IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN DOUGLAS ANDERSON,

Respondent.

/

Case No.: SC20-1642

The Florida Bar File Nos.
2019-10, 510 (13D)
2019-10, 681 (13D)
2019-10, 706 (13D)

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

A. Abbreviated Names

John Douglas Anderson, the Respondent, will be referred to as Mr. Anderson or the Respondent. The Florida Bar will be referred to as the Bar.

B. Citations to the Record

References to the Report of Referee will be cited as (ROR p.**).

References to specific pleadings will be made by Tab number in the Amended Index of Record, and with further information when the document is large. (Tab **).

The transcript of the final hearing will be cited as (T**).

The Bar's exhibits will be cited as (TFB-Ex. *) with specific reference to the transcript page number when needed.

NATURE OF THE CASE

The Bar seeks review of the Report of Referee in this disciplinary proceeding in which John Douglas Anderson is the Respondent. The Referee recommends that this Court find Mr. Anderson guilty of nineteen violations of the Rules of Professional Conduct. The Bar concurs in that recommendation. Mr. Anderson has not sought review of the Report.

The Referee recommends a six-month suspension as the sanction for these violations. The Bar sought a one-year suspension before the Referee and maintains that is the minimum appropriate sanction.

Because these violations include many that demonstrate a lack of competence to practice law even though Mr. Anderson has been licensed since 2003, the Court may wish to consider a requirement that Mr. Anderson take and pass the bar exam before petitioning for reinstatement.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

This case arises out of Mr. Anderson's conduct in three distinct proceedings: an adoption proceeding, a postconviction relief proceeding, and a misdemeanor battery proceeding. The Bar filed its Complaint against Mr. Anderson in November 2020. (Tab 1). Mr. Anderson never filed an answer.

The Referee held the final hearing remotely on April 12, 2021. (T. 1-147). The Bar introduced 19 exhibits (T. 5-6) and the testimony of four witnesses. The witnesses were Mr. Anderson, Judge Margaret R. Taylor, Judge James Pierce, and a former client, Timothy Stemen. Mr. Anderson presented no exhibits or witnesses. (T. 113). His closing arguments at both the final hearing and the sanction hearing are primarily an explanation of the three cases from his perspective. (T. 118-142)(TS. 20-29).

Following the final hearing, the Referee recommended findings of guilt for nineteen violations:

1. Rule 4-1.1, competence;
2. Rule 4-1.2(a), objectives and scope of representation: lawyer to abide by client's decisions;

3. Rule 4-1.3, diligence;
4. Rule 4-1.4(a), communication: informing client of representation;
5. Rule 4-1.4(b), communication: duty to explain matters to client;
6. Rule 4-1.5(e), fees and costs for legal services: duty to communicate basis or rate of fee or costs to client and definitions;
7. Rule 4-1.15, safekeeping of property;
8. Rule 4-1.16(c), declining or terminating representation: compliance with order of tribunal;
9. Rule 4-1.16(d), declining or terminating representation: protection of client's interest;
10. Rule 4-3.2, expediting litigation;
11. Rule 4-3.3(a), candor towards the tribunal: false evidence; duty to disclose;
12. Rule 4-8.4(a), misconduct: a lawyer shall not violate or attempt to violate the Rules of Professional Conduct;
13. Rule 4-8.4(c), misconduct: a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
14. Rule 4-8.4(d), misconduct: a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice;

15. Rule 5-1.1(a), trust accounts: nature of money or property entrusted to attorney;

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17. Rule 5-1.1(e), trust accounts notice of receipt of trust funds; delivery; accounting;

18. Rule 5-1.2(b), trust accounting records and procedures: minimum trust accounting records; and

19. Rule 5-1.2(d), trust account records and procedures, minimum trust account procedures.

(ROR pp. 6-7).

On April 30, 2021, the Referee held a sanction hearing at which neither party presented evidence. At the conclusion of the hearing, the Referee asked Bar counsel whether he could require Mr. Anderson to take the bar exam. (TS. 30-31). Bar counsel explained that the Referee may make that a part of any sanction. (TS. 31). The Referee found two aggravating factors: a pattern of misconduct and multiple offenses. (ROR p. 8). The Referee found two mitigating factors: absence of a prior disciplinary record and absence of a dishonest or selfish motive. (ROR p. 9). The Referee orally announced that his recommended sanction would be a six-month

suspension that did not include a requirement to retake the bar exam. (TS. 33). The Report of Referee was then filed on May 17, 2021.

