IN THE SUPREME COURT OF FLORIDA

Case No. SC20-1777
The Florida Bar File No. 2019-10,038(20A)

THE FLORIDA BAR,

Complainant,

v.

RAYMOND B. MITCHELL,

Respondent.

THE FLORIDA BAR'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

Respondent Raymond B. Mitchell seeks review of a Report of Referee recommending that he be found guilty of professional misconduct in violation of Rules 4-8.2(a) and 4-8.4(d) of the Rules Regulating The Florida Bar ("RRTFB") and receive a rehabilitative 91-day suspension. Mr. Mitchell challenges both his guilt and the recommended sanction. Because the Referee's fact findings and recommendation of guilt are supported by competent, substantial evidence, and the recommended discipline is supported by Florida's Standards for Imposing Lawyer Sanctions (the "Standards") and this Court's case law, Complainant The Florida Bar ("TFB") asks that the Court approve the Referee's recommended discipline.

B. Underlying Facts

1. The Motion to Disqualify

This disciplinary matter stems from Mr. Mitchell's attempt to disqualify the trial judge in a dissolution of marriage action in the Circuit Court in the Twentieth Judicial Circuit in Lee County, Florida,

styled *Varney v. Varney*. (ROR at 3.)[1] The proceeding was already pending when the husband, Travis Varney, hired Mr. Mitchell to replace his prior counsel. (Apr. 22 Tr. 62:25-63:11, 66:1-6.) Sometime after taking on the representation, Mr. Mitchell learned that Mr. Varney's case had been reassigned to Circuit Court Judge Amy Hawthorne. (*See id.* 65:22-25.)

Not long after the reassignment, on May 25, 2018, Mr. Mitchell filed a Motion to Disqualify or Recuse the Trial Judge and Affidavit (the "Motion to Disqualify"), which sought to disqualify Judge Hawthorne from Mr. Varney's case because: (1) Mr. Varney feared that Judge Hawthorne would be "biased and prejudicial in favor of" his wife because Judge Hawthorne and his wife are both women; and (2) Mr. Varney feared he would not receive a fair trial with Judge Hawthorne because she "refused to follow the laws of Florida

[1] Citations to "ROR" are to the Report of Referee dated June 3, 2021 (Tab 61 in the Second Amended Index of Record ("Index")). Citations to "Apr. 22 Tr." and "Apr. 23 Tr." are to the transcripts of the final hearing on guilt that occurred on April 22 and 23, 2021, respectively. Citations to "May 18 Tr." are to the transcript of the sanctions hearing held on May 18, 2021. Citations to "TFB Ex." are to TFB's exhibits entered at the hearing on guilt (Tab 37 in the Index). Citations to "Resp.'s Ex." are to Mr. Mitchell's exhibits entered at the final hearing (Tab 38 in the Index). Other references are to the record, including to the appropriate "Tab" number in the Index.

apparently just to get the cases done and completed to lessen the case load." (TFB Ex. 3 at 1-2.) The Motion to Disqualify contained several statements in support of these claimed biases, including the following:

> Husband fears he will not receive a fair trial with Judge Amy Hawthorne. Husband discovered on May 16, 2018 that Judge Amy Hawthorne is a woman/female and since his Wife (opposing party) is also a woman/female . . . . Husband greatly fears that since Judge Amy Hawthorne is a woman she would be very biased and prejudicial in favor of the female Wife who is a woman/female and grant large amounts of alimony to Wife based on bias and prejudice for women.
>
> . . . .
>
> Husband greatly fears he will not receive a fair trial with Judge Amy Hawthorne for another reason of bias and prejudice of Judge Hawthorne. Husband has learned from his attorney that Judge Amy Hawthorne is biased and prejudiced in several other cases, hearings, and trials his attorney has had with Judge Hawthorne wherein Judge Hawthorne was biased against the parties and refused to follow the laws of Florida apparently just to get the cases done and completed to lessen the case load. Husband has learned how Judge Amy Hawthorne blatantly refuses to follow the laws . . . . [and] had absolutely no concern whatsoever about how unjust, unfair, illegal her ruling was and had no regard whatsoever that her rulings clearly and blatantly violated crystal clear statutes, laws and rulings of Florida and had no concern at all how much her illegal and unlawful rulings destroyed and ruined people's lives, welfare, assets or had wasted their time and money paid to attorneys because the attorney had advised the client to follow a certain strategy based on the laws of

> Florida but at the hearing with Judge Hawthorne the Judge refused to follow the laws at all . . . .

(*Id.* at 1-2.)

The Motion to Disqualify cited two cases as examples of Judge Hawthorne's purported failure to follow Florida law. The first was another Lee County dissolution of marriage proceeding, *Miran v. Miran*, in which Mr. Mitchell represented the former wife on appeal. (*Id.* at 2.) According to the Motion to Disqualify, Judge Hawthorne erroneously enforced a marital settlement agreement from a prior dissolution of marriage case between the same couple, resulting in the former husband getting a house that the former wife alleged was a nonmarital asset. (*Id.* at 2-3.) Because Mr. Varney alleged that a house in his own divorce proceeding was a nonmarital asset, the Motion to Disqualify claimed, Mr. Varney "greatly fears that since Judge Amy Hawthorne disregards the laws of Florida and has no concern at all that she gives nonmarital houses to the other spouse in violation of Florida's laws that he will not receive a fair and unbiased trial from Judge Hawthorne." (*Id.* at 4.)

The second example cited in the Motion to Disqualify is *Rabedeau v. Rabedeau*. (*Id.*) In that case, the former wife—

represented by Mr. Mitchell—sought relief from a final judgment incorporating her and her former spouse's marital settlement agreement, which had left the child support obligation section blank. (*Id.*) According to the Motion to Disqualify, a magistrate recommended denial of the former wife's motion "in violation of Florida's laws" and Judge Hawthorne ultimately adopted the magistrate's recommendation. (*Id.*)

Although Mr. Varney signed the Motion to Disqualify (*id.* at 6), there is no dispute that Mr. Mitchell prepared the motion and the accompanying affidavit (Apr. 22 Tr. 68:11-20). At the time Mr. Mitchell filed the Motion to Disqualify, Judge Hawthorne's only involvement in the *Varney* case was entry of an order granting the parties' joint motion to continue trial. (*See* TFB Ex. 2.)

As to why the first disqualification basis was included in the motion, Mr. Varney later explained that he had decided on his own to search the internet for statistics on how men fared in divorce proceedings in front of judges who are women. (Apr. 22 Tr. 76:24-77:12, 78:3-6.) Mr. Varney purportedly found that "typically the men would lose"; e.g., "they would just, you know, not get to see their kids often, the alimony concerns, child support, vehicles, basically lose

out on everything." (*Id.* 77:16-24.) As a consequence, Mr. Varney "was definitely concerned" when his case was reassigned to Judge Hawthorne. (*Id.* 80:13-18.)

As for the second stated reason of bias—Judge Hawthorne's purported failure to follow the laws of Florida in order to quickly resolve cases—that basis came entirely from Mr. Mitchell, who was involved in both the *Miran* and *Rabedeau* cases. Mr. Varney did not speak with any of the parties involved in either case and knew nothing about Judge Hawthorne's case load, and instead relied upon what Mr. Mitchell told him. (*Id.* 69:10-16, 70:4-18.)

