IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1391
The Florida Bar File No. 2016-70,106 (11J)

THE FLORIDA BAR,
Complainant,

-vs-

JONATHAN STEPHEN SCHWARTZ,
Respondent.

ANSWER BRIEF OF RESPONDENT

ON APPEAL FROM REPORT OF REFEREE
HON. LIZZET MARTINEZ, REFEREE/COUNTY JUDGE

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STATEMENT OF THE CASE AND FACTS[1]

A. The Original Bar Proceedings.

This appeal by The Florida Bar challenges the findings and recommendations of the Referee solely on the issue of sanctions. This case began with a complaint filed by a Florida prosecutor against her criminal defense adversary, respondent Jonathan Schwartz, arising from a well-litigated criminal felony case. Acting on the complaint, The Florida Bar initiated grievance proceedings accusing respondent of utilizing a defense-created photo line-up during a deposition to test the victim's certainty as to the identification of the defendant as the perpetrator. The Referee, finding that because respondent acted in good faith, he did not violate the rules or engage in misconduct. This Court, concluding that respondent's intentional use of the altered

[1] This Answer Brief utilizes the same references utilized in the Initial Brief. The Florida Bar is referred to by its proper name, as Complainant, or as the Bar. Respondent Jonathan Schwartz is referred to by his proper name or as respondent. The First Report of Referee is indicated as ROR-1 followed by appropriate page numbers. The Second Report of Referee is indicated as ROR-2 followed by the appropriate page numbers. The final hearing transcript before Referee Lizzet Martinez is indicated by the letter "T" followed by a volume and page number. The exhibits are referenced as TFB Ex. and Respondent Ex. References to the Appendix use the letter "A." The Supplemental Appendix is referred to as "Supp.App."

line-up was itself misconduct, disapproved the Referee's conclusion and determined "that Schwartz violated the Bar Rules as charged …" *The Florida Bar v. Schwartz*, 284 So. 3d 393, 398 (Fla. 2019). This Court remanded the proceedings "to a newly appointed referee for a hearing limited to a determination of recommended discipline." *Id.*

B. The Sanctions Hearing on Remand from This Court.

The case was remanded to the newly appointed Referee to determine the appropriate recommended sanctions. The sanctions hearing focused on respondent's motivation for his admittedly improper conduct, consistent with the Court's directive that respondent's motive was a mitigating factor: "Indeed, if motive were the standard for evaluating whether the rule was violated, there would be no reason for 'absence of a dishonest or selfish motive' to be a mitigating factor." *The Florida Bar v. Schwartz*, 284 So. 3d at 396.

The Referee, upon consideration of the extensive presentations of The Florida Bar and respondent, recommended a suspension of ninety (90) days followed by a period of probation for one (1) year (A. 16). The Referee noted that none of the authority cited by the Bar in support of a more serious disciplinary recommendation was

analogous to the facts of this case (A. 9-15). The Referee included considerable legal authority supporting the recommended non-rehabilitative suspension (A. 15). Both the Referee and respondent acknowledged this Court's determination that respondent's conduct violated the cited Rules of Professional Conduct (A. 3-6).

C. Facts Presented at the Sanctions Hearing.

In following this Court's directive that the "absence of a dishonest or selfish motive" was an allowable mitigating factor, Mr. Schwartz presented extensive, incontrovertible evidence that he was a diligent and tireless advocate whose only interest in his defense of Virgil Woodson, his client, was to investigate and pursue his good faith defense of mistaken identification produced by a constitutionally impermissible suggested line-up. Mr. Schwartz has spent his entire professional career representing the less privileged whose lives were impacted by criminal proceedings, mental health issues, or debilitating civil trauma (T. 139-140, 148). From the start of his career in 1985 as an intern in the Office of the Miami Public Defender and continuing until 1991 when he opened his own firm, he dedicated his life to advocating on behalf of those who otherwise could not afford the passionate, persistent, tireless, and creative

representation that his firm has now provided for almost 4 decades (T. 20, 198).

People who interacted with Mr. Schwartz from all walks of life -- judges, psychologists, clients, and colleagues -- submitted statements and testimony on his behalf and clearly established that he has dedicated his life to the pursuit of bettering the lives of his clients and those around him (T. 88-176). His staff testified as to his dedication during the work week and his enthusiasm when representing his clients (T. 143-156, 178-183). His approach to each case and every client was to attempt to bring positive change, whether in focusing on downward departures in criminal sentencings or finding community support and services for clients in need (T. 174).

The Referee heard evidence of and considered his good works and life-long commitment to bettering himself even as he works diligently to better his clients' lives (T. 180-181, 186). Mr. Schwartz energized and revitalized his professional well-being and personal life by his sabbaticals at various times in his career (T. 200). He focused on becoming much more spiritual and gained insight as an ordained Interfaith Minister, traveling to observe various cultures throughout

the world and understanding the importance of holy sites to the believing populations (T. 200).

Another sabbatical led him to found and operate his non-profit organization Freedom Yoga through which he developed and implemented stress-reduction classes and seminars in local jails, a program that has spread throughout the Florida correctional system, including Florida and federal prison facilities (T. 202-203). Freedom Yoga continues to this day with Mr. Schwartz's guidance and the involvement of so many other volunteers (T. 203).

Knowing that his passion for helping others could be improved by developing his passion for empathy and understanding, Mr. Schwartz was admitted to a Ph.D./Psy.D. program at Nova Southeastern University (T. 198) where he improved his ability to incorporate an understanding of psychological and motivational issues, causes, and impacts involving his clients (T. 198).