B. Statement of the Facts

Because neither Mr. Anderson nor the Bar is challenging the findings of fact for the recommendations of guilt, the Bar relies upon the findings in the Report. This statement of facts will emphasize the evidence relevant to the issue of the appropriate sanction.

Mr. Anderson was admitted to the Florida Bar in 2003. (T. 7). His career as a lawyer is a second career. Previously, he worked as chemist for 30 years. (T. 8). He had trouble finding work after passing the bar exam, which he believed was due in part to his age. Thus, he became a solo practitioner at the commencement of his career. (T. 9). He primarily handled family law matters. (T. 9). He expanded his practice to criminal law in 2008. (T. 11).

The Adoption Case

In 2014, Mr. Anderson was retained by Ms. Calhoun to represent her in an adoption proceeding. (ROR p. 5). Ms. Calhoun wanted to adopt a minor child who was, at the time, in her legal custody. (T. 38). It should be noted that the parental rights of the biological mother had not been terminated prior to these events. In addition to being Ms. Calhoun's lawyer,

Mr. Anderson became the guardian of the child – a position that he still held at the time of the evidentiary hearing in this case. (T. 66).

In 2014, Mr. Anderson filed a petition for adoption in the Sixth Judicial Circuit, in Pasco County, on Ms. Calhoun's behalf. (T. 38). He charged Ms. Calhoun a $1,000 non-refundable flat fee. (T. 39). He was not sure if he had a retainer agreement with her. (T. 39).

Three years later when the adoption had not been concluded, Mr. Anderson transferred the case to Pinellas County, which is also in the Sixth Judicial Circuit. (T. 39). Mr. Anderson filed the motion for transfer because he felt that the case was progressing slowly, and he believed that the case would go faster if the venue was changed to Pinellas County. (T. 40). The files were transferred from Pasco County to Pinellas County and sealed in April 2017. (T. 72-73). Thereafter, there was some confusion about the location of the files. (T. 40). Mr. Anderson informed Ms. Calhoun of the confusion and she told him that she wanted him to withdraw from the case because she was going to get another attorney. (T. 41). He "left the case" after that. (T. 44). It is not clear from the record whether he actually withdrew from the case, but he does not state that he did.

Five years after the commencement of the case, on November 14, 2019, Judge Pierce entered a Notice On Petition For Order Approving

Placement that outlined the documents and filings required before the matter could proceed. He ordered Mr. Anderson to file an updated home study, a petition for termination of parental rights, the minor child's birth certificate, an affidavit in compliance with the Uniform Child Custody Jurisdiction and Enforcement Act, a search of the putative father registry, a birth parent interview and other materials as required by Florida Statutes. (ROR p. 5). Judge Pierce also gave Mr. Anderson sixty days to conclude the proceedings. (ROR p. 5).

Shortly after, Ms. Calhoun contacted Mr. Anderson and told him she wanted him back on the case. (T. 44). Ms. Calhoun did not have the funds for another home study. (T. 48). Mr. Anderson reportedly told Ms. Calhoun that he needed the minor child's birth certificate, but she never sent it to him. (T. 45). Judge Pierce acknowledged that, typically, if a party is unable to locate the birth parent or anything like that, the court would accept diligent searches or efforts in lieu of the documents. (T. 66).

At the final hearing, Mr. Anderson testified that he had filed a Uniform Child Custody Jurisdiction Enforcement Act affidavit, consents from the birth father, and affidavit of inquiry of the birth mother in Pasco County. (T. 41-44). However, he contends that those documents were in the file that was never transferred to Pinellas County. (T. 43). Mr. Anderson also contends

that the termination of parental rights was done in Pasco County. (T. 71). Judge Pierce never received any petition to terminate the parental rights. (T. 72).

Mr. Anderson failed to submit any documents or filings required to finish the adoption. (ROR p. 5-6). He was going to tell Judge Pierce of the problems they were having regarding the home study. (T. 50). His testimony concerning the problems and options at the time is confusing and may simply need to be read. (T. 51).

