support a greater sanction, this Court is free to conclude that a

lesser sanction recommended by a referee does not have a "reasonable basis" in the standards and the factors considered together.

ARGUMENT

I. The Standards considered by the Referee weigh in favor of a longer period of suspension.

In making her recommendation, the Referee "reviewed and considered" four Standards. For each Standard, the Referee considered a pair of sanctions. Each pair recommended either disbarment or suspension – not a lesser sanction. The Referee, at the hearing and in the Report, does not discuss which one of the pair of sanctions she concluded was more applicable in this case for each Standard. The Referee does not explain what sanction she concluded to be the appropriate baseline for the rest of her analysis after combining the results of the four separate Standards.

a. Standard 5.1 – Failure to maintain personal integrity.

The relevant portions of this standard as quoted in the Report provide:

> Absent aggravating or mitigating circumstances and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

> (a) Disbarment. Disbarment is appropriate when a lawyer:
>
> . . .
>
> (6) engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> (b) Suspension. Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included elsewhere in this subdivision or other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Mr. Schwartz clearly engaged in conduct that involved dishonesty, fraud, deceit, or misrepresentation. This Court has already determined it was intentional conduct, recognizing "the undisputed fact that Schwartz knowingly and deliberately created the defense exhibits by altering photocopies of the police lineups and showing them to the victim at the deposition." (A. 29). *See The Florida Bar v. Watson*, 76 So. 3d 915, 922 (Fla. 2011)(recognizing "the well-established principle that 'in order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing,'" citing *The Florida Bar v. Fredericks,* 731 So. 2d 1249 (Fla. 1999)).

It was also intentional as defined in section 1.2 of *Florida's Standards.* Mr. Schwartz created and used the fake line-up photographs with "the conscious objective or purpose to accomplish a particular result." That

particular result was to have the victim of the armed robbery, a woman who did not speak English, confuse the fake line-up photograph with the real photograph, causing her to misidentify the man who is circled as the man who was circled on the photograph during her prior identification. Mr. Schwartz obviously intended to try to create reasonable doubt for the benefit of his client by this artifice.

This deceit was actually more than intentional. It was carefully planned, and artistically created. It involved a heightened level of premeditation.

The Bar submits that this plan is conduct that "seriously adversely reflects on the lawyer's fitness to practice." It demonstrates an "ends justifies the means" mentality, which is a core problem underlying almost all of the Rules of Professional Conduct. Thus, the Bar suggests that Standard 5.1 at least leans in the direction of recommending disbarment in this case. Because Mr. Schwartz's conduct was more than "knowing" the recommendation for suspension in subsection (b) does not fit in this case.

That said, the list of other acts under this standard that warrant disbarment tend to be criminal acts including the sale of drugs and murder. Mr. Schwartz was not charged with a crime. Although his actions certainly border on tampering with or fabricating physical evidence under section

918.13(1)(b), Florida Statutes, he was not charged with this crime. Thus, giving Mr. Schwartz the benefit of the doubt, the Bar maintains that in light of all the circumstances of these violations, this Standard warrants a longer term of suspension – three years – rather than disbarment.

The Referee reached no express conclusion about the application of this standard.

b. Standard 8.1 – Violation of court order or engaging in subsequent same or similar misconduct.

The relevant portions of this standard as quoted in the Report provide:

> Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving prior discipline:
>
> (a) Disbarment. Disbarment is appropriate when a lawyer:
>
> (1) intentionally violates the terms of a prior disciplinary order and the violation causes injury to a client, the public, the legal system, or the profession; or
>
> (2) has been suspended for the same or similar misconduct and intentionally engages in further similar acts of misconduct.
>
> (b) Suspension. Suspension is appropriate when a lawyer has been publicly reprimanded for the same or similar conduct and engages in a further similar act of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Mr. Schwartz did not intentionally violate a prior disciplinary order by his conduct in this case. The question is whether he has been suspended for the same or similar misconduct and has intentionally engaged in further similar acts of misconduct.