Evidence also included how Mr. Schwartz has managed through the long pendency of the Bar grievance proceedings, what he has done to learn from his professional errors and misconduct, and how he has turned the past into a positive and productive future for himself, his family, his clients, his law firm and staff, and his

profession (T. 108, 190-193). He has taken proactive steps in accepting responsibility for his conduct (T. 191) and ensuring that ethics and professionalism are at the forefront of everything he does, both within and outside the law (T. 191-193). In November 2019, he voluntarily initiated contact with Florida Lawyers Assistance (FLA) led by Dr. Scott Weinstein and has since participated diligently in both Group and Individual therapy (T. 192-195). Dr. Weinstein's letter and testimony underscored that Mr. Schwartz has turned his character trait of empathy for others into a positive and productive source of learning how to utilize his skills in a professionally acceptable manner to help others in their times of legal need (A. 34). The Bar mistakenly used Dr. Weinstein's report to suggest that Mr. Schwartz has not accepted full responsibility for his creation of the misleading exhibit, an argument that was entirely unsupported and contrary to the actual evidence (Initial Brief at 17, 38, 41). Dr. Weinstein made it exceedingly clear that Mr. Schwartz acknowledged his misconduct and has taken extensive corrective action (A. 34).

Dr. Weinstein's observations were echoed by the testimony of Circuit Judge Alberto Milian, who provided passionate assurances that Mr. Schwartz was an asset and example to young lawyers in his

courtroom and always conducted himself with the utmost professionalism (T. 118-133).

Mr. Schwartz and his law firm continue to represent clients with diligence and passion, balancing a reasonable case load of 150 open felony cases (T. 21). The Referee considered the affordable cost and quality legal services provided by Mr. Schwartz and his team as an indication of his professionalism and remorse, as well as recognizing the impact of an unnecessarily lengthy suspension on his ability to continue his representation of a significantly disadvantaged population (ROR-2 at 13-14, A. 15-16).

STANDARD OF REVIEW

This Court's review of a Referee's Report of Recommendation is two-fold. Concerning factual findings, "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)." *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016).

This Court further explained and set forth the legal standard for review of a referee's report and recommendation in *The Florida Bar v.*

Martocci, 699 So. 2d 1357 (Fla. 1997):

> In bar discipline cases, an attorney may be found guilty only if the referee concludes that the alleged misconduct was proven by clear and convincing evidence. *Florida Bar v. Neu*, 597 So. 2d 266, 268 (Fla. 1992). Further, a referee's findings of fact carry a presumption of correctness which will be upheld on review "unless clearly erroneous or lacking in evidentiary support." *Florida Bar v. Stalnaker*, 485 So. 2d 815, 816 (Fla. 1986); Florida Bar v. Neely, 502 So. 2d 1237 (Fla. 1987). If the referee's findings "are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." *Florida Bar v. MacMillan*, 600 So. 2d 457, 459 (Fla. 1992); *Florida Bar v. Weed*, 559 So. 2d 1094 (Fla. 1990). Since the Bar is challenging the referee's findings of fact, it has the burden of showing that the referee's report is clearly erroneous or unsupported by the record. *Florida Bar v. Lanford*, 691 So. 2d 480, 481 (Fla. 1997) (citing *Neu*, 597 So. 2d at 268).

See also The Florida Bar v. Vannier, 498 So. 2d 896, 898 (Fla. 1986) (referee's factual findings and recommendation as to guilt have a presumption of correctness and must be sustained "unless clearly erroneous or without support in the record."); Rule 3-7.7(c)(5) of the Rules Regulating The Florida Bar ("[u]pon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified.").

On matters of discipline, the Referee's recommended sanction is subject to a broader level of review, as described in *The Florida Bar*

v. Altman, 294 So. 3d 844, 847 (Fla. 2020):

> 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).

This Court explained the appropriate standard when conducting its first review and then remanding this case to the newly appointed referee:

> But as to the actual recommendations of guilt, the referee's factual findings must be sufficient under the applicable rules to support the recommendations. *See Fla. Bar v. Shoureas*, 913 So. 2d 554, 557-58 (Fla. 2005). Ultimately, **the party challenging the referee's findings of fact and recommendations as to guilt has the burden to demonstrate "that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions."** *Fla. Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2007).

The Florida Bar v. Schwartz, 284 So. 3d at 396 (emphasis added).

SUMMARY OF THE ARGUMENT

The recommended discipline of a non-rehabilitative period of suspension followed by probation supervision for one (1) year is

supported by the facts and the law and is reasonable under the circumstances of this case. Respondent maintained at the hearing that a non-rehabilitative suspension was an appropriate, reasonable, and measured punishment in recognition of his acknowledgment of his wrongdoing, the nature of his misconduct, and his rehabilitative efforts. Respondent acknowledged his misconduct occurred during the deposition of a robbery victim in which the good faith defense was mistaken identification based on independent evidence that another person committed the crime (A. 25, 31).