Judge Hawthorne denied the Motion to Disqualify as legally insufficient. (TFB Ex. 4.) Mr. Mitchell filed a second motion to disqualify, this time because "Judge Amy Hawthorne had filed a complaint to the Florida Bar (or contacted them in some manner)" regarding the Motion to Disqualify. (TFB Ex. 10 at 1.) Judge Hawthorne also denied this second disqualification motion as being legally insufficient. (TFB Ex. 11.) Mr. Mitchell filed a petition for writ of prohibition concerning Judge Hawthorne's rulings on both motions, and the Second District Court of Appeal denied the petition. (TFB Exs. 6 & 9.)

Given Mr. Mitchell's reliance on Judge Hawthorne's rulings in the *Miran* and *Rabedeau* cases in the Motion to Disqualify, both cases are described in greater detail below.

2. The Miran *Case*

Miran was a dissolution of marriage proceeding in which Mr. Mitchell represented the wife, Caridad Miran (now known as Caridad Moulton ("Ms. Moulton")), on appeal.

Mr. Miran and Ms. Moulton had been parties to three dissolution of marriage proceedings. (Apr. 22 Tr. 209:9-19.) In the second, Case No. 11-DR-3524, before Judge Joseph Simpson, the parties had filed on the case docket a "Separation/Settlement Agreement" signed by both parties in February 2011. (*See* Resp.'s Ex. 1 at Ex. A.) As part of that settlement agreement, Ms. Moulton had agreed to transfer a home at 2601 4th Street NW in Lehigh Acres, Florida, to Mr. Miran in exchange for his payment of $14,000. (*Id.* at Ex. A (p. 5.).) The home had been previously titled in both Mr. Miran's and Ms. Moulton's names by quit claim deed in 2010, although the validity of the deed was disputed. (*See* Resp.'s Ex. 13 at 28:16-29:11.)

On March 7, 2011, Ms. Moulton filed a motion to set aside the marital settlement agreement on the basis that she had entered into it under duress. (Resp.'s Ex. 4.) But the motion was never heard (Apr. 22 Tr. 175:13-19), and on March 8, 2011, Mr. Miran dismissed the petition for dissolution of marriage in Case No. 11-DR-3524 (Resp.'s Ex. 5).

Ms. Moulton petitioned for divorce again on March 15, 2011, in a new case designated Case No. 11-DR-3833. (*See* Resp.'s Ex. 3 at 1.) The matter proceeded to a trial on May 20, 2015, before Judge Amy Hawthorne. (*See* Resp.'s Ex. 13.) Notably, Mr. Miran included in his trial exhibit list the February 2011 Separation/Settlement Agreement filed in Case No. 11-DR-3524. (Resp.'s Ex. 2 at 1.)

The only issue to resolve at trial was whether the Lehigh Acres home was marital property. (Resp.'s Ex. 13 at 8:1-6.) Ms. Moulton testified that she executed the 2010 quit claim deed including Mr. Miran on the title to the property only because "he was threatening to kill [her]." (Resp.'s Ex. 13 at 29:12-25.) On cross-examination, Mr. Miran's counsel specifically asked Ms. Moulton about the February 2011 settlement agreement, referenced as Husband's Exhibit 18B. (Resp.'s Ex. 13 at 81:17-83:8.) According to Ms.

Moulton, she did not agree to the settlement terms as she was "being held captive" by her husband at the time. (Resp.'s Ex. 13 at 83:13-15.) But Mrs. Moulton nevertheless admitted to signing the agreement, including the term in which she agreed to accept $14,000 in exchange for the Lehigh Acres home. (Resp.'s Ex. 13 at 85:2-9.) Judge Hawthorne took testimony from several other witnesses, including Mr. Miran who testified that he did not pressure Ms. Moulton to sign the February 2011 agreement. (Resp.'s Ex. 14 at 32:3-6, 33:10-34:6; Resp.'s Ex. 15 at 52:7-12.)

Judge Hawthorne asked both parties' counsel a number of questions concerning the February 2011 settlement agreement and confirmed that it had never been set aside. (Resp.'s Ex. 14 at 38:1-39:11.) Judge Hawthorne also heard extensively from both parties regarding the validity and enforceability of the settlement agreement. (Resp.'s Ex. 15 at 41:13-47:20.) Judge Hawthorne granted Mr. Miran's counsel's request to take judicial notice of the settlement agreement, without objection by Ms. Moulton's counsel. (Resp.'s Ex. 13 at 81:23-82:3.)

After trial, Judge Hawthorne entered a final judgment of dissolution of marriage, finding with respect to the division of assets as follows:

> In this case, there was a Separation/Settlement Agreement entered into by the parties on or about February 22, 2011 in case number 11-DR-3524. This agreement makes a complete and final division of the parties' non-marital and marital assets. This Court finds that this Agreement is valid. Therefore, the Separation/Settlement Agreement is filed as "Exhibit A" in this case and is ratified and made a part of this final judgment. The parties are ordered to obey all of its provisions.

(Resp.'s Ex. 3 at 1-2.)

Ms. Moulton's trial counsel, Douglas Spiegel, moved for a new trial and for rehearing and/or reconsideration, arguing that the settlement agreement should have been set aside because Ms. Moulton had entered into it under duress. (Resp.'s Exs. 1 & 2.) Judge Hawthorne denied both motions. (Resp.'s Ex. 6.)

Mr. Mitchell represented Ms. Moulton in her appeal of the final judgment. (*See* Resp.'s Ex. 17.) On December 15, 2017, the Second District Court of Appeal per curiam affirmed Judge Hawthorne's final judgment. (TFB Ex. 17.) The Second District also denied Ms. Moulton's motions for rehearing and for a written opinion on

February 26, 2018. (Apr. 22 Tr. 114:25-115:2; TFB Ex. 19.) Mr. Mitchell had the benefit of the appellate court's decisions in *Miran* at the time he filed the Motion to Disqualify on May 25, 2018. (Apr. 22 Tr. 141:11-142:5.)

3. The Rabedeau *Case*

In *Rabedeau*, Mr. Mitchell represented the former wife, Celeste Rabedeau (now known as Celeste Jones ("Ms. Jones")), in seeking relief from a prior judgment dissolving her marriage. (Resp.'s Ex. 28.) Specifically, Mr. Mitchell filed a motion on Ms. Jones's behalf seeking

> relief from the Judgment due to mistake or inadvertence, and surprise; and [Ms. Jones] has discovered new evidence, which is material and relevant to one substantial issue in the [Marital Settlement] Agreement; fraud/misrepresentation/misconduct of the Former Husband; and that part of the Final Judgment is void, and that the Judgment should no longer have prospective application.

(*Id.* at 1.) Mr. Mitchell contended that Ms. Jones was entitled to relief because "child support was never determined or established [in the parties' marital settlement agreement incorporated into the final judgment] and Former Husband should have paid child support to Former Wife." (*Id.* at 1; *see also* Apr. 22 Tr. 116:9-20.) Mr. Mitchell argued that the marital settlement agreement incorporated into the

final judgment left the child support payment section "totally blank," and according to Mr. Mitchell, the parties could not agree to waive child support. (Resp.'s Ex. 28 at 1-2.) Another judge, Judge John Duryea, had entered the final judgment at issue. (*See* Resp.'s Ex. 31 at 27:17-24; Apr. 22 Tr. 244:12-24.)