Although this is Mr. Schwartz's seventh disciplinary proceeding, only one prior proceeding resulted in a suspension. In 2012, he was suspended for 90 days in Case No. SC11-2143. (TFB-Ex. 7)(A. 58-68). The Report of Referee Accepting Consent Judgment in that case is included in the Bar's Exhibit 7. The report reflects that Mr. Schwartz represented a client in a paternity proceeding. The client resided in Venezuela. She apparently was poor (because he improperly loaned her money) and otherwise had communication difficulties with Mr. Schwartz. In order to keep the paternity proceeding pending in the United States, Mr. Schwartz repeatedly filed financial affidavits that were not properly executed. The first filing had a deficient notarization. The second was signed "JS for E. Ocampo." The third crossed through the "before me" portion on the notarization, and he personally notarized that document with his own expired notary license. (TFB-Ex. 7, ROR paragraphs 2-17). The referee in that case found these acts to be misrepresentations.

Although the current case involves misconduct in a criminal case and not a paternity action, the Bar submits that these two cases involve similar misconduct. Like this case, Mr. Schwartz's conduct in the paternity action bordered on criminal conduct. It is a felony to falsely take or receive an acknowledgment of a signature as a notary. *See* §117.105, Florida Statutes. Like this case, Mr. Schwartz doctored evidence because he thought the ends justified the means.

In both cases he engaged in a misrepresentation without disclosing the circumstances to the lawyer on the other side. In the paternity action, he both filed and served the financial affidavit, and in this case he was caught in the act so that nothing was filed with the court. But the point is that in each case he could have honestly disclosed what he was trying to accomplish and probably could have reached a resolution in each that accomplished legally a process that was sufficient for his client. But in each, he chose the misrepresentation as his preferred solution for his client.

Mr. Schwartz has two prior disciplinary actions that resulted in public reprimands. (TFB-Ex. 3 & 5). But the Bar does not contend they are substantially similar. They are relevant to the aggravating factors, but not to the initial decision under this Standard.

The Bar submits that this Standard fully supports disbarment. The Referee reached no express conclusion about the application of this standard.

c. Standard 7.1 – Deceptive conduct or statements and unreasonable or improper fees.

The relevant portions of this standard as quoted in the Report provide:

> Absent aggravating or mitigating circumstances and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving deceptive conduct or statements, improper division of fees, or unreasonable or improper fees.
>
> (a) Disbarment. Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public, or the legal system.
>
> (b) Suspension. Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

The Bar maintains that Mr. Schwartz "intentionally engage[d] in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for . . . another and cause[d] serious or potentially serious injury to . . . the public or the legal system. This brief has already discussed the intentional nature of the conduct, which obviously was a violation of a

duty owed as a professional. The conduct was engaged in to benefit his client, Virgil Woodson. The only question is whether this misconduct caused potentially serious injury to the public or to the legal system.

The victim in this case is a member of the public. She is actually a member of the public to whom heightened constitutional responsibilities are owed. In 2015, Article 1, section 16(b)(1) of the Florida Constitution provided special rights for victims of crimes. The victim here had the right to "due process and to be treated with fairness and respect for the victim's dignity." Art. 1, §16(b)(1), Fla. Const. (2015).

To be blunt, Mr. Schwartz did not treat this victim with the process that was due or with fairness and respect in the deposition leading to this proceeding.[3] The Bar fully recognizes that Mr. Schwartz had the right to ferret out the potential weaknesses in the victim's identification of his client as the perpetrator. But that right was not unlimited. He could not create fake evidence to trick her into a misidentification any more than a prosecutor could create such fake evidence to seek a conviction. There were many ways to use photos of Mr. Woodson and his similarly appearing acquaintance to see if the victim could sort them out. His way was not one of those ways.

[3] That deposition was the Bar's Exhibit 1 in the trial of the guilt phase of this proceeding.