Respondent created a defense photo line-up by changing the police photo-display presented to the victim, intending at the time that his testing of the accuracy of the victim's identification of the defendant was consistent with precedent. Respondent readily conceded his then-understanding of legal precedent was incorrect when this Court explained that such defense techniques were impermissible. *The Florida Bar v. Schwartz*, 284 So. 3d at 396. Respondent explained in his Bar hearing that he did not act to deceive or mislead the victim and believed he fully cautioned the witness to consider the photographic display as his own line-up creation. During her deposition and prior to the identification in the

police station, the victim testified she had seen Mr. Woodson at the police station immediately prior to being presented with the photo-lineup: when "I show up, I saw Mr. Woodson." (Supp. App pg. 176). It was in this context of believing he had a good faith basis to pursue a misidentification defense that respondent engaged in his now understood and acknowledged line-up misconduct. Respondent presented the witness with his version of the line-up as a black-and-white photocopy and did not use or alter the original color photos used by the police during the actual photo line-up (A. 5, 25). Respondent testified that during the deposition, when the prosecutor objected to his examination, he fully explained his creation of the line-up, withdrew the exhibit, and did not return to the line-up again (Supp. App. Pg. 190-194). Respondent further indicated that since that incident, he has never again created a defense line-up to challenge a victim's identification without pre-authorization by the court (T. 191).

Contrary to The Florida Bar's assertion at page 22 of its Initial Brief that respondent refused "to acknowledge the wrongful nature of his conduct," Respondent fully accepted responsibility for his wrongdoing and expressed not only remorse but further indicated his

good faith efforts to set the matter right (T. 191, 204). The Referee acknowledged Respondent's understanding that his actions, while taken in good faith, were contrary to law and precedent (T. 190-191).

The Referee's recommendation of a non-rehabilitative suspension followed by probation for one year was appropriate and reasonable, representing a sanction consistent with the Florida Standards for Imposing Lawyer Sanctions, the relevant mitigating and aggravation factors, and case law provided by the parties. Upon careful consideration of all relevant factors, the Referee recommended a non-rehabilitative suspension and probation sanction that is based on reason, supportive facts, and legal authority. This Court should approve the recommended sanctions.

ARGUMENT

I. THE REFEREE'S RECOMMENDED SANCTIONS ARE REASONABLY BASED ON THE FACTS AND THE LAW AND ARE CONSISTENT WITH THE APPLICABLE STANDARDS, ALL OF WHICH WERE CAREFULLY CONSIDERED.

As an initial matter, The Florida Bar argues that this Court is obligated to make its own determination as to the applicable mitigating and aggravating factors (Initial Brief at 35). On this record, however, the Referee considered all aggravating and mitigating

circumstances presented by the parties and gave each factor appropriate weight. The Referee ignored none of the cases cited by The Florida Bar, and did not diminish the Bar's argument. To the contrary, the Referee analyzed the totality of the admitted offense conduct the circumstances giving rise to that conduct, respondent's immediate corrective action, respondent's further efforts to learn from his misconduct, the applicable precedent governing analogous lawyer misconduct, and the appropriate level of discipline to punish respondent and act as a warning to other lawyers on matters involving actions that by their very nature are misleading. The Referee's cautious and measured consideration of all factors presented by The Florida Bar is reasonably based on the record and should not be subjected to second-guessing by the Bar. "[T]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." *The Florida Bar v. Altman*, 294 So. 3d at 847.

The Bar offered no showing of clear error in the Referee's recommendation and has not identified that the Referee overlooked or discarded any of the arguments or authority presented during the grievance hearing. In the absence of clear error, this Court should

not stray from the Referee's recommendation. *The Florida Bar v. Altman,* 294 So. 3d at 847 (referee's recommendation is entitled to approval "as long as it has a reasonable basis in existing case law and the standards.").

The Referee considered the applicable standards argued by The Florida Bar and respondent. The Report and Recommendation includes the Referee's discussion of the applicable standards (ROR-2 pg. 5-7; A. 7-9). Those included suspension as a sanction, with the Referee recommending that a non-rehabilitative suspension with a term of probation reflected the level of discipline needed in this matter. The recommendation was greater than that proposed by respondent, and less than that argued by The Florida Bar. The Referee's recommendation comprehensively compiled all the relevant facts and applicable law. The extensive record and hearing were reflected in the discussion and analysis of the applicable legal authority and precedent underscoring the Referee's detailed understanding of the specifics of this case and their place within the disciplinary system (ROR-2 pg. 7-13).

A. Standard 5.1 – Failure to Maintain Personal Integrity.

The Referee considered and discussed Standard 5.1, among

others, in concluding that a non-rehabilitative suspension was the appropriate disciplinary sanction. The standard recognizes that suspension is an appropriate sanction.

> **(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 . . . other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Florida Standards for Imposing Lawyer Sanctions 5.1. The Florida Bar's argument that Standard 5.1 "at least leans in the direction of recommending disbarment in this case" (Initial Brief at 25) is inconsistent with the record of these proceedings in which the Bar sought a 3-year suspension (Initial Brief at 26) and never argued for disbarment.[2] Absolutely, no record evidence or proffered case authority supported the bar's enhanced suspension argument. The Referee's application of Standard 5.1's suspension provision is more

[2] The Florida Bar's proposed Report of Referee argued for "Suspension from the practice of law for a period of three years." (Supp. App pg. 856).

than reasonable and appropriate considering the context of respondent's misuse of the photo line-up, his immediate and candid explanation to the prosecutor and corrective action taken, and his ready recognition of this Court's finding of wrongdoing. Respondent clearly recognizes that he did wrong, and further, has taken every imaginable step to affirmatively demonstrate as much. (T:192-195, 207). The Bar's argument that Mr. Schwartz did not accept responsibility is simply inconsistent with the extensive record developed throughout this extended litigation.