Magistrate Judge Carolyn Swift conducted an evidentiary hearing on Ms. Jones's motion. (*See* Resp.'s Ex. 29 at 1; Resp.'s Ex. 31.) At the hearing, Magistrate Judge Swift questioned Mr. Mitchell about the bases for his motion, observing that the motion appeared to concern "an enforcement and modification issue, not a fraud issue." (Resp.'s Ex. 31 at 12:17-19.) Mr. Mitchell responded: "Well, in our motion we didn't really—I don't believe we claimed fraud. Well, I might have mentioned it, but basically we are setting aside a judgment based on mistake . . . ." (Resp.'s Ex. 31 at 12:20-23.) After the hearing, Magistrate Judge Swift issued a report recommending denial of Ms. Jones's motion. (*See* Resp.'s Ex. 29 at 1.)

On behalf of his client, Mr. Mitchell filed exceptions to the magistrate's report. (*Id.*) Mr. Mitchell urged the court to reject the magistrate's report because, among other things,

> Magistrate Swift erred regarding the law and blatantly disregarded the plain and clear common law rulings of the Florida Supreme Court and Appellate Courts and the plain and clear laws in the Florida Statutes and substituted her own opinions instead of following the laws of Florida. Because of the Magistrate's blatant disregard of Florida law the Former Wife is now compelled to spend additional large amounts of money on attorneys to stop her unlawful Report which could have been used to support her children which she and her children need.

(Resp.'s Ex. 29 at 1-2.)

Magistrate Judge Swift's report and recommendation went to Judge Hawthorne, who held a hearing on the exceptions Mr. Mitchell had filed to the magistrate's report. (Apr. 22 Tr. 117:5-8.) Ultimately, Judge Hawthorne entered an order adopting Magistrate Judge Swift's report and recommendation. (*Id.* 117:9-16; Resp.'s Am. Ex. 36.) Ms. Jones did not appeal that order. (Apr. 22 Tr. 117:17-19.)

C. Disciplinary Proceedings

On December 8, 2020, TFB filed a formal complaint initiating these disciplinary proceedings against Mr. Mitchell, asserting that his statements in the Motion to Disqualify violated Rules 4-8.2(a) and 4-8.4(d) of the RRTFB. (Tab 2, TFB Complaint.)[2] This Court referred

[2] TFB voluntarily dismissed a third allegation that Mr. Mitchell had violated Rule 4-1.6(d) of the RRTFB on April 7, 2021. (Tab 24, Notice of Filing Voluntary Dismissal.)

the complaint to a Referee, the Honorable Heather Doyle, Circuit Court Judge for the Twelfth Judicial Circuit. (Tab 4, Order Appointing Referee.)

1. Proceedings on Guilt

The Referee conducted a final evidentiary hearing on guilt on April 22 and 23, 2021. The Referee took testimony from five witnesses—Mr. Varney, Mr. Mitchell, Mr. Spiegel, Ms. Moulton, and Ms. Jones—and received TFB's exhibits and almost all of the exhibits offered by Mr. Mitchell.

As part of its case in chief, TFB called Mr. Varney, who testified to the circumstances that led to the filing of the Motion to Disqualify. Mr. Varney confirmed that Mr. Mitchell prepared the Motion to Disqualify and accompanying affidavit, and that outside of the independent research Mr. Varney had conducted regarding statistics involving female judges, the bases for the Motion to Disqualify came from Mr. Mitchell. (Apr. 22 Tr. 68:11-70:18; *see also, e.g.*, *id.* 83:5-14.) Mr. Varney testified that he was "glad" Mr. Mitchell told him about Judge Hawthorne's prior rulings (*id.* 75:2-7), but agreed it would have been beneficial to know "the whole deal" about the cases, including whether an appellate court had upheld any of the judge's

rulings, before he signed the Motion to Disqualify (*id.* 93:13-94:7). Ultimately, despite his initial consternation about having a judge who was a woman, Mr. Varney conceded that Judge Hawthorne was "very fair" at his trial "and looked at all the evidence." (*Id.* 89:19-22.)

TFB also called Mr. Mitchell to testify. When asked for the basis of his claim that Judge Hawthorne was biased and refused to follow the laws of Florida "just to get cases done and completed to lessen the caseload" (TFB Ex. 3 at 2), Mr. Mitchell explained it was based on his experience "with Judge Hawthorne and just judges in general and the whole court system":

> Specifically, I've seen like docket soundings or . . . even hearings, that many times Judge Hawthorne and many other judges talk about how they want to get the cases over and, you know, this case is taking too long. She specifically said that many times at docket soundings I've been in.

(Apr. 22 Tr. 126:8-19.) When asked why he stated in the Motion to Disqualify that Judge Hawthorne "blatantly" refuses to follow the law, Mr. Mitchell conceded that the word "blatantly" was "probably my mistake to put in there" but that, in the *Rabedeau* case, Judge Hawthorne got it wrong, and he faulted the magistrate and Judge Hawthorne for not providing an explanation "why the magistrate was

right or I was wrong. [The motion] was just denied and that was it." (*Id.* 128:13-129:18; *see also id.* 133:12-20.) Likewise, with respect to the *Miran* case, Mr. Mitchell's testimony made clear that he simply disagreed with Judge Hawthorne's ruling, and to the extent the Second District per curiam affirmed that decision, it was wrong and "violates due process of law," given the failure to include an explanation. (*Id.* 130:1-133:10, 133:21-134:4.)

Mr. Mitchell called Mr. Spiegel, Ms. Moulton's trial counsel in the *Miran* case, as a witness. (*Id.* 153:8-10, 153:22-24, 154:24-155:2.) Among other things, Mr. Spiegel confirmed that Judge Hawthorne had heard Ms. Moulton testify at the trial in the *Miran* case about the facts supporting the claim of duress. (*Id.* 171:19-172:16.) Mr. Spiegel acknowledged that Judge Hawthorne ruled in part based on a belief that there was not "enough evidence that [Ms. Moulton] was forced to do whatever she was forced to do" with respect to the marital settlement agreement. (*Id.* 174:1-6.) When Mr. Mitchell pressed Mr. Spiegel about whether Judge Hawthorne's decision was correct based on the laws regarding distributing marital assets, Mr. Spiegel replied, "Florida is a no-fault state. Clearly, the property is to be divided up equally unless there is a pleading for

unjust equitable distribution. . . . [B]ut I'll just tell you that the judge based her decision upon the agreement that was previously entered into by the parties." (*Id.* 188:21-189:11; *see also id.* 192:13-23.)

Mr. Mitchell also called Ms. Moulton and Ms. Jones as witnesses. Mr. Mitchell elicited testimony from Ms. Jones suggesting that she and Mr. Mitchell had made a strategic decision to address the changed circumstances of her childcare needs after her divorce by pursuing a motion for relief from judgment rather than a petition to modify the final judgment because modification would have taken longer and cost more money. (*Id.* 231:23-234:11.)