On March 17, 2020, Judge Pierce submitted an order to show cause as to why Mr. Anderson should not be held in contempt for failure to comply with the November 2019 order. (ROR p. 6). A hearing on the Order to Show Cause was set for May 21, 2020. (ROR p. 6). Mr. Anderson failed to appear at the hearing. (ROR p. 6). Judge Pierce called Mr. Anderson to find out why he was not there. (ROR p. 6). Mr. Anderson told Judge Pierce that he thought the hearing was canceled. (ROR p. 6). Mr. Anderson indicated that he failed to comply with the November 2019 order due to his client's inability to pay for an updated home study and difficulty contacting the birth mother. (ROR p. 6). Mr. Anderson had not taken any further steps. (ROR p. 6). Judge Pierce held Mr. Anderson in contempt and imposed a $500 sanction

plus a fine of $100 for each day that Mr. Anderson failed to file the documents necessary for the matter to proceed. (ROR p. 6).

As of April 12, 2021, the adoption was still open, and Mr. Anderson had failed to file any documents necessary for the matter to proceed. (T. 48, ROR p. 6). Mr. Anderson has not paid any part of the sanction or fine. (ROR p. 6).

At the final hearing, Judge Pierce expressed "grave concerns" for the safety and well-being of the minor child. (T. 66-67). Moreover, during the final hearing, Mr. Anderson showed no remorse for how long the adoption was taking, even though he acknowledged that it is unreasonable that the matter has taken almost six years. (T. 48).

The Postconviction Relief Case

In September 2017, Timothy Stemen hired Mr. Anderson to assist him with postconviction relief. (ROR p. 3). Mr. Anderson had handled two or three other postconviction relief cases before. (T. 24). Mr. Anderson told Mr. Stemen that he had handled cases like this before. (T. 88). Mr. Stemen provided Mr. Anderson with $15,000. (ROR p. 3). $5,000 was a flat fee for the case. (T. 27, 90) (ROR p. 3). Mr. Anderson contends that the fee was non-refundable. (T. 27). Mr. Stemen, on the other hand, believed he would get some of the $5,000 back. (T. 90). The other $10,000 was to be

distributed according to Mr. Stemen's directions. (ROR p. 3). This agreement was never memorialized in writing. (T. 27).

The $10,000, was deposited into Mr. Anderson's personal account. (T. 27-29). At the time, Mr. Anderson did not have a trust account set up. (T. 30). He previously had a trust account, but he closed that account due to miscommunications with the bank. (T. 31-32). He testified that he "was kind of shy about setting up a trust account" due to the previous issues he had with the bank. (T. 30).

Mr. Stemen requested that Mr. Anderson give $6,000 to David Fiara, Mr. Stemen's friend. (T. 27) (ROR p. 4). Mr. Anderson completed the transaction in cash. (T. 27). Mr. Stemen never received a receipt for the transaction. (T. 91). Mr. Stemen also requested $1,800 go to his ex-wife. (T. 28). Again, Mr. Stemen did not receive a receipt for the transaction. (T. 90).

Approximately $2,200 should have been left for Mr. Stemen. In February 2019, Mr. Stemen asked Mr. Anderson to hold that money in a trust account for him. (T. 97) (ROR p. 5). Mr. Stemen later requested the funds. (T. 96). Mr. Anderson responded that he was only able to provide $300. (ROR p. 5). Mr. Stemen repeatedly contacted Mr. Anderson asking for the funds. (T. 97). From February to April 2019, Mr. Anderson disbursed $900

to Mr. Stemen. (ROR p. 5). He advised Mr. Stemen that he had disbursed the remaining $1,300 but failed to provide Mr. Stemen with an accounting of the disbursement of funds. (ROR p. 5). Mr. Stemen testified that he has received $1,150 of the $2,200. (T. 107).

At the beginning of his representation of Mr. Stemen, Mr. Anderson filed a 3.850 post-conviction relief motion. (T. 26). Mr. Anderson had limited experience in the practice of criminal law at the time he undertook this representation. (ROR p. 5). The motion was written by Mr. Stemen. (T. 26). Mr. Anderson believed that all his client wanted him to do was appear in court when there was a hearing on the motion. (T. 26). That hearing, however, never occurred because the court struck the motion due to a failure to meet the pleading requirements. (ROR p. 4). The court gave Mr. Anderson 60 days to file a facially sufficient motion, or the claim would be forever barred. (ROR p. 4) (T. 33). Mr. Anderson failed to file any motion, much less a facially sufficient motion, despite the fact that his client wanted to refile the motion. (T. 33, 98).