Contrary to the arguments in the Initial Brief, the facts explaining respondent's use of the photo line-up did not reveal his use was "carefully planned, and artistically created." (Initial Brief at 25). At the initial grievance trial, the entirety of the evidence was that respondent arranged the photo line-ups to test the victim's identification and did so in a manner not intended to mislead her in any way (Supp. App. Pg. 363-364, 374, 493). In retrospect, he readily recognized and understood his defense line-ups were potentially misleading on their face, although he had not intended them to mislead. The original Referee found respondent's actions were taken in good faith (T. 190; ROR-1 pg. 28) and the successor Referee made

no findings of bad faith or intentional deception on respondent's part (ROR-2 pg. 1-21, A. 3-23). As indicated by the Referee, the initial line-up and the altered lineup were both made available to the prosecutor (ROR-2 pg. 10). Mr. Schwartz never tried to hide from the prosecutor or the witness that the line-up was his own creation made by changing the original line-up display. Mr. Schwartz explained his use of the exhibit to the prosecutor when she objected. He reminded the prosecutor of the independent evidence that another person, Fritzlin Jean, had been separately identified as the perpetrator. Mr. Schwartz immediately withdrew his exhibit and did not continue with that line of questioning when the prosecutor objected. In support of his reasonable contention that the original police line-up was misleading, Mr. Schwartz sought to suppress the line-up and the victim's out-of-court identification as unlawful, deceptive, and misleading (T. 207).

Respondent's admittedly improper conduct was not intended to deceive and did not represent an "ends justifies the means" mentality as suggested by The Florida Bar (Initial Brief at 25, 28). As part of his defense efforts, Mr. Schwartz sought to suppress the line-up and had discussed with senior prosecutors the possibility that the defendant

was not the actual perpetrator (Supp. App. pg. 348). Respondent's use of the line-up exhibits, never occurring before or afterwards, was not akin to the criminal conduct claimed by The Florida Bar for the first time on appeal (Initial Brief at 25-26). Without even making that argument to the Referee, it is apparent the Referee saw the conduct in its rightful context: respondent attempted to misuse the discovery process to get to the truth of the potential misidentification, but immediately stopped and explained his actions when the prosecutor objected.

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

The Referee correctly applied Standard 8.1:

> **(a) Disbarment.** Disbarment is appropriate when a lawyer:
>
> * * *
>
> (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.

Florida Standards for Imposing Lawyer Sanction 8.1.

The Florida Bar agrees respondent did not intentionally violate a prior disciplinary order but instead focuses on whether respondent

had been suspended for the same or similar misconduct and intentionally engaged in further similar acts or misconduct. Respondent's prior suspension is not "the same or similar conduct" for purposes of disciplinary sanctions. In 2012, respondent was suspended for 90 days in Case No. SC11-2143. (TFB-Ex. 7; A. 58-68). That case involved a paternity proceeding in which respondent represented a client who resided in Venezuela. Respondent consented to the judgment arising from his notarization of the client's affidavit not in his presence. Respondent affirmatively omitted any reference to the client appearing before him and inserted his initials next to his signing of her name, thereby making it clear on the face of the document that he signed the declaration in her stead as she had authorized him to do. The notarization statute at the time required an affiant's physical presence when signing, although the statute has since been amended to allow an audio-video appearance in the instance of a known person whose signature is notarized. § 117.107(9), Fla. Stat. (2019).

That prior suspension is and was found to be entirely different from the case under consideration. Here, respondent took no action before a court, but readily disclosed his altered line-up to the

prosecutor during the pretrial deposition. His intention was to challenge the accuracy of the victim's identification, based on independent evidence that another person had been identified as committing the crime (T. 190-191) Importantly on this point, the Referee acknowledged that opposing *counsel was aware of the defense line-ups and was not misled* (ROR-2 pg. 10-11).

The Referee did not overlook respondent's prior suspension but determined it did not favor the Bar's argument for a more serious suspension. That the Referee considered the entirety of respondent's disciplinary conduct is precisely the role of a referee, whose recommendation was based on the facts, an analysis of the relevant law, and an application of the standards suggested by the parties.

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

The Referee applied Standard 7.1:

> **(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.

Respondent acknowledged making a serious professional and ethical error when creating and using the modified line-up that was potentially misleading on its face. He did so during a deposition at which opposing counsel, an experienced prosecutor, was present and had ready access to the exhibit. He never attempted to lead the witness into believing the line-up was the same as the one she was shown by the police, an array that was in color and not the black-and-white photocopy he used. The victim had ample time to review the line-up, and when the prosecutor objected, he withdrew the exhibit, and the deposition proceeded without incident. While the exhibit was itself misleading because it still contained the original circle that had been around the defendant's picture, the victim was not misled and nothing in the record indicates that she was misled or confused about the line-up. The record is likewise devoid of evidence supporting the Bar's argument that respondent created "fake" evidence to trick the victim into misidentifying a perpetrator. To the contrary, respondent's use of the defense constructed line-up during a deposition, while admittedly improper, was intended to determine the strength of the victim's identification done under circumstances indicating impermissible police suggestion of the

defendant as the perpetrator. The victim herself indicated that she saw Mr. Woodson (the defendant) just prior to the police identification. The entire case was resolved with a reasonable plea agreement soon after the conclusion of the deposition.