Whether his misconduct also caused "potentially" serious injury to the legal system, like most other potential harms, depends on events that did not happen because he failed in his attempt. But it is very clear that Mr. Schwartz intended to use the fake lineup photograph to obtain a misidentification from the victim by deception.

Mr. Schwartz has never suggested that he was going to immediately reveal his deception to the victim and the assistant state attorney if he succeeded in his ploy. He intended to use that misidentification for the benefit of his client. It was carefully crafted as a tool to create reasonable doubt at trial and to impeach the victim after she identified his client using the real lineup photograph. This would have resulted in real and serious harm to the legal system. Thus, in this context, the attempt resulted in potentially serious harm.

The alternative sanction of suspension described in this Standard is not a perfect fit for the facts in this case because that sanction discusses "knowing" conduct. The conduct here is more than "knowing." It is intentional. But if this Court were to decide that the potential injury was not "serious," then this case would fit into the suspension recommendation with the heightened fact that the conduct was intentional.

The Bar submits that this Standard supports the sanction of disbarment. It certainly supports a suspension. Although this Standard does not create specific tests for shorter, non-rehabilitative suspensions and for longer terms of rehabilitative suspension, when all of these circumstances are viewed objectively, it does not reasonably support a non-rehabilitative suspension. It supports a longer term of rehabilitative suspension. Again, the Referee reached no express conclusion about the application of this Standard.

d. Standard 6.1 – <u>False statement, fraud, and misrepresentation.</u>

The relevant portions of this Standard as quoted in the Report provide:

> Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation:
>
> (a) <u>Disbarment.</u> Disbarment is appropriate when a lawyer:
>
> (1) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
>
> (2) 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.

> (b) Suspension. Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action.

The Bar maintains that Mr. Schwartz's conduct was "prejudicial to the administration of justice [and] that [it] involve[d] dishonesty, fraud, deceit, or misrepresentation. It was done in a deposition to deceive the victim.

Under Standard 6.1(a)(1), the Bar recognizes that this misconduct did not occur in a courtroom or court file. Mr. Schwartz got caught in his deception at the taking of the deposition and the transcript of the deposition did not end up in a court file for use at trial. It is the Bar's position that a lawyer does not need to be in a courtroom or file a document in a court file to submit a false document "with the intent to deceive the court." When a lawyer is taking a deposition that may be used in court, and the lawyer intentionally submits a false document to a deponent to create improper evidence of misidentification by a victim of a crime, that submission satisfies this rule.

Moreover, under Standard 6.1(a)(2), it is clear that Mr. Schwartz withheld material information at the deposition. It has been Mr. Schwartz's position that the assistant state attorney either did view or could have viewed the doctored exhibit and, thus, he did nothing wrong. But the fact that the

exhibit had been modified was “material” and he affirmatively withheld that information from both the victim and the assistant state attorney. He cannot claim the rules of professional conduct allow him to engage in this deceptive conduct. Similar to the test for “severe injury,” this conduct had the potential to cause a significantly “adverse effect on the legal proceeding.”

The alternative recommendation for suspension under this Standard normally applies when someone else is withholding material information and the lawyer knows of the other person’s misconduct. Nevertheless, it also applies whether the lawyer knows that he is withholding material information. The sanction of suspension is appropriate even when the non-disclosure has no adverse effect. When it is the lawyer himself who is withholding material information and that information is important in a criminal proceeding, it would seem that any suspension under this Standard should be a rehabilitative suspension.

In summary, all four Standards could be used to justify disbarment in this case. The Bar has sought a three-year suspension, largely because Mr. Schwartz’s last sanction was a 90-day suspension and not a rehabilitative suspension. Given that disbarment should be the last resort, the Bar recognizes that Mr. Schwartz’s actions suggest that he is capable of rehabilitation. But that rehabilitation requires that he actually come to terms

with the fact that zealous representation does not override the rules of professional conduct even when he personally believes his client has a meritorious case. If he can actually learn to recognize and control his behavior when faced with this situation, then he may be sufficiently rehabilitated to return to pracitce. Given the report of Dr. Weinstein, the Bar submits that he needs a substantial term of rehabilitation to achieve this status. And that sanction will be a deterrent for similarly inclined lawyers.