After the evidence closed on April 23, 2021, the Referee issued an interim report as to guilt only ("Interim Report") on May 7, 2021. (Tab 47, Interim Report of Referee.) In the Interim Report, the Referee indicated that she would recommend that Mr. Mitchell be found guilty of violating Rules 4-8.2(a) (impugning the integrity of the judiciary) and 4-8.4(d) (engaging in conduct prejudicial to the administration of justice) of the RRTFB. (*Id.* at 17-18.) After recounting the facts presented at the final hearing, the Referee reasoned that while it is "permissible under Fla. R. Jud. Admin. 2.330 . . . to seek to disqualify" a judge, "a lawyer is not permitted to

lay down his ethical obligations and charge forth with reckless disregard to achieve that lawyer's desired result of having a different judge assigned to preside over a case." (*Id.* at 11.)

With respect to the charge that Mr. Mitchell violated Rule 4-8.2(a), the Referee found that there was "no objectively reasonable factual basis" to make the "broad, overreaching claims" made about Judge Hawthorne in the Motion to Disqualify, including the claims that Judge Hawthorne "totally ignores the laws of Florida" in an apparent effort "just to get the cases done and completed to lessen the caseload." (*Id.* at 13-14.) With respect to the charge that Mr. Mitchell violated Rule 4-8.4(d), the Referee found that he had disparaged Judge Hawthorne's qualifications and integrity in the Motion to Disqualify, particularly given what he knew about the *Miran* and *Rabedeau* cases. (*Id.* at 14-16.)

The Referee thereafter set a separate hearing on the subject of sanctions. (*Id.* at 18; *see also* May 18 Tr.)

2. Proceedings on Sanctions

At the beginning of the May 18, 2021 hearing on sanctions, Mr. Mitchell asked the Referee to correct a statement in the Interim Report that he had "testified that [he] never heard Judge Hawthorne

state something along the lines of that we need to get these cases over." (May 18 Tr. 3:24-4:18.) According to Mr. Mitchell, he instead stated that he heard Judge Hawthorne say something to that effect "in several cases at the docket sounding." (*Id.* 7:9-12.) Initially, the Referee agreed to order that portion of the transcript of Mr. Mitchells' testimony, and stated that she would modify the statement in the final report if she deemed it necessary. (*Id.* 15:7-14.) Later, however, the Referee decided she did not need to see that portion of the transcript prior to completion of the final report. (*Id.* 77:22-78:4.) But the Referee stated unequivocally, regardless of what Mr. Mitchell's testimony was on the point, "it does not change this referee's findings of guilt." (*Id.* 9:6-13.)

Turning to the issue of sanctions, TFB argued for a 91-day rehabilitative suspension and the existence of two aggravating factors: (1) Mr. Mitchell has substantial experience practicing law, having been admitted to TFB since 1994; and (2) he has not acknowledged the wrongful nature of his conduct. (*Id.* 28:6-29:1; *see* Tab 2, Compl. ¶ 1; Tab 7, Resp.'s Am. Ans. ¶ 1.) TFB also acknowledged Mr. Mitchell's lack of disciplinary history as a mitigating factor. (May 18 Tr. 29:2-7.)

In response, Mr. Mitchell agreed that he "should not have used the word 'blatant'" in the Motion to Disqualify, but continued to disagree that his other statements had violated any RRTFB. (*Id.* 31:3-23.) Mr. Mitchell also argued as mitigating factors a lack of a dishonest or selfish motive (*id.* 35:19-36:6), and cooperation with TFB (*id.* 45:25-46:7), and presented as a character witness his paralegal Teresa Campoli (*id.* 52:3-9). Mr. Mitchell also emphasized that his Motion to Disqualify caused no harm to "any of the parties of the case, or Judge Hawthorne, besides her feelings." (*Id.* 60:4-11.)

At the conclusion of evidence and argument, the Referee took the matter of sanctions under advisement. (*Id.* 79:4-6.)

3. The Final Report of Referee

On June 3, 2021, the Referee issued her final Report of Referee ("Report") in which she reiterated her recommendation that Mr. Mitchell be found guilty of violating two rules of the RRTFB and recommended he receive a 91-day rehabilitative suspension. In recommending that sanction, the Referee considered Standards 6.1 and 7.1, and found two aggravating factors—Mr. Mitchell had substantial experience in practicing law and refused to acknowledge

the wrongful nature of his conduct—and one mitigating factor—the absence of a prior disciplinary record. (ROR at 18-19, 21.)

Mr. Mitchell's request for review of the Report of Referee followed.

SUMMARY OF ARGUMENT

While a lawyer may engage in "legitimate criticism of judicial officers," they "must follow the Rules of Professional Conduct when so doing." *Fla. Bar v. Ray*, 797 So. 2d 556, 560 (Fla. 2001). Mr. Mitchell did not follow the RRTFB in making numerous inflammatory and misleading statements in a motion to disqualify Circuit Court Judge Amy Hawthorne which impugned her integrity and qualifications as a judge and prejudiced the administration of justice. The Court should approve the Referee's recommendation that Mr. Mitchell be found guilty of professional misconduct and sanctioned with a 91-day rehabilitative suspension among other measures.

First, competent, substantial evidence supports the Referee's recommended findings of guilt. The record evidence demonstrates that Mr. Mitchell filed the Motion to Disqualify in which he made various statements about Judge Hawthorne's qualifications or integrity without an objectively reasonable factual basis for doing so

in violation of Rule 4-8.2(a). Aside from leveling broad and unsupported accusations about Judge Hawthorne's purported "bias" in favor of women and failure to follow Florida law, Mr. Mitchell has not established that any of her specific rulings cited in the Motion to Disqualify violated any law. Further, competent, substantial evidence supports the finding that Mr. Mitchell engaged in conduct prejudicial to the administration of justice by knowingly, or at least through callous indifference, disparaging Judge Hawthorne in violation of Rule 4-8.4(d).

Second, the recommended sanction of a 91-day rehabilitative suspension is supported by the Standards and this Court's existing case law. The Standards expressly provide that suspension is an appropriate sanction in these circumstances. Standard 6.1 applies because Mr. Mitchell knowingly made false statements in the Motion to Disqualify, or at the very least omitted material information, including the fact that at least one of the complained-of rulings by Judge Hawthorne had been upheld on appeal. Further, despite Mr. Mitchell's arguments to the contrary, Standard 7.1 applies because his conduct did harm the public and the legal system at large as his comments eroded public confidence in the judiciary. Further, the

two aggravating factors and the single mitigating factor found all weigh in favor of the recommended 91-day suspension.

Mr. Mitchell raises a handful of complaints about the proceedings and the Referee's findings. But none of these complaints justifies an outcome other than what the Referee recommends. Mr. Mitchell's continual efforts to relitigate Judge Hawthorne's prior decisions should be rejected.

Accordingly, the Court should accept the Referee's recommendation to suspend Mr. Mitchell from the practice of law for 91 days.

ARGUMENT

I. THE COURT SHOULD ACCEPT THE REFEREE'S RECOMMENDATIONS OF GUILT.

A. Standard of Review

A party challenging "the referee's findings of fact and conclusions as to guilt . . . carries the burden of demonstrating 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. 2017). A party will not meet that burden "simply by pointing to contradictory evidence where there is also competent, substantial evidence in the record that supports the

referee's findings." *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000) (internal quotation marks omitted). Moreover, a referee's "judgment regarding credibility" of witnesses "should not be overturned absent clear and convincing evidence that [the referee's] judgment is incorrect." *Fla. Bar v. Tobkin*, 944 So. 2d 219, 224 (Fla. 2006).