Indicative of respondent's effort to truly determine the identity of the perpetrator, respondent immediately desisted from use of the line-up when the prosecutor objected, and then moved on to other areas of his deposition examination. The deposition concluded without incident or disruption, and the victim was never made to feel uncomfortable or deceived. (T:190-192).

Respondent's focus on a potential misidentification was not limited to the improper use of a facially misleading exhibit during the deposition. Respondent challenged the admissibility of the victim's police station identification as being unconstitutionally suggestive by filing a motion to suppress (T. 207). The weakness of the defendant's identification as the perpetrator led to a reasonable case disposition, resulting in the defendant being sentenced to boot camp and thereafter finding positive direction in life by enrolling in college (T. 208).

Based on the record and the standards, the Referee's non-

rehabilitative suspension recommendation is reasonable.

D. Standard 6.1 – False statement, fraud, and misrepresentation.

Standard 6.1, considered by the Referee, states:

> 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) Disbarment.** 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.

As indicated in this Standard, suspension is an appropriate penalty based on deception occurring in the presentation of documents. In this instance, no deceptive conduct was done in the presence of the court, and the discovery issue was rectified in real time during the deposition when respondent explained his creation

of the changed exhibit to the prosecutor, revealed his purpose in presenting it to the victim as a means of challenging her police station identification, and withdrew the exhibits upon objection. The exhibit document was never created or used to mislead the victim or the court, as the Bar contends (Initial Brief at 33).

The record evidence further indicates that respondent did not withhold information, but affirmatively disclosed the entirety of the exhibit and its purpose to challenge the legitimacy of the victim's police station photo identification. Respondent withheld nothing from the prosecution, a finding of fact made by the Referee. (ROR-2 pg. 10). Respondent's immediate corrective and remedial action underscores that a non-rehabilitative suspension is the appropriate discipline consistent with this standard.

E. The Referee Correctly Applied the Applicable Standards.

In conclusion, the applicable standards were considered and applied by the Referee, leading to a reasoned and fact-based recommendation of a non-rehabilitative suspension followed by probation as the appropriate consequence for respondent's admitted misconduct. The Referee cautiously and carefully analyzed the

applicable standards and considered all mitigating and aggravating circumstances presented by the parties and apparent in the record. The Referee reviewed the disciplinary history, determined which ones were most appropriate, and settled on the suspension recommendation best suited as punishment here. The Referee did not accept respondent's suggestion of a lesser term of suspension, nor did the Referee find the Bar's argument for a longer suspension to be appropriate. The Referee's recommendation has a reasonable basis in the standards and should be approved by this Court.

II. THE REFEREE'S RECOMMENDATION CAREFULLY CONSIDERED AND PROPERLY WEIGHED THE AGGRAVATING AND MITIGATING FACTORS.

The Referee found three aggravating and four mitigating factors when deciding the recommended sanction. These factors were carefully and properly considered and provide a reasonable basis for the Referee's recommendation.

A. Aggravating Factors.

The Referee considered these aggravators: 3.2(b)(1) prior disciplinary offenses; 3.2(b)(3) pattern of misconduct; and 3.2(b)(9) substantial experience in the practice of law (ROR-2 pg. 17-18).

1. Prior Disciplinary Offenses.

The Referee correctly concluded that only three prior disciplinary offenses could be considered. Although six were mentioned in the Report (ROR-2 pg. 14-17), the Referee recognized that three were for minor misconduct that occurred more than seven years prior and should not be considered. The Bar argues that the Referee could have considered the three minor misconduct disciplinary actions, citing to Section 3.2(b)(1), "prior disciplinary offenses, provided that after 7 or more years in which no disciplinary sanction has been imposed, a finding of minor misconduct will not be considered as an aggravating factor." (Initial Brief at 36-39). But the Bar concedes that the last sanction imposed was in 2012 (Initial Brief at 36 n.4), more than seven years from the recommendation in this case. The relevant time frame is from the imposition of discipline, and not the initiation of a grievance proceeding.

The first case at issue is Case No. SC02-787, from 2002. This case occurred eighteen years ago and involved an internal dispute with respondent's employees after his firm disbanded. The facts of that case are entirely different from this case and the matter was resolved almost twenty years ago. The Referee gave this case the

correct weight as an aggravating factor. The Bar suggests that under "modern sanction policies" the actions of this case should result in suspension. But it is not for the Referee or this Court to "repunish" respondent's conduct that occurred two decades before and was appropriately punished at that time in accordance with the law and standards applicable then.

The Bar, ignoring the Referee's findings and Section 3.2(b)(1), argues this Court should consider the 2007 minor misconduct proceeding. That was properly excluded from consideration, does not in any way implicate any greater punishment recommendation, and should not be considered.

The Bar argues for application of Case No. SC11-2143, from 2012, a case in which respondent undertook the *pro bono* representation of a Venezuelan national in a paternity proceeding. As discussed earlier in this Answer Brief, at p. 17, respondent submitted improperly notarized affidavits, but never hid from the Court that he had signed for his client because of her unavailability. That case was a highly contentious paternity suit in which the client had become pregnant by a successful professional athlete who disclaimed any responsibility for his child, and the mother's financial status was not

even a factor in the case (T. 214-215).

These cases were carefully evaluated and do not provide a reasonable basis for an increase in the recommended sanction.