From the hearing transcript and the Report of the Referee, it is impossible to know what sanction the Referee believed would be appropriate under the Standards before she applied the aggravating and mitigating factors. But the Bar submits that the Referee could only have reached the recommendation in the Report by substantially reducing the sanction based on the balance between the aggravating and mitigating factors. As the next section demonstrates, findings on the aggravating and mitigating factors simply do not provide a reasonable basis for such a major reduction.

II. The appropriate balance of the aggravating and mitigating factors does not justify a decrease from the longer period of suspension recommended by the Standards.

The Referee found three aggravating factors and four mitigating factors that can be considered in deciding what sanction to impose in this case. The Bar does not contest the findings of fact as to these factors, although it does

contest one factor for which the Referee made no findings. The Bar submits that the net effect of the combination of these factors cannot reasonably justify any substantial decrease in the sanction for Mr. Schwartz.

A. Aggravating factors.

Under section 3.2(b) of the *Florida Sanctions,* the Referee considered: (1) prior disciplinary offenses, (3) pattern of misconduct, and (9) substantial experience in the practice of law. (ROR p. 17-18),

- *Prior disciplinary offenses.* The Report identifies Mr. Schwartz's six prior disciplinary cases and concludes that the analysis of this factor must be limited to the three prior offenses occurring in the last seven years.[4]

In Case No. SC02-787, Mr. Schwartz was publicly reprimanded for seven violations, three involving dishonest or deceitful conduct. (ROR p. 17)(TFB-Ex. 3). The report in that case was uncontested, but the content of

[4] Section 3.2(b)(1) actually states that a referee can consider prior discipline "provided that after 7 years or more in which no disciplinary sanction has been imposed, a finding of minor misconduct will not be considered. . . ." Mr. Schwartz's last sanction was imposed by this Court on May 29, 2012. The conduct here occurred three years later and this petition was filed in 2017. Only the sanction itself will be imposed more than 7 years after the last sanction. There is no gap of 7 years or more without a sanction in Mr. Schwartz's record.

the report suggests that under modern sanction policies a non-rehabilitative suspension would now be appropriate for these seven violations.

In 2007, Mr. Schwartz received an admonishment for violating an advertising rule by using an advertisement without prior review that contained "misleading statements and statements improperly promising results." (TFB-Ex. 6).

In 2012, in Case No. SC11-2143, Mr. Schwartz received a non-rehabilitative suspension for the misconduct in the paternity case previously discussed in this brief.

This factor would provide a reasonable basis for an increase in the sanction to a rehabilitative suspension even if the Standards themselves did not already suggest such a sanction.

- *A Pattern of Misconduct.* A pattern of misconduct is not a factor limited to a period of 7 years. The Referee correctly found 4 prior cases involving a total of 9 violations for dishonest or deceitful conduct. (ROR p. 18-19). This pattern appears to be an escalating pattern. The events in 2012, as well as the events in this case in 2015, border on criminal misconduct. Accordingly, this factor weighs heavily in favor of a longer rehabilitative suspension. The Referee's report does not explain how this factor was discounted to allow for a non-rehabilitative suspension.

- *Substantial Experience in the Practice of Law.* Mr. Schwartz is 60 years old and has been practicing criminal law since 1986. He had nearly 30 years of experience when he created this elaborate deception to try to trick the victim of this armed robbery. To say that he was "old enough to know better" is a huge understatement.