B. The Referee's Recommendations of Guilt Are Supported by Competent, Substantial Evidence.

Mr. Mitchell's Amended Initial Brief largely eschews challenging the Referee's specific findings of fact as to guilt in favor of recounting his own version of the facts, including his own assessment of the proceedings and rulings in *Miran* and *Rabedeau*, and his own assessment of whether he violated the RRTFB. Regardless, TFB will recount the law and evidence supporting each count of misconduct found by the Referee.

1. The Record Evidence Supports the Finding that Mr. Mitchell Violated Rule 4-8.2(a).

Rule 4-8.2(a) prohibits a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." As the Referee recognized, the applicable standard under Rule 4-8.2(a) is "not whether the statement is false, but whether the lawyer had an

objectively reasonable factual basis for making the statement." *Fla. Bar v. Patterson*, 257 So. 3d 56, 62 (Fla. 2018); *see also Ray*, 797 So. 2d at 558-59. The record evidence establishes that Mr. Mitchell lacked an objectively reasonable factual basis for the statements he made in the Motion to Disqualify.

First, the record shows that Mr. Mitchell did not have an objectively reasonable factual basis to state that Judge Hawthorne, as a woman, "would be very biased and prejudicial in favor of the female Wife who is a woman/female." (TFB Ex. 3 at 1.) Mr. Mitchell argues that he was only outlining Mr. Varney's personal belief of bias, but under Florida Rule of Judicial Administration 2.330, the fear of bias offered to support a disqualification motion "must be objectively reasonable." *Gregory v. State*, 118 So. 3d 770, 778 (Fla. 2013) (internal quotation marks omitted). And the record demonstrates that Mr. Varney's belief of bias—based on Mr. Varney's internet research regarding women judges generally—was not objectively reasonable, particularly in light of Mr. Mitchell's own experiences with Judge Hawthorne in which she had ruled in favor of former husbands at least twice.

The record also shows that Mr. Mitchell did not have an

objectively reasonable basis to support his claims that Judge Hawthorne's rulings "clearly and blatantly" violated Florida law. (*See* TFB Ex. 3 at 2.) With respect to the *Miran* case, Mr. Mitchell suggests that under section 61.075, Florida Statutes, the Lehigh Acres home was indisputably Ms. Moulton's nonmarital property. (*See id.*) But section 61.075 simply outlines the framework for an equitable distribution of marital assets and liabilities, defines nonmarital assets and marital assets, and describes how the presumption that an asset is a marital asset may be overcome. *See* § 61.075(6), (8), Fla. Stat. The statute in no way decrees the Lehigh Acres home a nonmarital asset, and regardless, the statute does not invalidate the well-settled law that parties may agree to a different distribution of assets, *see, e.g.*, *Macleod v. Macleod*, 82 So. 3d 147, 149 (Fla. 4th DCA 2012). Further, the fact that the parties' settlement agreement came from a prior dissolution proceeding and was not previously made part of a final judgment does not affect its enforceability. *See Comstock v. Comstock*, 74 So. 3d 1094, 1095 (Fla. 4th DCA 2011) ("Former Wife is incorrect that the portions of the 2007 mediation agreement pertaining to equitable distribution, debts, and property agreements are unenforceable because an order approving the

agreement was never entered. A stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court." (internal quotation marks omitted)).

Mr. Mitchell specifies no other law that Judge Hawthorne purportedly violated in the *Miran* case. Instead he complains, for example, about her factual determination that Ms. Moulton did not establish duress, that no party sought to enforce the settlement agreement and Judge Hawthorne brought it up sua sponte (which as the record shows, is untrue), and that the settlement agreement provision granting Mr. Miran the house was generally unfair. (*See* Am. Initial Br. at 25, 38, 39-41, 43-44.) But these complaints are merely efforts to relitigate the findings in *Miran* and are not appropriate for this disciplinary proceeding. *See Fla. Bar v. Rosenberg*, 169 So. 3d 1155, 1160 (Fla. 2015) (holding that arguments seeking to relitigate findings and conclusions in another case from which disciplinary action stemmed "are not proper"). In any event, Mr. Mitchell ignores too that Judge Hawthorne's final judgment, incorporating and enforcing the marital settlement agreement, ***was upheld on appeal***. In short, nothing factually or

legally supports the contention that Judge Hawthorne refused to and did not follow Florida law in the *Miran* case.

Mr. Mitchell implies that his statement that Judge Hawthorne ignored Florida law in the *Rabedeau* case is factually and legally supported because she did not grant relief from a final judgment which incorporated a child support provision that was left "blank," and "Florida law does not allow child support to be agreed away or ignored," citing section 61.30(1)(a) and (11), Florida Statutes, and *Kelley v. Kelley*, 656 So. 2d 1343 (Fla. 5th DCA 1995); *Finch v. Finch*, 640 So. 2d 1243 (Fla. 5th DCA 1994); and *Doss v. Doss*, 627 So. 2d 1297 (Fla. 5th DCA 1993). (TFB Ex. 3 at 4.)

But the proceeding before Judge Hawthorne in *Rabedeau* did not involve an initial determination of, or even a requested modification of, a child support order. Instead, it concerned a motion for relief from judgment premised on mistake. (Resp.'s Ex. 28; Resp.'s Ex. 31 at 12:20-23.) A mistake of law is not a basis to set aside a judgment, even a judgment concerning the obligation to pay child support. *See Theodorides v. Theodorides*, 201 So. 3d 141, 143-44 (Fla. 3d DCA 2015) (reversing trial court order granting relief from judgment concerning child support payments, and observing that

"[a]n order changing a child support award is a substantive change" that "cannot be accomplished under [Florida] Rule [of Civil Procedure] 1.540(b)" by reason of mistake); *Moforis v. Moforis*, 977 So. 2d 786, 787-88 (Fla. 4th DCA 2008) (determining trial court order which mistakenly adopted and ratified child visitation schedule not subject to relief under Rule 1.540(b)); *see also, e.g.*, *Dep't of Revenue ex rel. Williams v. Annis*, 159 So. 3d 263, 266 (Fla. 2d DCA 2015) ("[T]he question of whether the original trial judge erred in setting the amount of child support or misapplied the child support guidelines to the facts . . . is not a 'clerical mistake' for which relief is available under rule 1.540(a). . . . [T]hose types of errors . . . must be redressed by appeal . . . ." (internal quotation marks omitted, alteration in original)). Mr. Mitchell's statements that both Magistrate Judge Swift and Judge Hawthorne reached the wrong result in *Rabedeau* are factually and legally unsupported.