2. A Pattern of Misconduct.

The Referee correctly considered the prior cases and correctly concluded there was no pattern of misconduct. Of the four prior cases, three occurred nearly two decades ago. The Bar's attempts to characterize the conduct in the 2012 case and this case as criminal activity was not made to the Referee and cannot be made here. Moreover, the Bar is simply wrong on this point, and its argument has no support whatsoever in the record.

3. Substantial Experience in the Practice of Law.

Respondent is a sixty-one-year-old lawyer who has practiced law Since June 1985. Respondent affirmatively and sincerely accepted responsibility for his misconduct. Dr. Weinstein, in his capacity as respondent's therapist and Director of FLA, unequivocally stated Mr. Schwartz was remorseful for his misconduct and has taken meaningful, affirmative steps to learn from his improper actions. The record reflects that Mr. Schwartz promptly took

corrective action. He explained his preparation and use of the line-up to the prosecutor. He desisted from using the line-up upon objection. He never returned to that matter, even as he continued to challenge the accuracy of the identification of the defendant to expose the weaknesses in the prosecution's case.

4. Refusal to Acknowledge the Wrongful Nature of the Conduct.

The Bar's argument that respondent refused to acknowledge the impropriety of his conduct is not supported by the record and was rejected as a matter of fact by the Referee. When asked if he accepted the Supreme Court's finding that what he did was wrong, respondent answered, "one thousand percent." (T.191). As further evidence of his full and complete acceptance of responsibility is respondent's acknowledgment that he is undergoing therapy to assist him in his decision-making efforts, and to understand that working vigorously to provide an effective defense to those accused of criminal conduct has significant limits. His therapist, Dr. Weinstein said, "I have seldom come across an individual so willing to avail himself to personal and professional scrutiny while facing the possibility of severe Bar sanctions." (A. 34). Dr. Weinstein further explained, "Mr.

Schwartz continuously accepted the feedback from his peers …"

The Bar argues that nothing shows that respondent will not cross this line of professionalism again, despite the ample and compelling evidence in Dr. Weinstein's letter alone indicating exactly the opposite. Respondent accepted full responsibility for his conduct and has demonstrated actual remorse as he continues to take corrective action daily. He has taken this breach of professionalism profoundly to heart and has worked hard to become a better lawyer and person. The Referee appropriately did not apply 3.2(b)(7) as an aggravator.

5. Vulnerability of the Victim.

Finally, the Bar argues, without any evidence, that the victim was especially vulnerable. That the witness did not speak English and was assisted by a Creole interpreter suggests she was not vulnerable in that nothing said by respondent was understood by her except through an interpreter. Respondent's careful and balanced explanations in advance of presenting the line-up was translated into her native language. She was represented during the deposition by an experienced prosecutor, who was quick to take protective action when the altered line-up was presented. The victim did not appear

confused, misled, or vulnerable during the deposition, even though the Bar could have called her as a witness if it had even a scintilla of information or a good faith belief that she was in any way misled or intimidated. There is no supportive evidence in the record for the bar's argument, and no fact-based reason to apply the vulnerable victim aggravator. The Referee correctly determined 3.2(b)(8) was not an aggravator.

B. Mitigating Factors.

In mitigation, the Referee considered: 3.3(b)(7) character and reputation; 3.3(b)(5) full and free disclosure to the Bar; 3.3(b)(9) delay in the disciplinary proceedings; and 3.3(b)(10) interim rehabilitation as mitigating factors (ROR-2 pg. 19-21).

1. Character and Reputation.

The Bar limits its discussion of respondent's good character by pointing to respondent's wife and the mother of the client-defendant. But perhaps the most persuasive and significant evidence of good character and reputation are the significant number of credible witnesses that testified to respondent's character, reputation, and community service, significantly, without cross-examination or rebuttal witnesses from Bar counsel.

Respondent has selflessly represented poor people and people of color for the last thirty-five years. The record contains dozens of letters from a wide range of the community attesting to respondent's extraordinary passion, energy, and commitment to justice, indicating the thousands of lives he has touched in a positive manner. The undisputed testimony of the community is that respondent is profoundly compassionate and spiritual to the core and advises people well beyond the confines of any case. The witnesses attested that respondent is a "Counselor at Law" in the truest sense. His contributions to the community in teaching stress reduction and yoga to disadvantaged children, foster kids, and battered women is well known. The extraordinarily compelling testimony of Circuit

Judge Milian,[3] Dr. Bruce Frumkin,[4] and the many others who testified as to respondent's daily commitment to compassion and a mastery of the law were not lost on the Referee, who gave great weight to the entire breadth of Respondent's legal career. Respondent has made and continues to make a profound impact and commitment to improving the lives of those who meet him. As the Referee concluded, these attributes are balanced against respondent's use of the defense exhibit some six (6) years ago (A. 22, ROR-2 at 20).

[3] When asked about the Respondents Reputation, Judge Milian answered "I do. I think he's been very diligent. He's a hardworking, competent attorney. What I knew of him, before I became a judge, I also held the same opinion. As far as his reputation, I think he's a very passionate advocate for his clients. I think he is a very rational attorney, very reasonable on the way he approaches the case, a very effective advocate, I would say, and I've never seen anything inconsistent with that opinion. I've seen him to be very knowledgeable on the law, very well versed on the facts of the case, comes to court extremely well prepared and exhibits a great deal of not only compassion, but a great deal of empathy for his clients." (T.124).

