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

REPLY BRIEF

ON REVIEW OF RECOMMENDED SANCTION

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PRELIMINARY STATEMENT

A. Citations to the Record

The Bar provides an appendix with this reply brief that contains the deposition and the line-up photographs that are critical to this case. They are already in the record, but this should allow for easier access. This brief cites to the reply appendix as (R.A. **).

ARGUMENT

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

Mr. Schwartz's argument, both before the second Referee and in his answer brief, confuses "motive" and "intent," and is based on what the Bar believes to be a misreading on this Court's prior opinion. In the prior opinion, this Court explained that the Referee "improperly focused upon Schwartz's asserted motive, which was to provide constitutionally effective assistance of counsel." *The Florida Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019). Instead, this Court correctly explained that "the Bar must prove intent." *Id*. at 396.

Intent is a matter proved by circumstantial evidence in most cases, and this Court explained that its consideration of the "defense-altered exhibits leads to the inevitable conclusion that they are deceptive on their face." Id. at 396. The Court "disapprove[d] the referee's findings of fact and recommendation that Mr. Schwartz did not violate any Bar rules in his use of two defense exhibits during a pretrial deposition." *Id*. at 394. This Court rejected the first referee's conclusion that the altered police photo lineups were not "misleading, fraudulent, deceitful, or misrepresentations" as "patently erroneous." *Id*. at 396. As a result, this Court found that the clear

and convincing evidence established that Mr. Schwartz had violated Rule 4-8.4(c) by engaging in intentional conduct involving fraud, deceit, or misrepresentation. This Court also found that he violated Rule 3-4.3 by committing an act that is unlawful or contrary to honesty and justice. This Court remanded for a new referee to be appointed to determine the appropriate recommended sanction.

The opinion announces all of these rulings, "notwithstanding the referee's credibility findings and her finding that Schwartz did not subjectively intend to deceive the witness." *Id*. at 396. Mr. Schwartz has latched onto this "notwithstanding" clause to argue repeatedly in his brief that he has been found not to have intended to mislead the witness. (A.B pp. 10, 16, 17, 21, 24, 29).

As his counsel explained to the Referee:

> 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. (TS. 254-256).

He seems to think that this Court has found some sort of objective intent standard for intentional fraud that does not really involve misconduct. The

Bar doubts that this is the Court's actual ruling; and such a ruling would not square with the evidence.

With this reply brief, the Bar provides a reply appendix that contains a copy of the deposition where Mr. Schwartz used his doctored exhibits. It also provides copies of the real police document, as well as the altered exhibits. (R.A. 46-49). This evidence was introduced at the original hearing in this case, and it was discussed in the briefing for the prior appeal. (TFB-Ex. 1).

The critical section of the deposition begins on page 25. Mr. Schwartz does not tell the witness that he created this exhibit or that it is an altered version of the earlier police document. The defense-altered exhibits were designed to keep all of the components of the original document except for the substituted photo inside the circled section of the document. Mr. Schwartz does not tell the assistant state attorney what he is doing. And he becomes aggressive when the assistant state attorney seeks to clarification about the document. (R.A. 27-28).

Mr. Schwartz's motive may have been to zealously represent his client, but the clear and unambiguous evidence demonstrates that he was attempting to mislead the witness with the altered evidence to obtain an identification contrary to her earlier identification. His client is no longer even

pictured on the altered document and, thus, could not possibly be identified from the altered document.

It is not for the undersigned, but rather for this Court, to decide, but the Bar submits that this Court accurately concluded in its prior decision that Mr. Schwartz intended to deceive this witness.

But, as quoted above and in the Bar's initial brief, Mr. Schwartz and his attorneys repeatedly argued to the Referee that this Court had "absolutely" "determined that what [he] did was just wrong no matter what [his] motivation and intention was." As Mr. Schwartz explained to the Referee: "My intent is irrelevant. It is clear that it was deceptive on its face." (I.B p. 8) (TS. 191).

It is little wonder why the Referee was confused about how to measure the appropriate sanction under the Standards in this case. Because of this strained reading of this Court's earlier opinion, Mr. Schwartz can even claim to the Referee and to this Court that "one thousand percent" he accepts that what he did was wrong. (A.B. 29). But that is based on the following question and answer:

> 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.

(TS. 191-192).

Even though the Referee never explains how she applied the Standards identified in the second Report of Referee, Mr. Schwartz argues that you cannot reject the Referee's recommendation in the "absence of clear error." (A.B. 13-14). This argument is followed by a citation to *The Florida Bar v. Altman,* 294 So. 3d 844, 847 (Fla. 2020), which actually says that the recommendation is subject to broader review and the Referee's recommendation must have a reasonable basis in the Standards and the case law.

a. Standard 5.11 – Failure to maintain personal integrity.