Instead of filing a facially sufficient motion, Mr. Anderson filed a motion to transfer venue of the postconviction proceeding from the court of conviction in Polk County to Hillsborough County because he “thought we

would have a better chance if we came to Hillsborough County." (T. 34). The motion, of course, was denied.

On April 2, 2019, Mr. Anderson filed a "petition for writ of mandamus" in the Second District Court of Appeal. (T. 35). Mr. Stemen wrote the petition. (T. 35). Mr. Anderson reviewed the petition and filed it. (T. 35). In a communication with this client, Mr. Anderson explained:

> *I'm glad you are sending me the sample (?) writ as that was one of my questions. I am ready to file the Writ of Mandamus as soon as possible. I just need to be sure of the court and case number.* (TFB-Ex. 12) (the question mark is original content).

The mandamus petition requests as relief that the client's conviction be "overturned" because of "his clear and evident claim of Civil Rights Violations." (TFB-Ex 15). The Second District denied the petition without prejudice, providing the helpful explanation that such a petition needed to make an express and distinct demand for performance, and reminding that any future petition needed to be served on the Attorney General. (TFB-Ex 16) (ROR p. 4-5). Mr. Anderson never gave his client a copy of the order denying the petition. (T. 104). No other petitions were filed. (T. 36).

<u>The Misdemeanor Battery Proceedings</u>

Mr. Anderson undertook the representation of Mr. Ricky Francis in a misdemeanor battery proceeding. (ROR p. 2). On September 24, 2018, Mr.

Anderson appeared before Judge Taylor representing Mr. Francis. (ROR p. 2). Bond for Mr. Francis had been revoked because he had been charged with a new felony. (T. 55). Mr. Anderson set a bond hearing. (T. 55). The following exchange occurred at the hearing:

> *The Court: Do you have any bond factors that you would like to present to the court?*
>
> *Mr. Anderson: No.*
>
> *The Court: No?*
>
> *Mr. Anderson: No.*
>
> *The Defendant: Mr. Anderson, we have bond factors.*
>
> *Mr. Anderson: We do?*
>
> *The Defendant: I'll have to speak for myself.*
>
> *Mr. Anderson: Yes.*
>
> *The Court: I'll pass it. I'll pass it for a minute so you all can chat, because if you're going to set it for bond hearing then I need to hear bond factors.*

(TFB-Ex. 3 p. 5). At the final hearing, Mr. Anderson testified that, at the time, he was mistakenly under the impression that the court wanted him to come up with the calculation method on what the bond should be. (T. 17).

Instead of asking for clarification, it was Mr. Anderson's client who had to inform Judge Taylor that he had bond factors. The court took a recess to

allow Mr. Anderson to discuss the issues with his client. (ROR p. 2). After the recess, Mr. Anderson explained only:

> *Yes, Your Honor. He's lived in Tampa for the last six years and he has not ever failed to appear on any other previous case that he's been involved in. His family lives here. He has ties to the community and there's no reason to believe that he is a risk of flight*.

(TFB-Ex. 3 pp. 5-6). The judge and the prosecutor then discussed Mr. Francis's limited prior record and the fact that he was actually entitled to bond on the charge. The judge then confirmed that the victim was present, and he asked the questions to confirm that the victim was not afraid of Mr. Anderson's client and wanted to have contact with him. (TFB-Ex. 3 pp. 6-7). Mr. Anderson asked no questions.

The judge modified the conditions of release to provide for no violent contact and released Mr. Anderson's client on $500 bond. (TFB-Ex. 3 pp. 7-8). Without the help of the client, the prosecutor, and the court, Mr. Anderson's client would have remained in jail awaiting trial.

At a subsequent hearing in the same matter, Mr. Anderson requested the court set his client's case for a jury trial. (ROR p. 2). Judge Taylor wondered if Mr. Anderson had experience in criminal law. (T. 56). So, Judge Taylor inquired of Mr. Anderson:

The Court: And in all candor to Court, Mr. Anderson, when was the last jury trial you had, criminal jury trial that you had?