Putting aside the specific statements concerning *Miran* and *Rabedeau*, Mr. Mitchell's other statements in the Motion to Disqualify are akin to the objectionable statements made in the respondent's letter in *Patterson* that were found to have violated Rule 4-8.2(a). In his letter, the respondent Kelsay Dayon Patterson, among other

things, "expounded upon the alleged bias of judges and the shortcomings of the legal system," including by claiming that the "[l]aw is whatever the judge or judges that day say it is." *Patterson*, 257 So. 3d at 62. Mr. Mitchell likewise made similarly broad and incendiary comments about Judge Hawthorne's qualifications and integrity, just a sampling of which includes statements that:

- she "blatantly refuses to follow the laws or [sic] order to have a trial or case completed or dismissed because it would take too much work and far longer to resolve the case if the laws of Florida were followed" (TFB Ex. 3 at 2);
- she "has absolutely no concern whatsoever about how unjust, unfair, illegal her ruling was" (*id.*);
- she "had no concern at all how much her illegal and unlawful rulings destroyed and ruined people's lives, welfare, assets or had wasted all their time and money" (*id.*);
- she "refused to follow the laws at all because it would take too much time to correct the issue or be too complicated if the laws were followed" (*id.*);
- Mr. Varney fears "he will not receive a fair trial at all by Judge Amy Hawthorne regarding his mother's house and wife's

alimony request as he heard of how often Judge Amy Hawthorne ignores the laws of Florida and rules against them and ignores the evidence and facts in her cases" (*id.* at 5).

That Mr. Mitchell may genuinely believe that Judge Hawthorne's rulings worked an injustice and evidenced bias is of no consequence ***absent an objectively reasonable factual basis for these statements***. *See Patterson*, 257 So. 3d at 63. Just as in *Patterson*, such beliefs standing alone fail to establish "an objectively reasonable factual basis" "and there is no other evidence in the record that would otherwise establish such a basis." *See id.* Consequently, this Court should conclude that Mr. Mitchell's statements "were made with a reckless disregard to their truth or falsity in violation of Bar Rule 4-8.2(a)." *Id.*

2. The Record Evidence Supports the Finding that Mr. Mitchell Violated Rule 4-8.4(d).

Rule 4-8.4(d) generally "prohibits a lawyer from engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice." *Patterson*, 257 So. 3d at 64. "[M]aking inappropriate and disparaging statements in court filings . . . about opposing counsel and judges" runs afoul of this rule, as it

"contribut[es] to the general lack of civility and professionalism this Court is striving to curb in the legal profession." *Id.*

The record evidence outlined above establishes that Mr. Mitchell's conduct violated this rule too. Mr. Mitchell's statements impugning the qualifications and integrity of Judge Hawthorne disparaged her, including on the account of her gender, and Mr. Mitchell made these statements at the very least with callous indifference. *See* RRTFB 4-8.4(d).

Mr. Mitchell's main argument in response is a legal one: that Rule 4-8.4(d) "plainly and clearly does NOT apply to a Judge." (Am. Initial Br. at 13.) Mr. Mitchell attempts a statutory construction argument by asserting that the drafters of the RRTFB explicitly referenced "judges" in other rules (including Rule 4-8.2(a)) but did not in Rule 4-8.4(d), and thus Rule 4-8.4(d) must not apply to judges. (*Id.* at 13-14, 19-20, 26-27.)

But Rule 4-8.4(d) is not so limited, either by its express terms or in interpretation. Notwithstanding Mr. Mitchell's disagreement, the clause is broad, barring such conduct with respect to "litigants, jurors, witnesses, ***court personnel, or other lawyers***." RRTFB 4-8.4(d) (emphasis added). Other than the fact that the term "judges"

is used in Rule 4-8.2(a)—which applies to a specific class of adjudicatory officers including judges and others of similar stature—Mr. Mitchell cites nothing to contradict the reality that judges are necessarily included in either of the Rule 4-8.4(d) phrases "court personnel" or "other lawyers."

Further, this Court has already confirmed that Rule 4-8.4(d) prohibits disparaging judges. In *Patterson*, this Court found that the respondent had violated Rule 4-8.4(d) by "making inappropriate and disparaging statements in court filings and in a letter . . . about opposing counsel ***and judges*** that presided in [his client's] case." 257 So. 3d at 64 (emphasis added). Mr. Mitchell argues that *Patterson* is distinguishable because the respondent there made "many unkind statements about many different court person[nel]" and the conduct in *Patterson* was more egregious than his own. (Am. Initial Br. at 27-28.) But those are not real distinctions, and the only common-sense reading of Rule 4-8.4(d) applies its prohibition on disparaging statements to all lawyers, including judges.

The competent record evidence supports the Referee's finding that Mr. Mitchell violated Rule 4-8.4(d).

3. Motions to Disqualify Judges Are Not Insulated from Rules Regulating Professional Conduct.

At the heart of Mr. Mitchell's argument is a contention that the analysis above must change because he made the objectionable statements within a motion to disqualify a trial judge on the basis of bias. Mr. Mitchell protests that he could not have violated the RRTFB because he followed then-Florida Rule of Judicial Administration 2.330 "as written" by putting "in detailed 'facts and reasons' . . . , such as the reasons the party feared the bias and prejudice from [Judge Hawthorne's] past history and apparent attitudes." (Am. Initial Br. at 11, 21.) Mr. Mitchell contends that "Rule 2.330 does not limit any type of bias and prejudice that a party may fear from a judge" and that may be the subject of a motion to disqualify or recuse. (*Id.* at 19.)

But Rule 2.330 does not authorize a motion to disqualify on the basis of simply any stated fear of prejudice or bias. "[A] verified motion for disqualification must contain an actual factual foundation for the alleged fear of prejudice." *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986). A "mere 'subjective fear[]' of bias" is not legally sufficient; "rather, the fear must be ***objectively reasonable***."

Gregory, 118 So. 3d at 778 (emphasis added, alteration in original). As explained above, Mr. Mitchell had every reason to doubt that Mr. Varney's fear that Judge Hawthorne was biased as a woman was objectively reasonable. Moreover, Mr. Mitchell's view that Judge Hawthorne had violated Florida law in prior rulings was not a good faith basis for a disqualification motion, as "[a]dverse or unfavorable legal rulings, without more, are not legally sufficient grounds for disqualification." *Pilkington v. Pilkington*, 182 So. 3d 776, 779 (Fla. 5th DCA 2015).

In any event, Rule 2.330 does not insulate Mr. Mitchell's Motion to Disqualify from the RRTFB, including the prohibition on disparaging members of the judiciary. As this Court explained in *Ray*, while there is a place for "legitimate criticism of judicial officers," an attorney "must follow the Rules of Professional Conduct" in offering such criticism. 797 So. 2d at 560. Indeed, this Court has previously sanctioned lawyers for making incendiary remarks and/or factually unsupported statements about judges in motions to recuse. *See Fla. Bar v. Norkin*, 132 So. 3d 77, 80, 82 (Fla. 2013) (approving a finding that the respondent violated Rule 4-8.2(a), among others, including because the respondent had made disparaging comments

regarding two judges in a motion to recuse); *Fla. Bar v. Wilson*, 714 So. 2d 381, 383 (Fla. 1998) (approving referee's finding that attorney violated Rule 4-8.4(d) based on attorney's motion to recuse judge after judge had orally granted motion to disqualify attorney and given the "tenuous factual allegations supporting the motion to recuse").