[4] Dr. Frumkin, asked about the Respondent's level of dedication, answered: "My experience is that it doesn't matter. He is very dedicated to his clients regardless of what the charges are." And when asked about the Respondents pro bono work, he answered, "He has called me up to consult with me on pro bono cases and has spent quite a bit of time doing research speaking to me on cases which he received no compensation." (T.136).

2. Full and Free Disclosure.

Respondent has made full and free disclosure in all his Bar matters. This was considered by the Referee. Respondent has not tried to minimize his responsibility and is vigorously working to better himself. This factor weighs heavily in favor of the non-rehabilitative suspension and probation recommended by the Referee.

3. Delay in the Disciplinary Proceeding.

The Referee found that respondent, over this multi-year process, has encountered many difficulties but has rebuilt his life, both personally and professionally (ROR-2 pg. 20-21). The Referee found this to be a mitigating factor. The Bar attempts to discount this consideration by undermining the role of a referee and denigrating these grievance proceedings in arguing the process has been delayed only because respondent "convinced the first Referee to make an erroneous ruling requiring the removal of that Referee." (Initial Brief at 40). What occurred in the initial grievance trial was not a delay, but instead resulted from a careful and professional trial on disputed facts arising from respondent's actions taken in good faith during his criminal defense representation. The Referee gave extraordinarily

diligent attention to the facts and the law. The Bar's disagreement with the case outcome was appropriately brought to the Supreme Court's attention on appeal, and the Supreme Court reversed the Referee's findings and conclusions, sending this case to the sanctions hearing that are now on appeal. The time-consuming process of appellate review was not respondent's fault or in any way improper. The Referee took this time and its extraordinary toll on Mr. Schwartz into consideration and made a reasonable determination to include this as a mitigating factor.

4. Interim Rehabilitation.

The Referee found interim rehabilitation as a mitigating factor (ROR-2 pg. 21). Respondent significantly minimized his case load, is involved in ongoing counseling, is open to criticism, and has actively shown remorse and his commitment to bettering himself and his practice. Respondent has done more than what has been asked of him in terms of rehabilitation. He sought rehabilitation on his own initiative and Dr. Weinstein testified that respondent's progress is substantial (A. 34). Respondent continues to pursue rehabilitation, corrective therapy, and good works.

5. Conclusion.

In conclusion, the Referee carefully and methodically considered all the facts, testimony, and evidence in conjunction with the applicable standards to conclude that a non-rehabilitative suspension and probation are appropriate. The Referee's conclusion has a reasonable basis that appropriately incorporates the aggravating and mitigating circumstances and should not be second-guessed where there is ample support in the record.

III. APPLICABLE CASE LAW WAS CONSIDERED BY THE REFEREE AND IS CONSISTENT WITH THE RECOMMENDED NON-REHABILITATIVE SUSPENSION AND PROBATION AS A REASONABLE SANCTION.

The Referee carefully considered the case law and based her decision and recommendation on the standards, the prior discipline, mitigating and aggravating factors, applicable legal authority, and entirety of the facts and circumstances involved. The Referee summarized and analyzed all the cases in her report and explained the application of each one to this case (ROR-2 pg. 7-13). The Referee was aware that the Bar did not present any case law or precedent "on all fours." *See McElwain v. State*, 777 So. 2d 987, 988 (Fla. 2d DCA 2000). None of the Bar's proffered disciplinary cases and none

presented in its Initial Brief support the request for a rehabilitative suspension. The Bar provided no decisional authority requiring that the Referee should have used any different standard when analyzing the relevant case law.

The Referee disagreed with the Bar's position that its case authority is sufficiently similar to this case because all arise from active, intentional, and affirmative deceit, dishonesty, and misrepresentations by lawyers intending to do wrong (Initial Brief at 43). The Referee considered all the cases and found them to be distinguishable on the issue of the appropriate quantum of punishment. The Referee convincingly recognized that not every case of lawyer dishonesty is treated the same, a situation recognized by the sliding scale of recommended punishment in the standards. The Referee's significant suspension decision is well within the recommended standards and identifies the principal reasons for deciding the measure of suspension within the broad range of the standards. The seriousness of this case is not lost on respondent and was understood by the Referee, even though the misconduct pales in comparison to the cases utilized by The Florida Bar.

For instance, the Bar's self-described closest case (Initial Brief

at 17, 44) is *The Florida Bar v. Dunne,* SC18-1880, 2020 WL 257785 (Fla. Jan. 16, 2020), a precedent that is decidedly more egregious than what occurred during the discovery deposition in this case. In *Dunne,* as the Referee explained, a prosecutor withheld information and misled defense counsel prior to witness depositions, even though defense counsel specifically asked whether the prosecutor possessed additional statements. Not only did that prosecutor violate the constitutional obligation to produce *Brady* information,[5] but the prosecutor affirmatively and intentionally misled counsel, thereby causing real and lasting harm to the defendant.

By comparison, the prosecutor in respondent's case was in possession of the defense-altered line-ups, received respondent's affirmative explanation, and objected to the use before any reliance thereon. But perhaps an even more important distinction as to the more serious gravity in *Dunne* is that the prosecutor there *intentionally lied after the fact*, falsely pretending to not have copies of the evidence that was available to both sides. Both assertions were false and were known to be so. By contrast, respondent did not

[5] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

withhold information about the line-ups, affirmatively revealed his preparation and intended use of the line-ups, and never lied to the court, opposing counsel, or the witness. Just as importantly, since *Dunne* approved a one-year suspension for the far more egregious conduct of a prosecutor who is held to a higher standard by reason of Rule 4-3.8 (Special responsibilities of a prosecutor), the non-rehabilitative suspension recommended here is reasonable and appropriately guided by the standards and case law.