- *Refusal to acknowledge the wrongful nature of the conduct.* The Bar argued that refusal to acknowledge the wrongful nature of the conduct should be a factor under section 3.2(b)(7). As demonstrated by Mr. Schwartz's testimony in the statement of facts, Mr. Schwartz does not plainly acknowledge the wrongful nature of his conduct; he acknowledges this Court's power to find it wrongful and will accept this Court's determination as supreme. But Dr. Weinstein's evaluation confirms that Mr. Schwartz actually thinks he is just zealous and that he did nothing wrong in this case. Mr. Schwartz claims he will not challenge this Court's prior opinion, but nothing in this record suggests that he will not cross the line of professionalism the next time he has a client that he personally believes is innocent.

The Referee does not include this aggravating factor in her report, which presumably means she rejected this factor. But the Referee also does not explain why she made no findings of fact on this factor. The Bar submits that Dr. Weinstein's report alone is compelling, competent substantial

evidence that clearly and convincingly demonstrates a need to have Mr. Schwartz undergo sufficient rehabilitative therapy before he is allowed to handle future cases, not as a condition of probation while he continues to represent new clients that he may personally view as innocent.

- *Vulnerability of the victim.* Finally, the Bar argued that the vulnerability of the victim should have been a factor under section 3.2(b)(8) of the Florida's Sanctions. Admittedly, the victim of the robbery did not testify in this case, but her deposition is in the record. Mr. Schwartz was trying to deceive the victim of a very serious offense – a victim who was not fluent in English and had no reason not to trust that the lineup photograph was genuine. The Referee does not explain her decision not to consider this factor and there is clear evidence that it warrants at least some consideration.

B. Mitigating Factors.

Under section 3.3(b) of the Florida Sanctions, the Referee considered: (7) character and reputation, (5) full and free disclosure to the Bar, (9) delay in disciplinary proceedings, and (10) interim rehabilitation. (ROR p. 19-21).

- *Character and reputation.* The Bar recognizes that Mr. Schwartz presented many witnesses that think highly of him. But these witnesses do not seem to be aware or appreciate Mr. Schwartz's extensive disciplinary

history. His wife would be expected to stand by his side, and Virgil Woodson's mother probably is not concerned about whether he committed misconduct so long as the three felonies did not lead to lengthy sentences for her son. In the process of balancing aggravating and mitigating factors, Mr. Schwartz's prior disciplinary history would reasonably appear to more than offset his reputation in the community.

- *Full and free disclosure*. The Bar does not claim that Mr. Schwartz did not fully and properly participate in this hearing. He did. The issue really is whether Mr. Schwartz has made a full and free disclosure to himself. His participation in this process simply is not a mitigator that should reduce his sanction below a rehabilitative suspension. Again, this factor seems more than offset by the pattern of misconduct demonstrated in his prior disciplinary proceedings.

- *Delay in the disciplinary proceeding*. The Referee did not actually make this finding; she finds that the "length of time" this proceeding has been pending is a factor. The Bar filed this proceeding in 2017 and it did not unreasonably delay this proceeding. The proceeding has been longer than normal because Mr. Schwartz convinced the first Referee to make an erroneous ruling requiring the removal of that referee. And again, the Bar maintains that his advocacy for a non-rehabilitative sanction has

prolonged this case. Thus, the Bar does not deny that delay may be a small factor in deciding the sanction, but it would not appear, on balance, to warrant a reduction in the sanction to a non-rehabilitative sanction.

- *Interim rehabilitation.* Again, the Referee did not actually make this finding. She found that Mr. Schwartz "testified that he is trying to limit the number of cases and kind of cases as well attempting [to] solve problems before they arise." (ROR p. 21). The Bar does not deny that is Mr. Schwartz's testimony. The problem is that Mr. Schwartz needs serious counseling to understand the line between zeal and unprofessionalism, which he has repeatedly crossed in his long career. Even Dr. Weinstein does not believe that counseling is complete. The Bar recognizes that Mr. Schwartz's incomplete, interim counseling is a factor that weighs against disbarment, but it does not weigh against a longer rehabilitative sanction.