Mr. Mitchell laments that "[s]tating that a judge did not follow the laws (if true) cannot be 'disparaging' a judge or else all appeals and motions to reconsider and relief from judgments would all be 'disparaging' judges." (Am. Initial Br. at 20.) But Mr. Mitchell did not simply state that Judge Hawthorne "did not follow the law." Rather, he accused her of failing to follow the laws in two cases where her rulings appear well-founded (one of which was upheld on appeal), of generally refusing to follow Florida law in order to expedite cases, and of being biased in favor of women. Thus, even if Mr. Mitchell's argument had some merit, it simply has no application here. *See, e.g.*, *Fla. Bar v. Clark*, 528 So. 2d 369, 372 (Fla. 1988) (lawyer was sanctioned "not for exercising his right to criticize the judiciary but for making false and unsubstantiated charges against the judiciary").

Mr. Mitchell also suggests that he was ethically obligated to pursue the Motion to Disqualify in order to diligently represent his

client. (*See* Am. Initial Br. at 22-23.) But Mr. Mitchell cannot wield his obligation to provide diligent representation as a shield against claims he crossed the line in the Motion to Disqualify. In *Patterson*, the referee based a recommendation of no guilt as to Rule 4-8.2(a) in part based on Mr. "Patterson's ethical duty to his client and his strong belief" that the objectionable letter "was the appropriate way to expose the perceived wrongdoing in his client's case." 257 So. 3d at 63. But as this Court found, "[s]uch factors, however, do not relieve [Mr.] Patterson of his guilt and are relevant only in mitigating the discipline imposed." *Id.* Likewise, that Mr. Mitchell felt compelled to pursue this course of conduct in an effort to diligently and zealously represent his client does not relieve his guilt in violating Rules 4-8.2(a) and 4-8.4(d).

Because Mr. Mitchell has not shown—and cannot show—a lack of record evidence supporting these findings of fact and recommendations of guilt, this Court should adopt the referee's findings of fact and recommendations of guilt and reject Mr. Mitchell's arguments to the contrary.

II. THE COURT SHOULD ACCEPT THE REFEREE'S RECOMMENDATION OF A 91-DAY REHABILITATIVE SUSPENSION.

A. Standard of Review

It is ultimately the responsibility of this Court to order the appropriate sanction. *Fla. Bar v. Altman*, 294 So. 3d 844, 847 (Fla. 2020). But generally, the Court will not second-guess the referee's recommended discipline as long as that discipline (1) is authorized under the Standards and (2) has a reasonable basis in existing case law. *Id.* The Court has also expressly signaled to all members of TFB that it "has moved towards imposing harsher sanctions." *Id.*

B. A 91-Day Rehabilitative Suspension Is Appropriate.

Pursuant to the applicable Standards, suspension is the presumed discipline "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," Standard 6.1(b), and "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," Standard 7.1(b). The Referee also found two aggravating factors and a single mitigating factor: that Mr. Mitchell lacked a prior

disciplinary history. All told, these findings support acceptance of the Referee's recommendation of a 91-day rehabilitative suspension, among other sanctions, and such a suspension is supported by case law.

In response, Mr. Mitchell does not challenge the aggravating factors found by the Referee, nor does he contend that the Referee should have, but failed to, adopt any additional mitigating factors. Instead, he challenges whether the Referee considered the right Standards and whether the combination of aggravating and mitigating factors justifies the recommended discipline.

First, Mr. Mitchell argues against application of Standard 6.1 because he "did not state any statement that was false or that he knew was false." (Am. Initial Br. at 37.) In support, Mr. Mitchell says no witness at the final hearing testified contrary to what he stated in the Motion to Disqualify, and claims as an example that Mr. Spiegel "agreed [with him] that Judge Hawthorne had violated numerous laws." (*Id.* at 38.) Mr. Mitchell grossly overstates Mr. Spiegel's testimony. The testimony Mr. Mitchell cites (Apr. 22 Tr. 215:10-15) does not coincide with Mr. Spiegel's testimony but rather Ms. Moulton's. In fact, Mr. Spiegel was much more circumspect in his

assessment of Judge Hawthorne's ruling, observing that this disciplinary proceeding is not before "an appeals court," and that Judge Hawthorne's ruling declining to set aside the marital settlement agreement was in part an evidentiary one based on the testimony she heard at trial as well as "the agreement that was previously entered into by the parties." (*Id.* 173:20-11, 188:21-189:11; *see also id.* 192:13-23.)

The record evidence demonstrates that Mr. Mitchell's statements were untrue or at the very least misleading. And Mr. Mitchell does not dispute that he omitted from the Motion to Disqualify the fact that the Second District Court of Appeal had upheld Judge Hawthorne's ruling in the *Miran* case, suggesting that he did not need to include that fact because Judge Hawthorne already knew it. (Am. Initial Br. at 41.) Mr. Mitchell offers nothing other than his own self-serving arguments to support the contention that the Motion to Disqualify was accurate and omitted no material information. Consequently, the Referee appropriately looked to Standard 6.1(b) to find suspension was the presumptive discipline in this case.

With respect to Standard 7.1(b), Mr. Mitchell argues that

suspension is inappropriate because "there was no injury or harm to anyone, no client, not the public, or the legal system as few people knew about the Motion to Disqualify." (Am. Initial Br. at 16; *see also id.* at 36.) Instead, he claims he should at most receive admonishment under Standard 7.1(d) because his conduct "cause[d] little or no actual or potential injury to a client, the public, or the legal system." (*Id.* at 35-36.) According to Mr. Mitchell, "[t]he only person who was possibly hurt by the Motion to Disqualify was Judge Hawthorne who likely had her feelings hurt." (*Id.* at 36-37.)

Mr. Mitchell's view of what constitutes injury to the public or legal system is far too narrow and inconsistent with this Court's precedent. Although there is no dispute that "ethical rules that prohibit attorneys from making statements impugning the integrity of judges are not [designed] to protect judges from unpleasant or unsavory criticism," such rules ***are*** "designed to preserve public confidence in the fairness and impartiality of our system of justice." *Ray*, 797 So. 2d at 558-59. This is because "statements impugning the integrity of a judge, when made with reckless disregard as to their truth or falsity, erode public confidence in the judicial system without assisting to publicize problems that legitimately deserve attention."

Id. at 560. In other words, such statements by their very nature harm the public and the legal system. It does not matter that Mr. Mitchell's statements were made in a filing made in a single case; "members of the Bar are viewed by the public as having unique insights into the judicial system," and thus their statements in court filings are held to a higher standard. *See id.* at 559.

In sum, the Referee looked to and considered the correct Standards in deciding that the presumptive discipline in this case is suspension. Her recommendation of a 91-day rehabilitative suspension in light of Mr. Mitchell's aggravating factors is also supported by this Court's case law. *See, e.g.*, *Fla. Bar v. Abramson*, 3 So. 3d 964, 967–69 (Fla. 2009) (imposing a 91-day suspension for violation of rule regarding making statements known to be false or with reckless disregard for the truth, rule prohibiting conduct prejudicial to the administration of justice, and others); *see also, e.g.*, *Fla. Bar v. Gwynn*, 94 So. 3d 425, 433-34 (Fla. 2012) (imposing a 91-day suspension for violating, in pertinent part, rules regarding meritorious claims and contentions; candor toward the tribunal; conduct involving dishonesty, fraud, deceit, or misrepresentation; and conduct prejudicial to the administration of justice). Indeed, in

Patterson—a case in which the respondent's conduct bears significant similarities to the conduct at issue here—this Court imposed a year-long suspension where the respondent violated Rules 4-8.2(a) and 4-8.4(d), among others, in part because the respondent had "yet to fully acknowledge the wrongfulness of his actions" and failed to uphold his commitment to "maintain the respect due to courts of justice and judicial officers." 257 So. 3d at 64-65.