Respondent and the Referee are aware that this Court has put lawyers on notice that harsher sanctions for misconduct are to be expected. *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 Referee specifically considered this line of case law and fully applied its principle. (ROR-2 pg. 12). The Referee's recommendation on the facts and circumstances of this case is indeed consistent with the emerging precedent and the penalty for engaging in misleading conduct as a lawyer.

The Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001), involved an even more egregious set of facts wherein the federal prosecutor

was involved in knowing, purposeful, intentional, and deceptive misconduct in the presence of a judge and jury by using an alias to hide the identity of a witness, and not revealing the truth of what was transpiring in open court and before a jury, even not disclosing the deception to the judge or presenting the truth *ex parte* or *in camera*. The prosecutor did this multiple times, introducing the witness to the court and jury by her alias in both *voir dire* and on direct examination. The false identity allowed the prosecutor to withhold disclosure of the witness's actual criminal history, a fact extremely relevant to any evaluation of the credibility and truthfulness of the witness, and further hid the additional benefit conferred by the government that was relevant to witness' bias and governmental assistance. Further, the prosecutor's misconduct led to the declaration of a mistrial, thereby prejudicing the administration of justice and precluding a retrial due to the double jeopardy bar, thereby dismissing the case against the defendant. In contrast, the misuse of the discovery exhibit in this case had the opposite effect, it led to an appropriate resolution of this case. Yet, in *Cox*, the prosecutor received a one-year suspension and not the three-year suspension advocated by The Florida Bar here. If the behavior in *Cox*

supports a 1-year suspension, then the Referee is on solid ground recommending the imposition of the non-rehabilitative suspension.

Even *The Florida Bar v. Dupee,* 160 So. 3d 838 (Fla. 2015), does not provide sound reasons for increasing Respondent's 90-day suspension and 1-year term of probation. That case arose from the knowing filing of an inaccurate financial statement in a dissolution action, accompanied by a willful failure to disclose relevant documents during discovery. The lawyer's willful deception would have resulted in colluding with his client to hide an asset worth almost a half million dollars that otherwise was considered as part of the marital estate. The lawyer's conduct included *deliberate misrepresentations to the court*, an important ingredient not appearing in Respondent's case. The lawyer's misrepresentation prevented that court from adequately performing its function to equitably distribute marital assets. The Referee in Respondent's case was therefore within allowable judicial discretion to find *Dupee* sufficiently distinguishable when Respondent's conduct was disclosed to the prosecutor and never infected judicial proceedings or determinations. (ROR-2 pg. 10). Just like in *Cox,* the sanction was a one-year suspension, meriting a fair consideration of Respondent's

non-rehabilitative suspension and probation here.

The Bar's reliance on *The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997), is unpersuasive in that the two cases are not factually similar or even closely aligned (Initial Brief at 49). The Referee found that Hmielewski intentionally withheld his knowledge of the location of the records during the discovery process and accused the hospital of deliberately concealing the records when the hospital was unable to produce same, all for personal gain. Through blatant dishonesty and deception, Hmielewski allowed his expert to file a report stating that the hospital's inability to produce the records in discovery was evidence of the hospital's malfeasance (ROR-2 pg. 10). Hmielewski's entire litigation was a deception from its inception. The differences from this case are entirely evident, as was identified by the Referee. Respondent here did not hide records or material information, did not mislead the court or opposing counsel, withdrew his use of the exhibit upon objection, and did not rely on the created documents. Nor was Respondent acting to obtain any personal, financial benefit as was the case in *Hmielewski*.

The Bar also incorporates *The Florida Bar v. Walkden*, 950 So. 2d 407, 410 (Fla. 2007), for support of increased sanctions, even

though that case is plainly distinguishable. In that case, a suspended lawyer continued to practice law and blatantly disregarded the Supreme Court's suspension. Nothing remotely similar is involved in Respondent's case.

In reaching the recommended sanction, the Referee considered other cases, including *The Florida Bar v. Committe*, 916 So. 2d 741 (Fla. 2005), *The Florida Bar v. MacNamara,* 132 So. 3d 165, I71 (Fla. 2013), and *The Florida Bar v. Cocalis*, 959 So.2d 163 (Fla. 2007). Both *MacNamara* and *Committee* involved repeated acts of dishonesty and the filing of frivolous claims. Both resulted in ninety-day suspensions. In *Cocalis*, the sanction was a public reprimand for violating Rule 3-4.3 (prohibiting acts that are unlawful or contrary to honesty and justice).

Based on the case law submitted to and considered by the Referee, the culmination of facts, Respondent's disciplinary history, application of the standards, and Respondent's motivations and significant testimony of his excellent character, the Referee's recommended sanction is reasonably based on the facts and supports the non-rehabilitative suspension followed by a one-year term of probation. This Court should approve no more than the 90-

day non rehabilitative sanction followed by a year of probation.

CONCLUSION

The Florida Bar failed to discharge its burden to demonstrate "that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." *Fla. Bar v. Germain*, 957 So. 2d at 620. Accordingly, this Court should approve the recommended sanctions in the Report of Referee.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the document complies with the applicable font and word count limit requirements. The type used is 14-point proportionately spaced Bookman Old Style.

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