In summary, the Referee's Report does not show a reasonable basis in the balance of these factors to justify a reduction in the sanction to a non-rehabilitative sanction, which is simply a repeat of his last sanction. Mr. Schwartz apparently succeeded in his attempt at the sanctions hearing to convince the new Referee that this Court only viewed his violations as technical violations. But this Court bluntly stated:

> While the referee repeatedly stated that Schwartz's use of the defense-created exhibits was either not contrary to, or was

> consistent with, honesty and justice, the exhibits themselves establish the opposite.

(A. 32).

The Referee was too focused on the numerous character witnesses and not on the prior discipline and the actual content of Dr. Weinstein's report.

III. The case law considered as a whole does not support a second non-rehabilitative suspension as a reasonable sanction.

The decision-making process for deciding upon a sanction has two components. The first involves the application of the Standards and the second involves a consideration of the body of case law. It is respectfully submitted that the Referee in the Report of Referee did not consider the case law in the way this Court expects the case law to be considered.

A trial judge is often called upon to make a legal ruling in pending case. When the ruling is not controlled by a statute, the judge hopes the attorneys can find a case "on all fours." *See McElwain v. State*, 777 So. 2d 987, 988 (Fla. 2d DCA 2000). It provides assurance that the trial judge will make a ruling that will not be reversed on appeal.

But the process of deciding upon a sanction is a complex, multi-faceted decision with many options from which to choose. The body of case law is somewhat limited, and each case tends to have its unique facts. As a result,

it is not uncommon for the parties in a disciplinary proceeding to have no case that is "on all fours" with the case at hand. This is such a case.

In the Report of Referee, the Referee repeatedly discusses a case, finds a factual difference between the precedent and this case, and rejects the precedent concluding: "I do not consider [the precedent] to be analogous to this case." (ROR p. 8-13)(A. 10-15). The Referee seems to fail to understand that the differing facts and outcomes in a series of cases addressing a similar problem – in this case dishonest and deceitful misconduct – can help to understand the penalty a lawyer should reasonably expect to receive for his misconduct. And it can help to assure that the penalty is balanced or proportionate, i.e. not an outlier that is too harsh or too mild. The case law helps to evaluate the three-purpose test usually relied upon by this Court.

In 1970, this Court explained the three purposes of lawyer sanctions in *The Florida Bar v. Pahules,* 233 So. 2d 130, 132 (Fla. 1970):

1. The judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty.

2. The judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation.

3. The judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

So, the case law is not expected to find another 30-year lawyer with six prior disciplinary proceedings, who recently had a 90-day suspension for submitting notarized documents where the notarization was fake, and now has created a doctored lineup photograph to try to get a victim of a robbery, who does not speak English, to misidentify the robber. The question is what sanction would be appropriate in light of prior cases to achieve the three purposes of this test in this case.

Among the many cases the Referee considered, the closest case to being on all fours with Mr. Schwartz's situation is *The Florida Bar v. Dunne,* SC18-1880, 2020 WL 257785. The Report of Referee in that case, which involves a consent judgment, is very helpful. Ms. Dunne was an assistant state attorney with 10-years' experience. She obtained recordings of jail calls adverse to the defendant's theory of insanity and did not disclose them prior to two depositions of the defendant's experts. She did not do this despite inquiries from defense counsel about whether she was in possession of additional statements.

After the depositions, she asked for guidance from her supervisor. Soon thereafter, she disclosed the existence of these recordings. However, she improperly thereafter took the position that the recordings had been equally available to defense counsel and that she did not have physical possession of the recordings.

Ms. Dunne was found guilty of three violations, Rule 4-3.3, Rule 4-4.1, and Rule 4-8.4(d). All involve candor and truthfulness. There were no aggravating factors in her case because she had no prior disciplinary history. Because she disclosed the recordings immediately after the depositions, the underlying court had found no prejudice from her violation. She demonstrated her remorse and knew that the violation put her job on the line.