Mr. Anderson: Probably about six months ago.

The Court: In front of whom?

Mr. Anderson: I can't really recall right now.

The Court: You can't remember the judge?

Mr. Anderson: Not right now.

The Court: Was it in Hillsborough County?

Mr. Anderson: Yes.

The Court: Was it a misdemeanor or a felony?

Mr. Anderson: Misdemeanor.

The Court: What was the charge?

Mr. Anderson: It was theft.

The Court: It was theft? It was petit theft?

Mr. Anderson: Yes.

The Court: Was it a male judge or a female judge?

Mr. Anderson: I think it was a male judge.

The Court: What was the last name of your client?

Mr. Anderson: Zafaris.

…

The Court: Okay. And you said six months ago?

Mr. Anderson: About six months ago. Yes.

Contrary to Mr. Anderson's representation, that case never went to trial. (T. 57). Judge Taylor's court staff looked into the matter and

determined that Mr. Anderson's client pleaded to the charge at the pretrial conference. (T. 57). There was no jury trial. (ROR p. 3). This caused Judge Taylor to contact The Florida Bar. (T. 57). Mr. Anderson never corrected this error. (T. 57). At the final hearing in this proceeding, Mr. Anderson testified that he went to trial in another case where he represented someone else against the Polk County Sheriff's Office. (T. 20). He was not sure if this was a criminal trial or a civil trial, but he believed it was a criminal case. (T. 20).

After Mr. Anderson told Judge Taylor he had trial experience, Mr. Francis requested new counsel. (ROR p. 3) (T. 57). The following exchange occurred:

> *The Court: Okay. All right. Mr. Francis, is that what you want to do? Do you want to take it to a jury trial?*
>
> *The Defendant: Yes, I would.*
>
> *The Court: All right. I only ask because the State's offer will generally change –*
>
> *The Defendant: Uh-huh.*
>
> *The Court: -- if it goes to a jury trial and the maximum jail time on this case is one year in the county jail. Your attorney has explained that to you, right?*
>
> *The Defendant: Yes, ma'am. But I would like another attorney because I'm not –*
>
> *The Court: Okay. Well, you hired him.*

The Defendant: I know, but I –

The Court: So then you have –

The Defendant: -- I want to get rid of him.

The Court: I mean –

The Defendant: I just want to let you know because multiple times I've tried to tell him to do things. He's not following through on it. And I've had – in another case, I had to accept an offer I didn't want to because he was not doing what I asked him to do.

The Court: Okay.

The Defendant: So –

…

The Court: Okay. All right. So why don't I pass your case, Mr. Francis, you know, in case we handle it today. If you all have irreconcilable differences, I'll enter an oral motion to withdraw, but you all need to chat first.

Mr. Anderson: Okay.

The Defendant: Uh-huh.

(Case passed.)

The Court: Mr. Francis.

The Defendant: Yes ma'am.

The Court: Do you know where Mr. Anderson is?

The Defendant: He just left.

The Court: He left the courthouse?

The Defendant: I guess so, yeah.

The Court: Did he really?

The Defendant: Yes.

(TFB-Ex. 4 pp. 6-8). Mr. Anderson never submitted an order allowing him to withdraw. (T. 22, 58). Mr. Anderson figured that the client had said that he did not want Mr. Anderson as his lawyer in front of the judge, so the whole matter was over. (T. 22). He never followed-up with the court to see if Mr. Francis retained a new attorney or to determine the status of the case. (T. 23).

This, however, was not the first time that Mr. Anderson had been discharged by a client. (T. 24). When he was discharged previously, he submitted an order of withdrawal "because it was done outside of the courtroom." (T. 24).

SUMMARY OF THE ARGUMENT

The Referee recommends that Mr. Anderson receive a six-month suspension for nineteen violations of the Florida Rules of Professional Conduct. These violations occurred between 2014 and 2020 in three cases, each of which was severely mishandled. There is clear and convincing evidence that Mr. Anderson has repeatedly violated his duty of competence and that he does not understand the basics of a trust account.

The Bar argued to the Referee that a one-year suspension was appropriate for these violations. Frankly, this Court may conclude that even a one-year suspension is insufficient.