Mr. Schwartz's argument in response to the Bar's discussion of this standard is that there is "no record evidence" supporting an "enhanced" suspension. (A.B. 15). As explained in the preceding section, the argument is based on his theory that, while the defense-altered documents were "potentially misleading on their face," he "had not intended them to mislead." (A.B. 16). That theory is simply not consistent with the evidence or what the Bar submits this Court has already found. He claims he "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." (A.B. 17). The Bar simply asks this Court to read pages 25 to 30 of the deposition in the appendix to confirm whether that is a fair assessment of the evidence. (R.A. 25-30).

The Bar is not trying to "enhance" the suspension. Whether Standards 5.1 supports a suspension of 30 days or 3 years depends on the nature of the intentional conduct. The Bar is not contending that the conduct was found to be criminal, but it is conduct approaching the alteration of evidence. Given that criminal conduct warrants disbarment, the Bar suggests that this misconduct warrants a longer suspension than lesser misconduct.

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

Mr. Schwartz argues that his suspension in 2012 was not for similar misconduct even though both involved a violation of Rule 4-8.4(c) – conduct involving dishonesty, fraud, deceit, or misrepresentation. In each case, he thought the merits of his client's case warranted the misrepresentation or deceit.

He emphasizes that the Referee here "acknowledged that opposing *counsel was aware of the defense line-ups and was not misled* [ROR-2 pg. 10-11)." (A.B. p. 20) (emphasis original). Actually, the Report of Referee says: "This case in not analogous because the records were not hidden in this case, and the prosecutor had access to the original line-up." (ROR-2 p. 1-11). As the initial brief points out, what was hidden, and what Mr. Schwartz

did not reveal was the fact that his deposition exhibit was a fake lineup photograph created by defense counsel and not the actual exhibit. (I.B. P. 49). That fact was discovered only because the assistant state attorney began to question whether the exhibit was the real line-up photo pack.

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

Mr. Schwartz's argument concerning this Standard is essentially the argument addressed at the beginning of this section. He does not seem to grasp the potential injury caused to the victim and the legal system when lawyers alter evidentiary exhibits in a criminal case during discovery to obtain a benefit for the defendant.

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

The only real question as to this Standard is whether it applies to conduct at a deposition, as contrasted with conduct in a courtroom or a court file. The case law contains no clear answer to this question. But given that depositions are taken to use as direct evidence and impeachment at trial, the Bar submits this Standard applies. Obviously, the Referee "reviewed and considered" this Standard but the Report does not explain how the Referee applied it to this case.

The Bar submits that the Standards support a longer rehabilitative suspension before the aggravating and mitigating factors are considered to adjust the appropriate sanction.

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 Bar is not arguing that this Court is "obligated to make its own determination as to the . . . factors." (A.B p. 12). The factual findings of aggravating and mitigating factors are reviewed like other findings of fact. The Bar does maintain that the process of evaluating a mixture of aggravating and mitigating factors to determine their net effect is a matter in which this Court plays a broader role in determining the appropriate sanction. That is particularly true in cases where the Referee does not even attempt to articulate the balance struck by competing factors.

Because of Mr. Schwartz's extensive arguments about his client's motive, it is worth emphasizing that the Referee did not find either: (1) a dishonest motive, or (2) the absence of a dishonest motive. Mr. Schwartz does not challenge that ruling. Motive is not a factor that moves the appropriate sanction down in this case.

A. Aggravating factors.

- *Prior disciplinary offenses*. The Referee found three relevant prior offenses. Before the Referee, both sides recognized that this factor was limited by the seven-year rule for a finding of minor misconduct. At the beginning of the hearing, counsel for Mr. Schwartz said that it could be an issue. (TS. 74-75). In the Answer Brief it is suggested that the Bar ignored the Rule and the Referee's findings in arguing that a 2007 violation should be considered. (A.B. 27).

Mr. Schwartz is correct that the initial brief incorrectly referred to the 2007 violation as one of the three prior disciplinary offenses. (I.B. 37). The 2007 case resulted in admonishment and is a minor misconduct case.

But the Referee was correct that there were three prior violations. The Report actually identifies the third violation as the 1997 case, which involved four violations, two of which involved dishonest or deceitful conduct. (ROR p. 17). That case is older than seven years, but it does not involve "minor misconduct" due to the dishonest or deceitful conduct. See Rule 3-5.1(b)(1)(E).

- *A Pattern of Misconduct.* Oddly, the Answer Brief claims that the Referee found no pattern of misconduct. (A.B. 28). But the Referee did find

a pattern of cases involving dishonest and deceitful conduct. (ROR p. 18-19). The Report describes four such cases beginning in 1995 and ending in 2012. This case will be the fifth case in the pattern. The Referee correctly found a total of 9 violations for dishonest or deceitful conduct in the four cases. (ROR p. 18-19). This pattern appears to be an escalating pattern. Given that the 90-day suspension did not end the pattern, this factor weighs heavily in favor of a much longer rehabilitative suspension. The Referee's report did not explain why this factor was discounted to allow for a non-rehabilitative suspension.