Despite ample character evidence and community service, under the new, harsher approach to sanctions, she received a one-year suspension for this first violation.

The Referee in this case found *Dunne* not to be "analogous" "because the role of Dunne, as a prosecutor, is different than the role of [Mr. Schwartz] as defense counsel." With all due respect to the Referee, prosecutors may have a heightened constitutional obligation to reveal evidence to the defense, but the basic duties concerning dishonesty and deceitful misconduct are the same for all lawyers. If a less experienced prosecutor

with no prior record, who at least voluntarily revealed the hidden records, received a one-year suspension as her first sanction, it is hard to see how Mr. Schwartz gets a second bite at a 90-day suspension. Ms. Dunne's one-year suspension ought to be the bottom of the range for Mr. Schwartz. And the Bar maintains that a three-year suspension is appropriate here.

The Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001), has similarities to the *Dunne* case, except for the fact that it was nearly twenty-years earlier, and prior to this Court's announcement of the harsher sanction policy. *See The Florida Bar v. Adler*, 126 So. 3d 244, 247 (Fla. 2013); *The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015); *The Florida Bar v. Altman*, 294 So. 3d 844, 847 (Fla. 2020). The federal prosecutor with no prior disciplinary record received a one-year suspension for placing a witness on the stand using an alias to hide her actual identify under circumstances where the prosecutor felt the deception was necessary. The *Cox* case was well known before Mr. Schwartz committed his deception in this case. It is not unfair to him to hold him to harsher sanctions, especially given his prior suspension. The Referee found this case not to be "analogous" because the conduct in *Cox* occurred in the courtroom and Mr. Schwartz's misconduct was not "presented to the tribunal." But professionalism today is perhaps

even more of a problem in discovery than in the courtroom. The idea that lawyers only need to tell the truth in the presence of a judge is not tenable.

While the other cases are not factually as similar to Mr. Schwartz's case, they are useful in setting the range of the sanction. They demonstrate that this Court has a long-standing policy of treating dishonesty and deceit as a category where serious sanctions are imposed, often on the first offense and often rejecting a lesser sanction recommended by the referee.

In *The Florida Bar v. Dupee*, 160 So. 3d 838 (Fla. 2015), for example, this Court rejected the referee's recommendation of a ninety-day suspension and imposed a one-year suspension. Ms. Dupee represented the wife in a divorce. With her knowledge, the wife attempted to hide $480,000 from her husband by writing a check to a non-existent trust and then moving the funds to other accounts. This ruse was not successful. With no discussion of any aggravating factors, this Court determined that a one-year suspension was appropriate. This Court explained: "Other cases show that intentional misrepresentation to a court is regarded as serious misconduct which usually results at minimum in a suspension requiring proof of rehabilitation for reinstatement." *Id. at 853.* Mr. Schwartz argues that his misrepresentation was only in a deposition that could later be used in court, and not actually in

court, but that distinction is not much of a justification for his deceptive conduct impacting a criminal case.

The Referee also cites to *The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997). Mr. Hmielewski represented a plaintiff in a wrongful death, medical malpractice case in Minnesota. The client had taken the decedent's medical records from the Mayo Clinic, and thus the Clinic could not find its records to produce. Mr. Hmielewski alleged that the Clinic failed to maintain records when he knew his client had the records. In discovery, Mr. Hmielewski hid this fact until his client's deposition. Before the deposition, the client was told to tell the truth if asked. And he did tell the truth at the deposition. *Id.* at 220.

In Minnesota, Mr. Hmielewski's client was fined $105,159. Mr. Hmielewski agreed to pay this fine for his client. When the matter was referred to the Florida Bar, the referee recommended a one-year suspension. This Court disagreed and suspended him for three years. In so doing, this Court emphasized that the referee had found that Mr. Hmielewski did not have a selfish motive, and explained:

> If it were not for this finding, the extremely strong character evidence, and Hmielewski's relatively unblemished record (one admonishment for minor misconduct in twenty-one years of practice), this Court would have no hesitation in imposing disbarment. Under the circumstances, we have determined that

> Hmielewski's misconduct warrants imposition of a three-year suspension.