Mr. Anderson is 72 years old and has been a Florida lawyer for 18 years. He has had no prior disciplinary proceedings, and the Bar agrees with the Referee that he has no dishonest or selfish motive. Despite the fact that he gave false information to a judge about his prior trial experience and that he mishandled his client's funds, this is not a case where the primary purpose of a sanction is to punish the lawyer for his behavior.

This is a case about competency to practice, and the need to protect the public from a lawyer who may mean well, but who simply cannot achieve the legal objectives of his clients despite his intentions. He has delayed a child's adoption for more than five years. He could not file a sufficient

postconviction motion for a prisoner despite the readily available standard forms designed for pro se use. And he placed funds from his client in his personal account because he did not have a trust account.

He did not know how to help his client at a relatively basic misdemeanor bond hearing. The client had to guide his lawyer on what needed to be done to obtain his release. Even his representation of himself in this proceeding demonstrates competency issues. Sadly, from the content of Mr. Anderson's closing argument at both the guilt phase hearing and the sanctions hearing, it is apparent that he does not fully appreciate his inability to handle these basic legal matters.

There are several Standards that apply in this case that support a suspension. In addition to the aggravating factors argued by the Bar and found by the Referee – pattern of misconduct and multiple offenses – the evidence probably supports additional factors: vulnerability of the victims, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the law.

But the Bar is not arguing that Mr. Anderson needs to be sanctioned because his acts are aggravated misconduct. It is not even entirely clear that the conduct involved in this case is intentional, as compared to knowing, because of Mr. Anderson's lack of competence.

This Court primarily needs to enter a suspension that is sufficient to protect the public and the administration of justice. In light of the entirety of the violations in this case, the six-month suspension recommended by the Referee is too short. It is not reasonably supported by the Standards and the case law. The suspension should be at least a year. The public would perhaps be better protected if Mr. Anderson were required to take and pass the bar exam prior to any petition for reinstatement.

THE DECISION-MAKING PROCESS IN A DISCIPLINARY PROCEEDING AND THE STANDARD OF REVIEW

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. "Standards of review" used to evaluate a trial court's final judgment do not apply here.

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 in a disciplinary proceeding.

1. 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).

2. Credibility

In reaching its findings of fact, the Referee has a heightened role in determining issues of credibility, which are important in this particular review. This Court has long held, "The referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." *The Florida Bar v. Tobkin,* 944 So. 2d 219, 224 (Fla. 2006) (quoting *The Florida Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991); *See also The Florida Bar v. Petersen*, 248 So. 3d 1069, 1077 (Fla. 2018).

3. Recommendation of Discipline

The Referee's recommendation of discipline 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.

ARGUMENT

I. The extent of the violations warrants a longer suspension because the purpose of the suspension is to rehabilitate Mr. Anderson while protecting the public.

Mr. Anderson was found to have violated 19 rules of professionalism in his representation of three clients over a period in excess of five years. Some of those rules were violated in each of the three cases. The rules violated include: (1) a lack of competence, (2) a lack of diligence, (3) failure to safekeep property, (4) multiple trust account violations, and (5) lack of candor to the court.

Moreover, the clients he was attempting to help were members of the public who could ill-afford to have these violations occur in their cases. A pretrial detainee eligible for bond who nearly stayed in jail. A prisoner trusting his money to his lawyer. A child needing adoption. The Referee undoubtedly had some sympathy for Mr. Anderson because he was not acting with an improper motive. But the Bar submits that even the one-year suspension recommended to the Referee may be viewed as insufficient by this Court.

In 1970, this Court explained in *The Florida Bar v. Pahules,* 233 So. 2d 130, 132 (Fla. 1970), the three purposes for a disciplinary sanction that have been considered in all subsequent cases:

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.

A rehabilitative suspension can serve all three of these purposes, but when a rehabilitative suspension is selected as a sanction, it is actually intended to provide a period for rehabilitation.

The length of the period may often depend upon whether the misconduct is knowing or intentional. When violations are based upon a serious flaw in a lawyer's character – on a lawyer's inability to obey common rules of ethics and morality – a longer suspension is needed to deter that lawyer and other lawyers because it is unlikely that the character flaw will be "cured" by a period away from the law.