For all these reasons, TFB asks the Court to impose the Referee's recommended 91-day rehabilitative suspension.

III. THE COURT SHOULD REJECT RESPONDENT'S OTHER ATTACKS ON THE REPORT OF REFEREE.

Mr. Mitchell's Amended Initial Brief lodges a number of other complaints about the Referee's Report. None of those arguments has merit, but in any event, none impacts this Court's determination of guilt or the appropriate sanction.

"This Court has held that Bar disciplinary cases are neither civil nor criminal, but rather are 'quasi-judicial administrative proceedings.'" *Fla. Bar v. Bischoff*, 212 So. 3d 312, 318 (Fla. 2017) (quoting RRTFB 3-7.6(f)(1)). "Accordingly, the referee is not bound by the technical rules of evidence, hearsay evidence generally is

admissible, and the respondent has no right to confront witnesses." *Id.* A referee's admission of evidence is also reviewed for abuse of discretion. *Fla. Bar v. Rotstein*, 835 So. 2d 241, 244 (Fla. 2002), *receded from on other grounds by Fla. Bar v. Parrish*, 241 So. 3d 66 (Fla. 2018).

First, Mr. Mitchell complains that the Report "contain[s] false and incorrect testimony" that the Referee promised to correct but did not. (*See* Am. Initial Br. at 14, 31.) Specifically, Mr. Mitchell claims that the Referee's finding that he "acknowledged that he had never heard Judge Hawthorne state that she wanted to get cases done and lessen her case load by not following the laws of the State of Florida" in the Report is untrue. (*Id.* at 31; *see* ROR at 11.) But that finding is consistent with the record, as Mr. Mitchell admits that he heard general statements by Judge Hawthorne at docket soundings regarding her desire to quickly resolve cases, but did not draw a connection between the objective of expediting cases to the alleged means of "not following the laws of the State of Florida"; it is Mr. Mitchell who is mincing words. (Apr. 22 Tr. 125:17-127:2; May 18 Tr. 14:12-15:5 ("I don't believe I said that, the second part about that, 'by not following the laws of the State of Florida.'"); ROR at 11

("Respondent acknowledged that he did not hear Judge Hawthorne utter the remaining part of the sentence 'by not following the laws of the state of Florida.'").) Regardless, this testimony was not relevant or material to the Referee's recommendation of guilt (May 18 Tr. 9:6-13), and Mr. Mitchell does not explain why this finding matters now to this Court's review.

Mr. Mitchell next complains that the Referee "made numerous errors in her report," largely concerning the evidence the Referee credited or referenced in her Report. (Am. Initial Br. at 38-39.) For example, Mr. Mitchell complains about the Referee's finding in the Report that Mr. Varney said it would have been "beneficial if he had known that the appellate court had upheld Judge Hawthorne's ruling in one of the cases listed in the Motion to Disqualify." (*Id.* at 38.) But that finding is entirely consistent with Mr. Varney's testimony. (*See* Apr. 22 Tr. 93:13-94:7 ("Q. Wouldn't you want your attorney to tell you or include in the motion additional information if an appellate court had decided that it found nothing wrong with Judge Hawthorne's ruling? A. Yeah, I would like the whole deal.").) Moreover, the fact that Mr. Mitchell elicited testimony from Mr. Varney agreeing that Mr. Mitchell had shown him "other documents"

and explained to him the "laws broken before in the other two cases" does not negate that testimony, much less negate any finding of professional misconduct or the recommended sanction. (*See* Apr. 22 Tr. 76:17-20, 81:25-82:4.) Rather, it confirms the relevance of Mr. Varney's testimony that it would have been beneficial to know the full story.

Mr. Mitchell also complains about other findings or statements made in the Report, but these complaints amount to improper efforts to relitigate the past proceedings before Judge Hawthorne. *See Rosenberg*, 169 So. 3d at 1160. For instance, Mr. Mitchell complains about a statement on page 8 of the Report implying that the settlement agreement in the *Miran* case was a "valid one that no one objected to at that trial." (Am. Initial Br. at 39.) The record before the Court reflects the numerous challenges made to the validity and enforceability of that settlement agreement, but in any event, the agreement ***was*** ruled to be valid and that ruling was upheld by the Second District Court of Appeal. None of Mr. Mitchell's arguments on the point establishes that he had an objective factual basis for his statements in the Motion to Disqualify regarding the *Miran* case.

Mr. Mitchell closes with arguments that TFB violated due process and the Eighth Amendment's prohibition against cruel and unusual punishment by "offering unjust offers to settle" and by originally including in TFB's complaint an allegation that Mr. Mitchell had violated Rule 4-1.6 of the RRTFB. (Am. Initial Br. at 45-47.)

To start, Mr. Mitchell's arguments regarding the purported unjust offers to settle are based on Mr. Mitchell's affidavit and the affidavit of Teresa Campoli that were the subject of Mr. Mitchell's Motion to Supplement the Record – Affidavits, which this Court denied on October 20, 2021, and were not before the Referee. (*See* Am. Initial Br. at 45; Court's Oct. 20, 2021 Order (denying Respondent's Motion to Supplement the Record – Affidavits); *see also* Apr. 23 Tr. 40:10-41:25.) Thus, these affidavits are not before the Court. Further, what TFB's grievance committee did or did not offer Mr. Mitchell to "settle" the complaint against him has nothing to do with the task before Court now: i.e., to decide whether Mr. Mitchell violated Rules 4-8.2(a) and 4-8.4(d) and if so, what sanction is appropriate.

With respect to the final argument, TFB's complaint initially included an allegation that Mr. Mitchell violated Rule 4-1.6 because

the Motion to Disqualify "contained information that was specific to respondent's other clients' cases without any apparent authorization or consent from those clients." (Tab 2, Compl. ¶¶ 17, 20.) Mr. Mitchell complains that TFB failed to investigate this allegation before making it, and that in fact his clients consented to the filing of the Motion to Disqualify and "nothing [in the motion] was confidential regardless." (Am. Initial Br. at 47.) But TFB dismissed this claim before the matter proceeded to hearing and thus it is not before the Court. (Tab 24, Notice of Filing Voluntary Dismissal.) Mr. Mitchell offers no authority for the proposition that he may now challenge an allegation from the complaint that was dropped months ago and is not a basis for any recommended disciplinary sanction against him.

In sum, competent, substantial evidence supports the Referee's recommendations of guilt, the recommended discipline is amply supported by the Standards and this Court's case law, and none of the claimed procedural infirmities or other complaints Mr. Mitchell raises justifies a different outcome.

CONCLUSION

For the foregoing reasons, TFB respectfully requests that the Court approve the Referee's recommendation of guilt and also

approve the Referee's recommended discipline of a 91-day rehabilitative suspension and payment of costs.

Respectfully submitted on November 8, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served via the Florida Courts E-Portal and by email on November 8, 2021:

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CERTIFICATE OF COMPLIANCE

I certify this document complies with the applicable font and word count limit requirements. *See* Fla. R. App. P. 9.045(e) & 9.210.

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