Id. at 221.

The facts in *Hmielewski* are admittedly different than the facts here, but both involve intentional deception to achieve a favorable outcome for a client. Mr. Hmielewski avoided disbarment in 1997 due to his "relatively unblemished record," and would not likely avoid that sanction today. But the Referee finds this case to be "not analogous because records were not hidden in this case, and the prosecutor had access to the original line-up." (ROR. p. 11). Of course, what was hidden, and what the prosecutor did not have access to, was the fact that the deposition exhibit was a fake lineup photograph created by defense counsel.

The Bar also provided the Referee with cases emphasizing that this Court views cumulative misconduct more seriously than isolated instances of misconduct. In *The Florida Bar v. Walkden*, 950 So. 2d 407, 410 (Fla. 2007), this Court explained:

> [T]his Court views cumulative misconduct more seriously than an isolated instance of misconduct. *The Florida Bar v. Carlon,* 820 So. 2d 891, 899 (Fla. 2002). In determining the appropriate discipline, we consider prior misconduct and cumulative misconduct, and treat cumulative misconduct more severely than isolated misconduct. Disbarment is appropriate where, as here, there is a pattern of misconduct and a history of discipline.

> Additionally, cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct. *The Florida Bar v. Vining,* 761 So. 2d 1044, 1048 (Fla. 2000).

These cases, when examined collectively, do not lead to the reasonable conclusion that another 90-day suspension is "fair to society." A longer rehabilitative suspension would not deprive the public of the services of a "qualified lawyer," given that the Referee recommends that this lawyer needs further psychological counseling to address his over-zealous misconduct.

Another 90-day non-rehabilitative sanction is not a reasonable sanction to punish Mr. Schwartz's breach of ethics, and more importantly, it is not providing the impetus for Mr. Schwartz to seek genuine rehabilitation.

Finally, and it may be a sad reflection on the state of our profession, but a repeat 90-day sanction sends entirely the wrong message to other lawyers who need to be deterred from similar misconduct.

The appropriate length of the suspension is obviously a matter for this Court to decide, but anything less than a year seems unreasonable to the Bar, and the Bar continues to believe that under current sanction policies, a three-year sanction is appropriate.

CONCLUSION

The Bar asks this Court to reject the recommendation of the Referee for a 90-day suspension and impose a rehabilitative suspension of three years' duration. The Court should impose the costs recommended by the Referee.

Respectfully submitted,

*/s/ Chris W. Altenbernd*_____
Chris W. Altenbernd, Esq.
Florida Bar No: 197394
Email: service-caltenbernd@bankerlopez.com
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, FL 33602
(813) 221-1500
Fax No: (813) 222-306

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 8th day of January, 2021 to:

Richard Baron, Esq.
Baron, Breslin & Sarmiento
169 East Flagler St., Suite 700
Miami, FL 33131
rb@richardbaronlaw.com
Attorney for Respondent

Jennifer R. Falcone, Esq.
444 Brickell Ave., Suite M100
Miami, FL 33131
jfalcone@floridabar.org
Attorneys for The Florida Bar

Patricia Ann Toro Savitz, Esq.
651 E. Jefferson St.
Tallahassee, FL 32399
psavitz@floridabar.org
Attorneys for The Florida Bar

Benedict Kuehne, Esq.
Kuehne Davis Law, P.A.
100 SE 2nd St., Suite 3550
Miami, FL 33131
Ben.kuehne@kuehnelaw.com
Attorney for Respondent

/s/ Chris W. Altenbernd
Chris W. Altenbernd, Esq.

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/s/ Chris W. Altenbernd
Chris W. Altenbernd, Esq.