But in case like this one, the Bar is not claiming the problem is a character flaw. Mr. Anderson simply lacks the knowledge and experience

needed to practice competently within the rules of professionalism, especially as a solo practitioner. Thus, the suspension is needed to protect the public and to allow him to rehabilitate himself.

He cannot gain the necessary knowledge and learn the rules of procedure and professionalism in six months. It may be optimistic to think that he can rehabilitate himself by learning a narrow legal field as a paralegal during a one-year suspension, but the Bar has been willing to be optimistic in this case.

Respectfully, the Bar submits that the Referee departed from the Standards and case law because the Referee did not consider the purpose of this rehabilitative suspension. If the public is to be protected in this case, the suspension must be longer.

II. The violations warrant a longer suspension under the Standards.

There are three Standards that recommend a suspension in this case:

> **4.1 FAILURE TO PRESERVE THE CLIENT'S PROPERTY**
>
> 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 the failure to preserve client property:

(a) Disbarment. Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

(b) Suspension. Suspension is appropriate when a lawyer knows or should know that the lawyer is dealing improperly with client property and causes injury or potential injury to a client.

Mr. Anderson knew he did not have a trust account and placed Mr. Stemen's money in his personal account. He mishandled those funds, and when Mr. Stemen's asked for the remaining funds to be returned Mr. Anderson returned only $1,150 of the $2,200 that should have been in Mr. Anderson's trust account, if he had actually had a trust account. The Bar argued to the Referee that subsection (b) supported a suspension. Given that the funds were placed in a personal account and never returned, the evidence would probably have supported a sanction of disbarment as well.

4.4 LACK OF DILIGENCE

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 a failure to act with reasonable diligence and promptness in representing a client:

(a) Disbarment. Disbarment is appropriate when a lawyer causes serious or potentially serious injury to a client and:

(1) . . .

(2) knowingly fails to perform services for a client; or

(3) engages in a pattern of neglect with respect to client matters.

(b) Suspension. Suspension is appropriate when a lawyer causes injury or potential injury to a client and:

(1) knowingly fails to perform services for a client; or

(2) engages in a pattern of neglect with respect to client matters.

Mr. Anderson knowingly failed to perform services in the adoption case, which hopefully only caused potential injury. He probably did the same in Mr. Stemen's case when he failed to file a facially sufficient amended postconviction motion. These actions support a suspension under subsection (b) of this Standard. If delay of a child's termination of parental rights and adoption is viewed as a potentially serious injury to a child, this conduct actually supports a disbarment.

4.5 LACK OF COMPETENCE

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 failure to provide competent representation to a client:

(a) Disbarment. Disbarment is appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal

> doctrines or procedures and causes injury or potential injury to a client.
>
> (b) Suspension. Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence and causes injury or potential injury to a client.

Mr. Anderson failed to provide competent representation to all three of these clients. His conduct clearly demonstrates that he did not know how to handle the adoption case. He could not file a sufficient postconviction motion even though Florida Rule of Criminal Procedure 3.987 provides the form for that motion. He demonstrated that he did not know the basic questions that help a pretrial detainee charged with a misdemeanor to obtain release on bond.

Mr. Anderson's conduct demonstrates that his failure to understand is not merely a failure to understand a "legal doctrine or applicable procedure" that would warrant a public reprimand. He lacks the basic knowledge needed to provide representation in misdemeanor cases, adoptions, and postconviction proceedings. Indeed, his conduct comes close to demonstrating that he does not understand "the most fundamental legal doctrines or procedures," which could actually support a disbarment for the potential injury caused the child and to Mr. Stemen.

III. The violations warrant a longer suspension under the case law

The Bar provided several cases that it believed would be useful in determining whether its proposed one-year suspension was in the appropriate range for the sanction in this case. (TS. 15-20). The Referee relied on two cases in his Report: *The Florida Bar v. Broome*, 932 So. 2d 1036 (Fla. 2006) and *The Florida Bar v. McBath*, No. SC18-892, 2019 WL 4855327 (Fla. Oct. 1, 2019). (ROR p. 9-11). *Broome* is sufficiently similar to support the Bar's suggestion of a one-year suspension and to demonstrate that the Referee's recommendation of a six-month suspension is not sufficiently supported by the case law.