- *Refusal to acknowledge the wrongful nature of the conduct.* The Bar recognizes that the Referee did not rule on its request for this factor, and that she did not include it in her Report. To the extent that its absence is a finding of fact, it is clearly erroneous. This Court need only look at what Mr. Schwartz describes as his misconduct in the "one thousand percent" discussion and in his more candid discussion with Dr. Weinstein that is described in Dr. Weinstein's report, to find that Mr. Schwartz is simply acknowledging conduct other than the misconduct found by this Court in its prior opinion. He acknowledges that he is over-zealous; he does not acknowledge that he opts to deceive or misrepresent facts when he

personally thinks the merits of his client's case outweigh the Florida Rules of Professional Conduct.

B. Mitigating Factors.

Mr. Schwartz argues, as he should, that he has a good reputation. Lawyers and judges had enough respect for him to testify for him before a Referee. The Bar is not contesting that his reputation is a mitigating factor.

The question here is how does his reputation, and the lesser mitigating findings by the Referee, stack up against the strong aggravating factors in this case. The Referee does not explain her reasoning, but the Bar submits that when a 90-day suspension for what it maintains is similar misconduct has not worked and a pattern of misconduct continues, a longer suspension is warranted. For Mr. Schwartz to come to terms with the fact that he is not just over-zealous and misunderstood, he needs a substantial period of rehabilitation. The Bar continues to suggest a three-year suspension.

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

Mr. Schwartz says that the Referee was aware that the Bar did not present a case "on all fours." (A.B. p. 36). What he does not say is that he too presented no case "on all fours." The Bar's concern is not that either party needed to find an identical case, but that the Referee seemed to be

looking for a controlling precedent rather than applying the existing cases to derive a sense of the range for the appropriate sanction in this case.

Mr. Schwartz argues that *The Florida Bar v. Dunne*, SC18-1880, 2020 WL 257785, is decidedly more egregious than his case. The Bar does not disagree that a *Brady* violation is serious. But Ms. Dunne had the good sense to go to her supervisor and disclose the problem to her supervisor shortly after the deposition. She did disclose the recordings to defense counsel thereafter. Nevertheless, she was not forthcoming about having copies of the evidence. She pled guilty to the violation and agreed to the one-year suspension.

Mr. Schwartz claims that Ms. Dunne affirmatively misled counsel and he did not. He claims that here the prosecutor "was in possession of the defense-altered line-ups, received respondent's affirmative explanation, and objected to the use before any reliance thereon." (A.B. p. 38). The Bar encourages the Court to review the deposition to decide for itself if that is accurate. It appears to the Bar that Mr. Schwartz started using the doctored exhibits without ever revealing to the victim or the assistant state attorney that they had been altered. It appears that counsel explained that he had altered the documents, off the record, only after the assistant state attorney realized that something was odd during the deposition. And it appears that

Mr. Schwartz continued to try to use the doctored evidence until the State essentially terminated the deposition. (R.A. 27-33).

The Bar is not suggesting that what Mr. Schwartz did was identical to Ms. Dunne's conduct. But the prosecutor agreed to a one-year suspension when she had had no prior discipline, much less a prior pattern of misconduct. Ms. Dunne's case certainly suggests that a rehabilitative sanction is fully appropriate under all of the circumstances of this case. It is needed to fulfill the three purposes of lawyer discipline announced in *The Florida Bar v. Pahules*, 233 So. 2d 130, 132 (Fla. 1970).

Mr. Schwartz points out that the Referee considered *The Florida Bar v. Committe*, 916 So. 2d 741 (Fla. 2005), a case in which a lawyer took extreme steps trying to block collection of a small judgment entered against himself. This Court rejected the referee's recommended admonishment and opted for a 90-day suspension for a first violation in 2005. It is hard to compare and contrast the facts in *Committe* to the facts in this case. However, nothing in *Committe* would appear to support another 90-day suspension for Mr. Schwartz in this case.

Mr. Schwartz is correct that the Referee also considered *The Florida Bar v. MacNamara*, 132 So. 3d 165 (Fla. 2013). In that case the Bar did not present clear and convincing evidence that the respondent failed to file an

estate tax return or that there was a dishonest motive behind respondent's failure to timely file the estate tax return. But the respondent still was not forthright with the Bar about the circumstances surrounding the filing of the tax return. The referee suggested two years' probation and the Bar suggested disbarment. Over Justice Canady's dissent for a greater sanction, the majority imposed a 90-day suspension because the respondent had no prior discipline over a long career and had other mitigating circumstances. *MacNamara* is a case that clearly supports a sanction in this case that is less than disbarment, but it does not support a non-rehabilitative sanction.

CONCLUSION

In his conclusion, Mr. Schwartz relies upon a quotation from *The Florida Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2007). It is a quote concerning findings of fact supporting a recommendation of guilt unsuccessfully challenged by a respondent. It has little to do with whether this Referee has recommended to this Court a sanction with a reasonable basis in the existing Standards and the case law. But like the referee in

Germain, the Bar submits that this Referee has recommended an insufficient sanction. This simply is not a case for a repeat, 90-day suspension.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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