In *Broome*, this Court imposed a one-year suspension. The referee found Ms. Broome guilty of thirty-three separate rule violations of eighteen different bar rules. *Id.* at 1038. Ms. Broome's misconduct stemmed from multiple unrelated matters. In various matters Ms. Broome failed to diligently pursue client's cases, failed to respond to a show cause order, failed to obtain a written fee agreement with her client, failed to perform any substantial legal work on her client's cases, failed to adequately communicate with her clients, and failed to file a timely motion for postconviction relief on behalf of her client, amongst other violations. Additionally, Ms. Broome was held in contempt for failing to comply with a

court's order and made misrepresentations to that court. Although Ms. Broome had clinical depression, this Court found that the numerosity of the violations and the numerosity of different rules violated distinguished Ms. Broome's case from other cases where clinical depression was found to be a significant mitigation factor. *Id.* at 1043. Moreover, this Court also noted that violations of rule 4-3.4(c), rule 4-8.4(c) and rule 4-8.4(d) result in greater sanctions than the violation of others. *Id.*

In Mr. Anderson's case, he was found guilty, which he is not challenging, of violating nineteen different bar rules. Of those nineteen rules, he violated rule 4-8.4(c) and rule 4-8.4(d). Mr. Anderson, like Ms. Broome, failed to act with diligence in pursuing his minor client's adoption case, pursuing a prisoner's claim for postconviction remedies, and in failing to present bond factors for a criminal defendant. Mr. Anderson failed to respond to a show cause order, which resulted in him being held in contempt. He has never performed the acts necessary to discharge the order of contempt. He failed to obtain a written fee agreement with Mr. Stemen, and made misrepresentations to Judge Taylor about his past experience with criminal jury trials. Moreover, unlike Ms. Broome's case, there was no evidence of a mental illness that contributed to his lack of competency and

diligence. And unlike *Broome*, Mr. Anderson was found guilty of multiple trust account violations.

Clearly, this Court's sanction fifteen years ago in *Broome* supports a one-year suspension in this case today. It unquestionably demonstrates that such a sanction is within the reasonable range for these violations, and that a lesser sanction is insufficient.

The Bar also discussed the one-year suspension of Dewey Homer Varner, Jr. *The Florida Bar v. Varner*, 992 So. 2d 224, 226 (Fla. 2008). Mr. Varner was handling a workers compensation claim for his client. Opposing counsel scheduled and noticed a physician's deposition. Upon receiving the notice, Mr. Varner called opposing counsel and requested the deposition be canceled. *Id.* Opposing counsel agreed on the condition that Mr. Varner file a voluntary dismissal. *Id.* Without the client's knowledge or permission, Mr. Varner filed a notice of voluntary dismissal on one of the client's claims. *Id.* Mr. Varner never told the client that the voluntary dismissal had been filed or the case had been dismissed. *Id.* It was a member of his support staff that informed the client, nearly a year later, that the case had been dismissed. By that time, the statute of limitations had run on the claim. *Id.* at 227.

Mr. Anderson, like Mr. Varner, caused his client, Mr. Stemen, to be unable to seek relief under a 3.850 postconviction motion because Mr.

Anderson failed to file a facially sufficient motion within 60 days of the court's order. We do not know whether his client had a strong claim, but he lost at least his right to due process – and there is no claim of ineffective assistance of postconviction counsel to give his client another opportunity. *See Kokal v. State,* 901 So. 2d 766, 777 (Fla.2005)("We have repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable.")

Then, after filing a frivolous motion for change of venue in the postconviction proceeding, Mr. Anderson filed a "petition for writ of mandamus," which did not even seek relief available under that extraordinary writ. After the petition was denied and Mr. Anderson was given a helpful explanation from the Second District of what needed to be accomplished for Mr. Stemen to pursue the petition, Mr. Anderson again failed to give a copy of the denial to his client or to file any motion that might have assisted his client. The *Varner* case provides ample support for a one-year suspension.

CONCLUSION

The Bar asks this Court to reject the recommendation of the Referee for a six-month suspension and impose a one-year suspension. This Court may wish to consider the additional requirement, rejected by the Referee, that Mr. Anderson pass the bar exam prior to seeking reinstatement.

The Court should impose the costs recommended by the Referee.

Respectfully submitted,

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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 19th day of August, 2021 to:

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